



# Adjudication Update

*What you need to know... and some other stuff you can probably forget.*

***Utah Water Users Workshop***

*March 20<sup>th</sup>, 2018*

**Blake W. Bingham, P.E.**

**Assistant State Engineer - Adjudication**

**Utah Division of Water Rights**

**[www.waterrights.utah.gov](http://www.waterrights.utah.gov)**

# *Agenda*

- *Historical Context of Utah Water Law*
- *What is a Water Rights Adjudication?*
- *Why do we conduct Water Right Adjudications?*
- *The Utah Lake and Jordan River Adjudication*
- *Adjudications in Salt Lake County*
- *Where are we going?*
- *Questions*



# **Historical Context – The Pioneer Era**

**July 23, 1847:** Advance party of the **Mormon pioneers** entered the Salt Lake Valley and began breaking-up the ground to prepare the land for crops. **Water from City Creek Canyon** was diverted to moisten the soil for plowing and later used for irrigation.

**September 30, 1848:** **Brigham Young** declares, “There shall be **no private ownership** of the streams that come out of the canyons... **These belong to the people:** all the people.”

**1847 – 1850:** The pioneer settlement went from being part of **Mexico** to the **State of Deseret** to the **Territory of Utah**; however, government remained Church-centric.

- *Diversions of water from streams were generally on a **community basis** to meet the immediate needs of the settlers.*
- *The **doctrine of priority** evolved from Church leaders' recognition of groups who first put the water to beneficial use as well as later beneficiaries (primary and secondary rights).*
- ***Conflicts were settled through ecclesiastical channels;** Bishop's Courts for local wards provided a judicial process with Stake High Councils serving as appellate courts.*



# **Historical Context - Territorial Era**

**1852:** The first Territorial Legislative Assembly passed an act authorizing the **County Court** control of "all timber, water privileges, or any water course or creek." **Salt Lake County** was the only one to assume these duties... other counties streams were diverted without public restriction.

**1877:** The **Desert Land Act** was passed to promote homesteading of arid and semiarid public land. The Act also **severed the title** of the water from the public land and **delegated authority** to the respective **state or territory** with regard to how water was appropriated.

**1880:** Due to **failure to enforce** the 1852 act, the legislature passed an act that replaced the County Court's authority with **County Selectmen** as the ex-officio water commissioners. Allowed recognition, determination, and recording... but not appropriation. Once again, this was **only enforced in Salt Lake County** and the certificates were generally considered worthless.

- **Confusion** over existing water rights continued in spite of the efforts of the Utah Territorial Legislature.
- The **Church continued to administer and decree water rights** in some areas (e.g. 1879 High Council Decision to divide the waters of the Spanish Fork River among various canal companies).



# ***Historical Context - Statehood and Beyond***

**1896:** Utah gains Statehood. Due to **fears of possible confiscation** of existing water rights by the State under a comprehensive water code, the adopted constitution only had **one sentence** regarding water law:

*"All existing rights to the use of any of the waters in this State for any useful or beneficial purpose, are hereby recognized and confirmed."*

- *Constitution of the State of Utah, Article XVII*

**1897:** **Office of the State Engineer** created and tasked with conducting **hydrographic surveys** and measuring stream sources. **Appropriations** were made by posting notice at the **source**, the nearest **post office**, and the **county recorder**... largely ignored.



**Willard Young**  
State Engineer

**1902:** **United States Reclamation Service** (i.e. The Bureau of Reclamation) established to "reclaim" arid lands in the Western United States. To secure Federal funding for **Reclamation projects**, **states were encouraged to adopt statutes** which provided certainty regarding existing water rights and future appropriations.

**1903:** State legislature enacted the first comprehensive **water law** which provided for appropriating surface rights, **recording of all existing water rights**, and the **adjudicating of rights** by the Court. However, the **Legislature failed to provide funding** to the local Courts.

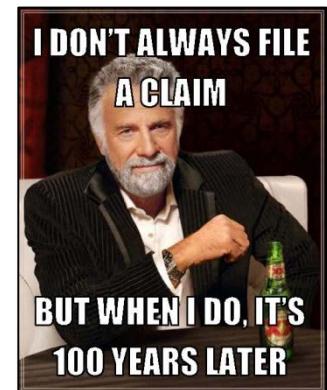
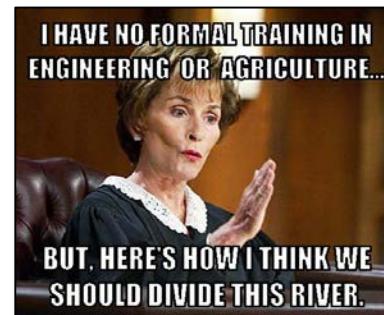
**1919:** The legislature provided the "machinery" to adjudicate water rights on a given stream by directing the **State Engineer** to develop a "**proposed determination**" of water rights for the Court to consider.



**1935:** The legislature required all **groundwater** to be appropriated through the State Engineer's office similar to surface water.

# *The Historical Case for Adjudication*

- Prior to the enactment of the comprehensive Utah Water Law in 1903, rights to the use of water typically fell into a combination of five categories:
  - Rights decreed by **ecclesiastical leaders**.
  - Claims **filed for record** at the county.
  - Rights **decreed by a court** (typically involving limited parties).
  - Contracts or **agreements** among limited parties.
  - Claims **never manifested in any record**, but evidenced by pre-statutory use.



