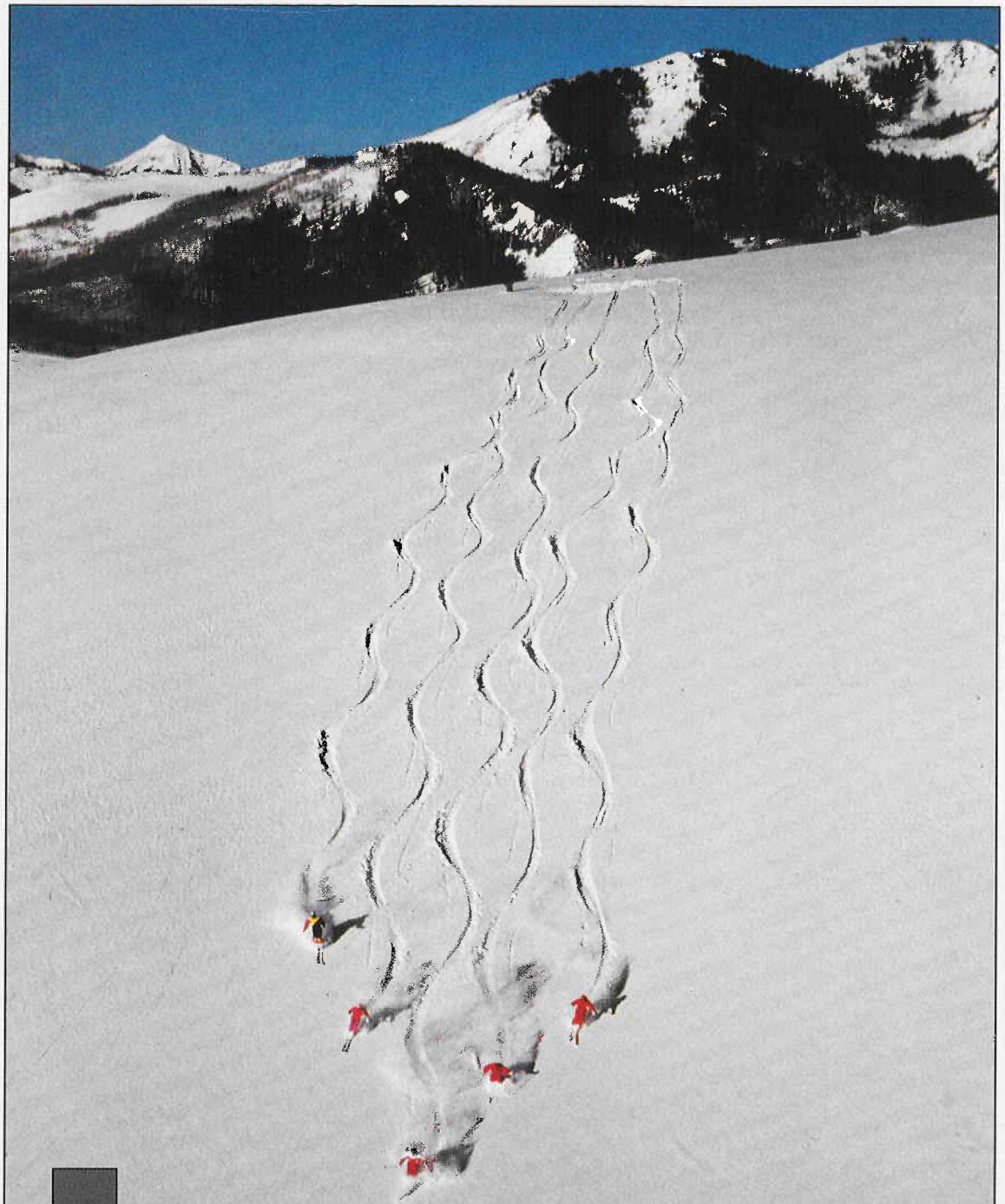
UTAH BAR JOURNAL

Vol. 4, No. 1 January 1991



NRS ASSOCIATES and SMG INCORPORATED

the general partners in several limited partnerships containing franchised restaurant operations including:
Sizzler — 11 Restaurants
Tony Roma's — 2 Restaurants
Viva La Pasta — 1 Restaurant

have completed

PARTNERSHIP VALUATIONS

We rendered a valuation opinion to Ronald J. Ockey, Attorney at Law with the firm of Jones, Waldo, Holbrook & McDonough, counsel to NRS Associates and SMG Incorporated, as to the cumulative fair market value of the above listed entities.

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Published by
The Utah State Bar
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Salt Lake City, Utah 84111
Telephone (801) 531-9077

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COVER: Five skiers enjoying the steep and deep on Flagstaff Mountain, which will open this year at DEER VALLEY RESORT. Our thanks to Robert B. Lence, a partner with the firm of Van Cott Bagley Cornwall & McCarthy, for obtaining this photograph, compliments of Deer Valley Resort.

Members of the Utah Bar who are interested in having their color slides or other art form published on the cover of the *Utah Bar Journal* should contact Randall L. Romrell, Associate General Counsel, Huntsman Chemical Corporation, 2000 Eagle Gate Tower, Salt Lake City, UT 84111, 532-5200.

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The *Utah Bar Journal* is published monthly, except July and August, by the Utah State Bar. One copy of each issue is furnished to members as part of their State Bar dues. Subscription price to others, $25; single copies, $2.50; second-class postage paid at Salt Lake City, Utah. For information on advertising rates and space reservation, call or write Utah State Bar offices.

PRESIDENT'S MESSAGE

By Hon. Pamela T. Greenwood

Recent ABA surveys have indicated a growing dissatisfaction with life as a lawyer. Competition for clients and a depressed economy have produced even greater emphasis on the number of billable hours and lessened both job security and job satisfaction. Concomitantly, there is a perception that professional standards of courtroom conduct and lawyer-to-lawyer courtesy are declining. We all have an obligation to continue the struggle for high ethical conduct and professional standards, to shape the legal profession of the future. This struggle takes place among many conflicting pressures. John Bingler, president of the Pittsburgh Bar Association, described this conflict as follows:

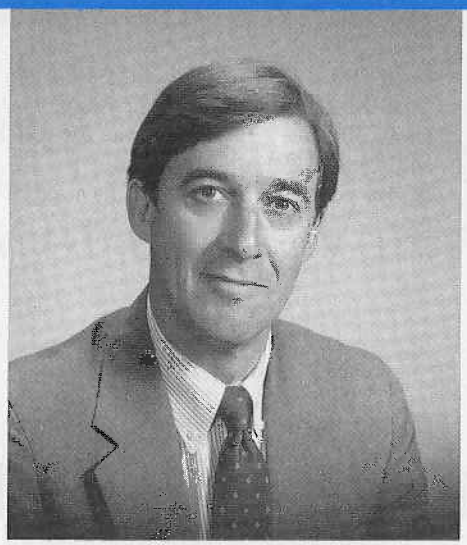
"Our system is designed as an adversary system. Thus, just from the system's design, we have a duty to be effective word-warriors for our clients. But, our words are fashioned from the shifting sands of human language. This factor alone makes easy ethical and professional decisions impossible. Beyond this, our duty to our clients exists amidst competing duties. We are called upon as lawyers to shoulder responsibilities not only to our clients but also to the courts, to justice, to the pursuit of truth and to our adversaries. Most troublesome is the fact that the adversary system's word-warrior duty is in direct conflict with the highest personal ethical standard set by western moral traditions, the positive Golden Rule. . .it calls on us to positively reach out to treat our neighbors as we would like to be treated. This call can never be completely harmonized with the duty imposed by the adversary system to wage word-war to win. Ethical, professional lawyers must live every day with conflicting Rambo and Good Samaritan impulses."

To highlight this balancing act, the following hypothetical was posed in connection with a professionalism seminar:

You are engaged in litigation representing a longtime client, who is being sued by *a lawyer you know only in passing*. In discussions with the other lawyer, you realize that she misunderstands the time limit for filing her counter-affidavit and objection to your motion for summary judgment. If you let it go, the motion will be granted and subsequent relief for her is unlikely. If you alert her, you lose the edge and know that material facts will probably remain in dispute. What do you do? Do you win at all costs? Do you stand by, on behalf of your client, and let another lawyer fail? Or do you make a moral judgment drawn upon your own concept of right and wrong and help that lawyer out, so that she will be around to do battle with you for another day?

Reactions to the hypothetical ranged from a simple "yes" to absolute "no's." What do you think? Does it make a difference that the lawyer is one you know "only in passing?" What is the impact on women lawyers who tend to be newer members of the Bar and, therefore, less well known? I would be interested in hearing your comments.

COMMISSIONER'S REPORT



By Dennis V. Haslam

Folks seem to ask me lately, "What is going on at the Bar?" Or, "What has the Bar done for me lately?" Well, at the risk of leaving somebody out and some things unsaid, here's a little bit of what is going on:

- At last count, there were 5,286 members of the Utah State Bar Association; about 4,127 are residents and 1,159 are non-residents; about 4,200 are active and 1,086 are inactive.
- 17 lawyers sit on the Board of Bar Commissioners, 11 of whom are elected by the membership. The ex-officio members include the Bar's past president, the deans from the University of Utah and BYU law schools, our two ABA delegates and the president of the Young Lawyers Section. The Board meets at least one full day per month to review and coordinate Bar affairs and activities. Commissioners act as liaison to committees and work closely with them. Commissioners also sit on hearing panels to review admissions, discipline and other matters. Additionally, Commissioners are assigned specific responsibility for subcommittees to address and report upon important issues facing the Board and the Bar's membership.
- The Utah Law and Justice Center currently has four full-time tenants in addition to the Bar Association. It has both large and small meeting rooms. The Bar Examinations are given in the Center. In 1991, we anticipate there will be more than 950 meetings, seminars, depositions and conferences held at the Center.
- The 11 members of the Character and Fitness Committee meet several times per year to review each student and attorney application file (remember filling those out?). When character or fitness questions are raised, the Committee holds additional informal hearings to further investigate the applicants.
- The Bar Examiner Review and Bar Examiner committees have approximately 65 members. They draft (and redraft) the 36 essay questions presented each year to 325 applicants. They grade 11,700 (36 x 325) answers. They don't get paid for it.
- The Fee Arbitration Dispute Committee has 24 members. A panel comprised of a lawyer, a judge and a non-lawyer meets monthly to review pending fee disputes.
- The Office of Bar Counsel (three lawyers and staff) investigates and processes 600 complaint files annually. How many cases do you handle?
- The Ethics and Discipline Committee has 21 members, four of whom are not lawyers. Screening panels meet once monthly to review complaints against lawyers for violations of the Code of Professional Responsibility. The committee members review the complaints against the lawyers (often comprised of scores, if not hundreds, of pages supporting and responding to the complaint). They spend several hours monthly listening to the complainants and the lawyers. Many complaints are unfounded, but the complainants have had, at least, an opportunity to discuss their problems with representatives of the Bar Association. Some complaints have merit. Some don't.
- The Client Security Fund Committee has 10 members. It meets several times a year to review the complaints of clients who have lost money as a result of a lawyer's misconduct. It recommends to the Board of Commissioners payments to the injured parties. There is approximately $100,000 in this fund.
- The Lawyer Referral Service Advisory Committee has 10 members. The service receives and processes approximately 15,000 inquiries per year.
- The Law Related Education and Law Day Committee has 30 members. It disseminates information about the law and lawyers. It facilitates high school mock trial competitions around the state and involves scores of lawyers as judges and advisors.
- The Young Lawyers Section has more subcommittees than can be counted, but include the Bill of Rights Commemoration Committee, the Community Services Committee, the Law Day Committee, the Law Related Education Committee, the Legal Briefs Committee, the Needs of the Children Committee, the Needs of the Elderly Committee and the Pro Bono Committee. This group is made up of a bunch of real do-gooders.
- The 21 different sections of the Bar Association meet regularly at section luncheons, breakfasts and continuing legal education seminars.

- The CLE programs sponsored by the Bar in 1991 will include 35 live seminars, 37 satellite programs and 20 MCLE accredited section luncheons. Approximately 1,785 volunteer hours were donated by members toward CLE programs last year. There are over 250 CLE videotapes available for use by Bar members.
- 19 other standing committees of the Utah State Bar meet regularly and report to the Board and the membership.
- More than 40 citizens volunteer their time to the Bar and sit as public members on committees. They don't get paid for it.
- Over 400 lawyers attended the 1990 Annual Meeting of the Utah State Bar. Over 300 lawyers will attend the 1991 Mid-Year Meeting.
- In Bar year 1991, it will cost us approximately $1,670,000 to run the ship.

A lot of good things are going on at the Bar. It is working (we are working) on a daily basis with you and for you. The Board of Bar Commissioners meets frequently and works hard to improve the practice of law and our profession. If you know of ways to improve our association, our practice, admissions, discipline, continuing legal education, our professionalism and our public service, let someone know. Call a friend. Call a Bar Commissioner.

An Introduction to the Law of Utah Water Rights

By Ms. Jody L. Williams

INTRODUCTION

Rights to use water in Utah may be acquired by appropriation of unused water or by purchase and conveyance of an existing water right. Utah's water rights system is based on the appropriation doctrine, as distinguished from the riparian system which evolved from the common law of England. Although Utah claims ownership of both surface and underground water within its boundaries, federal sovereign and proprietary rights to water are still exercised by the United States. This paper addresses the history of the appropriation doctrine and the statutory elements of a water right in Utah as well as conflicts between Utah and the United States inherent in water rights and regulations.

THE APPROPRIATION DOCTRINE

Utah's water law is based on the doctrine of prior appropriation, which is commonly explained as the first in time to put water to a beneficial use has the first and best water right. The appropriation permit system evolved in the arid western United States generally in early mining camps, where disputes over claims were resolved by simple priority rules.[1] The early Mormon settlers in Utah cooperatively carried out irrigation as they settled close to canyon stream mouths, diverting water from its channel, conveying it in canals and ditches, and consuming it for domestic, stock-watering and irrigation uses, all considered "beneficial" uses.

