

WHY HAS *STATE V. HUTCHINSON* BEEN IGNORED? AN ANALYSIS
OF WHY UTAH CITIES LACK AUTHORITY TO EXACT WATER

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I. BRIEF INTRODUCTION OF SCARCITY PROBLEM

The wisdom of Will Rogers is invoked for the proposition that, in the West, whiskey is for drinking and water is for fighting over.¹

“Although overall water consumption is not increasing significantly in the United States, the demand for water in certain sectors is rapidly growing.”² Specifically, demand for water in the West has always been high due to the arid landscape and drought cycles.³ “The West,” as understood in the context of water use and management is typically identified as the seventeen coterminous states located west of the Hundredth Meridian and exclusive of California, Oregon, and Washington.⁴ The Hundredth Meridian is used because precipitation rates east of that boundary average forty inches or more per year, while rates west average less than twenty inches.⁵ Oregon, Washington, and California are excluded because of their relationship with the Pacific Ocean which creates rainfall in excess of 100 inches in certain areas within those states.⁶

II. THE PROBLEM OF WATER SCARCITY IS LINKED TO RESIDENTIAL
DEVELOPMENT AND URBAN GROWTH

Western water demand in recent years has dramatically increased due to the “nation’s burgeoning population . . . settling primarily in metropolitan areas, with the fastest growing cities located in the arid Southwest.”⁷ People in the West consume much more water than the rest of America.⁸ The average American

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¹ LAWRENCE J. MACDONNELL, *Tradition, Innovation and Conflict: Perspectives on Colorado Water Law*, Intro. (Natl. Resources Law Ctr. 1988). *But see* John D. Leshy, *A Conversation About Takings and Water Rights*, 83 TEX. L. REV. 1985, 2005 (2005). In this article, the author attributes the quote above to Mark Twain.

² A. DAN TARLOCK, JAMES N. CORBRIDGE, JR. & DAVID H. GETCHES, *WATER RESOURCE MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY*, 1 (5th ed. 2002) [hereinafter TARLOCK ET AL.,].

³ MARC REISNER, *CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER* 87 (Penguin Books 1993).

⁴ TARLOCK ET AL., *supra* note 2, at 17.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 1.

⁸ Denise D. Fort, *Federal Water Policy for the West in the 21st Century*, 44 RMMLF-INST 25, § 25.01[3] (1998).

consumes about 80 gallons of water per day, whereas Westerners consume around 120 gallons.⁹

Utahns use more water per capita than any other state in the nation—293 gallons of water per person per day.¹⁰ In addition to the high consumption, some of the fastest and most explosive growth in recent years has occurred in Utah.¹¹ For instance, St. George, located in the southwestern part of the state, was the fastest-growing metro area in the nation between the years of 2000 and 2006.¹² St. George had a growth rate of 39.8%, which increased the population to 126,000, as of July 1, 2006.¹³ Another major metropolitan area in Utah, the Provo-Orem area was also listed in the top ten with a growth rate of 29.9%.¹⁴ This extreme growth would most likely not present the same type of problems in a metropolitan area in the eastern United States; however, Utah is the second most arid state in the nation.¹⁵

In order to sustain this growth and consumption, the West must realize that water is a precious commodity that must be planned for and protected.¹⁶ It can be argued that until recently, when the demand and competition for the existing limited supplies of water has dramatically increased, the majority of westerners have ignored the scarcity issue.¹⁷ Unfortunately, many people think that western water is rigidly accounted for and never wasted.¹⁸

In the West, much of the water is accounted for by shares represented by certificates of stock, known as “paper rights.”¹⁹ An accounting of these paper rights seems to indicate a sufficient supply of water.²⁰ However the misunderstood truth is that the paper rights are vastly disproportionate to the actual water rights.²¹ This “wet water” versus “paper water” dichotomy occurs when users have paper water rights that allow them to use a certain amount of water, but when the time

⁹ *Id.*

¹⁰ Jerry Spangler, *Utah Water War Mired in Politics, Lobbyists Sink Reform Efforts, Some Critics Say*, DESERET NEWS May 5, 2002, available at <http://www.deseretnews.com/dn/view/0,1249,395007436,00.html>.

¹¹ US CENSUS BUREAU, 50 Fastest-Growing Metro Areas Concentrated in West and South, Apr 5, 2007, available at <http://www.census.gov/Press-Release/www/releases/archives/population/009865.html> (last visited Jan. 16, 2008).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Spangler, *supra* note 10.

¹⁶ A. Dan Tarlock & Lora A. Lucero, *Connecting Land, Water, and Growth*, 34 URB. LAW. 971, 971-972 (2002).

¹⁷ *Id.*

¹⁸ Leshy, *supra* note 1, at 2005.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

comes to use that water, the stream or lake supplying the water is dry.²² This imbalance occurs even when users have “priority dates reaching back into the 1800s.”²³ This gap between actual and paper rights is misunderstood by many westerners.²⁴

Withdrawal and consumption percentages are also often misleading and may in reality reflect amounts lower than the actual amounts consumed because many non-agricultural uses return water back into the system to be used again and again, while agricultural uses lose most of the water to evaporation, evapotranspiration, and plant transpiration, which ultimately leaves little to return back into the system.²⁵

In Utah, cities are allowed to require exactions of water from developers as a condition precedent to developing within a specific city’s boundaries.²⁶ A water exaction is a requirement by a city of a developer, which forces the developer to turn over a certain amount of water to the city as a condition of receiving the city’s approval of the development. These exactions are usually in the form of water shares from irrigation companies. As will be discussed, these exaction requirements for the most part are determined solely at the city level. This note in part seeks to challenge the authority of Utah cities to make such exactions, and identifies the problems with continuing to allow cities to establish these water exactions. Special attention will be paid to the evolution of caselaw appearing to give cities the power to authorize such requirements, with an emphasis on whether they actually have been granted this authority.²⁷ Additionally, early caselaw will be examined which sets forth the requirements and standards to be used by cities if they want to avoid constitutional taking challenges.²⁸

The broad powers granted to cities within Utah announced in *State v. Hutchinson*,²⁹ coupled with the “reasonableness” approach as set forth by *Child v. City of Spanish Fork*,³⁰ has created a panoply of exaction approaches being used by Utah cities. The *Nollan-Dolan* cases provided further refining of the exaction standards, which have since been incorporated into the legislative code.³¹ However, the damage has already been done and with the great variation from city

²² Jedidiah Brewer, Robert Glennon, Alan Ker & Gary Libecap, *Transferring Water in the American West: 1987–2005*, 40 U. MICH. J.L. REFORM 1021, 1026 (2007).

²³ Janet C. Neuman, *The Good, The Bad, and the Ugly: The First Ten Years of the Oregon Water Trust*, 83 NEB. L. REV. 432, 437 (2004).

²⁴ Leshy, *supra* note 1, at 2005

²⁵ TARLOCK ET AL., *supra* note 2, at 17.

²⁶ *See generally*, *Child v. City of Spanish Fork*, 538 P.2d 184 (Utah 1975); *But see* S.B. 279, 2008 Gen. Sess. (Utah 2008) (This proposed bill will among other things prevent cities and counties from conditioning approval on water exactions).

²⁷ *State v. Hutchinson*, 624 P.2d 1116 (Utah 1980).

²⁸ *Child*, 538 P.2d at 186.

²⁹ 624 P.2d at 1116.

³⁰ 538 P.2d at 184.

³¹ *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987); *see also* UTAH CODE ANN. § 10-9A-508 (2007).

to city, a wide spectrum of exaction requirements has been established. This spectrum has created inefficiencies and will inevitably lead to future problems for Utah residents. For instance, currently there are cities requiring little or no water, which will inevitably lead to water shortages. On the other end of the spectrum, there are cities requiring double the amount of neighboring cities.

III. THESIS INTRODUCTION: UNDER *HUTCHINSON*, UTAH CITIES LACK THE POWER TO ENACT WATER EXACTION ORDINANCES BECAUSE WATER IS AN ISSUE OF “STATE-WIDE” CONCERN AND SHOULD BE REGULATED AS SUCH

Most developers and city planners will agree that from a common sense approach, some water exaction requirement is necessary to further responsible growth within the state. The central focus of this note is to suggest that cities lack the power to enact such exaction requirements and instead, a uniform state standard is necessary to ensure reasonable, responsible, and realistic growth far into the future.

There will be four sections to the note. The first section will examine the history of the current process including an analysis of the roles played by legislative and judicial decisions within Utah. Second, this note asserts that under *Hutchinson*, if a matter is considered “state-wide” in nature, a city may not regulate that matter. This section provides five reasons why water *is* an issue of “statewide concern,” including: A) the enactment of a comprehensive statewide water code; B) specific provisions within the Utah code suggesting cities are limited in this area; C) how the characteristics of water are inherently statewide and/or federal in nature; D) the inadequate long-term planning or protection of water at the local level; and E) the non-specific nature of current city exaction requirements.