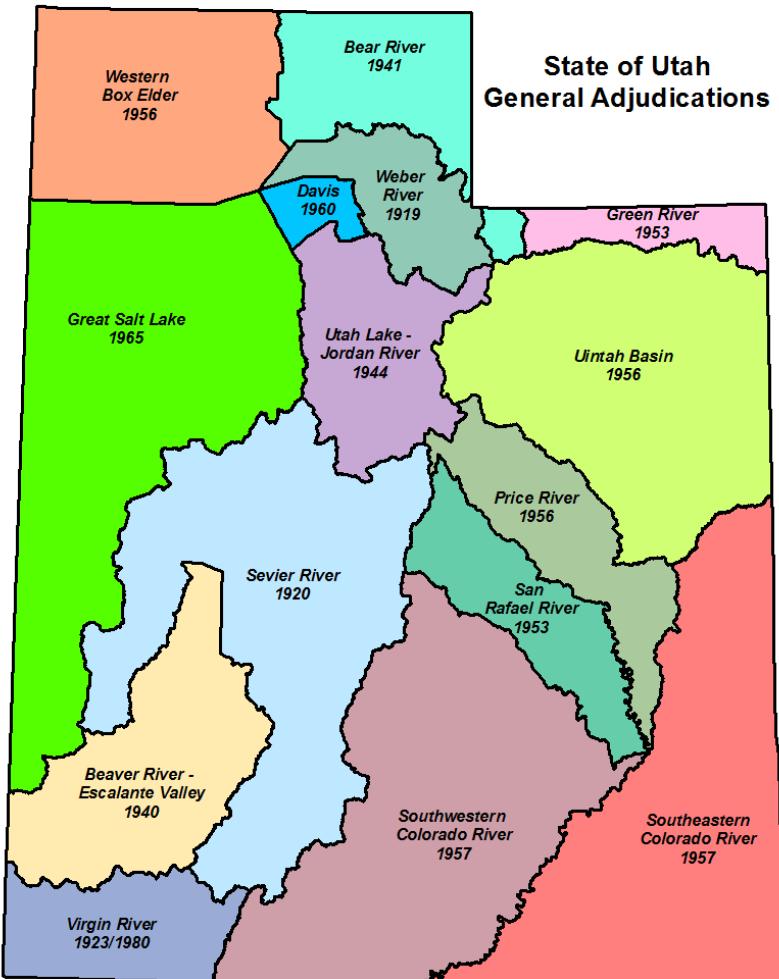
- Consequently, the lack of a definitive water law created a number of issues:
  - There was typically **no public record** of existing water rights.
  - Since there was no record, **over appropriation** of streams was common.
  - Often, rights **weren't defined** until they came into **controversy** and had to be settled by ecclesiastical or court decree.
- In his biennial report for 1901-02, the State Engineer made the following observation:

*"The definition of existing rights appears to be of **first importance**. This is not only necessary to **pacify present contention**, but to **prevent future conflicts and encourage further progress**. There can be no safe basis for future work before existing rights are known and made of public record."*

– A.F. Doremus, Utah State Engineer



# ***What is a General Stream Adjudication?***



## **What it IS...**

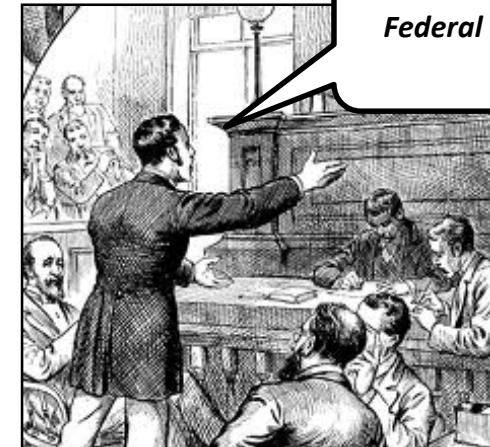
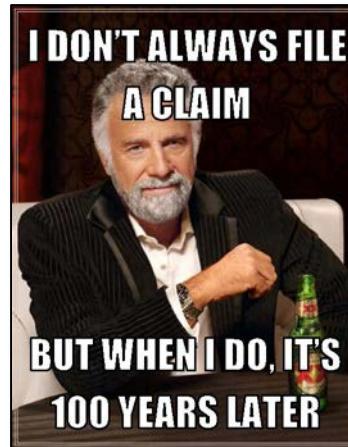
- *Action in State District Court*
- *Binds water users and the State Engineer (Division of Water Rights)*
- *Governed by Utah State Code: Title 73, Chapter 4.*
- *The first General Stream Adjudications took place in the 1920s – Sevier, Weber and the Virgin River basins.*



# **Why Do We Conduct General Adjudications?**

1. Bring all claims on to the permanent record:

- Pre-Statutory Claims
  - Diligence Claims (1903)
  - Underground Water Claims (1935)
- Federal Reserved Water Rights
  - Winters v. United States (1908)
  - McCarran Amendment (1952)



2. To prevent a "multiplicity of suits" and bring clarity to the water rights picture.

3. Remove/reduce rights which have been wholly or partially forfeited through non-use.

4. To obtain final comprehensive decrees on all water rights within the respective drainage.



# Federal Reserved Water Rights

- First delineated by **US Supreme Court in 1908** (*Winters v. United States*)

- Fort Belknap Indian Reservation created in 1888 adjacent to the Milk River in Montana
- Non-Indian settlers claimed all the water rights to the Milk River and prevented the tribes from using water for agriculture

- Federal reserved water rights **implicitly reserves sufficient water** to satisfy the purposes of the respective reservation based on its:

- Primary purposes and minimal needs

- Although initially associated with Indian Reservations, it has subsequently been extended to other federal reservations including:

- National Parks, National Monuments, Military Reservations, US Forest Service lands, and BLM "watering holes"

- **Priority date** is the date that the reservation was established.

- Federal reserved water rights are **not subject to forfeiture** or abandonment. They are also non-transferable.