Two forms of the appropriation doctrine evolved in the West, one in California and the other in Colorado. The California doctrine was a sort of hybrid system, recognizing appropriation and priority while still maintaining that rights whose points of diversion were not on public lands could be riparian rights.[2]

The Colorado doctrine, adopted and

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modified by the eight interior western states, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah and Wyoming, rejected, in later case law, the theory that riparian rights had ever existed within their boundaries, and supported the view that the federal government had never actively exercised its proprietary interest in Western waters.[3] In 1918, the Utah Supreme Court declared that, "In Utah the doctrine of prior appropriation for beneficial use is, and always has been, the basis of acquisition of water rights."[4]

Both the California and Colorado views were validated in 1935 when the United States Supreme Court, in interpreting the acts of 1866,[5] and 1870,[6] and the Desert Land Act of 1877,[7] ruled that the three acts severed all previously unappropriated nonnavigable water from the public domain.[8] The Western states were thus free to enact water legislation each deemed in the public interest.

EARLY UTAH LAW OF APPROPRIATION

The earliest water law in Utah, then the State of Deseret, was a series of grants to individuals and communities. The County Court had authority to settle water disputes. In 1880, the Territorial Legislature provided for recording of existing certificates, but did not delineate a system to appropriate new water rights.[9] However, in 1897, a statutory procedure for acquiring water rights was finally provided.[10] The law also created the office of the Utah State Engineer.[11] In 1901, the State Engineer's duties were expanded to include general water distribution supervision[12] and, in 1903, the office received from the Legislature in the State's first enacted "Water Code," the authority to receive and approve appropriation applications and to investigate and administer potential stream adjudications.[13]

Much of the 1903 system has survived to the present. Filing the application with the Division of Water Rights, diversion from the stream and subsequent beneficial use are required to obtain and maintain a water right. Since much of the arable land in Utah was not adjacent to a stream, or was owned by the federal government, who did not use water adjoining it, diversion from the channel into an artificial conveyance system for delivery to the prime farm land, to the rich ore deposit or to the developing community being built higher and higher on the foothills, and then farther and farther from the natural water source, became the norm, and the norm became the law.

THE RIPARIAN SYSTEM

The riparian water right system has survived in many states with more water than

Utah. Riparian water rights may be acquired by purchase of the riparian land or separately transferred, usually by easement. A basic concept distinguishing riparian from appropriative rights is that all riparian land owners have co-equal rights to the use, but not the possession, of a common water source such as a river, surface or subterranean stream, or lake.

In general, diffuse surface waters were classified as a "common enemy" at common law, and riparian landowners were more concerned with protecting themselves from flooding rather than claiming a riparian interest in them. Many American states have modified the common law by providing for drainage procedures. Springs are treated separately depending on whether they are sources of running watercourses in which case they may be subject to riparian rights,[14] or whether they sink back into the ground on the tract where they originated, in which case they may not be subject to riparian rights.[15]

Unlike appropriative water rights owners who are governed by a priority system, historically, riparian water users usually could not interfere with upstream or downstream users. This has given way to the "reasonable use rule," which allows for interference with another's use depending on the size and state of the watercourse, a balancing of the purposes of the uses, and a benefit to the proposed user at least commensurate with the injury to other riparian owners.[16] Often, courts must apportion water between two users.

FEDERAL WATER RIGHTS AND REGULATION

The tension between state and federal interests in the West extends to conflicts over water use and control. Even though the Desert Land Act of 1877[17] resulted in patents to federal land being issued without water rights to unappropriated, non-navigable water, leaving water rights up to the states to appropriate and administer, the federal government still exercises both sovereign claims and proprietary rights to water in Utah and the other Western states. The sovereign claims arise from the commerce clause, property clause, treaty power, war power and general welfare clause of the United States Constitution, and always remain with the federal government. Such interests as regulating commerce and controlling navigation are sovereign interests on which the United States may rely to control water.

FEDERAL PROPRIETARY RIGHTS IN WATER

The proprietary rights of the United States arise out of the government's ownership of property under Article IV, section 3, clause 2 of the Constitution of the United States. When the United States opens land to homesteading, patentees may acquire title to the land from the United States and appropriate water to use on it pursuant to state law. But if the United States withdraws or reserves its land from future settlement, the appurtenant water may also be withdrawn or reserved and then be unavailable for appropriation under State law.

FEDERAL SOVEREIGN RIGHTS IN WATER

Historically, the sovereign interest of the United States was construed to be limited to navigable waters. The Army Corps of Engineers was established to direct improvement of the navigable capacity of rivers and harbors. In 1851, the Supreme Court extended jurisdiction to waters suitable for navigation.[18] This test was further liberalized in 1871 in *The Daniel Ball*[19] when jurisdiction over rivers "navigable in fact" was defined as "when they are used or are susceptible of being used in their ordinary condition as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel over water."[20] This definition survives today as the allocator of title to submerged lands between the United States and the states and "foundation of federal jurisdiction unless Congress adopts the full commerce power."[21]

Federal jurisdiction was expanded over non-navigable portions of otherwise navigable rivers[22] and then to rivers which could be made navigable "by reasonable improvement,"[23] even though the Corps of Engineers had earlier determined the necessary improvements were not economically feasible. By 1960, the Supreme Court had ruled that conditions on development unrelated to navigation could be imposed on water projects on navigable in fact and non-navigable tributaries.[24]

In the 1970s, with the passage of the Clean Water Act,[25] the potential effect to interstate commerce became the basis for asserting federal jurisdiction over water, and alleging a relationship to navigation to uphold federal action was no longer necessary. Some other statutes under which the United States regulates water are the Federal Power Act[26] and the Endangered Species Act.[27]

The sovereign powers of the United States apply to water still owned by the United States as well as water in which the United States has acquiesced its title. Any rights created by state water law are subordinate to this overriding federal interest, and no compensation need be paid to holders of State-created rights when they are so impaired by the United States.[28]

FEDERAL RESERVED RIGHTS

Claims of the United States as proprietor of land withdrawn or reserved from future alienation raise substantial concern in Utah and its surrounding states. This is especially so if the federal rights have not been quantified in an adjudication, because the federal rights' priorities may predate later state-granted rights and thus affect vested rights on which local users and economies have relied for many years.

The initial case establishing federal reserved rights was *Winters v. United States*.[29] The Court held that when the United States had withdrawn land for an Indian reservation, it also had reserved, as the property owner, sufficient water for the Indians to use. The date of priority was the date of the withdrawal for the reservation.

Although later case law suggests that the determination of practicable irrigable acreage is the upper limit for quantification of an Indian reserved water right,[30] courts have also held that the extent of the right is commensurate with the needs to accomplish the purpose for which the federal reservation was made.[31] In *Arizona v. California*, the Supreme Court clearly stated for the first time that the United States had reserved water rights for non-Indian purposes.[32] Federal reserved water rights are not subject to forfeiture; the United States is not required to "use or lose" its water rights.

Whether or not organic withdrawal and reservation legislation implies reserved water rights continues to be argued. In 1978, the Supreme Court set out three narrow standards for finding implication.[33] The right must relate to the original purpose of the reservation; it must be necessary to fulfill the purposes of the reservation; and only primary, not secondary, purposes of the reservation may be served by the water.

Western states are more frequently attempting to quantify federal reserved water rights. The United States has submitted to state court jurisdiction for this purpose in adjudication suits and must assert and justify or lose its claims under the McCarren Amendment.[34]

ELEMENTS OF A WATER RIGHT

In Utah, as in most of the Western states, all water, whether surface or underground, is declared to be the property of the public,[35] subject to rights to use it, which may be acquired by following designated statutory procedures.

In Utah, diligence rights are those that predate statutory appropriative procedures. Diligence rights were established by diversion and beneficial use, and although filing a notice at the place of diversion and at the post office, and recording the notice at the county recorder's office, had the advantage of giving a priority date of the day of the posting, it was not required.[36]

Diligence rights to surface waters must have been acquired prior to 1903, and to groundwater prior to 1935. Article XVII, Section 1 of the Constitution of Utah specifically recognized water rights in existence at statehood.

Since 1903, the exclusive method in Utah of obtaining a new water right to surface water, and since 1935 for groundwater a statutory system for acquiring a water right, or appropriating water, has been in place. The Utah Supreme Court in 1910[37] stated that a valid right, based on appropriation and use, required three elements: (1) intent to appropriate the water and apply it to beneficial use; (2) an actual diversion from the natural water channel into a ditch, canal, or other conveyance system; and (3) application of the water to some economic or useful purpose, normally called "beneficial use." While water runs freely in its natural channel, it is usually considered unappropriated, publicly owned water. Diversion from the natural stream channel, which is a form of asserting possession of the resource, and thereafter beneficial use of the diverted water are the classic hallmarks of a Utah water right, although stock-watering from a stream without an artificial diversion has been the subject of controversy in the Utah courts,[38] current interpretation allows a stock-watering right without diversion.

As social values change and conflict with traditional uses, water rights for in-stream flows are being recognized. Amendments to §73-3-3, "Temporary or permanent changes in point of diversion or purpose of use," in 1986 and 1987 allowed an existing water right, owned or purchased by the Division of Wildlife Resources, to be used to provide "water for in-stream flows in natural channels necessary for the preservation or propagation of fish . . . " The statute[39] does not allow the Division of Wildlife Resources to file a new application to appropriate water for in-stream use, but only to change the use and point of diversion of an existing water right, so it seems that actual diversion from the natural stream channel is no longer a necessary component of a water right.

Beneficial use is still the measure and limit of the water right.[40] An applicant may apply for all the water he wishes, but in the end, only that amount of water the applicant can prove is actually beneficially used will be certificated as the water right.

While stated public policy and the courts have always asserted the inherent power to stop or prevent waste as a "non-beneficial use,"[41] the courts have also upheld some wasteful practices as within beneficial use.[42] As competing demands for available, good quality water become more focused, it is likely that some prior condoned practices will be required to change.

Once several appropriative rights in a water source have been awarded by the State, the water is allocated on the basis of priority.[43] Once a right is certificated, pri-

ority emanates from the date of the filing in the State Engineer's office, not the date of first beneficial use. The earliest-dated appropriator has the right to receive 100 percent of his whole supply before the second-earliest appropriator receives any. If enough water in the source is available, the second appropriator receives 100 percent of his supply before the third is delivered any, and so on.[44] This "first in time, first in right" doctrine provided an economic incentive and protection to be among the first settlers of an area.

There are many components to a water right. One of the most important values of a water right is its priority over subsequent appropriators in the same natural stream.[45] A 1980's priority consumptive use right will generally be inherently less valuable than an 1880's priority right from the same source. Other components of the right are quantity of water appropriated, the time or season of the year when the right to use the water exists, the place on the stream of the diversion, the place of use of the water, the nature or type of use allowed by the right, such as irrigation, domestic, manufacture or power generation. [46] Each of these components may, depending on the circumstances, be crucial to the value and usability of the water right. A water right for hydropower generation may have the earliest priority for use in the winter, yet may be 10th or 20th in priority during the summer due to earlier irrigation or municipal consumptive use rights. An appropriator's right is limited by the quantity of water beneficially used during the season he can use it.[47]

THE APPROPRIATION PROCESS

Water rights in Utah may be acquired by purchase and conveyance or by appropriation. Since 1903 for surface water and 1935 for groundwater, the current statutory procedure outlined in Chapter 3 of Title 73 of the Utah Code is the exclusive method of appropriating water.[48]

Before beginning construction of any diversion works or conveyance system to put water to beneficial use, a written application to appropriate water must be filed with the State Engineer in the Division of Water Rights. The application must state the name of the applicant, nature of the proposed use, quantity of water to be appropriated in second-feet (cubic feet per second) or acre-feet, the time of use each year, the name of the stream or source and a description of the diversion works, the points of diversion and return to the watercourse, and a description of the conveyance system.[49] If for irrigation use, the location of the land to be irrigated and total proposed irrigated acreage must be included. If for hydropower, the head, generation output, and generation equipment must be described. If for mining, the location and name of the mine and/or mill must be given. Lands to be inundated by a reservoir must be described.[50]

After the state engineer determines that the application comports to statutory requirements,[51] notice of the application is published for three successive weeks[52] and protests from "any person interested" are accepted for 30 days following the last date of publication.[53] Notice is required because senior rights may be impaired, and, since a water right is a real property interest, senior appropriators have a due process right to contest issuance.