The third section will provide potential solutions, including a brief outline under the *Hutchinson* framework for judicially challenging a city’s power to exact, and a new concept, the imposition at the state-level of a statewide “development template.” The fourth section will briefly address problems that may arise from either a judicial challenge under *Hutchinson*, or from implementation of the “development template.”

A. Illusion of Power—History of How Cities Gained Power to Exact Water

1. Statutory Authority

Actors at the state level are imbued with broad powers, and have inherent sovereign authority to act.³² Historically, “[states] need not look to positive sources such as state or federal statutes or constitutions [for authority to act]. . . [s]tate constitutions, therefore, are *limitations* on state governments, [whereas]. . .

³² JOHN MARTINEZ & MICHAEL E. LIBONATI, STATE AND LOCAL GOVERNMENT LAW: A TRANSACTIONAL APPROACH 6 (Anderson Publishing Co. 2000).

the federal constitution is a *grant* of power to the federal government.”³³ This power is known as the plenary power principle and has been endorsed by courts throughout the United States.³⁴

As early as 1920, states armed with plenary power set out to regulate land use and granted cities within their borders the power to control such use through zoning ordinances and other similar instruments.³⁵ Many states adopted the Standard State Zoning Enabling Act, (“SZE”) which was passed by the U.S. Department of Commerce in 1922 as a template for local entities to use to address the growth throughout the nation.³⁶ The Act was passed as a way of providing local governments, who chose to adopt it, with the power to enact comprehensive zoning ordinances and additionally, gave those local governments’ insight and direction as to how they should properly structure their ordinances.³⁷ Modern-day zoning such as SZE has been upheld as constitutional by the United States Supreme Court.³⁸ Utah passed a version of SZE entitled, The Municipal Land Use Development and Management Act.³⁹

The Municipal Land Use Act essentially grants cities and municipalities the authority to adopt “General Plans” that deal with the present and future needs of

³³ *Id.* (emphasis in original) (citation omitted) (As Professor Martinez succinctly noted).

³⁴ MARTINEZ & LIBONATI, *supra* note 30.

³⁵ See generally JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW § 36.03(B)(3) (Lexis Publishing 2000).

³⁶ SPRANKLING, *supra* note 35, § 36.03(B)(3).

³⁷ *Id.*

³⁸ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (Where the constitutionality of modern day zoning as we know it, often termed Euclidean zoning, was upheld by the United States Supreme Court. The Court held specifically that zoning ordinances, in general, will be considered valid unless “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare [of the municipality]”); see also *Nectow v. City of Cambridge*, 277 U.S. 183, 187-188 (citing *Village of Euclid, Ohio v. Ambler Realty Co.*) (1928) (Which for the most part followed the *Euclid* holding regarding the validity of zoning ordinances, but clarified and distinguished *Euclid* by announcing that a zoning ordinance as applied to a particular parcel might be considered unconstitutional if the zoning restriction “does not bear a substantial relation to the public health, safety, morals, or general welfare [of the municipality]”); see also SPRANKLING, *supra* note 35, §§ 36.03(C), 38.01 (Following these two early cases, federal and state courts took a very deferential standard of review and routinely upheld zoning ordinances, choosing not to engage in questioning the local government’s wisdom for enacting such zoning ordinances. Courts were willing to take a deferential view because early zoning ordinances were primarily enacted to enforce nuisance-control, but as time progressed, other important goals came into view requiring additional judicial review. Additional goals included a desire: 1) to protect property values, 2) to preserve the character of neighborhoods, 3) to prevent environmental degradation, 4) to enhance the property tax base, and 5) to encourage tourism and other economic development.).

³⁹ UTAH CODE ANN. § 10-9a-101 et. seq. (2005).

the municipality, as well as addressing growth and development.⁴⁰ The plans also provide for the health, general welfare, safety, energy conservation, transportation, prosperity, civic activities, aesthetics, recreational, educational, and cultural opportunities of the city.⁴¹ In order to accomplish the goals of the general plan, this chapter of the Utah Code provides that cities and municipalities through their “legislative body may enact a zoning ordinance establishing regulations for land use and development that furthers [the interest of the city or municipality].”⁴²

2. *Evolution of Common Law Authority*

As early as 1891, Courts in Utah recognized that cities had some form of power to require water from their citizens.⁴³ In *City of Springville v. Fullmer*, the respondent was diverting water from certain sources and was ordered by the City of Springville to cease the diversion.⁴⁴ The court held that the city had the authority to pass ordinances for the “peace, benefit, good order, regulation, convenience, and cleanliness” of the city so long as those laws were necessary for that purpose, and were not “repugnant to the constitution of the Unites States or the laws of this territory.”⁴⁵ Although the *Fullmer* case was not an exaction-type case, it laid the groundwork for future cases by establishing the broad powers and justifications for actions being taken by Utah cities regarding water.

A water exaction case did not arise until 1975 when the Utah Supreme Court decided *Child v. City of Spanish Fork*.⁴⁶ Here the city had been requiring developers who wished to annex into the City of Spanish Fork to turn over a specific amount of water shares before the city would approve the annexation of the development.⁴⁷ The city had followed this policy in the past, and believed the plaintiffs should also be required to comply.⁴⁸ The plaintiffs disagreed with the policy and challenged the exaction requirement as a violation of their equal protection rights and sought judicial intervention, claiming the exaction created an unlawful classification of property owners and that the classification caused them to be treated unequally.⁴⁹

The city required the exactions due to the increased burden and stress on the existing municipal services, which were provided for the use and enjoyment of the annexed development as well as the already existing residents.⁵⁰ The court held that there was “nothing inequitable, unjust or unlawful about requiring the

⁴⁰ UTAH CODE ANN. § 10-9a-401 (2005).

⁴¹ *Id.*

⁴² UTAH CODE ANN. § 10-9a-501 (2006).

⁴³ *City of Springville v. Fullmer*, 27 P. 577 (Utah 1891).

⁴⁴ *Id.* at 578.

⁴⁵ *Id.*

⁴⁶ 538 P.2d 184 (Utah 1975).

⁴⁷ *Id.* at 185.

⁴⁸ *Id.* at 185-186.

⁴⁹ *Id.* at 187.

⁵⁰ *Id.*

plaintiffs to make a reasonable contribution to the bearing of these additional burdens.”⁵¹ The court found there was no unlawful classification or unfair treatment of the developers and reasoned that when new developments created an additional burden on an existing infrastructure, it was acceptable for cities to require such exactions, so long as they were reasonable.⁵²

This idea of reasonableness was officially accepted by the Utah Supreme Court in *Call v. City of West Jordan*, when the court was asked to determine the validity of an ordinance passed by the City of West Jordan that required developers to either dedicate a certain percentage of land or pay a cash equivalent amount to the city as a condition for approval of their subdivision developments.⁵³ In turn, the city would use the dedication or cash equivalent amount “for the benefit and use of the citizens of the City of West Jordan,” using it for “flood control and/or parks and recreation facilities.”⁵⁴

The plaintiffs claimed that the dedication or cash requirement should fail because it did not solely benefit the subdivision in question.⁵⁵ The court stated that there must be a reasonable relationship between the dedication imposed and the needs created by the new subdivision, but also recognized the difficulty in allocating a percentage of need to the new development and those already existing.⁵⁶ Ultimately, the court held that as long as the imposition of the dedication benefited the general welfare of the whole community as well as the subdivision in question, the ordinance would be valid.⁵⁷

In 1981, the Utah Supreme Court further explained the “reasonableness test” when it decided *Banberry Development Corp v. South Jordan City*.⁵⁸ In this case, the court was asked to determine whether it was valid for a city to require developers, as a condition precedent for approving their development, to pay park improvement and water connection fees.⁵⁹ The Court in *Banberry* separately addressed the reasonableness of park improvement fees and water connection fees coming to the same conclusion that “although the benefits derived from the exaction need not accrue solely to the subdivision. . . the benefits derived. . . must be of ‘demonstrable benefit’ to the subdivision.”⁶⁰

⁵¹ *Id.*

⁵² *Id.*

⁵³ 606 P.2d 217, 218 (Utah 1979).

⁵⁴ *Id.* at 220.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ 631 P.2d 899 (Utah 1981).

⁵⁹ *Id.* at 901.

⁶⁰ *Id.* (quoting *Call v. City of West Jordan*, 614 P.2d 1257, 1259). It is worth noting that there were three *Call* decisions. *Call I* mainly addressed the issue of whether cities have the authority or “power” to enact ordinances regulating land use issues. *Call II* was concerned with the constitutionality of such ordinances. The preceding discussion was concerned with the latter inquiry, whereas the “power” question will be addressed later in

Although *Banberry* and *Call* dealt with improvement and connection fees, as well as dedication requirements, they are analogous to water exaction requirements, with the analytical approach being one in the same.⁶¹ Based on these court decisions and later amendments by the legislature incorporating language from the *Nollan-Dolan*⁶² cases, cities began imposing water exaction requirements on developers. Because of these cases, some city councils and city attorneys might improperly feel at ease regarding their ordinances.⁶³ However, even when exactions and impact fees are based on *Nollan-Dolan*, to be successful, they must also be consistent with and based on state law.⁶⁴ This note will discuss in the next section why the approach taken for water exactions should be treated differently than that of improvement and connection fees.

