

April 26,2010

Utah Water Users Association
Phone 268-3065 Fax 261-4069
Cell (801) 560-2533
Editor: Carly B. Burton

MESSAGE FROM THE PRESIDENT
By Blair Hamilton

I would like to start by thanking all of you for the honor you have provided me in representing such a distinguished group of people. I would like to thank Tage and all the other directors for their service the past years and look forward to their support in the future. The workshop at St. George was a great success. I have received many good comments about it. We are fortunate to have a staff devoted to the water cause. We are unique with the many different entities and in their usage of water. Recently I have had the opportunity to serve on a pilot advisory committee endeavoring to assess problems related to canal safety. The Strawberry Highline Canal Company along with State, BOR and other interested parties have been working together to formulate a pilot program in south Utah County. The BOR has funded a grant to help start this group. This may be a topic that may be of interest to most of our members. The future of water safety and other problems seem to be a much needed priority in the water world. It will take team work to overcome our problems. Let me say thanks again to all.

WATER OUTLOOK
By Randy Julander

It is now late April and Mother Nature is still tossing a few tricks into this year's runoff with yet another cold storm moving in this week. In the north, just as we completed the April first Snow Surveys, we had the biggest storm of the year – we got an incredible 30% of all the snow accumulated this year in that little 10 day period. The south just added to their already impressive snow totals. The Bear River Basin went from 55% to 75% of average. However, it was a hit and miss kind of storm as the Uintah Basin picked up relatively little snowpack during that time period. Soil moisture continues to be a great concern over the entire state – the

Little Grassy Snotel site melted 15 inches of Snow Water Equivalent over a 3 week period and the Santa Clara River barely budged. Snowmelt going right into the ground with very little runoff – we anticipate this same kind of loss in many areas around the state. Streamflows are starting to pick up steam as the snowpack begins to melt – the lower and mid elevation Snotel sites are melting 0.2 to 0.5 inches per day. It won't be long before they are melting at 1.5 inches per day. Peak flows will likely come in mid to late May this year. Fortunately, southern Utah currently has 100% to 160% of average snowpack and most areas will have near normal streamflows. In northern Utah, the prospects are not nearly as good with forecasts in general ranging from 20% to about 60% of normal. Some reservoirs may not fill and of those that do, it will likely kiss the top and head down fast. The caveat here is a June like last year – 300% of average precipitation will do a lot to reduce demand and keep reservoirs near full into July. I wouldn't bet the farm either way.

WATER & THE LAW
Potential Liability for Improving or
Piping an Open Canal
By Bryan C. Bryner, Esq.
Smith Hartvigsen, pllc

Many canal and irrigation companies are considering lining or even piping their open canals and ditches. There may be various reasons to do this. The first is for safety reasons, particularly in light of recently passed legislation regarding canal safety (HB 60 and HB 298). Second, lining or piping open canals improves water conservation by preventing losses due to seepage and evaporation. Third, improvements may be used to manage the risk of flooding and other potential liability to nearby property owners. Fourth, piping a canal allows for pressurization. But whatever the reason, canal owners need to review and understand the legal issues involved when lining or piping open canals and ditches.

One issue that continues to arise is the potential liability to nearby property owners who have benefitted from canal seepage, such as for incidental watering of vegetation, or who have designed open waterways into

outdoor landscaping. Utah case law has established that incidental beneficiaries of seepage water have no right to the water, and thus cannot compel a water user canal owner to continue to provide waste (unused) water or seepage water for their benefit. This principle applies equally to both waste and seepage water from irrigation end-use as well as from transportation through ditches and canals. Accordingly, canal owners may improve open canals to reduce losses through seepage and evaporation without liability to the effect on persons who may have used or benefitted from that seepage water.

In *Big Cottonwood Tanner Ditch Co. v. Moyle*, 174 P.2d 148 (Utah 1946), the Utah Supreme Court held that the defendant property owners could not prevent the ditch company from waterproofing its irrigation canal with cement even though flora along the banks would die without seepage water from the canal. The court stated that Utah law encourages conservation that promotes the wise and efficient use of water. The only caveat is that the canal improvements cannot add or materially change the burden on the land, but must remain within the scope of the original easement. Thus, the court in *Moyle* held that the ditch company's easement included "the right to improve the ditches in the interests of water conservation ... so long as [the ditch company] carries out its rights to improve in a reasonable manner," even where such improvements would decrease the value of the adjoining property. *Id.* at 158.

Later Utah cases have affirmed this principle, which remains in force today. See, e.g., *In re Steed v. New Escalante Irrigation Co.*, 846 P.2d 1223 (Utah 1992) (holding that adjoining landowner could not compel the water user to replace runoff and seepage water saved by the installation of a more efficient watering system); *Valcarce v. Fitzgerald*, 961 P.2d 305 (Utah 1998) (holding that pipe improved the conservation of water without changing or adding any burdens to the property, even though it deprived the property the benefit of seepage water).

There are other legal issues that should also be reviewed and understood, but the potential liability for cutting off seepage water is a frequently recurring issue, especially when a canal or ditch crosses dozens, if not hundreds, of individual properties. Utah law favors and encourages conservation efforts and efficiency improvements, and to that end allows canal owners to line or pipe open canals without liability to adjoining incidental beneficiaries of the seepage water.