The state engineer must approve the application if it is determined that there is unappropriated water in the proposed source; the proposed use will not impair existing rights or interfere with the more beneficial use of the water; the proposed plan is physically and economically feasible (unless it is a Bureau of Reclamation filing) and would not prove detrimental to the public welfare; the applicant has the financial resources to complete the development; and the application was filed in good faith and is not monopolistic or speculative. If the state engineer has or acquires information to indicate that the applied for right would interfere with its more beneficial use for irrigation, domestic or culinary, stock-watering, power or mining development or manufacturing, or will unreasonably affect public recreation of the natural stream environment, or prove detrimental to the public welfare, approval must be withheld pending further investigation. It may then be approved or rejected.[54]

Consistent with State policy that "new appropriations should be favored and not hindered,"[55] the State Engineer need only determine there is a reasonable basis to believe there may be unappropriated water[56] which can be appropriated to beneficial use without impairing existing rights[57] or interfering with the more beneficial use[58] and that the proposed plan is financially feasible for the applicant[59] and not detrimental to the public welfare. He need only determine that the project could be built, in which case he can find it economically feasible.[60] The Utah Supreme Court has upheld the State Engineer's determination to reject an earlier filed application in favor of a later application because it was for a more beneficial use.[61]

When the application has been approved, the applicant may commence work and construction on his plan within the time frame set out in his endorsed application.[62] Extensions of time to put the water to beneficial use of up to 14 years may be granted by an affidavit,[63] and extensions of up to 50 years may be granted on proper showing of diligence or reasonable cause for delay after application and republication.[64] An application for which proof of beneficial use has not been submitted within 50 years from the date of its approval will lapse.[65] Municipalities or other public agencies may accomplish a showing of due diligence to prevent lapsing an application by showing that the approved application is being held for future use.[66] Any person aggrieved by an order of the State Engineer may obtain judicial review by following the Utah Administrative Procedures Act, found in Chapter 46b of Title 63 of the Utah Code.[67]

Once proof of completion of the project and application of all or a part of the water to beneficial use is made, the State Engineer issues a certificate, which is *prima facia* evidence of the water right, subject to prior existing rights.[68]

ADJUDICATION OF WATER RIGHTS

As more and more water from the same source is put to beneficial use, conflicts between users naturally will arise. Chapter 4 of Title 73 of the Utah Code delineates the procedures to be followed in determining water rights in an adjudication. The Supreme Court characterized statutory adjudication as a measure to prevent piecemeal litigation and provide a method to determine all the water rights in a given stream or source in one action.[69]

An adjudication may be commenced in district court by the State Engineer upon approval of a verified petition of five or more, or a majority of water users on a stream or water source,[70] or by one or more claimants of water in a source or stream which involves a determination of the major part of the water supply in the source or stream, or the rights of 10 or more of the claimants.[71] A private water dispute pending in one district will be subject to the final decree in a general adjudication in another district.[72] A private suit in district court involving less than 10 claimants may be converted into a general adjudication, in which case the State must be joined.[73]

Once the adjudication is filed, the State Engineer publishes notice and, after the expiration of 90 days from the notice date, files with the court a list of all known

claimants, who are served with summonses.[74] The state engineer then begins a hydrographic survey of the water source or stream and an investigation and examination of the existing rights, uses and claims. Within 90 days of completion of the survey, each claimant must file a Verified Statement of Water User's Claims, giving information on the diversion, nature and place of use, the date when water was first beneficially used, the flow or volume claimed, the time of use and other pertinent information.[75] Failure to file a claim results in forfeiture and subsequent estoppel from asserting the right unless the Court allows late filing under certain conditions.[76] The State Engineer evaluates all of the claims and prepares and serves on the claimants a "Proposed Determination of All Rights to the Use of the Water."[77] Objections to the proposed determination may be filed and hearings scheduled to resolve conflicts,[78] but prior to the issuance of the final decree, or a modification of the proposed determination, the State Engineer distributes the water consistent with the proposed determination,[79] unless there is a prior decree on the system, in which case water is distributed pursuant to the prior decree until the new final decree of judgment is entered. The final decree of judgment is filed with the recorder of each county in which the water is diverted,[80] and an appeal to the Supreme Court on questions of fact and law may be made by any party.[81]

CONCLUSION

This paper addresses the doctrine of appropriation and the riparian doctrine, elements of a Utah water right and how to acquire one, federal-state conflicts and adjudication of water rights. The appropriation doctrine has worked relatively well to allow growth and development in Utah. Whether it can evolve to meet changing social and economic demands will be a major issue in the 21st century.

[1]A. Dan Tarlock, *Law of Water Rights and Resources*, ¶ 5.02 at 5- 5 (1989).
[2]*Id.*, at 5-10.
[3]5 R.E. Clark, *Waters and Water Rights*, ¶ 405 (1972).
[4]*Gunnison Irrig. Co. v. Gunnison Highland Canal Co.*, 52 Utah 347, 354, 174 P. 852, 854 (1918).
[5]Act of July 26, 1866, ch. 262, § 9, 14 Stat. 253, Rev. Stat., § 2339, 43 U.S.C. § 661.
[6]Act of July 9, 1870, ch. 235, 17, 16 Stat. 218, Rev. Stat., § 2340, 43 U.S.C. § 661.
[7]Act of March 3, 1877, ch. 107, 19 Stat. 377, as amended, 43 U.S.C. § 321.
[8]*California Oregon Power Co. v. Portland Beaver Cement Co.*, 295 U.S. 142 (1935).
[9]Utah Laws 1880, Ch. 20.
[10]Utah Laws 1897, Ch. 52.
[11]Utah Laws 1897, Ch. 38.
[12]Utah Laws 1901, Ch. 125.
[13]Laws 1903, ch. 100.
[14]Gillet v. Johnson, 30 Conn. 180 (1861).
[15]*England v. Ally Ong Hing*, 105 Ariz. 65, 459 P.2d 498 (1969).
[16]*Three Lakes Association v. Kessler*, 91 Mich. App. 371, 285 N.W.2d 300 (1979).
[17]Act of March 3, 1877, ch. 107, 19 Stat. 377, as amended, 43 U.S.C. § 321.
[18]*The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851).
[19]77 U.S. (10 Wall) 557 (1871)
[20]*Id.*, at 563.
[21]A. Dan Tarlock, *Law of Water Rights and Resources*, § 29.03(b), at 9-6 (1989).
[22]*Sanitary District of Chicago v. United States*, 266 U.S. 405 (1925).
[23]*United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940).
[24]*Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941); *United States v. Grand River Dam Authority*, 363 U.S. 229 (1960).
[25]33 U.S.C. § 1251 (1972).
[26]16 U.S.C. § 791(a) (1920).
[27]16 U.S.C. § 1531 (1973).
[28]*United States v. Rands*, 389 U.S. 121 (1967).
[29]207 U.S. 564 (1908).
[30]*Arizona v. California*, 376 U.S. 340 (1964).
[31]*United States v. Cappaert*, 426 U.S. 128 (1976).
[32]373 U.S. 546, *reh'g denied*, 375 U.S. 892 (1963).
[33]*United States v. New Mexico*, 438 U.S. 696 (1978).
[34]Act of July 10, 1952, ch. 651, § 208(a)-(c), 66 Stat. 560, 43 U.S.C. § 666(a).
[35]Utah Code Ann., § 73-1-1 (1989).
[36]*Cf. Corray v. Holbrook*, 40 Utah 325, 121 P. 572 (1912).
[37]*Sowards v. Meagher*, 37 Utah 212, 108 P. 1112 (1910).
[38]*Patterson v. Ryan*, 37 Utah 410, 108 P. 1118 (1910); *Bountiful City v. DeLuca*, 77 Utah 107, 292 P. 194 (1930); *Adams v. Portage Irrig. Res. & Power Co.*, 95 Utah 1, 72 P.2d 648 (1937).
[39]Utah Code Ann., § 73-3-3(11)(e) (1989).
[40]Utah Code Ann., § 73-1-3 (1989).
[41]*Fuller v. Sharp*, 33 Utah 431, 94 P. 813 (1908).
[42]*East Bench Irrig. Co. v. Deseret Irrig. Co.*, 2 Utah 2d 170, 271 P.2d 449 (1954).
[43]*Lehi Irrig. Co. v. Moyle*, 4 Utah 327, 9 P. 867 (1886).
[44]Utah Code Ann., § 73-3-21 (1989). See, however, the second part of this statute.
[45]*Whitemore v. Murray City*, 107 Utah 445, 154 P.2d 748 (1944).
[46]*Rocky Ford Canal Co. v. Cox*, 92 Utah 148, 59 P.2d 935 (1936).
[47]*Hardy v. Beaver Co. Irrig. Co.*, 65 Utah 28, 234 P. 524 (1924).
[48]Utah Code Ann., § 73-3-1 (1989); *Deseret Live Stock Co. v. Hooppiania*, 66 Utah 25, 239 P. 479 (1925).
[49]Utah Code Ann., 73-3-2 (1989).
[50]*Id.*.
[51]Utah Code Ann., § 73-3-5 (1989).
[52]Utah Code Ann., § 73-3-6 (1989).
[53]Utah Code Ann., § 73-3-7 (1989).
[54]Utah Code Ann., § 73-3-8(1) (1989).
[55]*Little Cottonwood Water Co. v. Kimball*, 76 Utah 243, 248- 249, 289 P.116, 118 (1930).
[56]*Id.*
[57]*Rocky Ford Irrig. Co. v. Kents Lake Res. Co.*, 104 Utah 202, 135 P.2d 108 (1943).
[58]*Tanner v. Bacon*, 103 Utah 494, 136 P.2d 957 (1943).
[59]*Bullock v. Tracy*, 4 Utah 2d 370, 294 P.2d 707 (1956).
[60]*Bullock v. Hanks*, 22 Utah 2d 308, 452 P.2d 866 (1969).
[61]*Tanner v. Bacon*, 103 Utah 494, 136 P.2d 957 (1943).
[62]Utah Code Ann., § 73-3-10 (1989).
[63]Utah Code Ann., 73-3-12(1)(d) (1989).
[64]*Carbon Canal Co. v. Sanpete Water Users Association*, 19 Utah 2d 6, 425 P.2d 405 (1967).
[65]Utah Code Ann., 73-3-12(2)(a) (1989).
[66]*Id.*, § 73-3-12(1)(i) (1989).
[67]*Id.*, § 73-3-14(1) (1989).
[68]*Id.*, § 73-3-16 (1989), and § 73-3-17 (1989).
[69]In re Bear River Drainage Area, 2 Utah 2d 208, 271 P.2d 846 (1954).
[70]Utah Code Ann., § 73-4-1 (1989).
[71]*Id.*, § 73-4-3 (1989).
[72]*Mitchell v. Spanish Fork Field Irrig. Co.*, 1 Utah 2d 313, 265 P.2d 1016 (1954); Utah Code Ann., § 73-4-24 (1989).
[73]Utah Code Ann., § 73-3-18 (1989).
[74]*Id.*, § 73-4-3,4 (1989).
[75]*Id.*, § 73-4-5 (1989).
[76]Utah Code Ann., § 73-4-9 (1989).
[77]*Id.*, § 73-4-11 (1989).
[78]*Id.*, § 73-4-13 (1989).
[79]*Id.*, § 73-4-11 (1989).
[80]*Id.*, § 73-4-17 (1989).
[81]*Id.*, § 73-4-16 (1989).

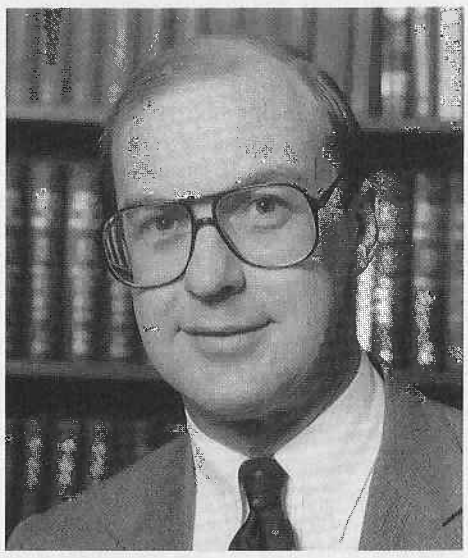
Update on Utah Caselaw Relating to Water Rights

by Michael M. Quealy Utah Assistant Attorney General

Following what has been a relatively quiet period for water law controversies, the Utah Supreme Court and the Court of Appeals have, in the past 18 months, issued several important decisions affecting Utah water law. The following is a brief summary of those decisions.

1. Perhaps the most important change in Utah water law occurred in the case of *Bonham v. Morgan, et al.*, 788 P.2d 497 (Utah 1989). This case dramatically expanded the criteria to be considered by the State Engineer (and courts on review) in approving or rejecting applications for changes in point of diversion, place or nature of use.

In 1984, Draper Irrigation Company and the Salt Lake County Water Conservancy District filed a joint change application to move part of Draper's water rights to the new SLCWCD treatment plant. The plan also required some modifications in the water collection system near Bell Canyon. Such diversions had already taken place prior to 1984 under annual temporary change applications. In 1983, during unusually heavy runoff, and while the new collection system was still under construction, flood waters damaged properties owned by Plaintiff Bonham which lay below the new system. Plaintiff claimed the construction of the new collection facilities was the direct cause of the flooding. When the permanent change application was filed, Bonham filed a protest with the State Engineer, claiming the construction of the new collection facilities created an increased threat of flooding to his property and was contrary to the public welfare, citing the various criteria set forth in Section 73-3-8, Utah Code Annotated 1953, as amended. The State Engineer rejected Bonham's protest on the grounds that under the change statute (Section 73-3-3) and the historical caselaw, the only criterion for rejecting a change application was whether the change would impair other vested water rights. The State Engineer therefore reasoned that issues such as flooding and "public welfare" were beyond his jurisdiction in considering a change application.



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He was in private practice from 1974 to 1979 specializing in water law and related natural resource areas. He joined the Utah Attorney General's Office in 1979 and over the years has represented most of the agencies in the Department of Natural Resources; but primarily the State Engineer's Office and the Division of Water Resources. He has also represented the State in the area of Indian law. He has been Chief of the Natural Resources Section of the Attorney General's Office since 1983. He serves on the Legal Committee of the Upper Colorado River Commission and the Litigation Action Committee of the Conference of Western Attorneys General.

On appeal to the District Court, the issue was basically one of standing, but that was dependent on the criteria to be used in considering change applications. As the Utah Supreme Court concisely stated:

". . . the parties conceded that the question of whether plaintiffs are aggrieved persons within the meaning of section 73-3-14 turns on whether the scope of the considerations appropriate for the State Engineer under a section 73-3-3 proceeding for a permanent change application is the same as that listed in Section 73-3-8. If it is, . . . plaintiffs are aggrieved persons; if it is not, plaintiffs . . . are not aggrieved persons and . . . summary judgment was proper. The District Court held that the only criterion applicable to change applications was impairment; that the broader criteria of Section 73-3-8 applied only to appropriations; and granted summary judgment in favor of the State Engineer."

On appeal, the Utah Supreme Court (in a 4-1 *per curium* decision) reversed. The Court found there was no ambiguity in Section 73-3-3 and that the legislature had intended the broader criteria of Section 73-3-8 to apply to change applications as well as applications to appropiate. The Court focused on a provision of Section 73-3-3 which states:

"The procedure in the State Engineer's office *and the rights and duties of the applicant with respect to application for permanent changes* in point of diversion, place or purpose of use *shall be the same as provided in this title for applications to appropriate water.*" (Emphasis the Court's.) The State Engineer and *amici* water users argued that this provision only applied to the procedural process before the State Engineer and did not intend to incorporate broader substantive criteria. This argument was buttressed by legislative history, and long-standing interpretation by the State Engineer and the water

bar. Further, although this specific issue was one of first impression, numerous prior Supreme Court cases had clearly implied that impairment was the only criterion.