3. Critical Distinction Regarding Power

There must be a critical distinction drawn regarding the “power” concept when talking about improvement or connection fee-type exactions, and water-exactions. Historically, although states possess inherent sovereign power, or “plenary power,” no such power exists at the city level.⁶⁵ At common law, in order for a city to act in any way, the power authorizing those actions must have been specifically and expressly authorized by the state legislature.⁶⁶ This has become known as the “Dillon Rule.”⁶⁷ At one point, the Dillon Rule was used widely

this note under the Critical Distinction Regarding Power section. The third decision, *Call III* was insignificant and outside the scope of this note and will thus not be discussed.

⁶¹ Sam D. Starritt & John H. McClanahan, *Land-Use Planning and Takings: The Viability of Conditional Exactions to Conserve Open Space in the Rocky Mountain West After Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), 30 LAND & WATER L. REV. 415, 456 (1995). The authors of this article draw no meaningful difference between water exaction requirements and impact fee-type requirements.

⁶² See *infra* notes 107-115 and accompanying text.

⁶³ Utah League of Cities and Towns, Advisory Memo from Attorney David Church, (on file with the author).

⁶⁴ W. Andrew Gowder & Bryan W. Wenter, *Exactions and Impact Fees 2007: The Limits of Local Authority*, 39 URB. LAW. 645, 656 (2007).

⁶⁵ *Call v. City of West Jordan*, 606 P.2d 217, 218 (Utah 1979).

⁶⁶ JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 3.7 (2d ed., 2007).

⁶⁷ *State v. Hutchinson*, 624 P.2d 1116, 1119 (Utah 1980). Dillon’s rule requires strict construction of city authority assuming they had to be assigned from the state to the municipality. Specifically, the rule states that a “municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation not simply convenient, but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation against the existence of the power.” John F. Dillon, *Commentaries on the Law of Municipal Corporations* § 237 (5th ed. 1911).

throughout the nation to control city authority because of an untrusting and critical attitude toward local governments.⁶⁸

However certain areas of regulation such as land use and school finance have historically been delegated to local governments.⁶⁹ The justification for this delegation is mainly due to the characteristic of the subject matter being delegated—that being local in nature.⁷⁰ Zoning for instance, is uniquely local in nature.⁷¹ When a municipality institutes a zoning decision, although it can have a regional impact,⁷² it normally is implemented to advance “local parochialism” to preserve “community character.”⁷³ These types of regulations generally only impact the city that advances them.

Zoning is a unique area which has enjoyed a hall pass to roam freely without fear of recourse from the Dillon Rule. Unfortunately, water exactions have been lumped into the broad zoning category, and cities have taken full advantage. However, due to the statewide and federal nature of water, it should have been distinguished and not been given the same free pass. Although the Dillon Rule was widely followed through the middle of the twentieth century, it has been abandoned by many states.⁷⁴

Utah formally abandoned the rule in *State v. Hutchinson*.⁷⁵ The court in *Hutchinson* stated:

In sum, the Dillon Rule of strict construction is not to be used to restrict the power of a county [or city] under a grant by the Legislature of general welfare power or prevent counties [or cities] from using reasonable means to implement specific grants of authority. County [or city] ordinances are valid unless they conflict with superior law; do not rationally promote the public health, safety, morals and welfare; *or are preempted by state policy or otherwise attempt to regulate an area which by the nature of the subject matter itself requires uniform state regulation.*⁷⁶

⁶⁸ Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1067 (1980).

⁶⁹ Richard Briffault, *Our Localism: Part I – The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 18 (1990).

⁷⁰ *Id.* at 19.

⁷¹ *Id.* at 23.

⁷² *Id.* at 46.

⁷³ *Id.* at 58. Professor Briffault suggests that many zoning decisions made by local governments are to control the type of citizenry whom occupy the city. This is accomplished by imposing restrictions on homes, apartments, or rentals that are unlike and do not conform to an expensive, luxurious home occupied by “the affluent people who can afford to own them.”

⁷⁴ Briffault, *supra* note 69, at 8.

⁷⁵ See generally *State v. Hutchinson*, 624 P.2d 1116 (Utah 1980).

⁷⁶ *Hutchinson*, 624 P.2d at 1127 (emphasis added).

Although *Hutchinson* broadly expanded cities' authority to act by shifting the presumption, it also limited the scope of what matters were acceptable for cities to regulate. Additionally, *Hutchinson* was decided *after* the majority of the landmark land use decisions concerning city ordinances requiring exactions, dedications, or other impact fee-type requirements.⁷⁷ Before *Hutchinson*, the courts looked at the power question in great detail.⁷⁸ For instance, even before statehood the Utah Territorial court, as early as 1881, referred to the Dillon Rule.⁷⁹ Whether in the context of a Dillon-analysis or in another form, Utah courts have first looked to the power question when determining the validity of any exaction-type ordinance.⁸⁰ In significant land use cases, the power question was closely examined.⁸¹ For instance, in *Call I* nearly the entire discussion was focused on the power question.⁸² Justice Wilkins strongly dissented from the majority pointing out that the majority, for the first time, "impermissibly expand[ed] municipal power."⁸³

One can speculate that due to the proximity in time between the two cases, and the strong dissent provided by Justice Wilkins that *Hutchinson* was decided as a result of *Call I*.⁸⁴ However after *Hutchinson*, as evidenced by *Banberry* (the first major land use/municipal power decision post-*Hutchinson*) the inquiry into the power question was no longer so closely scrutinized.⁸⁵

⁷⁷ See generally *Hutchinson*, 624 P.2d at 1127; *Child v. City of Spanish Fork*, 538 P.2d 184, 187 (Utah 1975); *Call v. City of West Jordan*, 606 P.2d 217, 220 (Utah 1979).

⁷⁸ *Hutchinson*, 624 P.2d at 1120. The court discussed the application of the Dillon Rule and the evolution before *Hutchinson* was decided.

⁷⁹ *Levy v. Salt Lake City*, 3 Utah 63, 1 P. 160 *passim* (Utah Terr. 1881).

⁸⁰ *City of Springville v. Fullmer*, 27 P. 577, 577 (Utah 1891). The court looked to early territorial laws to determine that "[t]he city council shall have power and authority to make such ordinances, not repugnant to the constitution [sic] of the United States or the laws of this territory, as they may deem necessary for the peace, benefit, good order, regulation, convenience, and cleanliness of said city, for the protection of property therein from destruction by fire or otherwise, and for the health and happiness thereof." (quoting 1 Comp. Laws Utah 1888, §§ 1045, 1050).

⁸¹ See *Child*, 538 P.2d at 186. Here the court looked to the state legislative code to determine a positive source of power regarding the city's authority to require water. Specifically, the court looked at UTAH CODE ANN. § 10-7-4 (1953) when determining the validity of the city's actions.

⁸² See generally *Call*, 606 P.2d at 217.

⁸³ *Call*, 606 P.2d at 222 (Wilkins, J., dissenting).

⁸⁴ *Hutchinson* was decided 348 days after *Call I*. It is also worth noting that the *Hutchinson* court cited to *Call I* and specifically the arguments made by Justice Wilkins regarding the Dillon Rule before finally sweeping it aside. See *Hutchinson*, 624 P.2d at 1123.

⁸⁵ *Banberry Dev. Corp. v. South Jordan City*, 631 P.2d 899, 901 (Utah 1981). The *Banberry* court devoted approximately three paragraphs to the power question, and spent the remainder of the opinion expanding the "reasonableness" analysis as set forth in the *Call* line of cases. However, it is interesting to note that Justice Howe dissented and stated that he "concur[red] with the reasoning of Justice Wilkins in his dissenting opinion in

This note is not intended to assert that cities lack the power to enact ordinances requiring land dedication or land impact fees. Historically, courts have seemed more than willing to concede this type of power to municipalities due to the character of this form of regulation, that of local concern.⁸⁶ In fact, it has been suggested that the power to zone is a city's most important power.⁸⁷ Rather, the focus of this note is to suggest that matters of water regulation including city exaction requirements are not of local concern, but actually are matters of state and even national concern. Consequently, cities should be limited in their power to require such exactions. More succinctly stated, according to *Hutchinson*, water exactions should be treated differently because water matters, by their very nature, "require uniform state regulation."⁸⁸

B. Why Water is a Statewide Concern

As *Hutchinson* sets forth, when a matter is one of statewide concern, or has been preempted by state policy, cities are forbidden from regulating that matter. This section provides five factors why cities are not authorized to regulate this area.

