

Water Transactions

March 6, 2025

Matthew Ekins

435.351.0533

mekins@parsonsbehle.com

Sean Robison

801.536.6767

srobison@parsonsbehle.com

**PARSONS
BEHLE &
LATIMER**

Agenda

Title 73 | What is a Water Right?

Recent Decisions Related to Title 73

Water Right Permitting/Licensing

Conveyance of Shares of Stock in Non-Profit Water Company

Common Due Diligence Issues

Transfer of Water Rights

Groundwater Management Plans

Three Strategies for Water Right Appeals

Title 73 (Water and Irrigation)

Title 73 is broad and covers many aspects of water, including (but not limited to) water rights, dam safety, interstate water compacts, tribal water settlements, boating, cloud seeding, geothermal resources, public water access, the Great Salt Lake Commission, and other water resource issues. Water rights issues are primarily located in Chapters 1 through 5.

What is a Water Right?

- Water is owned by the State. Water cannot be owned by any individual, corporation, or other entity. Utah Code § 73-1-1(1) (“All waters in this state, whether above or under the ground, are hereby declared to be the property of the public, subject to all existing right to the use thereof.”).
- Water rights are “the right to use water diverted at a specific location on a water source, and putting it to recognized beneficial use at set locations.” Utah Division of Water Rights, Glossary of Water Words (Glossary).
- Water rights are usufructuary rights – the rights to use a publicly owned resource.

Recent Decisions Related to Title 73

PARSONS
BEHLE &
LATIMER

Zundel v. Ramsdell, 2024 UT App 88

- Pre-2013 statute created a rebuttable presumption that water shares are not appurtenant to real property. Presumption may be overcome by clear and convincing evidence that (1) shares are appurtenant to real property and (2) grantor intended to transfer shares.
- This case likely has limited applicability; 2013 amendments to § 73-1-10 and 73-1-11 require water shares to be transferred in same manner as certificated securities, unless otherwise specified in the Articles of Incorporation or Bylaws of the company

Washington County Water Conservancy District v. Washington Townhomes, 2024 UT App 55

- After several years of pre-trial litigation, trial court granted motion to appoint a Special Master, citing (1) pending retirement of judge (2) length of the case (3) procedural and substantive complexities of the case; and (4) inability to hold bench trial prior to retirement of judge as the “exceptional circumstances” justifying the appointment.
- Court of Appeals held that the facts here do not present exceptional conditions, reasoning that (1) judges retire (or are reassigned) with relative frequency; (2) any newly assigned judge would have to duplicate much of the work to become familiar with the procedural history and substance of the case; (3) even if the special master makes reports and recommendations, judges will have to review all legal issues de novo; (4) a special master would not bring quicker resolution, where case is at the cusp of trial.

Texas v. New Mexico, 602 U.S. ____ (2024)

- Original jurisdiction case regarding Rio Grande Compact. United States opposed a consent decree approved by Texas, New Mexico, and Colorado.
- SCOTUS barred the consent decree because it would dispose of a third-party claims and United States has distinct federal interests to protect as a third-party complainant.

Seminal Water Case Law

Water Right Permitting/Licensing

PARSONS
BEHLE &
LATIMER

Appropriation

- Historically, water rights were created by appropriating water and placing water to beneficial use. In 1800s no application or approval required.
- Beginning in 1903 (for surface water) and 1935 (for groundwater), water rights were regulated and administered by the State Engineer and required an Application to Appropriate to obtain a new water right.
- Most areas of the state are now closed to new appropriation, “Closed Basin”. In limited areas small amounts of water can still be appropriated. These few “Open Basins” are generally for a home and other related uses to appropriate small quantities of water.
- Because water is fully appropriated, today, water users must acquire an existing water right and then file an Application for Permanent Change of Water in order to use the water right for the desired purpose.