With very little reasoning or discussion, the Court brushed these arguments aside and held that the above quoted provision was an unambiguous statement of the legislature that the broader substantive criteria of Section 73-3-8 were to apply to changes as well as new appropriations. The Court further noted that any other interpretation could lead to abuses where an applicant could file an application to appropriate in one location where the 73-3-8 criteria could be met and then apply to move the water to another location which might not have stood muster under 73-3-8 originally; yet absent impairment such a change could not be rejected.

The decision in *Bonham* may have some basis from a policy standpoint in today's world, where water use is driven by market pressures and most major water acquisitions involve change applications (the IPP Project is a prime example). Yet the Bonham opinion itself is open to criticism. In light of the importance of this case, given the prior long-standing practice, the *per curium* opinion resolved the dispute without providing a compelling rationale for its resolution. Further, if the criteria for evaluating change applications are to be changed for policy reasons, it would seem the appropriate body to do so should be the Legislature.

2. Another case dealing with who is an "aggrieved person" for the purpose of seeking review of a State Engineer's decision is *S & G, Inc., v. Morgan*, 133 Utah Adv. Rpt. 11 (Utah 1990). S & G contracted to sell a water right to the Intermountain Power Agency (IPA). Part of the purchase price was dependent on the amount of water the State Engineer allowed to be transferred to the project. Approximately 45 water users protested the change application and participated at the hearing. IPA was the applicant, and S & G did not participate in any of the proceedings before the State Engineer. The State Engineer approved the change, using a 4 acre-foot duty and reduced that amount by 15 percent to compensate for increased depletion. Neither IPA or any of the protestants appealed the decision. But S & G filed an appeal, claiming that its economic interests under the contract had been impaired and that the State Engineer had erred in using a 4 acre-foot duty and in further reducing the amount transferred by 15 percent.

The District Court granted summary judgment in favor of the State Engineer on the grounds that S & G lacked standing as an "aggrieved person" because its interests were purely economic and did not involve impairment of water rights. On appeal, the Utah Supreme Court affirmed, but on more narrow grounds. The Court held that S & G's failure to participate at the administrative level prevented them from appealing the decision. The Court reasoned that the requirement of participation at the administrative level was a corollary to the doctrine of exhaustion of administrative remedies. As the Court noted:

It is well settled under this doctrine that persons aggrieved by decisions of administrative agencies "may not, by refusing or neglecting to submit issues of fact to such agencies, bypass them, and call upon the courts to determine . . . matters properly determinable originally by such agencies." (Citing authority.)The Court further noted that requiring a party to participate at the administrative level ensures that those having an interest in the matter will submit to the agency all relevant facts and legal arguments, so the agency can make an informed decision. Moreover, the Court noted, such participation gives the agency and the other participants notice of the interested parties and their concerns.

"If a person or entity does not participate at the administrative level before the State Engineer, it will not be deemed an 'aggrieved person' for purposes of judicial review."

The moral of the *S & G* case is clear. If a person or entity does not participate at the administrative level before the State Engineer, it will not be deemed an "aggrieved person" for purposes of judicial review.

As an aside, it should be pointed out that at some point the courts will be called upon to define who is an "aggrieved person" for the purpose of contesting matters before the State Engineer. Certainly another water user can be directly affected. But, is an entity like S & G really an "aggrieved person" merely because the State Engineer's decision may impact them financially under a contractual arrangement? In *S & G*, the State Engineer urged the Court to adopt the so-called "zone of interest" test. *See: Clarke v. Securities Industries Ass'n*, 479 U.S. 388 (1987) and *Waste Management of Wisconsin, Inc., v. Wisconsin Department of Natural Resources*, 424 N.W.2d 685 (Wis. 1988). A more difficult question may be who has standing to assert—and what exactly is—the public interest criteria in administrative proceedings before the State Engineer? For example, assume the road contractor working on the Burr Trail files an application to divert water for construction purposes. Should the State Engineer be drawn into the policy debate over whether it is in the public interest to pave the road (which has nothing to do with water)? Or, should his inquiry be limited to whether it is in the public interest to simply divert that amount of water from that particular source? It seems logical that the "public interest" affected must at least have some direct relation with the diversion and use of the water, and not be merely some indirect result of a project or activity which requires water to be constructed or operated. For further discussion of these issues, *see*: Grant, *Public Interest Review of Water Right Allocation and Transfer in the West: Recognition of Public Values*, 19 Ariz. St. L. J. 681 (1987); and DuMars & Minnis, *New Mexico Water Law: Determining Public Welfare Values in Water Rights Allocation*, 31 Ariz. L. Rev. 817 (1989).

3. In addressing a seldom litigated issue, the Utah Supreme Court was called upon to determine whether an upstream junior appropriator had acquired a portion of a downstream senior right by adverse use. Acquisition of water rights by adverse use in Utah was prohibited in 1939 (Section 73-3-1, Utah Code Annotated); however, claims based on adverse use sometimes arise in cases where the claimed use occurred prior to 1939.

In *College Irrigation Co. v. Logan River & Blacksmith Fork Irrigation Co.*, 780 P.2d 1241 (Utah 1989), the Appellant was a junior water user on the Blacksmith Fork, a tributary to the Logan River. The Respondent was a senior user and diverted water from the Logan River downstream from the confluence with the Blacksmith Fork. Appellant claimed that prior to 1939 it had historically dry dammed the Blacksmith Fork, preventing any water from flowing to the Logan River, and had therefore acquired a right by adverse use as

against the Respondent.

The trial court found there had been no adverse use and the Utah Supreme Court affirmed, holding that Appellant had not carried its burden of proof. According to the Court:

"The elements of proof necessary to acquire a prescriptive right to water are seven years of continuous, uninterrupted, hostile, notorious and adverse enjoyment under a claim of title with knowledge and acquiescence of the owner of the prior right *and at a time when the owner of the right needed the water adversely claimed.*" (Emphasis added.) The Court's opinion hinged primarily on the latter part of the test. The Court reasoned that so long as the flow in the Logan River at Respondent's point of diversion was sufficient to fill its rights, there could be no complaint regarding diversions by upstream juniors on the Blacksmith Fork tributary. Thus, the Court held that in order for there to be an adverse use, the upstream diversion must actually deprive the downstream user of water. The evidence failed to show this had happened. According to the Court, the mere use of water by an upstream user proves nothing; there can be no adverse use if there is sufficient water (from whatever source) to satisfy the downstream senior right. For the use to be adverse, the party against whom the claim is asserted must actually be deprived of water. The evidence showed that during the period of the claimed adverse use, the flow of the Logan River was never less than the 248 c.f.s. required to fill Respondent's rights and therefore no adverse use could have taken place.

4. In *Nephi City v. State Engineer*, 779 P.2d 673 (Utah 1989), the Utah Supreme Court settled an issue which has been debated among Utah water lawyers for years; namely, whether a municipality could lose its water rights by non-use. The Court decided the question in the affirmative.

The Utah Constitution contains a unique provision which prohibits a municipality from directly or indirectly selling, leasing or disposing of any water rights or water works. Art. XI Sec. 6, Utah Constitution. On the other hand, Section 73-1-4, Utah Code Annotated, provides that a water right is forfeited and shall revert to the public if not used for a period of five years.

Nephi City held a hydropower right on Salt Creek dating to the early 1990s. In 1952, a flood destroyed the diversion works, which were never rebuilt. In 1982, the City proposed to construct a new hydroelectric facility several miles downstream and filed an application with the State Engineer to change its point of diversion. The application was rejected on the grounds that the water had admittedly not been used for over 30 years and the right had been forfeited by non-use under Section 73-1-4.

On appeal, the City argued that the non-use provisions of Section 73-1-4 could not be applied to water rights owned by municipalities because Art. XI Sec. 6 prevented a city from "directly or indirectly" parting with its water rights. The City argued the Constitution not only prevented a voluntary disposition of such rights, but also applied to a non-voluntary forfeiture through non-use.

The Utah Supreme Court disagreed, finding no conflict between the constitutional provision and the statute. The Court held that Art. XI Sec. 6 only applies to prohibit the voluntary transfer of water rights, and does not apply to involuntary forfeitures covered by the statute. The Court noted that the forfeiture of water rights for non-use had been the law in Utah prior to statehood and the framers of the Utah Constitution must be presumed to have been aware of that at the time they adopted the Constitution.

"... the forfeiture of water rights for non-use had been the law in Utah prior to statehood and the framers of the Utah Constitution must be presumed to have been aware of that at the time they adopted the Constitution."

The Court's decision has caused considerable concern among those cities holding water rights which have not been placed to beneficial use for many years. However, a city may keep a water right in good standing for future use by filing a "non-use" application with the State Engineer under Section 73-1-4(3)(b).

5. In *Blake v. State Engineer*, 782 P.2d 472 (Utah 1989), the Supreme Court further reinforced the so-called "two-year" rule for prosecuting appeals from State Engineer decisions. Section 73-3-14 Utah Code Annotated provides that an action to review a State Engineer decision must be prosecuted to judgment within two years of the commencement of the lawsuit. The Court had previously upheld two other dismissals under that section. *See, Dansie v. Lambert*, 542 P.2d 742 (Utah 1975) and *Provo City v. Hansen*, 601 P.2d 141 (Utah 1979).

In this case, Appellant argued that he had requested a trial date in advance of the two-year deadline, but the trial court administrator failed to set the case prior to the two-year date. Appellant did nothing to bring this oversight to the Court's attention and let the two-year deadline pass. Appellant claimed he had done all he could to bring the case to trial and should not be penalized for an oversight by the court administrator. The Supreme Court rejected that argument, pointing out that Blake knew the case had been set beyond the two-year deadline but did nothing to bring it to the Court's attention and could not place the blame on others.

Given the facts of the Blake case, it would now seem difficult for a plaintiff to avoid the two-year deadline under Section 73-3-14 unless it can be clearly demonstrated that the delay was totally attributable to causes beyond a plaintiff's control.

6. In *Little v. Greene & Weed Investments, et al.*, 141 Utah Adv. Rpt. 20 (Utah 1990), the Utah Court of Appeals ruled that a water right does not become appurtenant to land until a certificate of appropriation has been issued by the State Engineer. The significance of when a water right becomes appurtenant to land usually arises in the transfer of real property where the deed is silent as to water rights. Section 73-1-11, Utah Code Annotated, provides that any water rights appurtenant to real property pass with the property unless expressly reserved by the grantor.

This case involved a quiet title action to certain water rights by parties claiming under two chains of title. The time at which the water became appurtenant to the land was key to the outcome of the case.

In 1955, one Lester Little filed an application to appropriate water for the irrigation of 83 acres, which was approved by the State Engineer in 1958. Early in 1967, Lester constructed his diversion facilities and began irrigating the 83 acres. In December 1967, Lester filed his proof of appropriation with the State Engineer. In January 1968—but prior to the State Engineer's issuance of the certificate of appropriation—Lester conveyed the land in undivided shares to his five children. There was no specific mention of the water rights.

A certificate of appropriation was subsequently issued by the State Engineer, and in 1969 Lester conveyed the entire water right to two of his five children. The issue was which deed had passed the water rights? The two children claimed the water did not become appurtenant until the certificate was issued, and could not have passed under the former deed. The successor to the other children argued that the water became appurtenant when it was placed to beneficial use and proof was filed.

The Court of Appeals, in affirming the District Court, ruled that a water right does not become appurtenant until the State Engineer issues a certificate of appropriation. The Court found that the statutory procedure sets forth the exclusive manner in which water may be appropriated, and the procedural requirements which must be complied with. The Court held there are two steps in perfecting a water right so that it becomes appurtenant to land. First, the water must be diverted and put to use on the specific tract of land. Second, all the statutory procedural steps for appropriation must be completed, including the issuance of the certificate of appropriation.

Thus, when Lester transferred the 83 acres to his five children, the water right was not yet appurtenant and therefore did not pass with the land.

Attorneys dealing with water rights as part of real estate transactions or otherwise should therefore be careful in drafting or reviewing deeds. One should make sure that any water right which is to pass with the land is either decreed, certificated or represented by a diligence claim. If the water right has not been certificated, it should be transferred separately by an assignment form as provided in Section 73-3-18, Utah Code Annotated. Further, any water rights should be fully and specifically described by the State Engineer's file number and the amount of water.

CONCLUSION

Although not all may agree with the results of these recent cases, certain issues have been clarified. The next year or two may see further issues arise. Cases are currently pending which will test the validity of diligence claims in the context of general adjudication proceedings, and challenge the ability of stockholders in irrigation companies to file change applications based solely on their stock. Also, the issues of federal reserved rights and the export of water outside of Utah may have to be addressed.

Commission Highlights

During its regularly scheduled meeting of November 16, 1990, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The minutes of the October 26, 1990, meeting were approved, as amended.
2. The Commission reviewed the proposed budget and discussed comments made in the four letters which were received in response to President Greenwood's letter requesting suggestions. After the discussion, the proposed budget was approved.
3. President Greenwood reported on the Executive Committee presentation to be made at the November 16, 1990, Task Force meeting. She indicated that there had been an excellent response from the sections and committees. She indicated that a report had been prepared on the functions and operations of the Utah State Bar and how the Bar is complying with the recommendations from Grant Thornton.
4. The Commission voted to approve disciplinary recommendations.
5. Commissioner Haslam discussed grievance petitions with the Commission.
6. Bar Counsel Trost reported on litigation.
7. Lois Muir, Financial Administrator, distributed an income and expense statement and fact sheet. The Commission requested Ms. Muir to prepare cash flow projections for review at the November 21, 1990, meeting and voted that if the Bar is determined to have sufficient cash, the line of credit and the equipment loan should be paid off. The matter was deferred until the next meeting.
8. Executive Director Baldwin reported that a consultant has been hired to review the financial department's policies and procedures and do a work flow analysis.