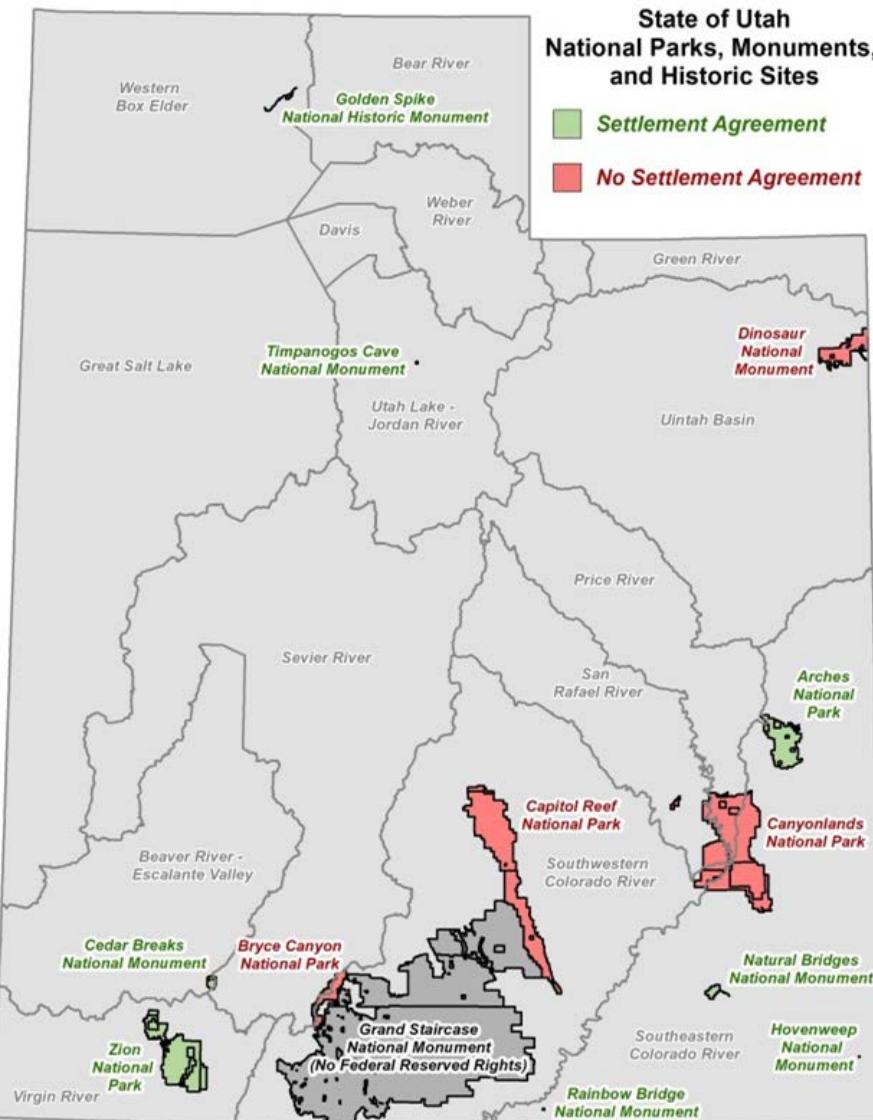
- The federal government enjoyed **sovereign immunity** and could not be forced to quantify any claims to federal reserved water rights—thus clouding the certainty of privately held water rights.

- The **McCarran Amendment** (1952) requires the federal government to **waive its sovereign immunity** in cases involving a general adjudication of water rights.



# Federal Reserved Water Rights

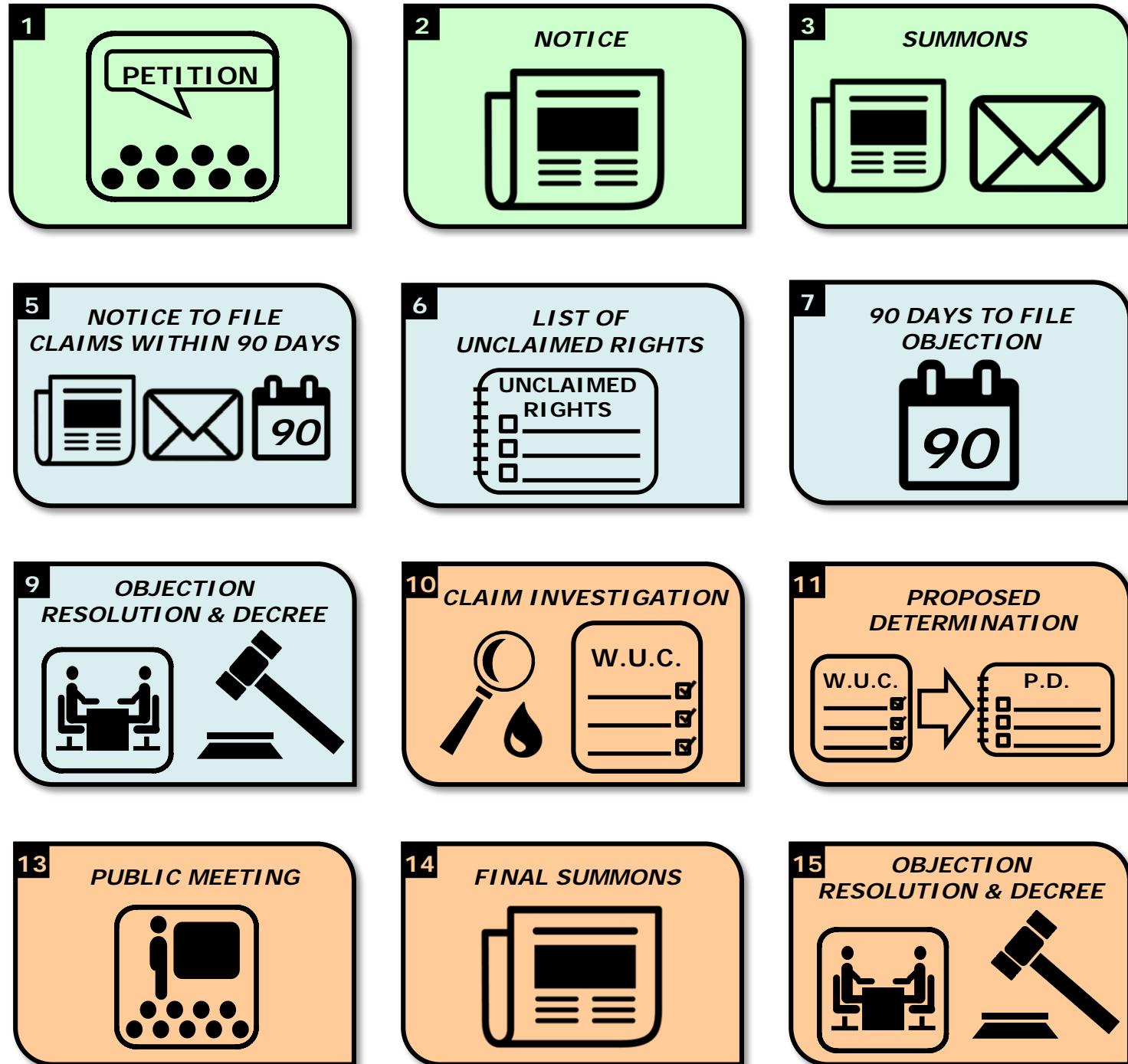
- Utah prefers the approach of negotiating federal reserved water rights rather than litigating them. However, the general adjudication act as the proverbial sword of Damocles that forces the United States to the negotiation table.