The author can be contacted at (801) 413-1600 or bbryner@smithlawonline.com.

CANAL AND DITCH COMPANY ALERT **By Jack Barnett**

At this last session of the Utah Legislature, canal safety and other issues relating to canal operation were discussed. One result was the passage of two laws that require actions of canal and ditch companies. HB 298 was titled the "Land Use Authority Notification of Canal Development Act." This act provides that canal owners and operators shall provide certain information to the county by July 1, 2010. This information is to include the location of each canal operated by the company. The county is then required to notify the canal company of land use change proposals that are near the canals.

There is no state agency charged with the administration of this act. There are no penalties described in that act with respect to non-compliance. There are no details in the act that describe what must be submitted to the county by the canal company. And, there is no agency to turn to for guidance. A map of the canals created from GPS data or digitized from aerial imagery may be the most expedient way for canal companies to proceed.

The second bill numbered HB 60 and entitled the "Water Conveyance Facilities Safety Act" is more comprehensive. A section of this act is titled "Management Plan for Water Conveyance Facilities." It does designate the Utah Division of Water Resources as the managing state agency. It also has a role to be played by the Utah Board of Water Resources. The bill focuses on identifying potential risk locations, requires a management plan to be submitted by May 1, 2013 by the canal company and allows the Board to loan or grant money for canal repairs or improvements. This bill specifies, among other things, GIS coverage or drawings identifying existing canals and lateral alignments, points of diversion, bridges, culverts, trash racks, spill points and evaluation of any areas with potential slope instability that may cause potential risk. Storm water entering canals is also addressed. The act also describes a potential role for conservation districts to provide information and technical resources.

One other easily solved issue for canal company officials was recently described by legal counsel. From the time of statehood (1896) through the early part of the twentieth century, canal companies had their first opportunity to incorporate. During this early period, state law allowed incorporation for only 100 years. Company officials for older canal companies may want to check and make sure their company is still incorporated.

For more information, contact Gordon Younker at the Utah Association of Conservation Districts (gordon.younker@ut.nacdnet.net or 435-753-6029) or

Jack Barnett or Scott Clark at Barnett Intermountain Water Consulting (jbarnett@barnettwater.com or sclark@barnettwater.com at 801-292-4662).

**MESSAGE FROM
THE DIRECTORS CORNER
By: Carly Burton**

Gooseberry Narrows Dam Resurfaces

Well folks, here we go again. The longest running water battle in the state got new life this past month when the U. S. Bureau of Reclamation issued the Supplemental Draft Environmental Impact Statement for construction of the Gooseberry Narrows Dam at the headwaters of the Price River high in the Wasatch Plateau. The primary purpose of the project is to enable Sanpete Water Conservancy District (SWCD) to develop a supplemental irrigation and M&I water supply for users in north Sanpete County, Utah. Reclamation has received from the SWCD its original application for a Small Reclamation Projects Act loan to construct the project and a request for authorization to build the project. SWCD will also provide an updated application for review and USBR will complete the required NEPA compliance documents for the project.

The project will consist of a 17,000 acre foot reservoir and the upgrading of the existing trans-basin diversion tunnel which would convey 5,400 acre feet of water per year from the reservoir for use in northern Sanpete County.

This project has been in the planning stage for more than 70 years and was formulated in response by requests from Sanpete County to provide a supplemental water supply for irrigation and M&I use.

The real history of the project goes back to the turn of the century when planning was completed for the Mammoth Dam near where the new dam is being proposed. That original dam was completed in 1917 but workers noticed leakage from the base of the dam after storage commenced with total dam failure occurring on June 25, 1917. The dam failure caused extensive damage downstream and the dam was never rebuilt.

The presently proposed project is similar to the original project envisioned by the Bureau of Reclamation back in 1933. The original Bureau project envisioned two dams including Gooseberry and Scofield but only the Scofield portion of the project was reconstructed and enlarged in 1946. Then in 1975 Reclamation assigned a portion of the project water rights to Sanpete in order to complete the Gooseberry

portion of the project. In 1981 SWCD submitted a Notice of Intent to Reclamation to apply for funding for the project and the Notice was updated in 1984 and 1990. Numerous efforts were made to try and resolve the ongoing disputes through a 1982 ruling by the Utah Supreme Court and a 1984 Settlement Agreement between the two counties. However, controversy continued to delay the project through numerous court proceedings, lawsuits and other legal and political posturing by both sides.

To say that Sanpete and Carbon Counties have been in controversy over this project would be a great understatement and the two sides have been in disagreement since the Gooseberry Project's original planning. In basic terms Sanpete residents believe that all water and snowfall originating in their County belongs to them. On the other side Carbon residents believe that since the natural drainage of Upper Gooseberry Creek flows into the Price River they should be the recipients of the water. Some have even described this historical battle as a "Holy War" between good and evil. Only problem in my mind is who is the good and who is the evil. Maybe a little of each should be credited to both sides.

The U. S. Bureau of Reclamation will be conducting public hearings during the Week of April 26 in Manti and Price in order to receive public comment on the Supplemental Draft Environmental Impact Statement. I'm sure we will continue to see disagreements and more controversy on this project but time will tell what will develop. We will keep all of you posted on this important water matter for Utah.
