

Water & The Law

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2020 Fall 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

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Upcoming Conferences

American Water Works Association
Intermountain Section Virtual Water Summit
October 21-23, 2020

For more information click [here](#)

Greetings!

Welcome to the 2020 Fall 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 Hartvigsen, PLLC

Utah Constitutional Amendment D

The November 2020 ballot in Utah will include Constitutional Amendment D, which asks the following question to voters:
Shall the Utah Constitution be amended to:

- * rewrite a provision relating to municipal water rights and sources of water supply;
- * allow a municipality to define the boundary of the municipality's water service area and to set the terms of water service for that area;
- * state that a municipality is not prevented from:
 - o supplying water to water users outside the municipality's boundary; or
 - o entering into a contract to supply water outside the municipality's water service area if the water is more than what is needed for the municipality's water service area; and
- * modify the basis upon which a municipality is allowed to exchange water rights or sources of water supply?

The constitutional amendment stems from legislative changes in 2019 and 2020 regarding municipalities providing water service outside of their municipal boundaries. The amendment clarifies that a municipality can provide water service outside of its boundaries by defining a "water service area," which may extend beyond the municipal boundaries. The amendment also explicitly allows "surplus water agreements," which have been long been used by municipalities under statutory authority to provide water outside of municipal boundaries. Municipalities will still be prohibited from selling, leasing, or disposing of its water rights and water sources, but can still exchange water rights or water sources, provided that the exchanged water rights or water sources will equally enable the municipality to meet the water needs of its designated water service area.

For more information on Constitutional Amendment D, click [here](#) or read pages 49-51 of Utah's official voter information pamphlet available [here](#).

Utah Water Rights Adjudication Update

Utah Association of
Conservation Districts
Nov. 4-5, 2020
St. George, UT
For more information click
[here](#)

Water Blog

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The State Engineer's Office and the courts have continued to move the adjudication of water rights forward since our last adjudication update in January of 2019. These adjudication efforts have expanded recently outside of the Utah Lake-Jordan River drainage basin to include sub-drainage basins (often referred to as "subdivisions") in the Moab and Ash Creek (Washington and Iron Counties) areas. Adjudications are currently active in the following 25 subdivisions:

Subdivision # Subdivision Name

- 55-3 Orem
- 55-4 Lehi
- 55-5 American Fork South
- 55-6 Provo City South
- 55-7 Provo City North
- 55-9 Provo Canyon
- 55-10 Midway
- 57-3 Red Butte Creek
- 57-11 Liberty Park
- 57-14 Parleys Creek
- 57-15 Mill Creek
- 57-16 Holladay
- 57-17 West Big Cottonwood Creek
- 57-18 Big Cottonwood Creek
- 57-19 West Murray
- 57-20 East Murray
- 57-21 Sandy/Midvale
- 57-22 Fort Union
- 57-23 Little Cottonwood Creek
- 57-24 Dimple Dell
- 57-25 Willow Creek
- 57-26 Draper

- 05-2 Moab North
- 05-5 Moab South
- 81-3 Ash Creek

Three new Proposed Determinations have been published in 2019 and so far in 2020 and four decrees have been issued in this same period, as follows:

Subdivision # Subdivision Name Type

- 57-10 Dry Creek Proposed Determination
- 57-12 Oakland Place Proposed Determination
- 57-13 Foothill Village Proposed Determination

- 51-5 Birdseye Decree
- 57-5 Nibley Park Decree
- 57-8 Rose Park Decree
- 57-13 Foothill Village Decree

According to his Eighth Status Report to the Court, dated June 12, 2020, the Special Master in the Utah Lake-Jordan River General Adjudication, Rick L. Knuth, stated that all of the Objections filed in the decades before his appointment have now been resolved, except in the following three subdivisions where work is continuing:

