



## GENERAL SESSION

March 5, 2014

### ***Program Topic: SB211 Water Rights Amendments***

**Presented by: Energy, Natural Resources, Agriculture, Environment Committee**

**Director: JoAnn Neilson**

**Co-Chairs: Gay Lynn Bennion & Amelia Powers**

**Speakers: *(unable to attend)***

**Sen. Margaret Dayton (R) Dist. 10 Utah County (Provo/Orem)  
Sponsor SB211 Water Rights Amendments**

***(speaking for her)***

**Jay Winters – Intern to Sen. Dayton**

**Kent Jones – State Engineer, Utah Division of Water Rights**

**Jay Winters**, speaking for Sen. Dayton, said Utah is one of the driest states in the nation. Sen. Dayton's bill would essentially put water rights "back into the hands of legislators." He said questions regarding those rights now inefficiently reside with the judiciary.

**SB211** requires a person who applies for a water right change to meet certain qualifications. It allows the State Engineer, upon receiving a change application, to determine the quantity of water that is being beneficially used, and to limit approval of a change application based on that determination.

In 2011, two Utah Supreme Court decisions (*Big Ditch and Jensen v. Jones*) removed the historical powers used by the State

Engineer to consider and approve change applications (necessary to make permanent water rights changes) based on non-use of water rights. The courts now must adjudicate them. Hence, these two rulings shifted water policy decisions from the legislature to the judiciary. Mr. Winters said the decisions have also transferred water rights away from owners to leasees or contract holders.

Responding to questions, Mr. Winters said Utah currently uses 75-78% of the interstate waters it has been allocated. Are individual legislators knowledgeable enough to make statewide water decisions? Probably not, he acknowledged. But the legislature does have complete access to any experts in the field, should the need arise. The two court decisions, he argued, have disrupted long-

standing change application policy that is more properly employed by the State Engineer.

**Kent Jones**, also speaking in favor of **SB211**, said he has worked at the State Water Division for more than 33 years and still finds many water issues unbelievably complex. The first State Engineer was appointed in 1897, just one year after Utah attained statehood. In the early pioneer days of “one person per stream,” disputes were easily settled. No more. Utah now needs 35 river commissioners. Water has always been a precious resource for our desert state. Water right issues must strike a continuing balance between traditional agricultural “ground use” and the growing needs of “service use” for businesses and residential areas.

In Utah, all waters above or below ground are considered to be public (state) waters. Landowners have rights to use the water. However, there is not enough water available at all times to satisfy all users. Beneficial use (how owners use the water) is an important consideration in disputes. Beneficial use includes such uses as domestic or municipal use, irrigation, fish and wildlife, manufacturing, mining, hydropower, and recreation. The amount of the water right is the amount of water put to beneficial use. Rights established in this manner are known as “beneficial use water rights.”

Generally, a priority system of “first in time is first in right” is the central principle of western water law. This is the right of a water user to be “first” or ahead of the claims of a subsequent water user. It is based on old western mining law. However, if an owner doesn’t use the water for five years, another user can take use of the water. In 1997, the law changed to protect the original owners. A subsequent bill, HB51 tweaked the language.

Responding to questions, Mr. Jones spoke to the issue of “fracking.” It is a slang term for hydraulic fracturing. Fracking refers to the procedure of creating fractures in rocks and rock formations by injecting high-pressured water into cracks, forcing them open to extract mineral resources. No new water right is needed for the procedure if the water used already belongs to the landowner.

Water rights for the new NSA Utah Data Center were obtained through a contract with Bluffdale City. The Data Center was not granted any special water right, other than the one granted by the city. Water brokers engage in “trading water,” meaning the buying and selling of water rights. Some argue “first use” policies have created inefficiency in the way water is allocated, especially as urban populations increase, as well as in times of drought. Water brokers who trade in water markets say the practice is a good way to correct these inefficiencies.