1. Enactment of a Comprehensive Water Code

First is the enactment of a comprehensive statewide code. Until 1847, the only large scale irrigation that had been attempted was undertaken by Native Americans in the Southwest.⁸⁹ When the Mormons entered the Salt Lake Valley in Utah in the summer of 1847, they brought with them the vision of large scale irrigation.⁹⁰ An early Mormon leader, Orson Pratt stated, "[w]e appointed various committees to attend to different branches of business, preparatory to putting in crops, and [within] two hours [of] our arrival we began to plough. . . [and] built a dam to irrigate the soil which. . . was exceedingly dry."⁹¹ In only a span of ten years from 1850 to 1860, the total acreage being farmed grew by 60,886 acres.⁹² By the year 1902, roughly fifty-six years after the Mormons entered Utah, "they

Call." As the author pointed out earlier, Justice Wilkins dissented strongly in *Call* because of the lack of power and the Dillon-Rule. Consequently, it appears that the Court still was cognizant of this developing area of law, but unfortunately, the majority had slammed the door and were no longer willing to address this particular aspect.

⁸⁶ Matthew Dunne, *Let My People Go (Online): The Power of the FCC To Preempt State Laws That Prohibit Municipal Broadband*, 107 COLUM. L. REV. 1126, 1149 (2007).

⁸⁷ Briffault, *supra* note 69, at 3.

⁸⁸ *Hutchinson*, 624 P.2d at 1127.

⁸⁹ See John H. Davidson, Background, in 3 Waters and Water Rights 25-1 (Robert E. Beck ed., 1991 & Supp. 2003).

⁹⁰ See *id.*

⁹¹ See *id.* (quoting from G. Thomas, *The Development of Institutions Under Irrigation*, 18, The Macmillan company, 1920).

⁹² See Davidson, *supra* note 89 (citations omitted).

had made a Mesopotamia in America between the valleys of the Green River and the middle Snake. . . [and] had six million acres under full or partial irrigation.”⁹³

Most of the water in Utah is provided by irrigation organizations, with 77% of all freshwater withdrawal from rivers, streams, and lakes being used for agricultural irrigation.⁹⁴ Regionally, irrigation is a high consumption practice accounting for 90% of all western water consumption.⁹⁵ Utah has an irrigation withdrawal of approximately 80%.⁹⁶ Additionally, various estimates indicate that anywhere from 67.5% to 116.8% of irrigated acreage in Utah is provided by water institutions.⁹⁷ Estimates also vary regarding the amount of irrigation water being provided by mutual irrigation companies, with amounts ranging from up to 99.7% being provided by mutual irrigation companies, and only 7.1% coming from public water districts.⁹⁸ Obviously the percentages are somewhat misleading because the total amounts greater than 100%. However, regardless of the exact amounts, the percentages demonstrate the vast proportion of water being provided by water institutions, particularly mutual irrigation companies.

Due to the prevalence of mutual irrigation companies, state water law evolved from local practices.⁹⁹ However, states quickly assumed control of the local irrigation companies and districts by passing legislation that ensured they operated under the supervision of the state engineer.¹⁰⁰ Utah created the State Engineer’s Office in 1897, and enacted a complete “water code” in 1903, which was subsequently revised and reenacted in 1919.¹⁰¹

Professor Tarlock suggests that when a state enacts a comprehensive water management code administered by a state official such as the state engineer, this serves as “evidence of an express intent to displace local regulation.”¹⁰² Enactment of this comprehensive code demonstrates the legislature’s intent to regulate water on a statewide level. The *Hutchinson* court specifically warned that an ordinance is not valid when it has been “preempted by state policy.”¹⁰³

⁹³ REISNER, *supra* note 3, at 2.

⁹⁴ TARLOCK ET AL., *supra* note 2, at 14.

⁹⁵ *Id.*

⁹⁶ *Id.* at 24.

⁹⁷ Barton H. Thompson, Jr., *Institutional Perspectives on Water Policy and Markets*, 81 CAL. L. REV. 671, 687 (1993).

⁹⁸ *Id.* at 688.

⁹⁹ A. Dan Tarlock, *Contested Landscapes and Local Voice*, 3 WASH U. J.L. & POL’Y 513, 526 (2000) [hereinafter Tarlock].

¹⁰⁰ *Id.* at 527.

¹⁰¹ UTAH DIV. OF WATER RIGHTS, WATER RIGHT INFO. (2005), <http://www.water.rights.utah.gov/wrinfo/default.asp> (last visited Dec. 29, 2007).

¹⁰² Tarlock, *supra* note 99, at 526.

¹⁰³ *State v. Hutchinson*, 624 P.2d 1116, 1127 (Utah 1980) (emphasis added).

2. *Conflicts and Limitations within Other Sections of the Code*

The second factor prohibiting cities from regulating this area are the specific provisions within the Utah Code that place limitations on a city's authority to act in this setting. The Utah Municipal Code grants cities the general power to "acquire, purchase or lease" water.¹⁰⁴ This is the specific area of the code that the *Child* court looked at when determining whether Spanish Fork City had the authority to act.¹⁰⁵ The court viewed the statute as one of authorization rather than limitation or restriction when interpreting the meaning.¹⁰⁶ The court could see no reason why a municipality could not acquire water by other means such as by "gift, assignment, or even by prescriptive use or easement."¹⁰⁷

Child was decided in 1975, and the version of the Utah Code viewed by the *Child* court was the 1953 version.¹⁰⁸ The legislature amended this particular section in 2004.¹⁰⁹ The legislature did not add the language used by the court in *Child*, but instead, the revision contained language regarding condemnation proceedings being undertaken by municipalities.¹¹⁰ Had the legislature intended to give the cities the power to "exact" water rights, it would most certainly have included the proper language governing this area of jurisprudence, namely the language from the *Nollan-Dolan* cases, or at a minimum would have incorporated the language used by the Supreme Court in *Child*.¹¹¹

There is a special rule to apply when dealing with exactions.¹¹² The rule is formulated by combining portions of the *Nollan-Dolan* cases and states that in order for an exaction-type ordinance to withstand a constitutional challenge, there must be an "essential nexus" between the exaction and a legitimate state interest that it serves,¹¹³ and the exaction must be "roughly proportional" to the nature and extent of the project's impact.¹¹⁴ It is clear that had the legislature wanted cities to have the power to exact *water*, they would have included the *Nollan-Dolan* language in section 10-7-04, especially when the Utah Supreme Court looked to this specific section when it determined a city's authority to act when imposing water exaction requirements.¹¹⁵

¹⁰⁴ UTAH CODE ANN. § 10-7-4 (2004).

¹⁰⁵ *Child v. City of Spanish Fork*, 538 P.2d 184, 186 (Utah 1975).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* The Utah Supreme Court viewed UTAH CODE ANN. § 10-7-04 (1953).

¹⁰⁹ UTAH CODE ANN. § 10-7-4 (2004).

¹¹⁰ *Id.* (specifically, the revisions gave instruction on how to properly compensate under a condemnation proceeding, and what factors to consider).

¹¹¹ *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), *Child*, 538 P.2d 184.

¹¹² SPRANKLING, *supra* note 35, § 40.08.

¹¹³ *Nollan*, 483 U.S. at 836-37.

¹¹⁴ *Dolan*, 512 U.S. at 391.

¹¹⁵ *Child*, 538 P.2d at 186.

The Utah Legislature recently added a specific section within the Land Use Ordinance Section of the Municipal Code dealing with land exactions that incorporated the *Nollan-Dolan* language.¹¹⁶ If the legislature would have wanted municipalities to have the power to exact water, they could have easily added the *Nollan-Dolan* language in the section of the Utah code which historically has been examined by courts when dealing with water-type exactions. The failure to do so provides evidence of the legislature's intent to retain this power.

There are other portions of the code that place limitations on water-type exaction and regulation requirements. For instance, the code provides that, "[u]nless otherwise provided by law, nothing contained in this chapter may be construed as giving a municipality jurisdiction over property owned by the state or the United States."¹¹⁷ The waters in Utah have been declared as property of the state.¹¹⁸ Because water is considered the property of the state held in trust for the use of the public, municipalities do not have jurisdiction over it. Even when the form of ownership is in an irrigation company, the water is subject to reversion to the public when abandonment or forfeiture for nonuse occurs.¹¹⁹ The limitation on the ability to transfer and restrictions on the use of water provides evidence that water use matters have been subjected to much more stringent regulation and control than land use matters.¹²⁰

¹¹⁶ UTAH CODE ANN. § 10-9a-508 (2007).

¹¹⁷ UTAH CODE ANN. § 10-9a-305 (2005).

¹¹⁸ UTAH CODE ANN. § 73-1-1 (1953). ("All waters in this state, whether above or under the ground, are hereby declared to be the property of the public, subject to all existing rights to the use thereof.").