During its meeting of November 21, 1990, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. Executive Director Baldwin and Lois Muir, Financial Administrator, explained the Bar's cash on hand, current fiscal year's revenue and expense projections, including membership revenue receipts and projections for currently unpaid dues collection and license fee payments by category. After discussing the projections explanation, the Commission voted to pay off the line of credit and equipment loan for the purpose of saving interest.
2. Associate Bar Counsel Sutliff discussed proposed changes to the Rules of Professional Conduct with the Commission. The Commission adopted the Office of Bar Counsel's proposed rules.
3. The Commission considered admissions petitions filed by Bar Exam applicants. After examining the Grievance Petition Hearing Panel's recommendation to pass applicants who had filed grievance petitions, the Commission approved the panel's recommendation.
4. President Greenwood reported on the Supreme Court Task Force's meeting held on November 16, 1990.
5. President Greenwood notified the Commission that the Task Force will be conducting a survey of the Bar membership sometime within the next few months.
6. The Commission reinstated an attorney who had been suspended.
7. The Commission discussed reports from the Organizational Review Committee regarding proposed amendments to the Rules of Integration.
8. The Commission approved a recommendation on "Territorial Division" which would maintain the current number and boundaries, and add the possibility that out-of-state active members would be able to choose their division and vote for commissioners.
9. The Commission approved a recommendation which would fill vacancies on the Board by special election in all divisions, but not allow the Board to fill a vacancy by the appointment of a successor in the Third Division.
10. The Commission approved a recommendation that those wishing to serve on the Bar Commission have only five signatures on their nominating forms.
11. The Commission rejected a recommendation which would have created a special judicial classification outside of active membership for members of the judiciary.
12. The Commission approved a recommendation that the members of the judiciary should be eligible to serve as commissioners and be officers, with the exception that only judges who were in a position to exercise supervisory authority over the Bar or Board of Bar Commissioners would be ineligible to be nominated to the office of commissioner and accordingly required to resign as a commissioner if elected or appointed to such judicial position while serving as a commissioner.
13. The Commission discussed the election procedures, terms of office of the President, and a President-Elect, whether the President-Elect should be termed a "Vice President" and whether the President-Elect or "Vice President" should automatically become the President. The Commission deferred action pending further study by Commissioner Howard.
14. The Commission approved a referendum procedure by petition of 10 percent of the active members.
15. Executive Director Baldwin was directed to request Bar Counsel Trost to re-examine the legality of prepaid legal service plans. Discussion was then deferred until the December 1990 Commission meeting.

A full copy of the minutes of these and other meetings of the Board of Bar Commissioners is available for inspection by members of the Bar and the public at the Office of the Executive Director.

Salt Lake City Chapter of Tax Executives Institute Formed

A Salt Lake City chapter of the Tax Executives Institute (TEI) has recently been formed. The chapter holds monthly local meetings and participates in regular regional and national meetings to discuss the important tax issues affecting business taxpayers. Membership is open to persons not engaged in public tax practice whose work consists principally of administering taxes for their employer on an executive or management level. Please contact Milan Crane of Longyear Company at 972-6430 for information regarding upcoming meetings and membership in TEI.

Discipline Corner

ADMONITIONS

1. An attorney was admonished for violating Rule 1.4(a), 1.13(b) and 8.1(b) by failing to respond to his client's repeated requests for information and requests for an accounting of the retaining fees and for failing to issue a refund of those retaining fees. In addition, the attorney failed to timely respond to the Office of Bar Counsel regarding the complaint.

2. An attorney was admonished for violating Rule 1.3 by failing to timely prepare Findings of Fact and Conclusions of Law and Decree of Divorce. The attorney failed to prepare the documents for a period of three months.

3. An attorney was admonished for violating Rules 1.4(a) and 1.13(c) by failing to maintain appropriate communication with his clients and failing to reach an agreement with his clients regarding fees, so that monies which the client had given to the attorney to hold in trust were used for fees.

4. An attorney was admonished for violating Canon 6, DR 6-101(A) (3) by failing to adequately communicate with his client. The client believed that the attorney was not moving forward on the divorce action and initiated a complaint in the Office of Bar Counsel. The Screening Panel found that the attorney had performed adequately but failed to communicate that fact to the client.

5. An attorney was admonished for violating Rule 3.5(d) by failing to obey a request from a Judge to leave the Judge's chambers and arguing with the Judge after several requests to cease. The Judge felt that the attorney was attempting an ex parte communication and requested that the attorney leave the chambers, which the attorney refused to do.

6. An attorney was admonished for violating Rule 1.4(a) by failing to clearly explain the terms of the fee agreement and adequately inform the client of services to be performed for the fee. Based on the failure of communication, the client believed that the fee would cover all the expenses of an expert witness, when in fact the fee was consumed in an attempt to locate an expert witness.

PRIVATE REPRIMANDS

1. For violating Rule 1.3 of the Rules of Professional Conduct of the Utah State Bar, an attorney was privately reprimanded for failing to perfect an appeal for his client and failing to ensure that the judgment of the lower court was stayed pending the appeal. The neglect of the attorney resulted in an Order to Show Cause hearing to which his client was obliged to respond.

2. For violating Rule 1.13(b) of the Rules of Professional Conduct of the Utah State Bar, an attorney was privately reprimanded for executing an agreement wherein he acknowledged a lien against the proceeds of a settlement in behalf of his client and subsequently failing to ensure that the lien holder received payment from the funds. The attorney disbursed the funds to the client who failed to pay the medical provider.

3. For violating Rules 3.2 and 3.4(c) of the Rules of Professional Conduct of the Utah State Bar, an attorney was privately reprimanded for failing to draft the final documents regarding a settlement of divorce after being ordered to do so by the court. The attorney failed to prepare and file the documents for 11 months.

SUSPENSION

On October 30, 1990, Benjamin P. Knowlton was suspended for six months with five months stayed pending payment of restitution for violating Canon 1, DR 1-102(A) (4). The actual suspension was to begin on November 13, 1990. Mr. Knowlton was retained to negotiate the sale of a house, which sale was completed in 1982. He was paid $2,000 for his services and an additional $5,599.95 from the proceeds of the sale was deposited into his trust account. The sum held in trust later became a disputed marital asset in his client's subsequent divorce proceeding. Mr. Knowlton was not the attorney in the divorce proceeding. The Judge in the divorce proceeding ordered that Mr. Knowlton hold the proceeds in trust pending a resolution of the dispute. Upon Order of the Court that the proceeds be disbursed to one of the parties, Mr. Knowlton claimed a lien for fees owed him by the other party and intentionally converted those funds. The Hearing Panel found that Mr. Knowlton's intentional conduct was an aggravating factor.

Annual Law Firm Party Becomes Project for the Homeless

Thursday, November 8, at 6:30 p.m., members of Campbell, Maack & Sessions, a Salt Lake City law firm, hosted and served dinner for families at the Homeless Shelter. The children were gifted with vouchers for shoes and a clown/magician entertained everyone.

What made the evening unique was that the law firm of Campbell, Maack & Sessions decided (1) to turn their annual "firm party" into a community service project and (2) to challenge other law firms in Salt Lake City to help the Shelter as well.

In discussions with the president of the firm, Robert S. Campbell Jr., Mr. Campbell indicated that the firm considered this effort as a very small step but an important one that should be taken by others as well. Mr. Campbell said that the costly role of government in providing social services should be significantly reduced if increased numbers of private citizens would be willing to give a little of their time and resources.

Stacey Bess, Shelter School Director, and Pat Hoagland, Office Manager at the Family Shelter, join Campbell, Maack & Sessions in issuing this "challenge." As you know, the needs are many but—if this challenge succeeds—quite achievable. Needs range from a full-time teacher's salary, camera and slide projector, new desks, units of study, to volunteers who can share their areas of specialization and interest with these disadvantaged children.

The Shelter School, whose children learn under Stacey's leadership and experience caring and concern for the first—and sometimes the only time in their lives (and that time is restricted to 90 days)—provides an especially significant opportunity for making a difference, short and long-term.

The dichotomy between the clean, well-kept facility and the dark human drama at the Shelter can be mitigated if we all help. Any support others can give in responding to this "challenge" would extend the significance of this evening and multiply the resources of the Shelter itself.

Thank you.

Salt Lake City Law Firms Honored by the United Way

Two Salt Lake City law firms were recently honored by the United Way of the Great Salt Lake area. The law firm of Van Cott, Bagley, Cornwall & McCarthy, which has been a very generous supporter of United Way for many years, made the largest firm contribution to the 1990 United Way campaign and was honored with a trophy for its generous support.

The Salt Lake City firm of Ballard, Spahr, Andrews & Ingersoll was also honored by the United Way for having made the largest contribution per attorney of any law firm. This firm, with headquarters in Philadelphia, has supported the United Way both locally and nationally for many years.

Other law firms and lawyers made generous contributions to the United Way. During the last two years, contributions to the United Way campaign from lawyers and law firms have increased from approximately $45,000 in 1988 to $65,000 in 1989, and to approximately $80,000 during the 1990 campaign.

The United Way thanks each of you for your contributions.

United States Attorneys, Federal Public Defenders and State Bar Associations, 10th United States Judicial Circuit

The following is the amended calendar for the 1991 sessions of court for the United States Court of Appeals for the 10th Circuit and the Judicial Conference. The amendment indicates the September Session of Court is to be held in Utah, rather than Kansas.

January Session (Denver)
January 14-18

March Session (Denver)
March 4-8

May Session (Denver)
May 6-10

Judicial Conference of 10th Circuit (Sedona, AZ)
July 17-19

September Session (Utah)
September 30-October 4

November Session (Denver)
November 18-22

Waste Recycling Encouraged

In light of environmental concerns for Utah, the Nation and the World, the Staff of the Utah State Bar is encouraging the members of the Bar to recycle waste products from their businesses and homes. When one considers the amount of paper alone that lawyers and law firms produce and discard, the benefits for our communities would be great. Also aluminum cans, plastic and glass containers from lunch rooms and other areas can be easily recycled. Over the past months we have initiated a successful recycling program at the Bar offices. Therefore, the Bar staff encourages attorneys to become environmentally concerned and to join in this effort to improve our world. Also, the Bar staff is more than willing to help lawyers initiate recycling programs. For more information, contact Tobin Brown or Toni Marie Sutliff at the Bar offices, (801) 531-9077.

Interest Bearing Trust Accounts

The 1990 Legislature passed H.B. 387 (Court Funds and Interest) which amended UCA 78-27-4. Statute now provides that the Judicial Council shall adopt rules governing the maintenance of court trust funds and the disposition of interest earnings on those trust funds.

Rule 3-407 (3) (F) of the Code of Judicial Administration provides that the Judicial Council shall set the fee for interest bearing accounts established at the request of the litigant, or by court order, where the interest accrues to the litigant. **The minimum amount that a litigant can request to be placed in an interest bearing trust account is $5,000.** No minimum is required under a court order. The fee is $50 or 0.647 percent (less than 1 percent) of the principal amount, which ever is greater.

Statute provides that funds held in trust by the court shall be deposited with the Clerk of the Court. In cases where interest is to accrue to the litigant on funds held by the court, an agreement which stipulates that the fee is to be paid from the principal amount and that the litigant is responsible for the taxes on the interest must be signed. The Clerk will then deposit the funds in a Demand Account under the name of the court with the bank which holds the court trust funds in general.

Questions concerning this policy should be addressed to:
Fred E. Jayne, Financial Manager
Administrative Office of the Courts
230 S. 500 E., Suite 300
Salt Lake City, UT 84102

Head Injury Seminar a Success

A two-day seminar for attorneys handling head injury cases attracted over 90 Utah lawyers, as well as attorneys from Idaho, Wyoming, Nevada and Colorado. It was the second seminar of its kind in Utah.

The conference, co-sponsored by the Utah State Bar and the Utah Head Injury Association, was held on November 1 and 2 at the Little America Hotel in Salt Lake City. Speakers included nationally recognized brain trauma expert Richard M. Restak, M.D., from Washington, D.C., and neurologist D. Frank Benson of the UCLA School of Medicine. Local presenters and panelists included biomechanical engineer Paul France, physiatrist Milton D. Thomas and economic analyst Paul A. Randle. Local attorneys who have had success in prosecuting and defending head injury cases provided insights in breakout sessions throughout the second day of the conference.

Based on attendees' positive evaluations and specific expressions of interest, plans are being made for a third annual head injury seminar to be held in the fall of 1991. (The first conference was held in November 1989.) Next year's conference will focus on the mild to moderate brain injury case. For more information, contact Bob Sykes, Robert Henderson or Doug Mortensen.

Submitted by
Douglas G. Mortensen & MATHESON, MORTENSEN & OLSEN, P.C.
68 E. 100 S.
Salt Lake City, UT 84102
363-2244

Special Institute on International Resources Law: A Blueprint for Mineral Development

Denver, Colorado
February 18 and 19, 1991

The Rocky Mountain Mineral Law Foundation and the International Bar Association—Section on Energy and Natural Resources Law are sponsoring a Special Institute on International Resources Law on February 18 and 19, 1991, in Denver, Colorado. This conference will feature speakers from nine countries with international expertise, and will present an organized and comprehensive approach to the major factors to be considered when initiating and developing foreign mineral opportunities.

The first day will cover issues pertinent to the country under consideration including analysis of the underlying legal system, treaties and bilateral agreements, and assessment of political risk, all subjects that must be fundamentally understood before entering into business in any foreign country. The involvement of the host country in oil, gas and mining agreements also will be discussed.

The second day will focus on tax and non-tax considerations involved in setting up an operating entity and doing business in the host country, including branch versus subsidiary determinations and international tax planning. Emphasis also will be placed on selection of the legal and financial structures to be utilized for obtaining and operating mineral properties. Coverage of the extraterritorial effect of U.S. laws will address the conduct of U.S. companies doing business abroad, a subject that is vital not only to advisors of companies but also to their overseas partners.

The Institute will be invaluable to anyone involved in international mineral development projects, including attorneys and accountants in corporations, private practice, financial institutions, academia and government agencies.

Registration fees for this program include an extensive course manual containing scholarly and practical Institute papers, plus two luncheons and one dinner. A special post-conference ski package has been put together in Steamboat Springs for those who wish to enjoy skiing in Colorado.