Governor Herbert joined representative from the Division of Water Rights in signing the tenth reserved water right agreement with the federal government at Arches National Park.



# *The Adjudication Process*



# Common Issues

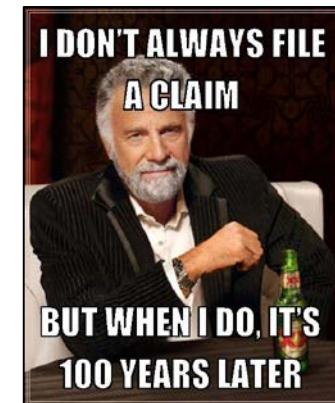
- ***Title Ownership***

- Claimants (who are not the owner of record) may file a “claimant claim” to prevent a water right of record from being included on the List of Unclaimed Rights.



- ***Pending Adjudication Claims & Pre-statutory Use***

- WUCs asserting pre-statutory use will need to include information and evidence supporting the assertion.



- ***Evaluating Irrigation Companies***

- Irrigation shares often supplement other privately owned water rights. Sole supplies must be evaluated by the State Engineer among the two competing interests.
- The mapping of irrigation is a “snap shot in time” to identify the extent of beneficial use (i.e., total amount of irrigation).
- Shareholders who hold more shares than the footprint of their irrigated acreage may contribute to partial forfeiture of an irrigation company’s rights. Companies may allocate the loss to the respective shareholder (Utah Code § 73-1-4.5).
- Irrigation shares owned by public water suppliers may be protected from forfeiture.



# Common Issues

- **Unauthorized Uses**

- Unauthorized (i.e., illegal) beneficial use may protect against forfeiture (*Eskelsen v. Town of Perry*)
- Must be from the **same source** for unauthorized use to be recognized by State Engineer and recommended in a PD.
- WUC and PD include notes that the beneficial use is unauthorized and requires a change application to conform with Utah law.
- Unauthorized changes are punishable as a class B misdemeanor up to a third degree felony. (Utah Code § 73-3-3 and 73-2-27)