¹¹⁹ UTAH CODE ANN. § 73-1-4 (2007). ("(1) (a) In order to further the state policy of securing the maximum use and benefit of its scarce water resources, a person entitled to the use of water has a continuing obligation to place all of a water right to beneficial use. (b) The forfeiture of all or part of any right to use water for failure to place all or part of the water to beneficial use makes possible the allocation and use of water consistent with long established beneficial use concepts. . . (2) As used in this section, 'public water supply entity' means an entity that supplies water as a utility service or for irrigation purposes and is also: (a) a municipality, water conservancy district, metropolitan water district, irrigation district, or other public agency; (b) a water company regulated by the Public Service Commission; or (c) any other owner of a community water system. (3) (a) When an appropriator or the appropriator's successor in interest abandons or ceases to use all or a portion of a water right for a period of five years, the water right or the unused portion of that water right ceases and the water reverts to the public. . .").

¹²⁰ Leshy, *supra* note 1, at 1994. (Professor Leshy provides a great example demonstrating how water rights have been treated differently than land rights. He states, "[a] landowner's right to make new uses of land is generally presumed unless the government affirmatively restricts it. If land were comparable to water, this would be the result: Your property right in your land might be no more than a right to grow cotton or another crop; it would not include a right to switch to an industrial use of land without government permission. If you stopped growing cotton and didn't get government permission to use the land in some other endeavor, your property right could be extinguished, and no compensation would be owed you.").

Additionally, although the Utah Municipal Code provides that a municipality may set forth a comprehensive, long-range general plan providing for factors such as growth and development, “the efficient and economical use, conservation, and production of the supply of. . . food and water,”¹²¹ when the “plan of a municipality involves territory outside the boundaries of the municipality, the municipality *may not* take action affecting that territory without the concurrence of the county or other municipalities affected.”¹²²

This places cities that require water exactions in direct conflict with the Utah Code. If cities within the same geographical area or drainage basin do not at least work together when establishing their zoning ordinances which require water exactions, they will be in violation of Utah Code. A brief survey of several Utah cities showed that when these types of ordinances are enacted, neighboring city councils are not consulted.¹²³ The regional and statewide nature of water warrants such coordination, and the lack of coordinating such efforts provides evidence of why water should be regulated at the state level rather than at the local level. Furthermore, as noted the code itself does not provide cities with the authority to make decisions that affect other municipalities.¹²⁴

3. Characteristics of Water are Inherently Statewide and/or Federal in Nature

The third reason that water exactions should be viewed as a matter of statewide rather than local concern is that water has statewide or federal characteristics. The following hypothetical is illustrative. Assume several cities located within the same drainage basin are receiving the majority of their water from the same sources. Further, assume that each city has enacted its own version of a comprehensive land use plan and accompanying ordinances. Suppose that one of the cities, City A, requires developers to provide water exactions before granting approval of new subdivisions, but the other cities, Cities B and C do not require any water exactions but instead only impose impact fees.

To further complicate matters, suppose now that City A requires approximately double the amount of water that is used by other cities throughout Utah before approving developments. In order to satisfy City A’s requirement, it is not sufficient for the developer to turn in the water that is appurtenant to the land, but the developer must actually try and purchase water from landowners in neighboring cities. The problem is not immediately realized, but rather in the future when Cities B and C experience the same growth as City A and start imposing similar water exaction requirements. Now the landowners in Cities B

¹²¹ UTAH CODE ANN. § 10-9a-401 (2005).

¹²² UTAH CODE ANN. § 10-9a-403(1)(d) (2005) (emphasis added).

¹²³ Telephone Interview with Richard J. Heap, City Engineer/Public Works Director, Spanish Fork City (Oct. 5, 2007) [hereinafter Heap]; Telephone Interview with Dan Johnson, City Engineer, West Valley City, Utah (Oct. 9, 2007); Telephone Interview with Jon Wells, Planning and Zoning, Smithfield City, Utah (Oct. 8, 2007).

¹²⁴ UTAH CODE ANN. § 10-9a-403(1)(d) (2005).

and C who sold their water will face difficulties when they seek to develop their land.¹²⁵

Another problem that can arise is improper apportionment. For instance, suppose you have a City that will accept water that is used to irrigate lands located in an unincorporated part of a neighboring county. This means you have water being transferred from the unincorporated area into the city. When the unincorporated area decides to incorporate and landowners choose to develop their land, they will have no water available to do so due to the earlier transfers.¹²⁶ Consequently, there will be no water available to serve those residents.

The problem becomes more complex when you have a federal source such as the Central Utah Project ("CUP") that provides water to municipalities located within several counties.¹²⁷ The CUP was created as a way for Utah to use its allotted share of the Colorado River.¹²⁸ The CUP currently provides water to municipalities along the Wasatch front.¹²⁹ The CUP contracts with many agencies

¹²⁵ This hypothetical is not uncommon in Utah. Take for example the City of Smithfield, Utah, where the City actually requires one acre/foot of water for every building lot, whereas neighboring cities like Hyde Park or North Logan only require impact fees. Compare SMITHFIELD, UTAH, CODE § 16.16.050, available at <http://66.113.195.234/UT/Smithfield/index.htm> (requiring one acre-foot of usable water per dwelling unit or residential lot as a condition of approval for annexation), with CITY OF NORTH LOGAN, UTAH, CODE § 6-400, available at <http://www.ci.north-logan.ut.us/City%20Code/Title06%20-%20Finances%20and%20Taxation.pdf> (requiring only impact fees, but no water exaction requirement), with CITY OF HYDE PARK, UTAH SUBDIVISION ORDINANCE, APPENDIX B, available at <http://utahreach.org/library/news/P100-092507.pdf> (requiring only impact fees, but no water exaction requirement).

¹²⁶ This hypothetical is not uncommon either. For example, in the City of Spanish Fork ("SF City") there are four main classifications of irrigation company stock that SF City will recognize for development purposes. They include, East Bench Canal, Southfield Irrigation, Westfield Irrigation, and South East Irrigation. All four sources come from the Spanish Fork River system. A problem arises, however, because Southfield and Westfield Irrigation Companies service land that is *outside* SF City boundaries, and actually in unincorporated Utah County. So suppose Farmer A in unincorporated Utah County sells his water to Developer B for his subdivision in SF City. Farmer A will not immediately realize a problem until his land is either annexed into SF City, or becomes incorporated into a new city. The most likely result is that it will be annexed into SF City as part of a new development. However, either Farmer A or the developer seeking annexation of Farmer A's land will face major obstacles when trying to meet the city's exaction requirement. However, suppose incorporation takes place instead. The problems are still present. The new city will struggle to find the water to serve its residents because the source has been fully appropriated and transfers have previously been made to SF City.

¹²⁷ See generally U.S. Bureau of Reclamation, Central Utah Project Overview, <http://www.usbr.gov/dataweb/html/cupoverview.html#general> (last visited Jan. 18, 2008) [hereinafter Bureau].

¹²⁸ Bureau, *supra* note 127.

¹²⁹ *Id.*

to provide this service.¹³⁰ Generally, agencies like this were created under the impetus of state statutes and the national reclamation movement.¹³¹ The principle goals varied from the generation of electricity and providing municipal and industrial water, to as well as supplying water for irrigators.¹³² In Utah, Water Conservancy Districts were created as the local entities that would contract with federal projects.¹³³ The CUP is vast covering approximately ten counties in Utah.¹³⁴ The complex and immense nature of sources such as the CUP indicate that water is inherently a statewide concern rather than local.

This idea is not unique to Utah; other states have recognized that certain matters have statewide impact and should not be controlled at the local level.¹³⁵ Water allocation normally is exclusively a statewide function.¹³⁶ Chief Justice Cardozo set forth a useful test to determine whether a regulatory matter was statewide or local in nature.¹³⁷ Judge Cardozo set out three main categories: “(1) matters of state concern; (2) matters of local concern; and (3) matters that fall into the area where state and local concerns overlap.”¹³⁸ Regarding the third category, Judge Cardozo instructed that a matter is a state concern when there is a “substantial” state interest in the matter.¹³⁹ It could easily be argued that there is a substantial state interest in the protection and preservation of Utah’s scarce water resources. Water clearly is state-wide in nature.

4. Inadequate Long-Term Planning

The fourth reason water should be treated as a statewide concern is that some municipalities and improvement districts are not taking adequate steps to protect the State’s precious water sources for future use by her residents. This note is not intended to claim that cities are doing nothing to protect the resources, just that more could certainly be done. Additionally, the author must admit that a

¹³⁰ *Id.* Agencies include, Central Utah Water Conservancy District, Salt Lake County Water Conservancy District, Uintah Water Conservancy District, and Jordan Valley Water Conservancy District.

¹³¹ TARLOCK ET AL., *supra* note 2, at 713.

