

Water & The Law

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Winter 2019 Issue

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Contact Us

If you have any questions or if you would like to see something discussed in the future, please let us know by sending an e-mail to info@water.law

or contact one of us directly through the following links:

[Craig Smith](#)
[David Hartvigen](#)
[Jeff Gittins](#)
[Nathan Bracken](#)
[Devin Bybee](#)

To view previous newsletters, visit our website www.Water.law

Upcoming Conferences

Uintah Basin Water Summit

Jan. 16, 2019
Vernal, UT

For more information contact Cheryl Meier at 435-781-5483 or by email at cmeier@uintah.utah.gov

Rural Water Association of Utah Annual Conference

Feb. 25-Mar. 1, 2019
St. George, UT

For more information click [here](#)

Water Law & Policy Seminar

Mar. 18, 2019
St. George, UT

For more information contact Donna Keeler at 801-292-4664

Utah Water Users Association

Greetings!

Welcome to the Winter 2019 Issue of *Water & The Law*. We hope you will find this newsletter to be helpful and informative. As always, we welcome your feedback. If you have questions or comments, please reply to this e-mail or call us at 801-413-1600.

Smith Hartvigen, PLLC

STATE ENGINEER ISSUES FIVE NEW WATER RIGHT POLICIES

By Jeffrey R. Gittins

On December 28, 2018, State Engineer Kent L. Jones issued five new policies regarding the administration of water rights in Utah. These policies are summarized below. The full text of the policies can be found on the Division of Water Rights website.

<https://WaterRights.utah.gov/MiscInfo/CurrentIssues.asp>

Policy Regarding Domestic Duty Considerations

Historically, the Division of Water Rights has used a "duty" of 0.45 acre-feet per residence per year, which is based on an estimated 400 gallons per residence per day. Recent studies have shown that due to conservation efforts, water efficient appliances, and other considerations, Utah households only use about 70 gallons per person per day. Thus, a home with four people will only use about 280 gallons per day, or 0.314 acre-feet per year.

The policy notes that 0.45 acre-feet per residential connection is still a safe number to use in water right applications, and it is the number that the Division will continue to use for domestic use if there is no evidence to suggest otherwise. However, the Division "will consider reduced amounts of water required per connection in applications filed if the projected usage rate numbers are based on scientific evaluations and the water used is measured and reported to the Division of Water Rights through the Water Use Program." The policy does not provide additional explanation regarding what evidence and "scientific evaluations" will be sufficient to convince the Division to depart from the standard requirement of 0.45 acre-feet per residential connection.

The policy also notes that part-time residences (such as cabins) may only require 0.16 acre-feet per year or less, which is a decrease from the current requirement of 0.25 acre-feet per year. The same considerations outlined above would apply in getting the Division to approve part-time residences with a diversion limit of less than 0.25 acre-feet per connection.

Policy Regarding Municipal Use Water Rights

This new policy is an expansion of the State Engineer's policy on municipal use water rights issued in December 2010. Prior to 2010, only public entities, such as cities, towns, and districts, could hold municipal water rights. The prior policy extended municipal use

Annual Conference

Mar. 19-20, 2019

St. George, UT

For more information click
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rights to "public water suppliers," as defined in Utah Code section 73-1-4. Public water suppliers are generally larger water providers that serve more than 100 connections or 200 residents on a year-round basis. The new policy extends municipal use rights to "public water systems," which are smaller water providers that serve at least 15 connections or 25 individuals for a minimum of 60 days each year.

If public water systems wish to have municipal use water rights, they will need to file change applications on their water rights to convert them to municipal use. Additionally, all municipal water use will have to be metered and reported to the Division's Water Use Program.

It is important to note that even though the smaller "public water systems" will be allowed to hold municipal use water rights, they are still not qualified as "public water suppliers" and will therefore not be entitled to the special protections provided to public water suppliers under Utah Code sections 73-1-4 and 73-3-12.

Policy Regarding Corrected Certificates

Certificates are issued by the Division of Water Right to complete the process of appropriating a new water right or changing the use of a water right through a Change Application. In the past, the Division has treated the certificates as "set in stone." As a result, when there was a clear error in the proof or certificate process, it has proven challenging to get the Division to correct the errors. This new policy is meant to address such circumstances.

The State Engineer emphasizes that the goal and primary effort is, and will continue to be, to issue certificates carefully and accurately. However, the State Engineer acknowledges, and provides examples of, situations where errors have occurred in the certificate process. The State Engineer notes that the Division is not obligated under statute to reissue certificates based on errors and omissions, but that "it seems the appropriate thing to do to reflect the actual beneficial use of water." Although this policy appears to give considerable latitude to Division staff to correct erroneous certificates, the State Engineer does provide some guidelines:

- * Before a certificate is corrected, the Division may require the applicant to prepare and submit a revised proof.
- * A corrected certificate should only be issued to reflect the actual beneficial uses, places of use, and points of diversion that existed at the time of proof, provided that these uses were consistent with the approved application that was being certificated.
- * Corrections should only occur on a showing of clear error.
- * Because certificates are prima facie evidence of a right, corrected certificates are not preferred and may lead to problems.