Legal Secretaries to Sponsor Seminar

An all-day seminar for legal secretaries, legal assistants and support staff will be held Saturday, February 23, 1991, at the Utah Law and Justice Center, 645 S. 200 E., Salt Lake City. The legal education seminar is sponsored by the Salt Lake Legal Secretaries Association and is designed to benefit both beginning and experienced law office personnel. Participants will have an opportunity to hear experts, ask questions and discuss issues relating to their own job responsibilities.

The seminar will include the following sessions: "Using Martindale-Hubbell as a Resource Tool with Emphasis on Volume VIII" by Russell Kearl of Callister, Duncan & Nebeker; "Examination, Comparison and Analysis of Handwriting to Assist Attorneys and Support Staff in Cases Where Fraud Might Be a Question" by J.D. Bergen, Forensic Document Examiner and Certified Handwriting Expert; and "Computer File Organization and Word Perfect Macros" by Judy Herd of Training Technologies.

Welcoming remarks will be made by Marsha Gibler, PLS, President of the Salt Lake Legal Secretaries Association, and Brian Florence of Florence & Hutchinson, past Utah State Bar President and past acting Bar Director.

The registration fee of $45 for members and $65 for non-members includes handout materials, lunch and parking. Registrations received after February 15 will require an additional $10. Registration at the door is on a space available basis.

Contact Dawn Hales, PLS, at 322-2516; or Penny Dixon at 359-0999 for further information.

United States District Court
for the District of Utah
Office of the Clerk of Court
NOTICE TO THE BAR AND THE PUBLIC
December 1, 1990

Revisions to the Fee Schedule for the United States District and Bankruptcy Courts

The Director of the Administrative Office of the United States Courts has revised the basis for calculating the fees assessed by the Judicial Branch for the handling of funds that are deposited into a court's registry and, subsequently, placed into interest-bearing accounts.

Effective December 1, 1990, all funds—including criminal-bond monies—that are deposited with the United States district or bankruptcy courts and that are placed by those courts into interest-bearing accounts or instruments will be assessed a charge of 10 percent of the income earned, regardless of the nature of the action underlying the investment.

The registry fees will be deducted at the time that (1) the interest is computed and added to the account, or (2) the interest-bearing instruments mature.

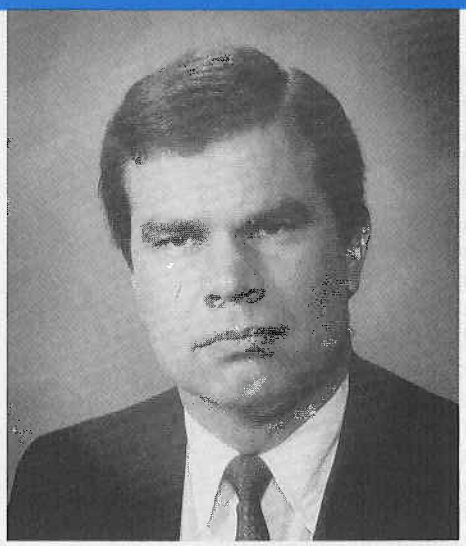
As with other miscellaneous fees authorized under 28 U.S.C. §§1913, 1914, and 1930, these fees may be taxed as costs by the court pursuant to 28 U.S.C. §§1920. In cases where the United States Government is a party to the actions underlying the registry investment, the funds withheld in payment of the fee may be restored to the United States upon application filed with the Court by the United States Attorney or other government counsel.

If you have questions, please call either the district court clerk or the bankruptcy court clerk.

Energy, Natural Resources and Environmental Law Section CLE Breakfast Seminar

The Energy, Natural Resources and Environmental Law Section of the Utah State Bar is pleased to present a CLE Breakfast Seminar entitled "Attorney Conflicts of Interest in Natural Resources and Other Business Transactions." The speaker will be Clayton J. Parr of Kimball, Parr, Waddoups Brown & Gee. Mr. Parr's presentation will begin at 7:30 a.m. on January 16, 1991, at the Utah Law and Justice Center, 645 S. 200 E. The cost is $5.50 per person for breakfast and printed materials will be provided. The seminar will qualify attendees for ONE HOUR ETHICS CLE credit. All members of the Bar are invited and encouraged to attend. Seating is limited; to register for this CLE Breakfast Seminar, call Kelli Suitter at the Utah State Bar, 531-9095 on or before January 10, 1991.

CASE SUMMARIES



By Clark R. Nielsen

SEARCH AND SEIZURE, SOBRIETY ROADBLOCK

A DUI arrest at a sobriety checkpoint which had been established under program guidelines was consistent with fourth amendment limitations on searches and seizures. A seizure occurs when a vehicle is stopped at the checkpoint. The objective measure of the intrusion is balanced against the effectiveness of the control and the grave interests of the state in curbing drunk driving. The stopping of every vehicle minimizes any subjective intrusion and potential for generating fear or surprise.

Michigan Dept. of State Police v. Sitz, 1990 W.L. 78597, S. Ct. (U.S. June 14, 1990) (C.J. Rehnquist with J's Stevens, Brennan and Marshall dissenting).

DEPOSITIONS, DISCLOSURES AS PUBLIC RECORD

The sealing of a deposition prior to its use in trial or other proceedings is intended to preserve the deposition's integrity and not a "mandate for secrecy." Under Utah Rules of Civil Procedure 26(c) and 30(f), sealed depositions are still matters of public record and are publicly accessible, absent other good cause to restrict their use. Justice Zimmerman's majority opinion (with J's Durham and Howe concurring) holds that pretrial depositions, even though still unopened, were available to the public. Parties to the litigation could not prevent their disclosure without a strong showing of good cause for a protective order. Public access is based upon Utah's public Writings Act, §78-26-1 to 8, and not upon an argument of constitutional right of access. The majority opinion demonstrates the risk to a litigant that fails to take all avenues to protect his or her privacy disclosed in a public court record. The opinion also dismisses the fact that a protective order often is a burdensome and difficult matter to litigate. Chief Justice Hall dissented, arguing that unpublished depositions are not available to the trial judge until published and, therefore, should not be available as a public record. Justice Stewart's dissenting opinion argues that disclosure encroaches upon the significant privacy interests of litigants in a wide variety of litigated matters. The majority opinion places the burden to avoid disclosure upon the litigants whose private life, intentionally or unintentionally, is subjected to media scrutiny. An individual litigant must show "good cause" to preserve his or her right of privacy. The burden for such a showing should be entirely different than a corporation's burden to show "good cause" in order to preserve corporate records or competition secrets.

Carter v. Utah Power & Light Co., 146 Utah Adv. Rep. 6 (October 22, 1990) (J. Zimmerman; C.J. Hall and J. Stewart dissenting).

ADMINISTRATIVE LAW, STANDARDS OF PROOF AND REVIEW, PROPERTY VALUATION

An administrative agency's decision must rest upon a sound evidentiary basis and not just agency fiat. The Tax Commission does not have constitutional or legislative authority to exercise unbridled discretion "to make findings unsupported by evidence in the record." Consequently, the tax agency's decision that the taxpayer incurred an expense ratio of 25 percent, and not 31 percent, must be supported by substantial evidence. The party attacking the findings below must marshall *all* the evidence, including both evidence that supports the finding and evidence that detracts from the finding, in order to show that the finding is not supported by substantial evidence.

Because the record was unclear how the Tax Commission arrived at the income-to-expense ratio, the proceedings were remanded to the Commission for further findings. This opinion contains a simple, clear explanation of application of the income approach in property tax evaluation. *First National Bank of Boston v. County Board of Equalization*, 145 Utah Adv. Rep. 8 (October 16, 1990) (C.J. Hall).

RULE 60(B) MOTION— RES JUDICATA

Fraud or misrepresentation that affects the basic fairness of a prior adjudication may provide a basis for collateral attack against and relief from that adjudication. A judgment debtor who is denied relief under Rule 60(b), Utah R. Civ. P., is not barred from attacking the judgment collaterally on grounds different than those adjudicated in the Rule 60(b) motion. The

two methods of attacking a judgment, collateral attack and Rule 60(b) motion, are not mutually exclusive and a debtor need not choose one path to the automatic exclusion of the other. The estate beneficiaries were allowed to pursue their collateral fraud claim against the bank executor even though the beneficiaries had previously been denied Rule 60(b) (7) relief ("any other reason justifying relief . . . "). The denial of a Rule 60(b) motion for relief is res judicata in a collateral action only as to the ground or claim actually adjudicated in the motion. "To hold otherwise could result in a denial of the process." The denial Rule 60(b) motion to set aside an estate closing order because of insufficient time to respond to the closing petition does not preclude a later collateral action for fraud and misrepresentation against the estate's personal representative.

Note: The court does not discuss the correlation or distinction between this case and the *res judicata* principles discussed in *Wheadon v. Pearson*, 14 Utah 2d 45, 376 P.2d 946 (1962), and *Belliston v. Texaco*, 521 P.2d 379, 380 (Utah 1974): that res judicata applies not only to points and issues actually raised and decided on the prior action, but also to those that could have been adjudicated providing that the claim, demand or cause is the same in both cases. Also, what is the *res judicata* effect of the denial of a 60(b) motion for reasons of untimeliness when the same claim is asserted in a collateral action?

Pepper v. Zions First Nat'l Bank, N.A., 147 Utah Adv. Rep. 5 (November 9, 1990) (J. Stewart).

SHERIFF SALE, REDEMPTION PRICE

The redemptioner of property that has been sold at sheriff's sale need not pay expenses incurred by the property's purchaser that were not reasonable and necessary in the maintenance of the property. The addition to the redemption price of unnecessary and unconsented expenditures erodes redemption rights and is contrary to Utah R. Civ. P. 69(f). The evidence at trial did support the purchaser's expenditures for building demolition but not additional costs for tree removal and site elevation. The matter was reversed and remanded for proper allocation of the purchaser's expenses.

Galloway v. Merrill, 147 Utah Adv. Rep. 49 (Ct. of App., November 16, 1990) (J. Greenwood).

SALES TAX, TANGIBLE PROPERTY AND ELECTRONIC DATA

The sale or lease of computer lists on mailing labels or computer tape is subject to sales or use tax even though the purchaser's dominant purpose is to obtain the knowledge and information contained thereon and not the physical medium. A purchase of any information conveying media may be taxable as a sale of tangible personal property. Because the form of the delivery of information controls, the possibility of alternative means to transfer the information by direct electronic transmission from one computer to another does not destroy the taxable nature of a transfer on tangible media. The medium actually used to transfer is dispositive whether the transaction is tangible and taxable, or intangible and non-taxable.

Mark O. Haroldsen, Inc. v. State Tax Comm'n, 148 Utah Adv. Rep. Utah Supreme Court, #870468 (November 27, 1990) (J. Stewart).

JURISDICTION, MOTION TO DISMISS, REVIEW STANDARD

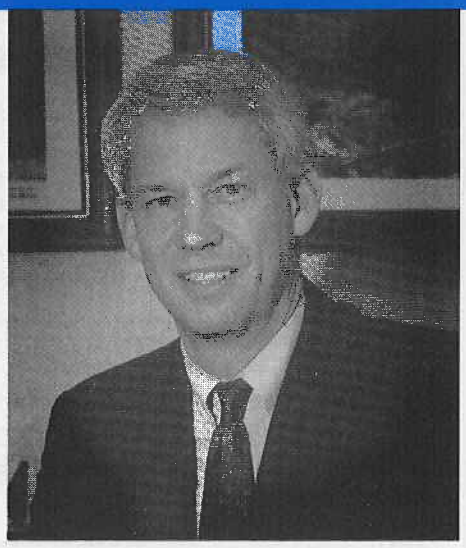
Granting defendant's motion to dismiss for lack of personal jurisdiction was error when the trial court relied merely upon documentary submissions in resolving factual disputes relative to the jurisdiction issue. A plaintiff's factual allegations are accepted as true unless specifically controverted by affidavit or disposition, but any factual dispute in documentary evidence must be resolved in plaintiff's favor. The trial court may not weigh conflicting evidence until an evidentiary hearing or trial is held. Absent a hearing, plaintiff need only make a prima facia showing of jurisdiction before trial, then prove jurisdiction by a preponderance of evidence at trial.

Anderson v. Amer. Soc. of Plastic & Reconstructive Surgeons, 148 Utah Adv. Rep., Utah Supreme Court #870421 (November 15, 1990) (J. Durham).

CONFIDENTIALITY, DISCLOSURE OF PUBLIC INFORMATION

The "Official Privileges Act," U.C.A. §78-24-8 (Supp. 1989) confers a confidential privilege on internal communications within a police department only when the "public interest" would suffer by disclosure. There also exists a common law privilege against disclosure which must be balanced against the interests of those seeking disclosure and the purposes of disclosure. The balancing of the privilege and interests seeking discovery suggests an *in camera* review by the trial judge in exercising broad discretion. Parties seeking to preserve confidentiality are "free to articulate any precise and certain reasons for so doing." In this case, disclosure of internal affairs investigation reports has a very slight potential of public harm, particularly when judicial limits and protections can be imposed, as compared to the benefit of allowing public access.

Madsen v. United Television, Inc., 147 Utah Adv. Rep. 12 (November 9, 1990) (J. Howe).



Preview of the 1991 General Session Utah State Legislature

By John T. Nielsen

Like every session of the Legislature, each seems to have its own personality. The approaching 1991 session is certainly no different, but may be characterized more by the personality of its leadership rather than substantive law which has traditionally marked the legacy of a particular session.

There was significant turnover in both houses at large, but more interestingly in the leadership, particularly in the House of Representatives. Those who follow legislative matters await anxiously the interplay between Speaker of the House Craig Moody and his counterpart, newly elected House Minority Leader Frank Pignanelli. Both men are viewed as strong personalities and effective legislators, and the stage is set for an interesting and lively legislative session within the House of Representatives. In the Senate, the Democrats rejected longtime Minority Leader Rex Black in favor of Utah County Legislator Eldon Money. Although the Democrats picked up seats in both the Senate and the House, the Republicans still retain a clear majority.