¹³² *Id.*

¹³³ Central Utah Water Conservancy District, <http://www.cuwcd.com/> (last visited Jan. 3, 2008).

¹³⁴ *Id.*

¹³⁵ John R. Nolan, *The Erosion of Home Rule Through the Emergence of State-Interests in Land Use Control*, 10 PACE ENVTL. L. REV. 497, 502 (1993). The article notes that there were at least nine states that have adopted a state-wide management plan, which directs local governments in their planning decisions. In addition to the direction, it helps coordinate public expenditures and requires consistency among local and regional plans.

¹³⁶ Tarlock, *supra* note 99.

¹³⁷ John R. Nolan, *The Erosion of Home Rule Through the Emergence of State-Interests in Land Use Control*, 10 PACE ENVTL. L. REV. 497, 513 (1993) (citing Adler v. Deegan, 251 N.Y. 467 (1929) (Cardozo, C.J., concurring)).

¹³⁸ *Id.*

¹³⁹ *Id.*

comprehensive study was not undertaken of all cities, conservancy districts and other participators throughout the state when formulating this view.¹⁴⁰ Finally, due to the range of conservation methods and the difficulty of addressing each of them, this note will only address one method, recharge, and use it as an illustrative example.

In Utah, the legislature passed the Groundwater Management Plan, which ensures that users do not withdraw groundwater water in excess of “safe yields.”¹⁴¹ A safe yield is defined as “the amount of groundwater that can be withdrawn from a groundwater basin over a period of time without exceeding the long-term recharge of the basin or unreasonably affecting the basin’s physical and chemical integrity.”¹⁴² Additionally, the legislature enacted the Groundwater Recharge and Recovery Act (“GRRRA”) to provide a mechanism for “artificially recharging”¹⁴³ sensitive areas.¹⁴⁴

Cities vary in their level of understanding and implementation of “recharge” as an important tool of conservation. Some cities have considered utilizing recharge methods, but ultimately have decided against doing so due to cost-benefit determinants.¹⁴⁵ However, other cities feel that recharge efforts are currently unnecessary. Some participants seemed to misunderstand the purpose of recharge altogether and felt that, “their wells are immune from going dry” because their depth is in excess of 1,000 feet.¹⁴⁶ Although there are some participants who may

¹⁴⁰ The view of inadequate planning was formulated from brief conversations which were held with approximately five city authorities ranging in position from planner, engineer, or mayor; two improvement district authorities; and two water conservancy districts authorities.

¹⁴¹ See generally UTAH CODE ANN. § 73-5-15 (2007).

¹⁴² UTAH CODE ANN. § 73-5-15(1)(b) (2007).

¹⁴³ UTAH CODE ANN. § 73-3b-102(1) (1991) “As used in this chapter: (1) ‘Artificially recharge’ means to place water underground by means of injection, surface infiltration, or other method for the purposes of storing and recovering the water.”

¹⁴⁴ UTAH CODE ANN. §§ 73-3b-101-402 (1991).

¹⁴⁵ Heap, *supra* note 123. Mr. Heap stated that Spanish Fork City has recognized that although the current water system with regards to their culinary water will sustain future growth, the secondary system has some foreseeable problems. To combat the problems, the city had considered groundwater recharge methods, but ultimately chose not to implement a recharge system due to the burden of meeting the requirements of the Groundwater Recharge and Recovery Act.

¹⁴⁶ Telephone Interviews with Jon Wells, Planning and Zoning, & Jim Glass, Manager/City Engineer, Smithfield City, Utah (Oct. 8, 2007). Smithfield uses culinary wells as a source of water which supplement springs which are used from April to mid-October. The springs must be supplemented because of the seasonal agricultural use during this period, and because the Smithfield Irrigation Company’s rights are senior to those of Smithfield City. To remedy this problem, Smithfield City and Smithfield Irrigation Company entered into an agreement many years ago, that allowed the City to trade shares of Logan Hyde-Park Smithfield Canal Company to Smithfield Irrigation Company, in exchange for continued use of the springs during the summer irrigating months. The Logan Hyde-Park Smithfield Canal Company shares are then turned into

not completely understand the importance of this tool, there are others who do and who use it in their arsenal to implement conservation efforts.¹⁴⁷

Participants should not be faulted for not applying recharge efforts due to the heavy burdens imposed by the state, regardless of the level of understanding. For instance the GRRR requires that a “recharge permit”¹⁴⁸ be obtained before any recharge efforts are undertaken.¹⁴⁹ Other requirements include, “the applicant ha[ving] the technical and financial capability to construct and operate the project” and the project must be “hydrologically feasible, not cause unreasonable harm to the land, not impair any existing water right within the area of hydrologic impact, and [] not adversely affect the water quality of the aquifer.”¹⁵⁰ Lastly, once the aquifer has been “artificially recharged,” the user cannot withdraw the water without a “recovery permit.”¹⁵¹

The author is careful to point out that this discussion of the note was not intended to point fingers or be critical, but rather to show that even when cities are cognizant of conservation methods, they are not always used. Furthermore, the difficulty imposed by the GRRR shows that cities have not been properly equipped with the necessary tools to deal effectively with the growth and provides yet another reason for statewide regulation of this precious resource.

5. Non-Specific Exaction Requirements

The fifth and final reason providing evidence that cities lack the power to regulate this area is that existing exaction requirements are non-specific and too generalized in nature. Another hypothetical is illustrative. Suppose for new developments, City A requires one acre/ft of water per residential lot, and City B

Summit Creek, which has allowed continued summer use of the springs for Smithfield City for culinary use, as well as use, by the Smithfield Irrigation Company for summer irrigation purposes. This arrangement is not necessary, nor is the withdrawal of the groundwater wells, during the winter months, because Smithfield Irrigation Company’s use of the springs is only seasonal, whereas the city’s use is year-round. Because of this arrangement Smithfield feels comfortable with its ability to deliver water to its residents. Additionally, the city has been banking shares and water rights in order to develop a new well for future use. (On file with author).

¹⁴⁷ Telephone Interview with Alan Packard, Assistant General Manager/Chief Engineer, Jordan Valley Water Conservancy District, Utah (Oct. 10, 2007). The Jordan Valley Water Conservancy District monitors the groundwater sources and is cautious to only withdraw water at a rate that is within the natural recharge of the aquifers. Additionally, the Groundwater Management Plan is consulted to ensure this natural process is adhered to by not withdrawing water in excess of the safe yields.

¹⁴⁸ UTAH CODE ANN. § 73-3b-102(3) (1991) “Recharge permit means a permit issued by the state engineer to inject water into an underground aquifer for the purpose of storing the water.”

¹⁴⁹ UTAH CODE ANN. §§ 73-3b-103-402 (1991).

¹⁵⁰ UTAH CODE ANN. § 73-3b-202 (1991).

¹⁵¹ UTAH CODE ANN. §§ 73-3b-102-103 (1991).

also requires a one acre/ft dedication.¹⁵² Suppose further that City A allows residential lots ranging from 10,000 sq. ft. to 20,000 sq. ft., but City B only allows lots that are greater than 32,670 sq. ft.¹⁵³ At first glance, this might seem acceptable posing no significant problems.

However, upon closer look at just one factor such as lawn irrigation, the drastic difference between the cities' ordinances becomes apparent. Consider the general presumption that "1 inch of water applied over a 1,000 square foot area equals 624 gallons," and that the average lawn requires between one to two inches of water per week.¹⁵⁴ This means a developer subdividing a ten acre parcel in City A, pursuant to the minimum densities allowed would have forty-three lots.¹⁵⁵ Each lot would require approximately 3,120 gallons of water per week.¹⁵⁶ The entire development would consume approximately 134,160 gallons of water per week.¹⁵⁷

In comparison, suppose that a developer in City B also develops a ten acre parcel. Under City B's ordinances, her parcel would yield a thirteen lot development.¹⁵⁸ Each lot in this development would consume approximately

¹⁵² Compare SMITHFIELD, UTAH, CODE § 16.16.050, available at <http://66.113.195.234/UT/Smithfield/index.htm> (requiring "one acre-foot of usable water per dwelling unit or residential lot" as a condition of approval), with HUNTSVILLE, UTAH, CODE § 15.27.3(C), available at <http://huntsvilletown.com/documents/Huntsville%20Title%2015.pdf> (stating "the general guideline of one (1) acre foot of water per residential building permit will be a minimum standard" for new developments).

¹⁵³ Compare SMITHFIELD, UTAH, CODE § 17.56.030, available at <http://66.113.195.234/UT/Smithfield/index.htm> (setting forth three acceptable zones, R-1-10 or 10,000 sq. ft.; R-1-12, or 12,000 sq. ft.; and R-1-20, or 20,000 sq. ft.), with HUNTSVILLE, UTAH, CODE § 15.2.1, 15.6.3, available at <http://huntsvilletown.com/documents/Huntsville%20Title%2015.pdf> (establishing R-1 as the only available residential zone, and defining R-1 as having a "minimum lot area [] not less than thirty-two thousand six hundred and seventy [] square feet").

