

July 28, 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

We live in a very complex society where all segments are competing for our limited resources, namely water. The demand for this important resource is getting greater each day. Different entities are competing for control of its use. This causes turmoil in the water community. There are different views even in our organization as to the best solution to this problem. Despite the different views, we must continue to work together to safeguard this precious resource. We have been blessed for past people who have had the vision to build water projects that sustain our livelihood. We too must be vigilant in our efforts to have the vision to perpetuate ways to continue this effort. Each of us can contribute in this process by working together. We need everyone's ideas and support to make this happen.

WATER OUTLOOK
By Randy Julander
Water Supply, July, 2010

Well, its mid July, hotter than a \$2 pistol – the broncs and bulls of the 4th are behind us and the bulldoggin and team ropin of the 24th are just ahead. So, what's with the tiny green apricots in my orchard? And what's up with raspberries just now fruiting? - They are called June Bearing for a reason. One would think I lived at Bear Lake instead of Layton. A cool spring (with downright cold spurts – as in snow at higher elevations on the 4th...) can do strange things to Agriculture. I know folks who planted their gardens 3 times this year. Corn should be as high as a mule's eye and it's barely knee high. As you can tell, it's been an odd spring. Currently there are only snow drifts left in sheltered locations and those are melting fast.

However, the cool days (now being replaced by out of the freezer and into the fire) have paid off in some water savings – reservoir storage is a bit higher than expected: Bear River – 47%, Weber – 97%, Provo – 95%, Uintah Basin – 94%, SE Utah – 82%, Sevier -54%, SW Utah – 68%, and statewide – 79% of capacity. Very nice numbers, especially in northern Utah. Many of the streams and rivers across the state are currently running near to above average which is a bit unexpected but welcome at any time. Mountain soil moisture is currently running about average compared to the past 5 years in all basins. As far as this summer is concerned, the Climate Prediction Center is forecasting above normal temperatures and near normal precipitation. Make some hay while the sun shines.

WATER & THE LAW
Case Law Update: Bingham v. Roosevelt City
By Jeffrey R. Gittins
Smith Hartvigsen, PLLC

The Utah Supreme Court recently issued a significant decision regarding water rights in Bingham v. Roosevelt City. The case centered around five Roosevelt City wells, known as the Hayden Well Field, through which the City pumped water out of an unconfined, shallow aquifer underlying the Hayden area. The water level in the area dropped significantly due to the City's pumping. For example, the static water level at one well dropped from 14.3 feet to 94.6 feet.

A group of landowners near the Hayden Well Field were affected by the decreased water table levels. The landowners found that when they applied water to their fields, the water was quickly drawn down deep into the soil past the root zone of their crops. Thus, the landowners found it more costly and, in some instances, practically impossible to raise crops and livestock. The landowners filed suit against the City, asserting three claims: interference with water rights, takings, and

negligence.

The Supreme Court held that because the landowners had not lawfully appropriated the water in the water table, the landowners' interest in maintaining the historic level of the water table underlying their property was not a protectable interest under the Utah Constitution or the United States Constitution. Therefore, the Court rejected the landowners' takings claim.

The Court also held that the landowners' water right interference claim failed because they still received their full quantity and quality of water at their approved point of diversion. Although the Court acknowledged that the City's pumping from the Hayden Well Field affected the soil saturation and the water table, the Court concluded that the City was not interfering with the landowners' ability to receive and divert water under their water rights. In essence, the Court limited water interference claims to situations where a plaintiff does not receive his or her full water right at the point of diversion.

Finally, the Court held that the district court erred when it granted summary judgment in favor of the City on the landowners' negligence claim. The Court held that the negligence claim was not barred by the statute of limitations because the City's pumping--which caused the alleged damage--was a continuing tort. Most significantly, the Court held that the City did owe a duty to the landowners to exercise reasonable care in obtaining its water. In other words, a water right does not give its owner the absolute right to divert that water without regard to neighboring owners that would be unreasonably affected by the diversion. The Court recognized that the landowners would be able to prevail on their negligence claim if the facts support the landowners' assertion that there were reasonable alternative means for the City to obtain its water without adversely affecting the landowners. The case has been remanded to the district court for additional proceedings on the negligence claim.

The author can be contacted at 801-413-1600 or jgittins@smithlawonline.com. He also has a water rights blog at www.utahwaterrights.blogspot.com.