Permanent and Temporary Change Applications

- A permanent change requires an application to change the use and obtain a Certificate of Beneficial Use. The approval is permanent and requires use of the water and compliance with the certificate to remain valid.
- A temporary change can be approved administratively by the Water Division in a regional office. Approval for a temporary change application remains valid only for one year. (Utah Code §§ 73-3-5.5).

Application Process for both Applications to Appropriate and Change Applications

- Application (Utah Code §§ 73-3-2, 73-3-3).
- Review for completeness (Utah Code § 73-3-5(2)).
- Publication in local newspaper of general circulation and on Utah Public Notice website (Utah Code § 73-3-6(1)).
- Protests by any interested person (Utah Code § 73-3-7(1)).
- Administrative Hearing (if required under statute/rule).
- Decision by State Engineer (Utah Code § 73-3-8).
- Request for Reconsideration (Utah Code § 63G-4-302) and/or de novo Judicial Review (Utah Code 73-3-14(1)).

The State Engineer is Required to Approve Applications When There is “Reason to Believe That”:

- Water is available in the source (§ 73-3-8(1)(a)(i)).
 - “Under the language of the statute it is not a prerequisite . . . that there is unappropriated water in the proposed source. The proposition is stated in the negative, and it is only when there is no unappropriated water in the source that the application is to be rejected.” *Little Cottonwood Water Co. v. Kimball*, 289 P. 116, 118 (Utah 1930).
- The proposed use will not impair existing rights or interfere with the more beneficial use of water (73-3-8(1)(a)(ii)).
 - “[U]nless it appears that the approval of the application will injure vested rights of prior appropriators, the application to appropriate should be approved.” *Rocky Ford Irr. Co. v. Kents Lake Reservoir Co.*, 135 P.2d 108, 113 (Utah 1943).

The State Engineer is Required to Approve Applications When There is “Reason to Believe That”:

- The plan is physically and economically feasible and will not be detrimental to the public welfare (73-3-8(1)(a)(iii)).
 - *HEAL Utah v. Kane County Water Conservancy District*, 2016 UT App. 153, ¶ 40: Three elements for feasibility:
 - Land is physically suited or adaptable to the potential use.
 - Land is legally available for potential use, or any legal restrictions have a reasonable probability of being modified.
 - There is sufficient economic demand for the potential use.
 - District Court (in place of state engineer) approved application on the condition that the application would be junior to a subsequently filed exchange application based on senior water rights (PRWUA exchange for Deer Creek Reservoir based on Reclamation’s water rights). “Where the approval of the application would . . . interfere with the more beneficial use . . . or would prove detrimental to the public welfare, the State Engineer is directed to reject the same.” *Tanner v. Bacon*, 136 P.2d 957, 962 (Utah 1943).

The State Engineer is Required to Approve Applications When There is “Reason to Believe That”:

- The applicant has the financial ability to complete the proposed project (73-3-8(1)(a)(iv)).
 - The State Engineer’s approval is based upon whether the proposed project is “within the financial ability of the applicant.” *Bullock v. Tracy*, 294 P.2d 707, 709 (Utah 1956).
- The application was filed in good faith and not for purposes of speculation/monopoly (73-3-8(1)(a)(v)).
 - There is no definitive Utah case law about this, but there is some indication that applications might be speculative when:
 - Project is “gargantuan and complex” or “grandiose,” “the only proposed beneficial use for the water [is] a plan to sell it to others” and the applicant has “no lands, facilities, customers, or contracts” in support of the project. *HEAL Utah v. Kane County Water Conservancy District*, 2016 UT App 153, ¶ 49 (citing *Western Water, LLC v. Olds* 2008 UT 18, ¶ 26).

The State Engineer is Required to Approve Applications When There is “Reason to Believe That”:

- The application complies with any applicable groundwater management plan (73-3-8(1)(a)(vi)).