Subdivision # Subdivision Name

- 51-4 Hobble Creek
- 53-1 Goshen Valley
- 57-1 Emigration Creek

The Special Master also reported that all Objections to Proposed Determinations filed in a total of 14 subdivisions have been resolved

and that the Objections filed on the List of Unclaimed Rights in 17 subdivisions have also been resolved. He noted, however, that the Covid-19 pandemic, which has significantly impacted court proceedings, has "markedly impeded progress" in this General Adjudication since March of this year. He also noted that since in appointment on June 28, 2016 thru May 21, 2020, a total of 215 Objections have been addressed, that he has issued 188 Reports and Recommendations on those Objections, and that the Court has taken final action on 191 of those Objections.

The Courts, the Special Master, the Division of Water Rights and their legal team at the Utah Attorney General's Office, the Utah Legislature, and the Governor should all be commended for making resolution of the long pending general adjudications in this state a priority and for moving them forward in an impressive manner over the past five years. Much work is still to be done, but the progress to date is impressive.

You can find additional information about the active adjudications, including maps of each subdivision and information about individual water rights, [click here](#).

If you receive notices concerning any aspect of the ongoing adjudications, please take time to study the notices so that you understand what the notice is about. Also, please make sure that you understand and meet any deadlines, otherwise your water rights could be put in jeopardy.

Arave v. Pineview West Water Company, Utah Supreme Court

The Utah Supreme Court recently issued its decision in the case of Arave v. Pineview West Water Company. This case focused on issues of interference with well water rights.

The Araves and other plaintiffs had water rights that allowed them to divert water from two wells for their two homes and a bed and breakfast. Most of these water rights were established in the 1960s and 1970s. Pineview West Water Company ("PWCC") had a larger, junior water right that is allowed to be diverted from deeper and stronger wells to supply water to 70 homes and irrigate 20 acres. One of PWCC's wells is located only a few hundred feet from the plaintiffs' wells. When the PWCC well was first test pumped in 2004, it affected one of the plaintiffs' wells almost immediately. Within hours, the well was unable to pump any water and was sucking air, which resulted in silt damage to the two homes. A subsequent test yielded the same results. The plaintiffs' other well also experienced issues, albeit to a lesser degree. To resolve the issue, PWCC connected the plaintiffs to its water system and provided them with water for a flat rate of \$20 per month. Several years later, however, PWCC sought to increase the fees to match the fees paid by other PWCC customers. When negotiations broke down, the plaintiffs brought this lawsuit claiming interference with water rights, negligence, and nuisance.

Following a four-day trial, the district court ruled in favor of the plaintiffs on their interference and negligence claims. The court concluded that when PWCC's well was operating, it deprived the plaintiffs' first well of "virtually all water" and obstructed the second well's ability to produce water. The court also concluded that PWCC had been negligent in locating, drilling, and using its well in such close proximity to the plaintiffs' wells. The court ordered PWCC to stop pumping its well unless it could demonstrate that it could do so

without interfering with the plaintiffs' two wells or, in the alternative, to provide replacement water to the plaintiffs at no cost to the plaintiffs. The court also awarded PWCC to pay approximately \$50,000 in compensatory damages to the plaintiffs. PWCC appealed the decision to the Utah Supreme Court.

The Court began by laying out the elements of an interference claim. To prevail on an interference claim, a plaintiff must establish that

- (1) they have an enforceable water right;
- (2) their water right is senior to the defendant's water rights;
- (3) their methods and means of diversion are reasonable;
- (4) despite their reasonable efforts, they are unable to obtain the quantity or quality of water to which they are entitled; and
- (5) the defendant's conduct obstructed or hindered their ability to obtain that water.

The Court determined that the district court had made insufficient findings regarding the third and fourth elements. With respect to the third element, the district court had not made findings about whether the plaintiffs could have lowered their pumps or modified their wells to reach the available water. With respect to the fourth element, the plaintiffs had not offered evidence about how much water they used or how much of their allowed water they were not able to obtain (due in part to the fact that the plaintiffs did not have a meter on their wells).