¹⁵⁴ AMY VICKERS, HANDBOOK OF WATER USE AND CONSERVATION, 154 (Waterplow Press 2001).

¹⁵⁵ <http://en.wikipedia.org/wiki/Acre> (last visited Jan. 12, 2008) (defining an acre as 43,560 sq. feet). So that would mean the development would have a total area of 435,600 sq. ft. divided by 10,000 sq. ft. lots for a total of forty-three lots.

¹⁵⁶ See *supra* note 148. This is calculated taking 5,000 sq. ft. as the irrigable area, (which was roughly approximated using the Author's general knowledge that on average, 50% of a lot is typically irrigated or at least open, due to the other 50% being attributed to footprint of the house, the driveway, sidewalks, planters and other similar things) divided by 1,000 sq. ft. to determine how many "inches" would be necessary to irrigate a 5,000 sq. ft. lawn as provided above, then finally multiplying 5 by 680 to get 3,120.

¹⁵⁷ This was calculated taking the approximation of 3,120 gallons per lot multiplied by forty-three lots. It is worth noting that some cities are aware that larger lots consumer more water, and require dedications of water to compensate for the higher consumption.

¹⁵⁸ See *supra* note 149. Taking ten acres multiplied by 43,560, which equals 435,600, and then dividing that by the applicable zoning of City B which was minimum lot sizes of 32,670 to get thirteen lots.

10,880 gallons of water per week.¹⁵⁹ The consumption would be approximately 141,440 gallons of water per week for the entire development.¹⁶⁰

So the development in City A is consuming approximately 134,160 gallons per week and the development in City B is consuming approximately 141,440 per week. This seems pretty insignificant until you remember that City A received forty-three shares¹⁶¹ of water, whereas City B only received thirteen shares.¹⁶² From a water consumption standpoint, it appears that City A is in a much better position to provide the water to her residents. From a monetary standpoint, it appears that the developer in City B got a huge discount. Assuming water shares were \$1,500 in both cities, one developer surrendered approximately \$19,500, whereas the other developer surrendered approximately \$64,500, a difference of \$45,000!¹⁶³

The preceding hypothetical was given to illustrate the non-specific water policies which are present throughout Utah. The hypothetical was not meant to be an exact representation of what actual consumption is or would be in Utah. Even though Utahns consume nearly 350% more water than the average American,¹⁶⁴ the typical suburban lawn in American only consumes approximately 10,000 gallons per year.¹⁶⁵ Rather, the example was presented to demonstrate why this issue should be regulated at the state level, rather than local.

Additionally, there are numerous other factors to consider when calculating actual consumption such as the income of the user, climate, temperature,

¹⁵⁹ This was calculated taking the presumption noted above that 50% of a total lot generally will be irrigated. Consequently, of a 32,670 sq. ft. lot, approximately 16,335 sq. ft. will be irrigated. This means there will be 16 units of 1,000, or 16 inches of rain per week to cover the entire lawn.

¹⁶⁰ Calculated by multiplying 10,880 by 13 lots.

¹⁶¹ Please assume that each share represents one acre/ft of water. Generally speaking, the actual amount of water that is conveyed with a share of water will vary among irrigation companies. This variation depends on many factors including the duty assigned to the area the shares service, the priority of the shares, the reliability of the source and many other factors. However for simplicity, assume that any share discussed throughout this note represents one acre/ft of water.

¹⁶² See *supra* note 153 and accompanying text.

¹⁶³ Calculated by multiplying the assumed market share amount of \$1,500 per share by the number of shares required for each development—thirteen in City B, and forty-three in City A.

¹⁶⁴ See *supra* notes 9-10.

¹⁶⁵ VICKERS, *supra* note 155, at 140.

precipitation, evapotranspiration rates,¹⁶⁶ the landscaping method used¹⁶⁷ such as Xeriscape,¹⁶⁸ soil, length of the irrigation season, and other factors.¹⁶⁹

Because cities generally do not contemplate all of these factors when establishing their water policies, they should not be allowed to regulate this area. Another factor to consider is voluntary conservation. In Las Vegas, a program called Water Smart Landscapes offers \$1 per square foot to homeowners willing to convert traditional lawns to drought-tolerant landscapes using Xeriscape techniques.¹⁷⁰ In 2005, the Las Vegas program had converted 50 million sq. ft. of landscape.¹⁷¹ Although the program had reduced water demand by 2.8 billion gallons a year, it came with a \$40.7 million price tag.¹⁷² Cities in Utah neither have the incentive nor the funding to encourage such conservation efforts, whereas the State has both. This is yet another reason why the State should take-back control of this critical issue.

C. Solutions

1. Challenge under *Hutchinson*

For a successful challenge to be brought under *Hutchinson* the challenger should make every effort to separate and distinguish land-type exactions and water-exactions, as courts have readily conceded the power regarding land-type exactions.¹⁷³ By focusing on the statewide character of water decisions and the local character of land use decisions, a challenger might persuade the court to treat them separately.¹⁷⁴

If successful in convincing the court that the two types of exactions *should* be treated differently, a challenger should next focus on the presumption set forth in *Hutchinson*. The presumption is that city ordinances are valid unless preempted

¹⁶⁶ See generally Charles F. Phillips, Jr., *The Regulation of Public Utilities*, Reg. Pub. Util. Ch. 16 (1988).

¹⁶⁷ See generally John J. Entsminger & Michael J. Brennan, *The Challenges of Water for the Future of the West: Where Will We Get the Water?*, 51 RMMLF-INST 25 (2005).

¹⁶⁸ VICKERS, *supra* note 154, at 146. Vickers states “Xeriscape™, a trademarked term pronounced ‘zera-scape,’ is derived from the Greek words ‘xeros’ (dry) and ‘scape’ from landscape.” Vickers points out that there are seven principles incorporated into the Xeriscape concept to promote conservation and protection of the environment: 1) proper planning and design, 2) soil analysis, 3) appropriate plant selection, 4) practical turf areas, 5) efficient irrigation, 6) use of mulches, and 7) appropriate maintenance.

¹⁶⁹ *Id.* at 154.

¹⁷⁰ John J. Entsminger & Michael J. Brennan, *The Challenges of Water for the Future of the West: Where Will We Get the Water?*, 51 RMMLF-INST 25, § 25.02[6][a] (2005).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ See *supra* notes 70 & 71.

¹⁷⁴ A challenger could use the five characteristics listed above to persuade the court.

by or conflict with state law, do not promote health and safety concerns, or attempt to regulate a subject matter which by its very nature requires a uniform state regulation.¹⁷⁵

By doing this, the challenger will have shifted the court's focus to the critical power question.¹⁷⁶ It is unsure whether the court would then determine that because the municipality was trying to regulate a statewide matter that the ordinance was facially deficient, or whether the court would apply some sort of quasi-Dillon analysis.¹⁷⁷ If the court applied a Dillon-type analysis, the next step would be to determine whether power had been expressly granted.¹⁷⁸ The court would then closely examine the code to determine if such express authority exists.¹⁷⁹

Once here, the main hurdle faced by the challenger would be to argue that the recently added exaction section was only meant to apply to land-type exactions.¹⁸⁰ In doing this, it would be helpful to provide a history of the exaction cases and draw a meaningful distinction between the court's analysis of those cases paying special attention to the specific portions of the code that prior courts examined when determining constitutionality and power questions.¹⁸¹ Drawing this distinction is important because the next step would be to discuss the recent changes in the code including the addition of the exaction section and its specific placement in the land use section of the code which has been historically been used when viewing land-type dedications rather than water dedications.¹⁸² Additionally, the failure to add correlating provisions in the water portion of the code, and the importance of such "special language" should be addressed.¹⁸³

Finally, the challenger should discuss any other ambiguities within the code and argue that the legislature never intended for municipalities to have the power over this specific area.¹⁸⁴

¹⁷⁵ See *supra* note 76.

¹⁷⁶ See *supra* notes 75-8570 and accompanying text.

¹⁷⁷ See *generally* State v. Hutchinson, 624 P.2d 1116 (Utah 1980). The court did not reach this in their decision, but rather ended the analysis after providing an alternative to Dillon.

¹⁷⁸ See *supra* notes 65 & 66.

¹⁷⁹ *Id.*

¹⁸⁰ UTAH CODE ANN. § 10-9a-508 (2007).

¹⁸¹ Child v. City of Spanish Fork, 538 P.2d 184 (1975), Call v. City of West Jordan, 606 P.2d 217, 220 (Utah 1979). Noting specifically that the *Call* court took a "health, safety, welfare" approach and looked to UTAH CODE ANN. § 10-9-1 (1953), whereas the *Child* court looked at UTAH CODE ANN. § 10-7-4 (1953) in making their inquiry.

¹⁸² See *supra* notes 104-111 and accompanying text.