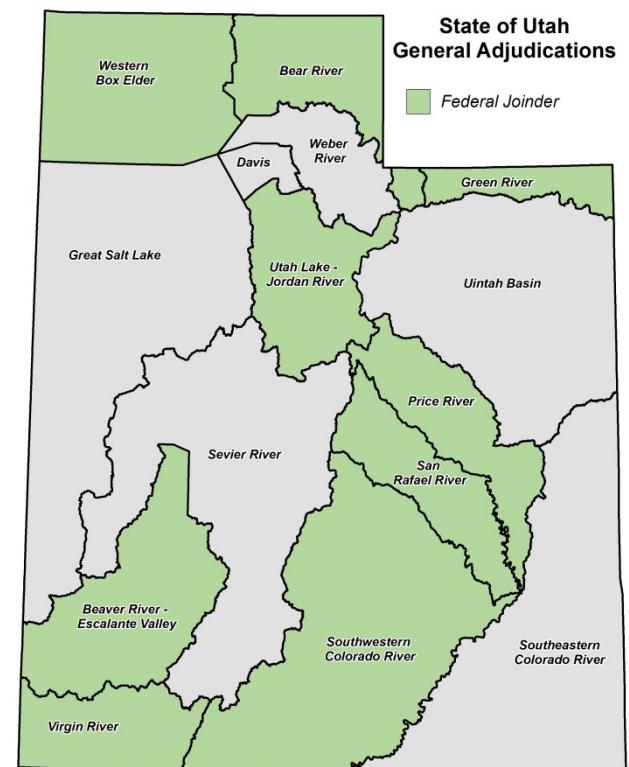


- **Federal Joinder & Reserved Rights**

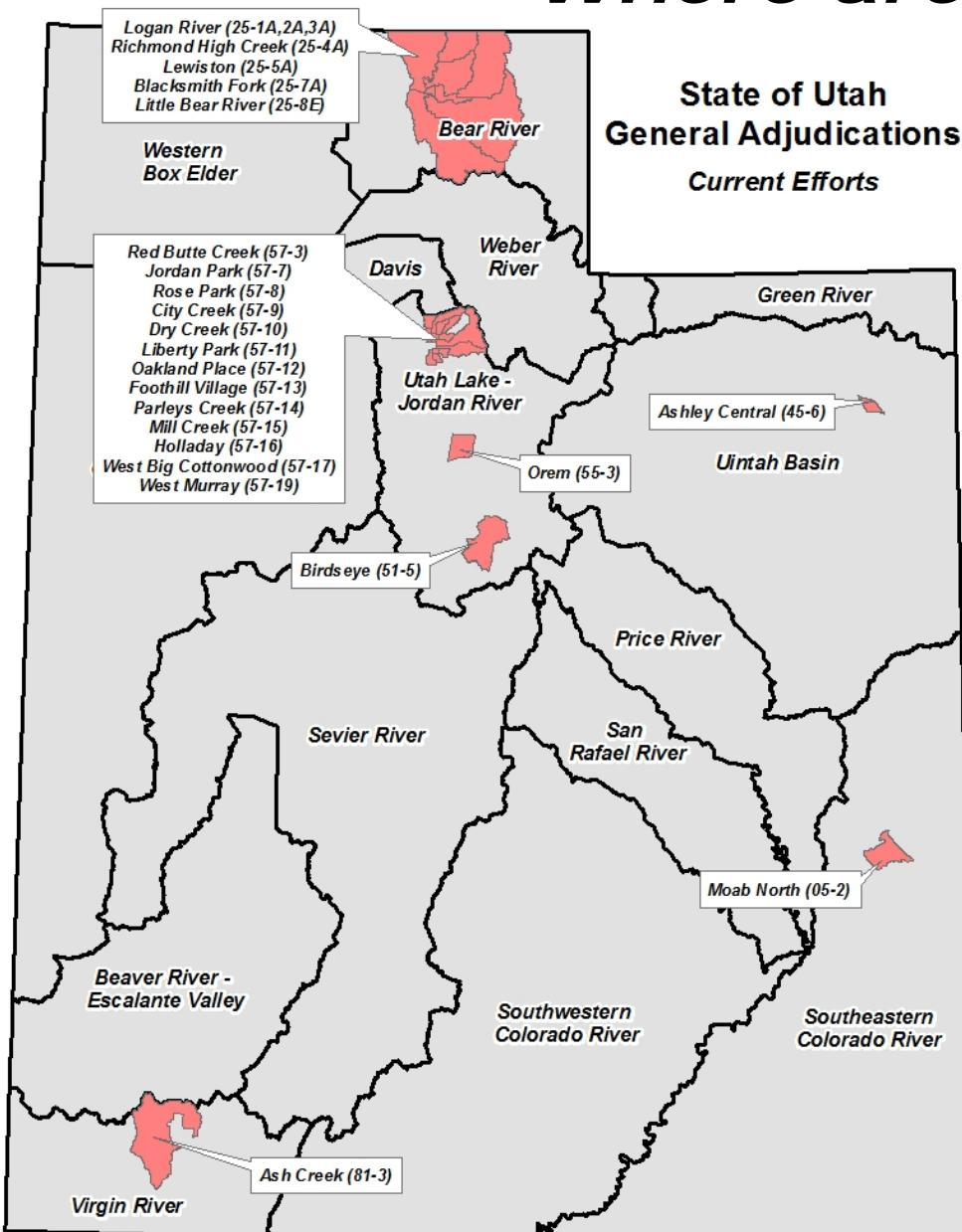
- The Federal Government has not been joined in some adjudications.
- When joined, the Department of Justice typically files a “master statement of claim” on behalf of various federal agencies.
- The State Engineer has typically engaged in settlement negotiations rather than litigating Federal Reserved Rights.
- Some proposed determinations simply defer to handling Federal Reserved Rights at a later date.

- **WUC Education**

- WUCs mistakenly filed for a person’s culinary water service connection.
- WUCs filed for speculative purposes.
- Incomplete WUCs that do not meet statutory minimum information requirements.



# Where are we today?

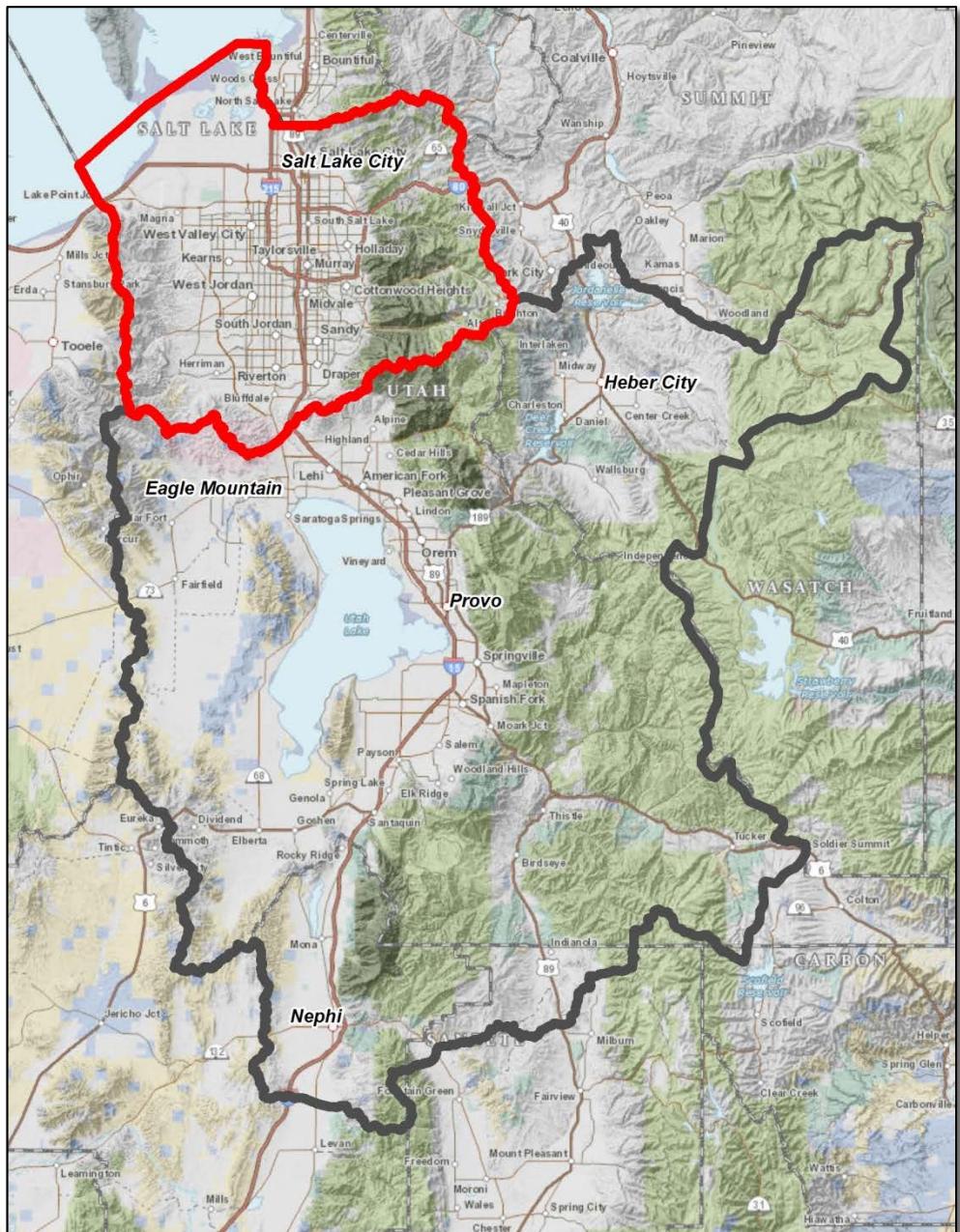


## State of Utah General Adjudications Current Efforts

- **State-wide Program** focusing on General Adjudication efforts.
- Consists of **18 staff members**
  - Assistant State Engineer
  - Adjudication Engineer
  - 3 Attorneys (AG's Office)
  - 1 Paralegal (AG's Office)
  - 4 Adjudication Team Leaders
  - 8 Adjudication Technicians (3 interns)
- **Regional Offices** support Adjudication efforts in remote areas.
  - Southwestern Region (Cedar City)
  - Northern Region (Logan)
  - Southeastern Region (Price)
  - Eastern Region (Vernal)
- Continually working with the **Attorney General's office** to resolve objections to previous Proposed Determinations in order to obtain interlocutory decrees. There are **over 366 un-resolved objections** on record.