Thus, the Court reversed the district court's ruling that PWCC's well had interfered with the plaintiffs' two wells. Because the district court's negligence determination was related to its interference determination, the Court remanded the negligence claim back to the district court for further factfinding and analysis. The Court also vacated a portion of the compensatory damage award and remanded to the district court to revisit the calculation of compensatory damages based on the reversal of the interference determination.

To read the full opinion, [click here](#).

Mineral County v. Lyon County, Nevada Supreme Court

The Nevada Supreme Court, in answering questions posed and certified to it by the Ninth Circuit Court of Appeals, is the latest court to weigh in on the effect of the public trust doctrine on state appropriated water rights. The decision in Mineral County vs. Lyon County, 136 Nev. Advance Opinion 58, was issued in September 2020.

In 1983, the California Supreme Court in *National Audubon Society v Superior Court*, 658 P2d 709 (Cal. 1983), which has become known as the Mono Lake Case, held that state appropriated water rights could be curtailed by the operation of state public trust doctrine. The public trust doctrine is a court-recognized principle that certain natural and cultural resources are of such importance they must be preserved and held in trust by the sovereign for the public's benefit. The United States Supreme Court first enunciated the doctrine in *Illinois Central R. Col. v. Illinois*, 146 US 387 (1892), in overturning a grant of Chicago's shoreline to a private railroad, which gave it control of the harbor. When it comes to water, the federal public trust doctrine is typically limited to "navigable waters" and managing these waters for the public to use and enjoy. The state public trust doctrine has a potentially greater reach, as western states, including

Utah, declare that all water is the property of the public, not just navigable waterways. See Utah Code § 73-1-1. Thus, all state appropriated water rights may be subject to limitations of public trust. In the Mono Lake Case, previously appropriated water rights were subject to, and could be curtailed under, California's public trust doctrine to protect the water flow into Mono Lake.

Nevada, however, came to the opposite conclusion in Mineral County. The Nevada Supreme Court was asked to opine on whether the exercise of the public trust applied to existing, state appropriated water rights in Nevada, such that existing diversions could be curtailed. The case concerned the Walker River, which flows from eastern California into western Nevada with its terminus at Walker Lake. Along the way to Walker Lake, water is diverted by water users, primarily for ranching and farming. Mineral County sought to reduce the diversions from the Walker River to allow more water to flow into Walker Lake, which has shrunk considerably and continues to shrink in size, due to lack of inflow. Mineral County sought to apply the public trust doctrine in much the same way California has for Mono Lake by applying it to existing diversions upstream in the Walker River to manage or curtail these diversions to provide for more inflow into Walker Lake.

The Nevada Court ruled 4-2, with one abstention, that under Nevada law, the doctrine of prior appropriation (which is the same water law doctrine we have in Utah) takes public interest into account when water rights are appropriated, but that the public trust doctrine cannot be thereafter employed to reallocate or reduce water rights already adjudicated and settled. While the Court reaffirmed that the state public trust doctrine exists and clarified that the doctrine applies to all waters in Nevada, the Court limited the scope and application of public trust to the appropriation of water rights in Nevada. The Supreme Court concluded that Nevada's public trust doctrine is applied through Nevada's prior appropriation laws at the time of the appropriation. The Court also held when water rights are allocated under the prior appropriation doctrine, there is "certainty and finality" such that the public trust doctrine could not retroactively apply water to curtail water rights that had already been appropriated under state law.

The state public trust doctrine is one important example of the inherent tension between public and private interests in water, which is the most important, scarce, and valuable resource allocated by law. While Utah has addressed its public trust doctrine obliquely, in the context of public access to water ways in Utah Stream Access Coalition v VR Acquisitions LLC, 2019 UT 7, thus far, no Utah court has addressed its effect on existing Utah water rights.

For more information about the case, [click here](#).

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