- An approved application allows an applicant to move forward with a proposed project, but does not confer a perfected right to the use of water. *HEAL Utah v. Kane County Water Conservancy Dist.*, 2016 UT App 153, ¶ 8.
- Water rights become vested once the applicant places water in beneficial use according to the approved application, files proof of beneficial use and obtains a Certificate of Appropriation from the State Engineer. (Utah Code §§ 73-3-16(2), 73-3-19(6)).

Conveyance of Shares of Stock in Non-Profit Water Company

PARSONS
BEHLE &
LATIMER

Utah Code

- Utah code provides that shares in a non-profit water company is not a water right appurtenant to land and must be transferred in compliance with the Uniform Commercial Code applicable to investment securities.
 - Utah Code §§ 73-1-11(4)(a): “The right to the use of water evidenced by shares of stock in a corporation is not a water right appurtenant to land.”
 - Utah Code § 73-1-11(4)(b): “On or after May 14, 2013, unless provided otherwise in a corporation’s articles of incorporation or bylaws, the right to the use of water evidenced by shares of stock in a corporation shall transfer only as provided in Subsection 73-1-10(2).”
 - Utah Code § 73-1-10(2): “The right to the use of water evidenced by shares of stock in a corporation shall be transferred in accordance with the procedures applicable to securities set forth in Title 70A, Chapter 8, Uniform Commercial Code – Investment Securities.”

Utah Code

- Although the statute directs that water shares are NOT appurtenant to land, prior to 2013, Utah courts interpreted this as a presumption; buyers may rebut the presumption by providing “clear and convincing evidence” that (1) water shares are appurtenant to property and (2) the seller intended to transfer the water shares with the conveyance of land. *Zundel v. Ramsdell*, 2024 UTAH App. 88, ¶ 16.

Best Practice

- Land deeds should generally exclude any water (both rights and shares). Water should be conveyed separately, either by a deed, assignment (or deed and assignment), assignment of shares and stock power, or indorsement and delivery of share certificates.
 - This is clearer (there is no ambiguity about which water rights may or may not have been appurtenant to the property).

Common Due Diligence Issues

PARSONS
BEHLE &
LATIMER

Common Due Diligence Issues

- **Title** – Transfer by appurtenance can create interesting ownership issues for water rights.
- **Historic Use and Forfeiture** – If Seller has not consistently used water rights, then Buyer may not be entitled use water rights and could face challenges in obtaining an approved change application.
- **Identification of Sole Supply/Beneficial Use**
 - Some water rights can be used in water use groups, where various water rights contribute to a common use. If it is not clear how much each water right contributes to the overall use, then it is difficult to assess how much water Buyer might be able to divert under a single water right.

Rebuttable Presumption of Quantity Impairment

- Utah Code § 73-3-8(6)(c)(i): There is a rebuttable presumption of quantity impairment . . . to the extent that, for a period of at least seven consecutive years, a portion of the right identified in a change application has not been (A) diverted from the approved point of diversion or (B) beneficially used at the approved place of use.
- Exceptions – Utah Code § 73-3-8(6)(c)(ii): The presumption does not apply if nonuse is excused by: any of the statutory forfeiture exceptions defined in 73-1-4(2)(e), an approved nonuse application, an approved application for an instream flow, or the statute of limitations for judicial forfeiture of water rights.
 - Listed exemption include: (i) beneficial use of water according to a written lease, (ii) the source fails to yield sufficient water to satisfy the right, (iii) a period of nonuse during an approved change application that is diligent pursuing certification, or (iv) water right within a water bank.

Rebuttable Presumption of Quantity Impairment

- Treatment by Division: If RPQI applies (and is not rebutted), State Engineer must reject the application on the basis of presumed impairment to other water rights.

Transfer of Water Rights

PARSONS
BEHLE &
LATIMER

Transfer of Water Rights

- Water rights shall be transferred by deed in substantially the same manner as real property. Utah Code § 73-1-10(1)(a).
 - This only applies to water rights evidenced by decree, certificate of appropriation, diligence claim, or water user's claim. It does not apply to water rights evidenced by an approved application to appropriate or change application or pending (unapproved) applications to appropriate or change applications.