Of significance to members of the Bar is the loss of a number of lawyer legislators. Gone are longtime lawyer Senators Lorin Pace, Kay Cornaby and Richard Carling. The House of Representatives also lost some lawyer-legislators and most recently lost Representative Stanley Smedley, who passed away suddenly in December. Those of us who worked with Stan knew him as a fine person, an excellent and respected legislator and an exemplary member of the Bar. Other members of the Bar were elected to serve in both the House and Senate, but the leadership and example of those lawyer-legislators who no longer serve will be sorely missed.

As in the past, the Bar will be represented at the Legislature within the guidelines set forth by the Supreme Court. The regularly constituted Legislative Affairs Committee of the Bar will meet regularly to analyze legislation as to its applicability to those guidelines and will make recommendations to the Bar Commission as to what, if any, specific legislative matters to support or oppose. Only those matters on which the Bar Commission takes action can be represented to the Legislature as the official position of the Utah State Bar. While individuals and sections are certainly free to voice individual opinion, care must be taken to avoid a perception that such views represent an official position of the Bar.

As to substantive matters of relevance to attorneys, there will likely be a host of bills that will bear watching as they relate to various practice specialties. Practicing attorneys who neglect client interest at the Legislature do not serve his or her client as fully as possible. The following is a subject matter list of bills that have been pre-filed or will very likely appear sometime during the session:

H.B. 4 Homicide by Assault—providing an offense of homicide by assault and defining the penalty.

S.B. 2 Statutory Homicide References—amending terms referring to certain homicide offenses.

S.B. 1 Safe Drinking Water Act Amendments—authorizing the certification of operations for any water systems.

H.B. 1 Payment of Attorneys' Fees—providing for the award of attorneys' fees to the prevailing party in civil actions and providing criteria and exceptions.

H.B. 2 Foreign Judgments Act Amendment—clarifying filing procedures for foreign judgments.

H.B. 7 Right of Legal Action—amending the definition of heir and a reference to injury as applicable to recovery in wrongful death actions.

S.B. 10 Utah Shoplifting Law Amendments—amending provisions for awarding exemplary damages in civil shoplifting cases.

H.B. 15 Public School Trust Lands

Task Force—providing for a task force on public school trust lands.

S.B. 11 Division of Water Rights Amendments—amending the powers and duties of the State Engineer.

In addition to the aforementioned bills which were pre-filed at this writing, there are a number of other important matters of which the practicing attorney should be aware.

Significant legislation will be introduced to comply with the Supreme Court directive in *Amax Magnesium Corp. v. Utah State Tax Commission.* Business and industry will be watching such legislation very carefully respecting its implications and impacts.

In the environmental arena, legislation will likely be introduced to create a new State Department of Environmental Quality. Environmental legislation has been common in the last few years, and this initiative promises to be a significant point of discussion in January and February.

Lawyers practicing in the area of workmen's compensation can expect a number of bills to surface during the session, some of which have already been pre-filed.

In addition to the attorneys' fees bill indicated above, the Interim Judiciary Committee has been considering a number of issues dealing with alternative dispute resolution, paralegals, document facsimiles, statute of repose, pre-emptory challenges of judges, and court structure and jurisdiction. Additionally, significant legislation will be introduced dealing with corporations.

While the above list is by no means exhaustive, it is illustrative of the kinds of issues that will likely be presented and dealt with in the general session which begins in January 1991.

The Legislative Affairs Committee and the Bar Legislative Representative desire an open dialogue with members of the Bar concerned about any piece of legislation. All should feel free to contact a member of the Committee or the Bar Legislative Representative, John T. Nielsen, for information, legislative updates or assistance.

Diversity in the Legal Profession

NEW COMMITTEE FOR LAWYERS

By Charlotte L. Miller
President Elect

In the year 2000, women are expected to own 37 percent of all United States companies.[1] Today women are starting new businesses at a rate of five times that of men.[2] Attorneys (who are quickly learning that marketing is part of their job description) will be competing for the work of these women-owned businesses.

Recently, the following conversations were related to me as occurring in workplaces in Salt Lake City:

- A male attorney advised a female attorney that women attorneys should not be litigators because it makes them unappealing to men, and women don't have the mental strength for the job.
- One attorney advised another that he should slap his wife around once in a while to make sure she knows who is in charge.
- A male attorney joking about rape said that he didn't see the problem and would invite such an assault.
- An attorney said that women entering the legal profession are dangerous to families because the women present a temptation to male attorneys.

Attorneys with the above attitudes probably will have difficulty attracting and keeping as clients businesses owned and operated by women. Cutting off such a substantial portion of the business community would be devastating to one's practice. Beware if you think only "older" attorneys are at risk. Even the most reform- minded "young" lawyer has received little education about understanding the diverse world in which we live. Also, beware if you think you are unaffected because your practice does not have clients in the traditional sense. Government attorneys and corporate counsel will be seeing more financial officers, judges, witnesses, politicians, police officers, etc., who happen to be women.

Businesses have started teaching their managers, who tend to be white males, how to interact with and effectively manage a more diverse workforce. Managers are encouraged to expand their focus from assimilating women and minorities into a dominant white male culture, to creating a heterogeneous culture that fosters full participation by all individuals.[3] Employers view this training as an economic and business necessity rather than a legal responsibility because a substantial majority of the people joining the labor force by the year 2000 will be people of color and women. Managers who have learned only how to manage a homogeneous, white male work force may not know how to encourage productivity and enthusiasm in a diverse work force; therefore, unless the managers are retrained, the employer may suffer economic consequences.

In the legal profession, the challenge of working productively and harmoniously in a diverse work force is not a challenge to be faced solely by women but by everyone. Often, we have neglected to include men in the process of trying to create a more harmonious environment in the workplace. We create groups made up of women (groups which are needed) to talk about the problems of the workplace, but a significant portion of the work force is never a part of these conversations. This separation may result in some "us" versus "them" attitudes. On the refrigerator in my own house I used to have a cover from an *ABA Journal* titled "I Don't Think That Ladies Should Be Lawyers," and next to it was a poster that stated, "If They Can Send One Man to the Moon, Why Not All of Them." Fortunately, both have been replaced by my children's artwork.

The Young Lawyers Section has created the Diversity in the Legal Profession Committee in an effort to improve all attorneys' understanding of the diverse world in which we live, and the diversity that we will be seeing more of in our client base. The Committee will address racial and ethnic diversity as well as gender diversity. The Committee is chaired by Ken Wallentine, a 1990 graduate of the J. Reuben Clark Law School, who currently is a law clerk for the Hon. Gregory K. Orme at the Utah Court of Appeals. Ken has written a variety of articles on the current state of the law as it affects employees and was helpful in instituting a new class at the J. Reuben Clark Law School: *Gender and the Law*. Ken and I first began discussing the problems of men and women working together in the legal profession when, at his request, I served on a panel at the J. Reuben Clark Law School. The panel addressed issues of how men and women work together in the legal profession and allowed law students and teachers to talk openly about the problems they had dealing with the other gender in the work force. Many questions were left unanswered and the problems were not solved, but people began to understand that problems exist. Ken and I hope the Diversity in the Legal Profession Committee will be a forum for aggressively solving some of the problems.

The Committee has three principle objectives. First, the Committee seeks to educate and stimulate discussion of gender and minority issues in order to increase awareness and sensitivity both for attorneys and the public. Second, the Committee reaches out to assist law schools in further diversifying the profession. Third, the Committee acts to respond to certain recommendations of the Gender and Justice Task Force, directly involving young lawyers in confronting the system, through areas such as legal facets of domestic violence and gender bias in the practice of law.

We invite all lawyers to participate in these endeavors by giving their ideas and support to the Committee. Please call Ken Wallentine at 533-6800 for more information.

[1] *The Wall Street Journal*, October 17, 1990, by Jeanne Sadler.
[2] *Executive Female*, March-April, 1987, p. 8 "Progress Report on Women in the Workplace."
[3] *Fair Employment Practices*, December 8, 1988, "The Dynamics of Diversity: Managing the Work Force of the Future."

Thanks to Volunteer Instructors at People's Law Seminars

The Young Lawyers Section Law Related Education Committee has recently completed its presentations of "People's Law Seminars" at Bryant Intermediate School in Salt Lake City and Tyler Library in Midvale. Volunteers from the Young Lawyers Section presented seminars to the public on the following topics:

Finding Your Way Through the Legal System

What About the Fine Print of Consumer Rights?

You Can't Take It With You, or Can You?

You Do Not Have to Hold Your Nose and Jump (Legal Aspects of Starting a Business)

The Cold War is Alive and Well in the '90s: Landlord-Tenant Law

Holy Wedlock or Holy Deadlock?—Divorce and Child Custody

The following volunteer instructors are recognized and appreciated for their pro bono educational efforts: Mark M. Bettilyon, Mark R. Gaylord, H. Michael Drake, Shawn McGarry, James C. Hyde, R. Bret Jenkins, Noland Taylor, Gary R. Henrie, Mark S. Webber, Lawrence R. Dingivan, Elizabeth Dalton and Helen Christian.

Brown Bagger with Judge Sam

The Honorable Judge David Sam will address the Young Lawyers Section of the Utah State Bar as the kick-off speaker for the 1991 Brown Bag Lecture Series on January 24, 1991, at 12:00 noon in his courtroom, Federal Courthouse—350 S. Main. The topic of Judge Sam's presentation will be "The Moral Ethic and Effective Litigation."

Judge Sam has been a distinguished member of the federal judiciary since November 1985, and in that capacity, he has been appointed by United States Supreme Court Chief Justice Rehnquist to serve as a member of the Codes of Conduct Committee of the Judicial Conference. His experiences in private practice and on the bench offer an enlightening perspective on professionalism.

Attendees will receive one CLE credit. All are invited to attend.

Litigation Teamwork Seminar Sponsored and Taught by Young Lawyers

The Law Related Education Committee and the Legal Assistants Association of Utah co-sponsored a CLE seminar on November 9, 1990, at the Law and Justice Center. The seminar was called, "Teamwork: Litigation, Lawyers & Legal Assistants." The Hon. David Sam briefly introduced the seminar on the newest techniques for managing an effective litigation. Kevin Anderson, Gordon Jensen and Toni Sutliff, all members of the Young Lawyers Section, made presentations.

Pro Bono Day

The Young Lawyers Section of the Utah State Bar is providing the services of LEXIS/NEXIS, at no charge, in connection with pro bono cases and projects. This service is available to all members of the Bar and will continue to be available the last Friday of each month (January 25, 1991, and February 22, 1991).

All attorneys doing pro bono projects are invited to the Mead Data Central training center at 47 W. 200 S., Suite 300, American Plaza III, Salt Lake City.

For additional information, please contact John Bowler at 355-8651.

1990 Utah Bar Foundation Grant Recipients

The Utah Bar Foundation received another outstanding collection of grant applications in the 1990 grant cycle. All grant applicants seeking review for the 1991 cycle must submit their applications to the Foundation on or before May 31, 1991. Grant applications are available at the Bar Foundation's office in the Law and Justice Center. In 1990, $202,328 were distributed in grants to the following programs:

American Inns of Court received $300 per Inn. There are currently three Inns in the State of Utah. The Inns are roughly modeled on the English Inn system and allow law students, lawyers and judges to discuss and learn about various legal topics. Utah is also the home to the first American Inn which was set up in Provo by then Chief Justice Warren Burger, Rex Lee and Hon. A. Sherman Christensen.

Law Related Education (LRE) was the recipient of $28,600. IOLTA funds were awarded to help LRE provide such programs as the Conflict Management Program and "Teaching Legal Concepts in the Public Schools" program. The Conflict Management Program goes into the public schools and teaches children how to talk through conflicts instead of turning immediately to violence. "Teaching Legal Concepts in the Public Schools" programs provides a team of law students to teach high school students about different aspects of the law. LRE also has developed or expanded the Court Tour Program, Juvenile Justice and Delinquency Prevention Program, Law Day, Statewide Mock Trial Competition, Summer Teacher Training Institute, and Teaching About the Bill of Rights Through Language and Arts to name a few of their programs.

Legal Aid Society of Salt Lake (LAS) received a grant for $40,000. LAS is a non-profit corporation which provides legal counsel to indigent members of the community who, by reason of their poverty, are unable to employ an attorney to assist them. LAS does not accept cases that are criminal in nature or any cases that are potentially revenue producing, and emphasizes representation in domestic relations law. The vast majority of LAS clients are women with dependent children.

Young Lawyer's Section of the Utah State Bar received a grant for $10,000 to be used in funding the In-School Bill of Rights Forum Program. This program will focus on junior high and high school students and will explain how the Bill of Rights affects students in their daily lives.

Legal Center for People with Disabilities received a grant for $12,000. The Legal Center's mission is to protect the legal, civil and human rights of Utahns with disabilities. IOLTA funds have been used to help partially finance the Legal Center's office in Price, Utah, which provides essential services to Southeastern Utah.

Utah Law and Justice Center received a grant for $20,845 to be used to offset costs in making the Center available for arbitration and mediation.

Utah Legal Services received a grant for $30,000 to provide for a Paralegal in Southeastern Utah who serves low-income persons living in Carbon, Emery and Grand counties. The paralegal has assisted clients with public entitlement, consumer, housing and family law matters. The IOLTA funds were also provided for a one-time computerization which is anticipated to cut down on travel and long-distance phone calls and to connect the Southeastern Utah office with the ULS main computer system. IOLTA funds also help provide funds to provide Immigration services and to publish the Landlord/ Tenant handbook.

Utah Judicial Council received a grant for $7,483 to be used in the production of "Doing Utah Justice" or "The Utah Courts System; What You Don't Know Could Hurt You" video. The goals of the video would be to dispel the most serious misconceptions about the State courts system revealed by the surveys, and to give a clear and simple outline of how the system works, and how citizens can most easily gain entry when they need to. Finally, the video would highlight the most important issues facing the court system in the future, such as the degree to which the adversary system is outmoded, and ways in which the system might be transformed by new technology.