# Utah Lake & Jordan River Adjudication



**1925 – 1935:** Utah and the United States is plagued with an extended drought that results in wide-spread shortages.

**March 22, 1933:** Salt Lake City files suit against various irrigation companies and the State Engineer for an adjudication of the Utah Lake and Jordan River drainage. However, the State Engineer lacks the funding and is unable to comply.

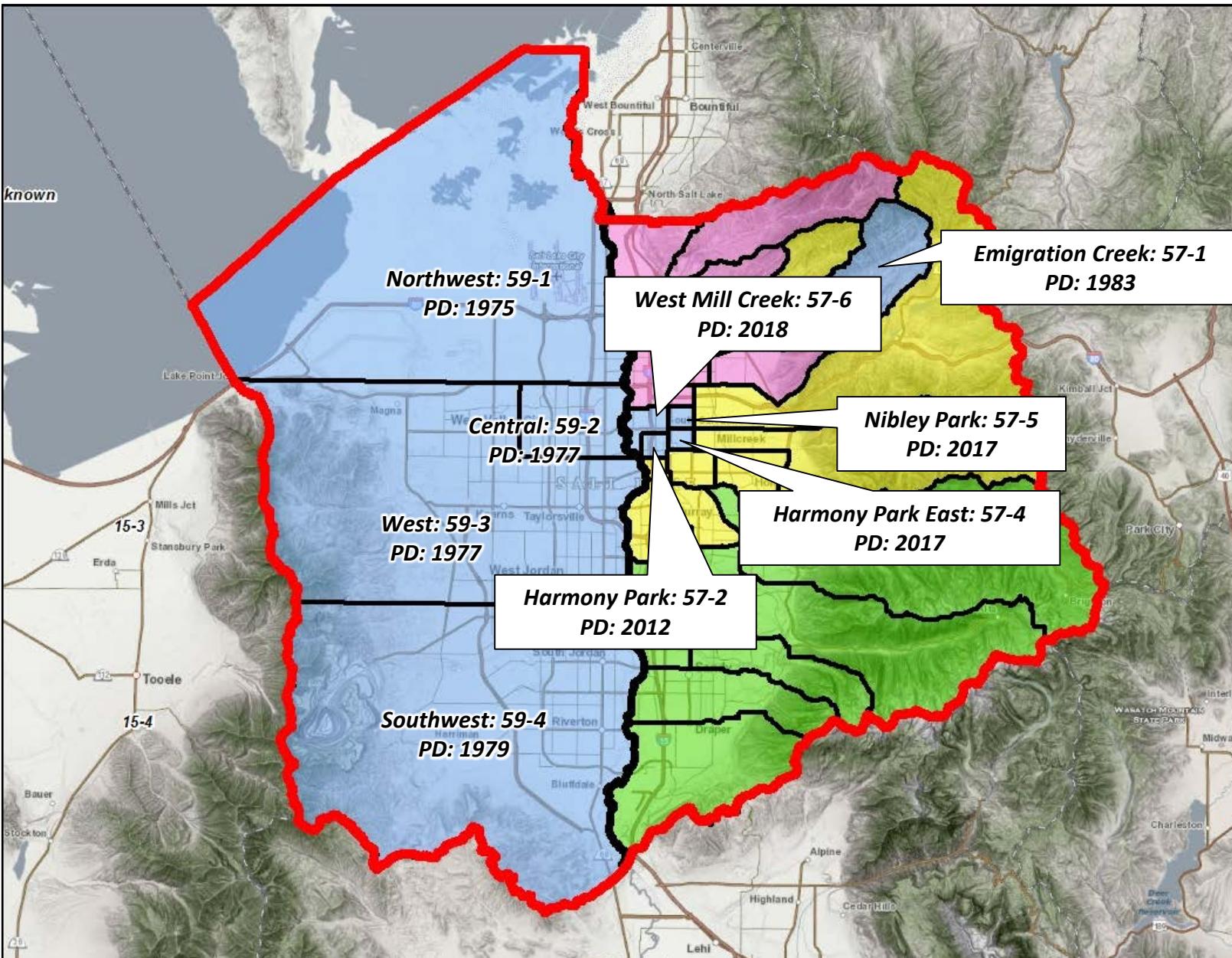
**May 28, 1936:** Salt Lake City and various canal companies files suit against roughly **3,000 defendants** and asks the court to take on the responsibility of determining the water rights since the State Engineer lacked funding.

**July 10, 1940:** Supreme Court rules that the district court lacks jurisdiction in the determination of water rights without first deferring to the determination made by the State Engineer.