Report of Conveyance (ROC)/Addendum to Deed

- ROC Form ([roc full.pdf](#))
 - **Process:** Using form, establish chain of title from record owner (listed on Division's database) to present owner, attaching supporting documents (recorded deeds, wills/probate documents, etc.) from oldest to newest.
 - If deeds do not expressly identify a water right number (i.e., if water rights are conveyed by appurtenance), must also include maps identifying the land (place of use) that conveyed.

Report of Conveyance (ROC)/Addendum to Deed

- Must be completed and filed by a professional (attorney, engineer, title professional) unless:
 - Deed conveys 100% of water right and water right number is listed on the deed.
 - Deed conveys a portion of the water rights, the water right number is listed in the deed and the sole supply has been established for the portion conveyed.
 - Report of Conveyance filed for name change only (does not convey interest to a new party).
 - Removing the name of a joint tenant due to death.
- ROC Regulations (Utah Admin. Code R655-3)

Report of Conveyance (ROC)/Addendum to Deed

- Water Deed Addendum Form (WaterDeedAddendum.pdf)/Land Deed Addendum Form (LandDeedAddendum.pdf)
 - Deed Addenda are attached to deeds and recorded; County recorder will forward deed and addenda to State Engineer to update records.
 - Can only be used for one conveyance.

- Before the state engineer issues a certificate of appropriation, a right claimed under an application for the appropriation of water may be assigned by a written instrument, including by the use of a form provided by the state engineer's office. Utah Code § 73-3-18(5).
- Transfer of water right may be conditioned upon a successful change application and final, non-appealable order

Groundwater Management Plans

PARSONS
BEHLE &
LATIMER

Groundwater Management Plans

- Utah Code § 73-5-15(2)(a)-(b): State Engineer may regulate groundwater withdrawals in specific groundwater basins in order to limit groundwater withdrawals to safe yield, protect physical integrity of the aquifer, and protect water quality.
- If groundwater withdrawals exceed safe yield, State Engineer must regulate (curtail) groundwater rights based on the priority date of the water rights unless there are voluntary arrangements that require different distribution.
- Current Groundwater Management Plans:
 - [Utah Water Rights - Groundwater](#)

New/Proposed Groundwater Management Plans

- Parowan (adopted October 15, 2024)
- Sand Hollow (proposed)

Three Strategies for Water Right Appeals

PARSONS
BEHLE &
LATIMER

Water Right Appeal Strategies

1. Utilize a Water Judge. Cases filed under Utah Code Title 73, Chapter 3 or 4 are eligible for reassignment to a water judge under Utah Code of Judicial Administration 6-104. The request must be in the complaint or first responsive pleading or by motion to the presiding judge.

Water Judge	District
Judge Angela Foncesbeck	First District
Judge Jennifer Valencia (Supervising Water Judge)	Second District
Judge Blaine Rawson	Second District
Judge Laura Scott	Third District
Judge Patrick Corum	Third District
Judge Kent Holmberg	Third District
Judge Kraig Powell	Fourth District
Judge Gregory Lamb	Eighth District

Water Right Appeal Strategies

2. Include all water users in a source as parties. Otherwise, risk dismissal of the case for failure to join necessary and indispensable parties. This argument has seen some traction in district court. URCP 12(b)(7).
3. After the administrative decision and order issues, proceed in District Court as the appeal body in a timely manner. Utah Code § 73-3-15, a review action may be dismissed for “failure to prosecute the action with diligence.” Subsection 15(2) states that failure to hold the trial within two years gives rise to a rebuttable presumption of a lack of due diligence.

Thank You



Matthew Ekins

435.351.0533

mekins@parsonsbehle.com



Sean Robison

801.536.6767

srobison@parsonsbehle.com