**Reported by Pam Grange**

## **General Session II**

***Program Topic: HB37 Public Water Access Act***

**Presented by: Energy, Natural Resources, Agriculture, Environment Committee**

**Director: JoAnn Neilson**  
**Co-Chairs: Gay Lynn Bennion & Amelia Powers**

**Speakers: Rep. Dixon Pitcher (R) Dist. 10 Weber County**  
**Sponsor, HB37 Public Water Access Act**

**Rep. Mike McKell (R) Dist. 66 Utah County**  
***(speaking against HB37)***

**Rep. Pitcher**, speaking in defense of his bill **HB37**, outlined the issues surrounding water access. Rivers and streams sometimes pass through private property for certain distances. The water itself is owned by the people of Utah and is accessible to the public. But the streambed may reside on private property. Often, fishermen need initial access to the water. Private property owners, understandably, don't want people using their property for access.

A recent dispute occurred in Weber County when someone floating down a stream got off the conveyance and went onto private property. This began a series of lawsuits regarding what land is accessible and what isn't. The first court decision held that the outdoor enthusiast could get off the conveyance and go onto the property. The legislature then passed a bill requiring a person to stay on the conveyance. Consequently, a person couldn't access the riverbank or even stand on the bottom of the stream.

Rep. Pitcher described a similar problem in San Francisco, California. The beaches there are public property, but much private property has been purchased next to the beaches. The property owners have prevented beach/water access across their property. The public, of course, wants beach access from somewhere.

To solve the problem here in Utah, a group called the Stream Access Coalition got together to work out a compromise solution. **HB37 Public Water Access Act** is the result. First, the bill would only apply to navigable streams and rivers. "Navigable" is defined as wherever a 6-inch diameter log can be floated (navigated) down a river or stream. Smaller tributaries would not be affected.

Second, the bill stipulates that if property owners choose to allow access across their property to the water, a person could use the streambed as long as he/she stays below the high water mark, not onto the rest of the property. In other words, when fishing in navigable streams bordered by private property, a person must stay within the normal high-water marks of the stream, unless the landowner grants permission to get out on the bank. If an easement or right-of-way exists, access is already permitted.

Rep. Pitcher noted this compromise has existed in Idaho for forty years. He believes the compromise set forth in **HB37** would stave off lengthy and expensive court battles, which could result in bad decisions. Unfortunately, the bill is bottled up in the Rules Committee.

**Rep. McKell** spoke against the bill, acknowledging the fact that he is an ardent fisherman. He grew up in rural Emery County on a family farm. Their current farm

in Spanish Fork has a stream running through it. Being both a private property owner and a lifelong fisherman, he confessed to feeling conflicted loyalties.

**HB37** addresses a difficult issue with two important, understandable, but competing interests. Legislators have to decide which answer serves the greater good. On this issue, he said, he weighed both sides and ultimately came down on the side of private property rights.

Rep. McKell explained that, although private property rights are enforceable under criminal law, the reality is that actual enforcement is often difficult to provide in

remote areas of Utah. The issue has already been litigated in several surrounding states. The Idaho compromise is working for Idaho, but he does not believe it is right for Utah. He also doesn't like the "6-inch log standard" for determining river or stream navigability.

As an alternative solution to the one offered by **HB37**, Rep. McKell has placed a line item in the budget for \$300,000. This money would come from the Division of Wildlife Resources (DWR) excess funds from the purchase of fishing and hunting licenses. The money would be used to pay fees to private property owners for access to waterways running through their property.

**Reported by Stuart Gygi**

**THIS BULLETIN IS A PUBLICATION OF  
THE WOMEN'S STATE LEGISLATIVE COUNCIL OF UTAH, INC.**  
<http://www.wslcofutah.org>

**"CELEBRATING 94 YEARS OF SERVICE"  
1920 - 2014**

**President:** Kari Malkovich  
**Advisor:** Skip Reese  
**Editor:** Pam Grange  
**Assist. Editor:** Eileen Hallet Stone

*Printed by AlphaGraphics  
117 West 900 South  
Salt Lake City, UT 84101*