¹⁸³ See *supra* notes 112.

¹⁸⁴ See *supra* notes 88, 100-103, 108-111, 115-124.

2. *Development Template*

Most of the discussion has been devoted to the discussion of why cities lack the power to regulate matters of statewide concern. This section will briefly address possible solutions to the problem by setting forth a new concept developed by the author called a development template. In addition to expressly revoking cities' authority to regulate water, a section would be added incorporating the development template into the Utah Municipal Code. The code would mandate that cities implement and utilize the template as part of their development process, and would give cities the express authority to exact water, according to the established template. The main purpose of the development template is to help cities specifically tailor any water requirements being imposed on new developments. The template will ensure the most reasonable and realistic growth for Utah and her residents. Additionally, developers will be able to look to the template when planning and proposing subdivisions, and will benefit, up front, from knowing the specific requirements that will be imposed on their development. The template will ensure that water is used by all players in the most responsible and reasonable way.

As noted earlier, there are many factors that determine consumption amounts for a particular development.¹⁸⁵ To ensure that each development accounts for these particular considerations, the state should provide a matrix (development template) which has identified several of the most important consumption factors, and the specific water requirements that should be imposed for those factors. Once the consumption amounts were determined, a city could input the proposed development into the template and use a formula to calculate a more precise amount of water.

For example, suppose a development in City A has 10,000 sq. ft. lots, has sandy soil, has an average summer temperature of ninety degrees, and the developer has imposed a fifty percent Xeriscape requirement. You would take those factors, and input them into a formula to compute the specific amount that development would consume. Alternatively, suppose another development in City B has 43,560 sq. ft. lots, has clay soil, has the same average temperature, but has no Xeriscape requirement. The second development would obviously consume different amounts of water than the first, but if City B plugged it into the development template, the specific consumption would be identified and properly required of the development.

D. Problems with Implementation or Challenge under Hutchinson

Several problems exist with regard to the implementation of either a development template or an attempt to successfully challenge under *Hutchinson*. This section will briefly address those difficulties.

¹⁸⁵ See *supra* notes 167-170 and accompanying text.

In order for the development template to be successful if implemented, consumption trends and characteristics would have to be identified. The initial cost of performing the research and gathering the data would be the largest cost. However, once the data has been gathered, and the template created, the cost thereafter would be relatively low.

The State Engineer's office indicated that if something like this were passed, the burden of implementation and cost therein would most likely become their responsibility.¹⁸⁶ Due to expanding responsibilities and already limited resources, the State Engineer's office feels that this additional burden would be difficult to manage.¹⁸⁷ One way to implement the template successfully would be to spread the cost to many users.¹⁸⁸ If the legislature decided to incorporate the template into the planning process, it could impose a development fee on each new home buyer.¹⁸⁹ That fee would then go into a state-fund that was dedicated to maintaining and updating the template.¹⁹⁰

The legislature must recognize the importance of and need for this template or a similar solution and should provide adequate funding to whatever department is chosen to implement the desired solution. The importance of taking control of the water in Utah cannot be overstated, and regardless of the cost, the legislature must step to the plate and make it happen.

In addition to the cost, another obstacle which may prevent any significant changes is that annexation is generally at the city's discretion.¹⁹¹ Cities cannot be forced into providing services through the annexation process.¹⁹² Consequently, a city may make the decision that if it cannot require water exactions, it simply will not annex new developments. This obviously would be more troublesome to developers than the current system which requires developers to provide water to cities as a condition to annexation. Similarly, cities may get around the exaction dilemma through the use of annexation or development agreements.¹⁹³ When a city chooses to use an agreement such as this, it may impose aggressive exaction requirements without worrying about takings claims by developers.¹⁹⁴ The reason for this is because these types of agreements are viewed by courts through the lens

¹⁸⁶ Interview with Boyd Clayton, Assistant State Eng'r., Utah Div. of Water Rights, in Salt Lake City, Utah (Sept. 4, 2007).

¹⁸⁷ *Id.*

¹⁸⁸ Telephone Interview with Bob Fotheringham, N. Region Eng'r., Utah Div. of Water Rights (Approximately Aug. 16, 2007). (Mr. Fotheringham suggested that as an alternative to having the Division of Water pay for it that developers or end users could pay for implementation.)

¹⁸⁹ *Id.* (This was suggested as a possible method of implementation by Mr. Fotheringham.)

¹⁹⁰ *Id.*

¹⁹¹ Starritt & Mcclanahan, *supra* note 61, at 456.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

of contract law rather than constitutional law.¹⁹⁵ So for instance, even if the exaction power was strictly enforced through a development template, a city could simply require developers to enter into private development agreements and thus circumvent the proposed changes.

A recently proposed Senate Bill which, if passed, will restrict cities and counties from conditioning annexation upon water rights.¹⁹⁶ Likely the Bill will be received with great resistance by Utah cities. These cities likely will require private development agreements for all developments in order to circumvent the new Legislation. If the Bill does pass, developers might long for the old system due to the increased use and aggressive imposition of private development agreements by Utah Cities.

Finally, there is concern that aggressive water policy changes may impede new housing growth in Utah. Studies have shown that depending on the specific water policy being implemented, a local government may experience growth impediments, or higher property values.¹⁹⁷ Although the higher property values would benefit existing homeowners, they would be an impediment to individuals looking to purchase a home. Regarding the growth impediments, many of them occur in rural areas because not many water supply alternatives exist.¹⁹⁸ This suggests that some growth impediments are unique to rural areas. Additionally, it has been shown that certain policies, such as the aggressive use of impact fees, do not significantly deter housing growth.¹⁹⁹

Regardless of whether a change in Utah water policy slows housing growth or not, when viewed through a long-term lens, growth speed really seems insignificant; if Utah runs out of water due to poor planning, housing growth will not only slow down, but will cease.

IV. CONCLUSION

The *Hutchinson* court broadly expanded cities authority to act.²⁰⁰ *Hutchinson* was a welcome change to Utah cities, because it rejected the *Dillon* rule which had required that before cities could act, they must have been given the express authority to do so by the Utah Legislature.²⁰¹ Although *Hutchinson* expanded cities authority, it also clearly announced when a matter is statewide in nature or has been preempted by state policy, cities are forbidden from regulating the matter.²⁰² Any ordinance attempting to do so, will be invalid.²⁰³ This note has

¹⁹⁵ *Id.*

¹⁹⁶ S.B. 279, 2008 Gen. Sess. (Utah 2008).

¹⁹⁷ Ellen Hanak & Ada Chen, *Wet Growth: Effects of Water Policies on Land Use in the American West*, 47 J. REGIONAL SCI. 104 (2007).

¹⁹⁸ *Id.* at 106.

¹⁹⁹ *Id.*

²⁰⁰ See generally *State v. Hutchinson*, 624 P.2d 1116 (Utah 1980)

²⁰¹ See *supra* notes 65-68, 75-76 and accompanying text.

²⁰² See *supra* note 76.

²⁰³ *Id.*

shown ample evidence demonstrating why water matters are both statewide in nature and how such matters have been preempted by state policy.²⁰⁴

Although the *Hutchinson* court did not suggest or give guidance of how an exaction challenge would be treated, it seems logical that a Dillon-type analysis would be taken. The court would first look to see whether a city had received express authority from the legislature. This note has shown that the Utah legislature has never expressly given cities the authority to exact water, and arguments can be made that they have never impliedly granted authority either.

The first step in protecting Utah water is for the legislature to expressly disallow cities to exact water, and implement a statewide process of regulation. If the Utah legislature does not step up to the plate and take back the regulation of all aspects of water use, this valuable resource will not be available to sustain Utah's projected growth. Utah is expected to add more than one million residents by the year 2020.²⁰⁵ In addition to Utah, other states are also experiencing dramatic growth and are competing for Utah water.²⁰⁶ The Bureau of Reclamation announced long ago that the era of government subsidized big water and power projects is officially over, and that the new focus is that of conservation.²⁰⁷ The legislature must take action now and implement a statewide system of controls, or live with the consequences. After all, water *is* worth fighting for.²⁰⁸

²⁰⁴ See *supra* notes 89-180 and accompanying text.

²⁰⁵ See Envision Utah, <http://www.envisionutah.org/> (last visited Jan. 12, 2008).

²⁰⁶ ABC 4 Investigation: A new battle over Utah's water, http://www.abc4.com/most-popular/story.aspx?content_id=d9d74f01-d45d-4174-95b6-078f3ecd18aa (last visited February 1, 2008).

²⁰⁷ Philip Shabecoff, *U.S. Bureau for Water Projects Shifts Focus to Conservation*, N.Y. TIMES, Oct. 2, 1987, available at <http://query.nytimes.com/gst/fullpage.html?res=9B0DE0D8113DF931A35753C1A961948260&sec=&spon=&pagewanted=1>.

²⁰⁸ See *supra* note 1 (emphasis added).