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

Water Task Force

In case you weren't aware, a task force has been created to deal with unresolved water issues following the 2010 Legislative Session. This task force is chaired

by Mike Styler, Executive Director of the Utah Department of Water Resources. The task force consists of state representatives, water attorneys, conservancy districts, Utah Farm Bureau, Farmland Reserve, Rural Water Users, Utah League of Cities and Towns and others. Typically, about 40 individuals from the water community are in attendance to discuss unresolved water issues of importance to state water users. In a sense, this is the behind-the-scenes, down-in-the-trenches group that works hard to hammer out language on difficult water issues into a format which is suitable for legislative introduction. A summary of the issues being discussed is listed below:

Management of Surface and Ground Water

- Cache County representatives have introduced the concept of water banking to improve water efficiencies and to deal with issues related to forfeiture from non use.
- The plan is for the county to act as a water brokering entity for the benefit of cities and towns in Cache County.
- The county is proposing to use ground water supplies and to use irrigated lands that have been taken out of production for mitigation of increased use of ground water.
- Several entities have expressed concern about this concept so, naturally, there is ongoing dialogue on this issue.

Water Companies and Water Right Change Requests

- This topic which addresses the process for changing water rights has been crafted by Steve Clyde and is currently in a draft legislative bill format.
- This draft bill includes the treatment of a change application by a share holder in a water company,
- provides restrictions on a water company's denial of a shareholder's change request,
- allows a water company to require a shareholder to pay certain water company costs. and
- prohibits a water company from requiring a shareholder, as part of the share assessment process, to pay a proportionate share of the costs of a change application request.

Keep in mind that this bill (S.B.99) is in draft format and is subject to considerable editing in the months ahead.

Update on EPA Pesticide Ruling

Beneficial Use

- Kent Jones, State Engineer has proposed discussion on various aspects of the concept and law under beneficial use, including a better definition of what beneficial use should be, senior versus junior rights and possible consideration to junior right holders and better defining the concept of public welfare.
- This topic will be under considerable discussion in the months ahead.

Aging Infrastructure

This issue is of great importance and of great concern both on a state and a national level. Most of the existing dams in the state were built well over 50 years ago and many are in need of extensive renovation and repair not just for continued operational integrity but to meet critical dam safety requirements. Not surprisingly, the upgrading of these facilities will cost hundreds of millions of dollars in the years ahead. Budget constraints will require all entities from facility owners as well as state, federal and private agencies to be creative and innovative in finding the most economical means to fund improvements into the future. Part of this cooperative effort will be to inform and educate the legislature on the issues and the costs in order for them to make better and more informed decisions.

Scholarship Awards

For the past 4 years our Association has sponsored a scholarship program to recognize and reward college students who have demonstrated high scholastic achievements and a commitment to further the cause of water resources studies in the State of Utah. This year our scholarship committee, chaired by Keith Denos, has selected two recipients to receive the Utah Water Users Association annual scholarships. They are Michael Clark and Alex Vaz. Both of these outstanding college students attend Brigham Young University. Both are majoring in Civil Engineering and both have worked for water oriented organizations during their college careers. Congratulations to both students and to Brigham Young University for this great achievement!

In an article from Western States Water, on June 2, 2010 EPA announced the public availability of a draft NPDES general permit for point source discharges from the application of pesticides to waters of the United States. The permit would regulate biological and chemical pesticide discharges that leave a residue, and would cover a number of pesticide use and application procedures including mosquito and other flying insect control, aquatic weed and algae control, aquatic nuisance animal control, and forest canopy pest control. It does not authorize coverage for pesticide discharges already impaired by these specific pesticides or discharges to outstanding national resource waters. These types of discharges will require coverage under individual NPDES permits.

The general permit is a response to litigation regarding a 2006 EPA ruling that stated NPDES permits were not required for pesticide applications to U. S. Waters. Environmental groups challenged the rule in 11 different federal circuit courts and the cases were consolidated in the 6th Circuit which vacated the rule as being an unreasonable interpretation of the Clean Water Act. The court also gave EPA and states with NPDES permitting authority until April 9, 2011 to develop, propose and issue general permits for pesticide applications. Although the decision applies nationally, EPA's permit will only apply in areas where it has NPDES permitting authority, like Idaho and New Mexico. States with delegated NPDES permitting primacy are responsible for issuing and administering their own permits.

EPA believes the draft permit strikes a balance between using pesticides to control pests and protecting human health and water quality according to EPA administrator, Peter Silva. EPA plans to finalize the permit order in December, 2010 and will accept comments through July 19. It also held a series of public meetings in Albuquerque, New Mexico on June 14 and Boise, Idaho on June 16. If you would like additional information on this issue contact us or contact NWRA at their website at www.nwra.org.

Electronic Newsletter Inquiry

We are continuing to try and reduce costs and be more efficient in the distribution of the quarterly newsletter to our members. If you would rather receive the newsletter electronically just send us an e-mail to utahwaterusers@aol.com with your e-mail address. This program is a work in progress and eventually we would like to substantially reduce hard copy mailings. Just let us know.