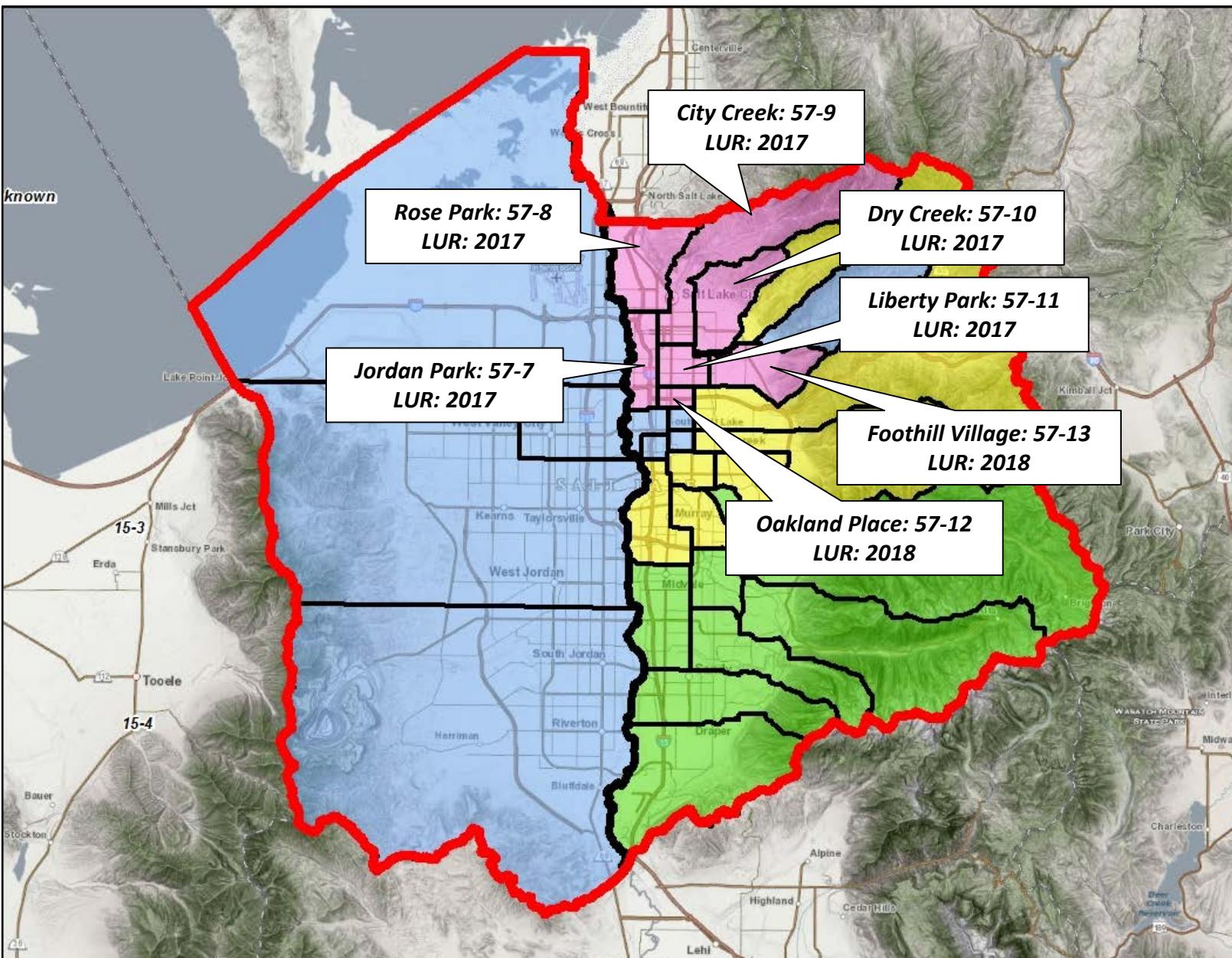
**September 1, 1944:** Third District Court orders that the suit proceed under the general water rights adjudication statute and that the State Engineer make a determination of water rights.

**June 21, 1972:** Third District Court issues a clarification of scope to include ALL waters (both surface and underground) within the Utah Lake and Jordan River drainage.