Policy Regarding Depletion Limitations on Certificates

This policy reiterates that when a new certificate is issued for a newly appropriated water right or for a change application, the certificate sets limitations for diversion and depletion amounts. Once the depletion limits are set through a certificate, the depletion limits cannot revert to their prior (and higher) amounts.

Consider the following example. A landowner has an irrigation water right that allows him to divert 1 acre-foot to irrigate 0.25 acres. This water right has a depletion limit of 0.5 acre-feet, based on a 50% depletion rate for irrigation in the area. The landowner files a change application to allow the water to be used for the domestic use of 1 home (0.45 acre-feet of diversion) and irrigation of 0.1375 acres (0.55 acre-feet of diversion). The diversion limit would remain 1 acre-foot, but the depletion limit would be reduced from 0.5 acre-feet to 0.365 acre-feet ((0.45 acre-feet of domestic use x 20% depletion rate) + (0.55 acre-feet of irrigation use x 50% depletion rate)). The change application is then approved and certificated.

Later, the home burns down, and the landowner files a new change application to revert the water right back to irrigation. The new, lower depletion rate will limit the amount of irrigation. In other words, the landowner will no longer be able to divert 1 acre-foot to irrigate 0.25 acres, but will only be able to irrigate 0.1825 acres with a diversion limit of 0.73 acre-feet and a depletion limit of 0.365 acre-feet.

Policy Regarding Beaver Dam Analogues

Beaver dam analogues (BDAs) are small, man-made impoundments of water on natural streams. Proponents assert that BDAs enhance stream channels and stream flows, diminish erosion, increase the health of riparian zones, prevent fire damage during wildfires, and help restore damaged streams in wildfire burn areas. Opponents assert that BDAs impound water belonging to downstream water users, increase evaporation and evapotranspiration of the water, and diminish the water flowing downstream to satisfy water right holders.

Based on these considerations and concerns, the State Engineer issued a policy to govern construction of BDAs. The following are some of the key points in the new policy:

- * Any BDA construction will first require that a Stream Alteration Permit be filed and approved by the Division of Water Rights.
- * During the Permit review process, the regional engineer will make a determination if any water rights will be impacted by the BDA.
- * If water rights will be impacted, the applicant will have to compensate downstream uses for the impairment. It is contemplated that this will be accomplished by the applicant acquiring a water right and filing a Temporary Change Application on the water right to cover the anticipated impacts. It is assumed that the impacts of the BDA to the water system will stabilize during the one year that the Temporary Change Application is in place.
- * If no water rights will be impacted, the only approval required from the Division is the Stream Alteration Permit.
- * In emergency situations (e.g., in areas affected by wildfires where it is critical to stabilize streams and help diminish debris flows), no water right will be required. The only approval required from the Division will be the Stream Alteration Permit.

GENERAL ADJUDICATION UPDATE

By Devin L. Bybee

The General Adjudication of water rights in the Utah Lake-Jordan River basin, which began in 1936, is steadily moving forward. The Court, the Special Master, the Utah Division of Water Rights, and the Utah Attorney General's Office have made significant progress in this enormous and historic effort. On December 3, 2018, the Special Master filed his Fifth Status Report to the Court, detailing the progress with the General Adjudication since his last Report on June 15, 2018. Some of the key highlights are listed below.

Reports and Recommendations. The Special Master issued 25 Reports and Recommendations to the court to dispose of objections. This raises the total number of Reports and Recommendations that the Special Master has filed to 153.

Resolved Objections. All objections have now been resolved in the following subdivisions:

- * Spanish Fork Subdivision, Book 1 (51-1)
- * Spanish Fork Subdivision, Book 2 (51-2)
- * Palmyra-Lakeshore Subdivision (51-3)
- * Cedar Valley Subdivision (54-1)

- * Round Valley Subdivision (55-1)
- * Salt Lake County Central Subdivision (59-2)
- * Salt Lake County West Subdivision (59-3)
- * Salt Lake County Southwest Subdivision (59-4)

In addition, the Special Master estimates that by mid-2019, he will have Reports and Recommendations issued for all objections that pre-date his appointment, except for the Hobble Creek Subdivision (51-4). The Special Master estimates that Reports and Recommendations for the Hobble Creek Subdivision will be completed by the end of 2020.

Ongoing and New Adjudication Areas. The adjudication process has been initiated in all subdivisions in the Salt Lake County East Division. In addition, the General Adjudication process will be starting in areas of Utah County and Wasatch County that have not previously been adjudicated in recent decades. These areas where new adjudications will be initiated in the near future include:

- * Lehi Subdivision (55-4)
- * American Fork South (55-5)
- * Provo City South Subdivision (55-6)
- * Provo City North Subdivision (55-7)
- * Provo Canyon (55-9)
- * Midway (55-10)
- * Daniels Creek (55-11)
- * Lake Creek (55-12)
- * Jordanelle (55-13)
- * Francis-Woodland (55-14)
- * Upper Provo River (55-15)

You can find additional information about the active adjudications, including maps of each subdivision, information on individual water rights, and objections within each subdivision, by following this link:

<https://waterrights.utah.gov/adjdinfo/default.asp>

If you receive notices concerning any of the subdivisions, make sure you understand what the notice is about and make sure you meet any deadlines in those notices or your water right(s) could be lost.

We welcome feedback and questions. Please contact us at info@Water.law
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