National Pro-Bono Conference held its annual meeting in Snowbird, Utah, this year and the Foundation provided $500 to help host a reception on behalf of the attorneys of Utah for the conference participants.

Emergency Grants were also provided to Law Related Education in the amount of $15,000 and to Legal Services for the Poor in the amount of $15,000 to help these two programs remain in operation until the 1990 grants were disbursed.

The Foundation would encourage all interested parties or organizations to please submit applications for the 1991 grant cycle before May 31, 1991.

CLE CALENDAR

NOTICE - January is DISCOUNT VIDEO MONTH. All during January, Utah State Bar CLE Videotapes will rent for $10 per week. This is a $20 SAVINGS off of the regular rental price. Don't miss this opportunity to obtain CLE credit at such reduced prices. Contact Toby or Monica at the Bar office for a list of videotapes. Regular deposits and late fees apply.

Also, for those Family Law and Tax practitioners who missed the October 26, 1990, seminar, "Retirement Equity Act: Divorce Taxation and Pensions," there are extra materials sets for sale. These 250-page sets are designed to explain the use of Qualified Domestic Relations Orders (QDRO) and the income tax results of payment under a QDRO. This set usually sells for $135 to $140. While they last, they are available for the low price of $75. This highly useful set includes an update to cover recent changes. To purchase this set, contact Toby or Monica at (801) 531-9095.

POLLUTION LIABILITY

A live via satellite seminar. For this seminar the federal environmental laws (CERCLA, RCRA, SARA and UST) that create the obligation to pay will be reviewed, including the duties, remedies, responses, causes of action and what is new. A considerable amount of time will be devoted to the CGL policy—what triggers it, cleanup costs, the duty to defend, dec actions, reservations and exclusions, defenses and drafting history. The Property Policy, the Environmental Impairment Liability Policy, the Excess Umbrella and Reinsurance Policies will also be examined in detail.

CLE Credit: 4 hours
DATE: January 17, 1991
PLACE: Utah Law and Justice Center
FEE: $140 (plus $6 MCLE fee)
TIME: 10:00 a.m. to 2:00 p.m.

THE S & L CRISIS— HOW LAWYERS CAN HELP

A live via satellite program. This seminar will focus on the legal issues involved in the failure of S&Ls, pro active advice, investigation and preparation for litigation related to, and arising from, the failure, analysis of claims against and transactions involving a failed S&L and an overview of legislative initiatives which will affect the industry and address this unprecedented situation. These issues will be approached from a multitude of perspectives, so any lawyers involved in this type of work would find this program interesting and helpful.

CLE Credit: 6.5 hours
DATE: January 22, 1991
PLACE: Utah Law and Justice Center
FEE: $165 (plus $9.75 MCLE fee)
TIME: 8:00 a.m. to 3:00 p.m.

WORDPERFECT UPDATE

A live via satellite program. This year's program explores the new opportunities the most recent release of WordPerfect 5 offers lawyers and their staffs. The course includes a demonstration of the Generic Law Practice System and how you can use it to automate routine legal tasks such as collections, estate administrations and corporate functions. Document assembly demonstrations will challenge you with all new ways to create a lawyer-driven, two-fingered interrogatory builder plus a sophisticated deed creation system. You will pick up important, late-breaking facts about subjects designed to help chart your firm's future automation course.

CLE Credit: NONE
DATE: January 29, 1991
PLACE: Utah Law and Justice Center
FEE: $165
TIME: 8:00 a.m. to 3:00 p.m.

DEVELOPMENTS AND CURRENT STRATEGIES TO LIMIT LENDER LIABILITY

A live via satellite seminar. This program will review recent legislative and judicial developments of lender liability with a special emphasis on loan workouts, bankruptcies and environmental issues affecting real estate transactions. The faculty will offer practical suggestions on loan documentation and loan administration practices that minimize lender liability risk and avoid litigation. Attention will also be given to lenders' potential liability to third parties and lender liability problems issues which may be encountered during the administration of a loan workout.

CLE Credit: 4 hours
DATE: January 31, 1991
PLACE: Utah Law and Justice Center
FEE: $140 (plus $6 MCLE fee)
TIME: 10:00 a.m. to 2:00 p.m.

BASIC ESTATE AND GIFT TAXATION AND PLANNING

This program is the annual presentation prepared by ALI-ABA. Park City was chosen as this year's site and the Utah State Bar will be co-sponsoring this seminar. This basic three-day program will set forth the law and planning as conceived in the Tax Reform Act of 1976 and modified by subsequent legislation. It will appeal to lawyers with no background in this subject as well as to those who feel the need to relearn the law from the ground up. A small faculty of active practitioners will concentrate on setting forth the basic law and presenting the working concepts and planning suggestions that permit the registrant to move forward at his or her own pace to more sophisticated estate planning.

CLE Credit: 20 hours (with 1 in ethics)
DATE: February 13-15, 1991
PLACE: Park City, Olympia Hotel
FEE: $485 plus mandatory CLE fee: $15
TIME: 9:00 a.m. to 5:00 p.m., February 13-14
8:00 a.m. to 4:00 p.m., February 15

FUNDAMENTALS OF REAL ESTATE TAXATION

A live via satellite program. This seminar examines four topics of great interest to practitioners in the real estate industry: Choice of Entity, Limitations on Losses, Like-Kind Exchanges and Troubled Real Estate. The goal of the program is to alert practitioners to the opportunities and pitfalls confronting the real estate investor or developer. The program will also review current and important developments in real estate taxation.

CLE Credit: 4 hours
DATE: February 14, 1991
PLACE: Utah Law and Justice Center
FEE: $140 (plus $6 MCLE fee)
TIME: 10:00 a.m. to 2:00 p.m.

ENVIRONMENTAL SCIENCES FOR LAWYERS SEMINAR SERIES

Lawyers practicing in the field of environmental law face an increasingly complex array of technical and scientific issues. In order to advise clients and interface with technical consultants, lawyers need to be educated about these issues.

The seven sessions will focus on the basics of seven different environmental sciences. With emphasis on scientific principles, rather than environmental law, scientific and technical information will be presented in the context of legal issues related to contaminated sites and regulatory compliance. This seminar series is intended for all enviromental, real estate, corporate, trial and other lawyers and environmental professionals.

CLE Credit:	14 hours
DATES:	February 12, 19, 28; March 5, 12, 19; April 2,1991
PLACE:	Utah Law & Justice Center
FEE:	$140 ($130 for Energy...Section members)
TIME:	4:00 to 6:00 p.m. each evening

INSURANCE LITIGATION DEFENSE STRATEGIES AND INNOVATIONS

A live via satellite program. More information will be forthcoming at a later date.

CLE Credit:	6.5 hours
DATE:	February 26, 1991
PLACE:	Utah Law and Justice Center
FEE:	$165 (plus $9.75 MCLE fee)
TIME:	8:00 a.m. to 3:00 p.m.

THE USE, OVERUSE AND ABUSE OF EXPERT WITNESSES

A live via satellite program. More information will be forthcoming at a later date.

CLE Credit:	6.5 hours
DATE:	February 27, 1991
PLACE:	Utah Law and Justice Center
FEE:	$175 (plus $9.75 MCLE fee)
TIME:	8:00 a.m. to 3:00 p.m.

CORPORATE MERGERS AND ACQUISITIONS

This is another ALI-ABA annual program. It was held in Park City last year and was such a success that it is being held here again in 1991. Further details on this program will be published as they are available.

DATE:	March 14 and 15, 1991
PLACE:	Park City, Olympia Hotel

SECTIONS' CLE LUNCHEONS

Listed below are luncheons put on by Bar Sections which will qualify for CLE credit. Not all sections plan their meetings far enough in advance to make this calendar, so watch for section mailings on those and other programs. Typically these meetings qualify for ONE HOUR of CLE credit and attendance is for cost of lunch only (lunch need not be purchased). To register for these luncheon CLEs, call the Utah State Bar Reservations desk at 531-9095 at least one week prior to the date of the program. Dates and topics listed are subject to change.

DATE	TITLE	CREDIT
Banking & Finance Section		
Jan. 17	FDIC, RTC and OTS after FIRREA	2 hours
Feb. 21	Sex, Fraud and Data Processing Tapes	1 hour
Education Law Section		
Feb. 8	The Americans with Disabilities Act	1 hour
Family Law Section—Upcoming Topics:		
	Rule 4-501—"The Domestic Stepchild"	1 hour
	Ethical Considerations	1 hour
Tax Section		
Jan. 30	Divorce Taxation	1 hour
Feb. 27	Creative Charitable Gifting Strategies	1 hour
March 27	How to Succeed in Dealing with the IRS	1 hour
April 24	Utah Legislative Update	1 hour
May 29	Utah State Tax Issues	1 hour

CLE REGISTRATION FORM

TITLE OF PROGRAM — FEE

1. _____ _____
2. _____ _____

Make all checks payable to the Utah State Bar/CLE — Total Due

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Bar Number — American Express/MasterCard/VISA — Exp. Date

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Signature

Please send in your registration with payment to: Utah State Bar, CLE Department, 645 S. 200 E., Salt Lake City, Utah 84111.

The Bar and the Continuing Legal Education Department are working with Sections to provide a full complement of live seminars in 1990 and 1991. Watch for future mailings.

Registration and Cancellation Policies: Please register in advance. Those who register at the door are welcome but cannot always be guaranteed entrance or materials on the seminar day. If you cannot attend a seminar for which you have registered, please contact the Bar as far in advance as possible. No refunds will be made for live programs unless notification of cancellation is received at least 48 hours in advance.

NOTE: It is the responsibility of each attorney to maintain records of his or her attendance at seminars for purposes of the 2-year CLE reporting period required by the Utah Mandatory CLE Board.

CLASSIFIED ADS

For information regarding classified advertising, please contact Kelli Suitter at 531-9095.

BOOKS FOR SALE

United States Code Annotated; ALR Federal Vol. 1-71; ALR 1st and ALR 2nd; CCH U.S. Tax Cases Vol. 1-71, Bound Volumes through 1987; CCH Tax Court Memorandum Decisions, Bound Volumes through January 1988; CCH Employment Practice Decisions, Bound Volumes through 1980. Please contact Tamie or Jim at (801) 328-8987.

OFFICE FURNITURE FOR SALE

Oak Conference Table with eight chairs (light gray tweed), excellent condition. $1,800. Call Paul at (801) 263-5555.

OFFICE SPACE AVAILABLE

SMALL AV rated law firm engaged in business practice seeks one or two attorneys to share downtown office space. Preference is attorney specializing in bankruptcy or litigation. Reply to Utah State Bar, Box H, 645 S. 200 E., Salt Lake City, UT 84111.

LAW OFFICE sharing in downtown Salt Lake City law firm. Facilities include: shared secretarial and word processing, office equipment, furniture, common area. Excellent location. Call (801) 521- 8288.

PRIME OFFICE SPACE FOR SUBLEASE. 4,000 to 6,226-square-foot Penthouse suite formerly occupied by Sessions and Moore. Upgraded wall coverings, millwork and built-in furnishings. Covered parking. Call Geoffrey Smart at (801) 355-5100.

POSITIONS AVAILABLE

NINE LAWYER FIRM with established commercial practice seeks diversification through additional 1 to 3 person litigation, bankruptcy, family law or other compatible practice group. Will consider full integration into the firm, of counsel, or other arrangement. Excellent downtown facilities. Reply to Utah State Bar, Box K, 645 S. 200 E., Salt Lake City, UT 84111.

GENERAL PRACTICE ATTORNEY. Rural law practice needs associate with some litigation experience. Base practice with personal injury and criminal law as specialties. Need basic understanding of civil and domestic relations law as would be expected in a rural practice. Non-compensated fringe, the greatest outdoors you should ever hope to live in. Base salary and fringe commensurate with experience. Send resume as soon as possible to Utah State Bar, Box M, 645 S. 200 E., Salt Lake City, UT 84111.

ASSISTANT OR SENIOR CITY ATTORNEY for Salt Lake City Corporation. Represent city in civil matters including construction, tort, and civil rights litigation; prepare ordinances, resolutions, contracts, leases and memoranda; represent the mayor, city council, department heads and other employees. Consideration will be given to applicants with experience in specialized areas of municipal law including water rights, governmental immunity, planning and zoning and related fields.

Must be a member in good standing with the Utah State Bar. Minimum of six years of full-time paid employment in the practice of law. Substantial court experience preferred. Beginning salary range dependent upon qualifications—$26,592 to $45,732 with excellent benefits program.

Submit applications to Salt Lake City Department of Human Resources, 451 S. State Street, Fourth Floor, Salt Lake City, UT 84111. For additional information, contact Steven W. Allred, Deputy City Attorney. (801) 535-7788.

THE UNITED STATES COURT OF APPEALS for the Tenth Circuit in Denver, Colorado, seeks an attorney to establish and direct an appellate settlement conference program. Applicants must have knowledge of federal civil practice and procedures, litigation experience, and must present evidence of exceptional aptitude and skills for problem solving and consensus building. Mediation or negotiation training and administrative experience are preferred. United States citizenship, graduation from an accredited law school, and Bar admission are required. The salary range is currently $59,216 to $76,982 per year. Application may be made by sending: 1. current resume and, 2. information relating to applicant's interest and successful experience in mediation to: John K. Kleinheksel, Chief Staff Counsel, 1929 Stout Street, Drawer 3588, Denver, CO 80294. (303) 844-5306. The Court is an active equal opportunity employer. Open until filled.

POSITION SOUGHT

1988 MBA/JD UNIVERSITY OF UTAH GRADUATE with two years Commodities and Securities experience as a Federal Trial Attorney. Member of Utah and California State Bars. For additional information, send request to Utah State Bar, Box J, 645 S. 200 E., Salt Lake City, UT 84111.

AMBITIOUS MEMBER of Utah, New Hampshire and Maine Bars with primary experience in litigation seeking full-time position or affiliation. Wide variety of experience. Excellent verbal and writing skills. Contact Mark W. Baer at 1682 Yale Avenue, Salt Lake City, UT 84105 or call (801) 583-4655.

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