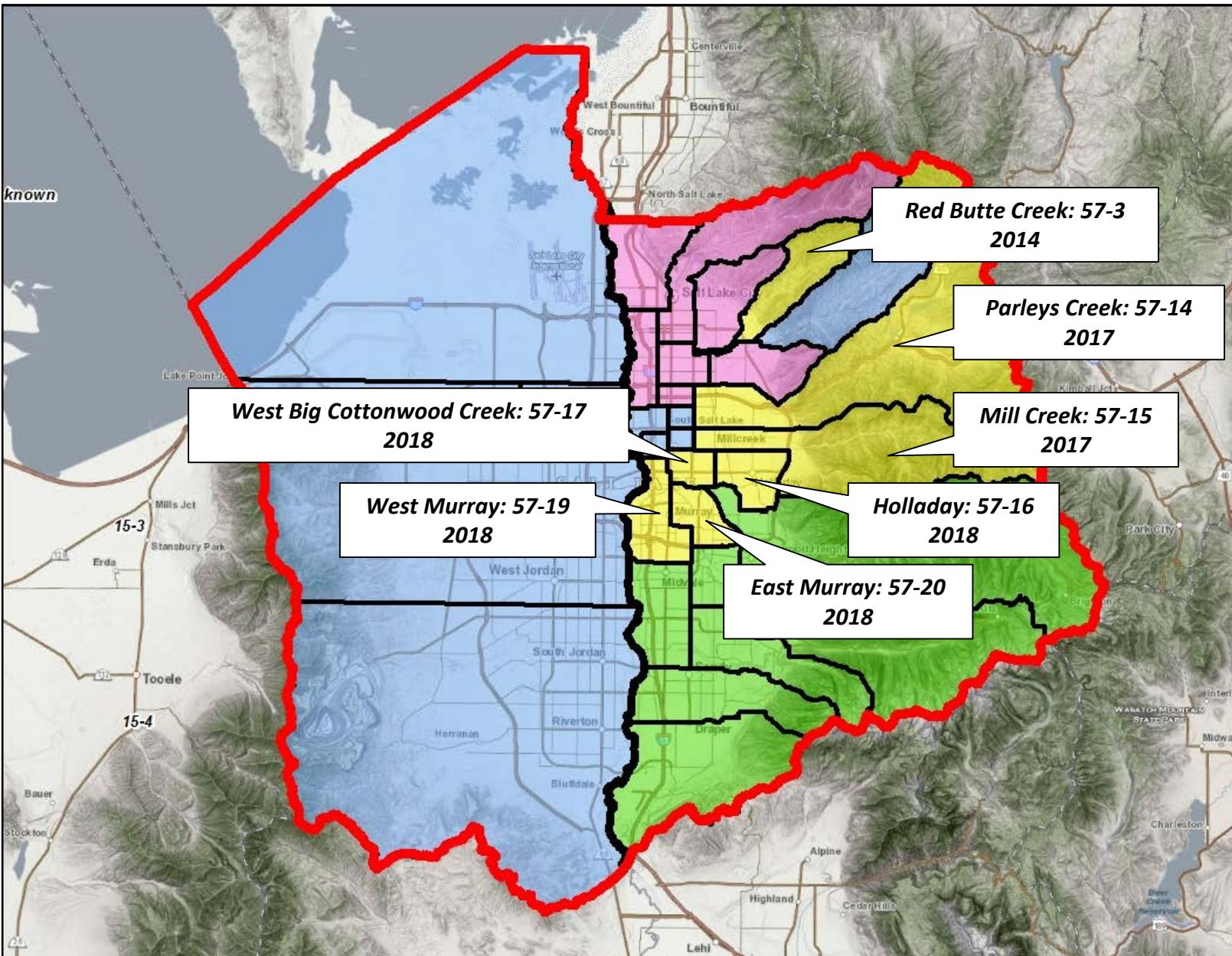
# Salt Lake County Adjudications



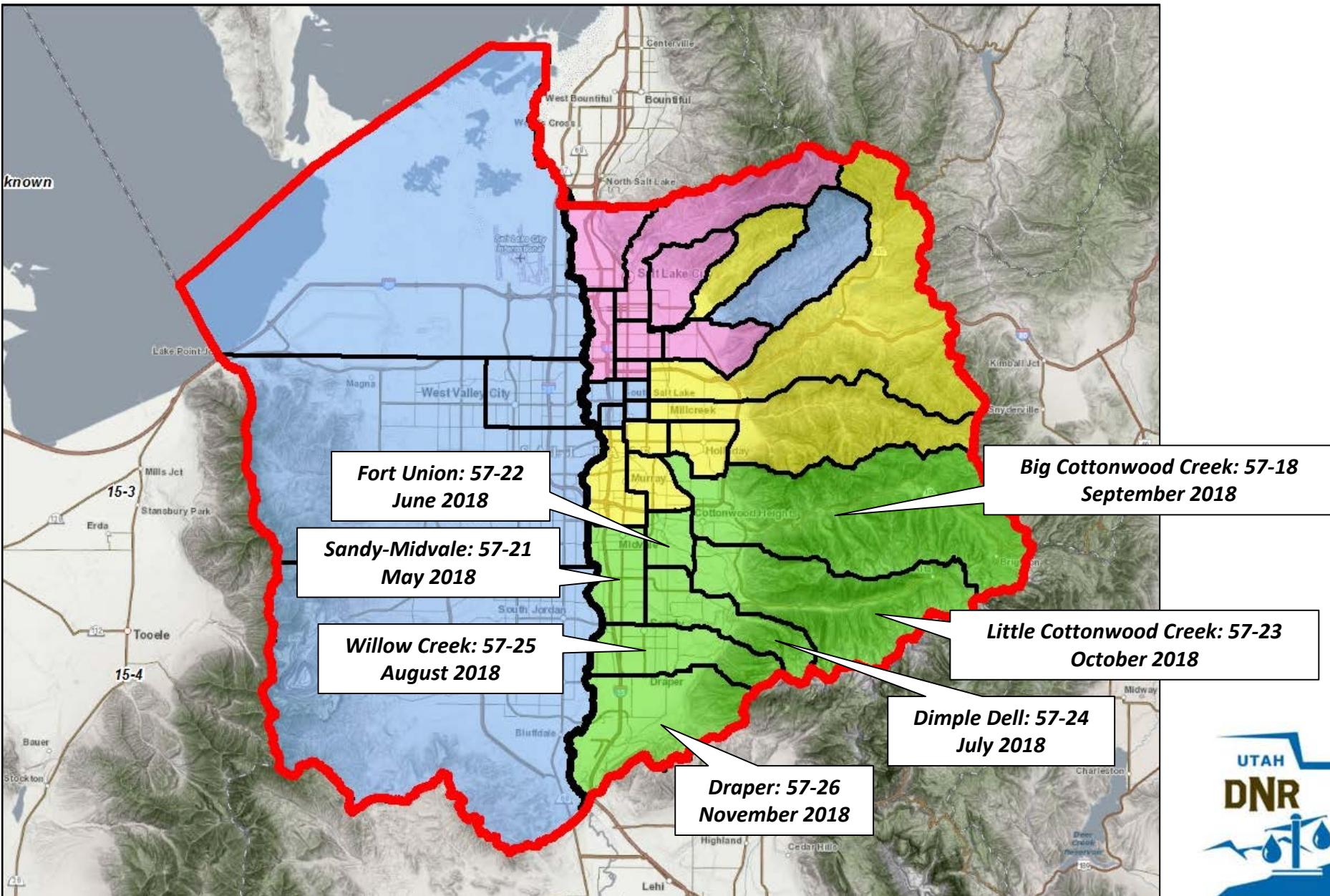
# Salt Lake County Adjudications



# Salt Lake County Adjudications



# Salt Lake County Adjudications



# *Where are we going?*

*“One does not ‘get out’ of a general adjudication. It is a sort of judicial black hole into which light, sound, lawyers, water—even judges—indeed, whole forests of paper, will disappear. The only way out is the other end.”*

- Michael J. Brophy  
Arizona Water Attorney

*Efforts to get us out the other end of the Utah Lake & Jordan River Adjudication...*

1. *Revised statute to streamline and modernize the water rights adjudication process. SB 75 (2016) & SB 61 (2018)*
2. *Court appointed “Special Master” to help resolve the backlog of outstanding objections.*
3. *Focus adjudicative efforts and resources within the Salt Lake and Utah valleys.*
4. *SB-113 (2017) provided additional funding to increase staffing.*
5. *Enhanced public out-reach and transparency.*

[www.waterrights.utah.gov/adjinfo](http://www.waterrights.utah.gov/adjinfo)



# *Questions?*

**Blake Bingham, P.E.**

*Assistant State Engineer - Adjudication*

Phone: 801-538-7345

E-mail: [blakebingham@utah.gov](mailto:blakebingham@utah.gov)

