

UPCOMING TRAININGS & CONFERENCES

A full list of NDAA's virtual learning sessions is available at
[▶ ndaa.org/training-courses/](https://ndaa.org/training-courses/).

**NDAA's Mastering Masking Digital Course/
On Demand Training (CLE Available)**
[▶ ndaa.org/training/mastering-masking-2/](https://ndaa.org/training/mastering-masking-2/)

**NDAA's Human Trafficking and the Impact on
Commercial Driver's Licenses/On Demand Training**
[▶ ndaa.org/training/human-trafficking-and-the-impact-on-commercial-drivers-licenses/](https://ndaa.org/training/human-trafficking-and-the-impact-on-commercial-drivers-licenses/)

**NDAA's Prosecuting DUI Cases Online Course/
On Demand Training (CLE Available)**
[▶ ndaa.org/training/prosecuting-dui-cases/](https://ndaa.org/training/prosecuting-dui-cases/)

**NDAA's Investigation and Prosecution of Drug-Impaired
Driving Cases Online Course/On Demand Training
(CLE Available)**
[▶ ndaa.org/training/on-demand-learning-investigation-and-prosecution-of-drug-impaired-driving-cases/](https://ndaa.org/training/on-demand-learning-investigation-and-prosecution-of-drug-impaired-driving-cases/)

**Evidence Issues: The Confrontation Clause & Crawford
(Live Webinar)**
 June 14, 2023 @ 11:00 a.m.-2:45 p.m. ET

RESOURCES

Impaired Driving Resources
[▶ ndaa.org/programs/ntlc/](https://ndaa.org/programs/ntlc/)

CDL-Related Resources
[▶ ndaa.org/programs/ntlc/commercial-drivers-license/](https://ndaa.org/programs/ntlc/commercial-drivers-license/)

NDAA STAFF

Executive Director **Chief Operating Officer**
 Nelson O. Bunn, Jr. Christine Mica

Vice President, Education & Engagement
 Lorena Vollrath-Bueno

THE NATIONAL TRAFFIC LAW CENTER

Director
 Joanne E. Thomka jthomka@ndaajustice.org

Coordinator, Education & Engagement
 Kristian Thomas kthomas@ndaajustice.org

Senior Attorneys
 M. Kimberly Brown mkbrown@ndaajustice.org
 Jim Camp jcamp@ndaajustice.org

Staff Attorneys
 Erin Inman einman@ndaajustice.org
 Bella Truong btruong@ndaajustice.org

The National Traffic Law Center is a division of the National District Attorneys Association. This document was prepared under Cooperative Agreement Number 693JJ91950010 from the U.S. Department of Transportation National Highway Traffic Safety Administration. Points of view or opinions in this document are those of the authors and do not necessarily represent the official positions or policies of the Department of Transportation or the National District Attorneys Association.



Volume 31, Issue 5 | May 2023



Utah: Leading the Way in Traffic Safety

Becoming the First State to Create a .05 per se BAC Impaired Driving Law

By Tyson Skeen, Utah Traffic Safety Resource Prosecutor

Across the country, alcohol-impaired driving continues to be a pervasive problem with deadly consequences. Although the implementation of .08 blood alcohol concentration¹ ("BAC") laws adopted decades ago resulted in the steady reduction of alcohol-impaired driving deaths, recent years have seen this trend plateau before an alarming 14% spike from 2019 to 2020.² It is simply unacceptable to have 11,654³ deaths in one year. This disturbing jump in fatalities has spurred numerous discussions

¹ .08 BAC is shorthand for the concentration, or percentage, of alcohol in the blood and is reflected as .08 grams of alcohol per 100 mL of blood or .08 g/100 mL BAC or .08% BAC.

² National Center for Statistics and Analysis. (2022, April). *Alcohol-impaired driving: 2020 data* (Traffic Safety Facts. Report No. DOT HS 813 294). National Highway Traffic Safety Administration.

³ *Id.* at page 2.

between those invested in ensuring the spike in alcohol-impaired driving deaths is an anomaly, and those interested in seeing the trends decline again.

While Utah has one of the lowest alcohol-impaired driving fatality rates when compared with overall crash fatalities,⁴ the number of people killed on Utah roadways each year is still appalling. The question of how to help reduce alcohol-impaired driving fatalities led legislators in Utah to consider lowering the BAC, much like it did in 1983 when it became the first state to lower the BAC from .10 to .08. Years later, Utah is once again leading the way in traffic safety by becoming the first state to legislatively decrease its per se BAC for impaired driving to .05%. Below are some of the reasons why Utah changed to .05, some of the concerns voiced by opponents, as well as the arguments overcoming those concerns, and a traffic safety snapshot as Utah approaches five years since the law was enacted.

Why .05?

A legislative solution to any problem can often be difficult to obtain. This is especially true when seeking to modify, no matter how minor, a criminal statute such as an impaired driving offense like Driving While Under the Influence (“DUI”).⁵ The tentacles of a DUI arrest and/or conviction are far reaching and often times extend into multiple other criminal and/or civil statutes regulating issues such as driver licenses, administrative hearings, insurance requirements, and any number of additional, non-statutorily acknowledged secondary effects. Further, policy making can be messy. Many stakeholders are connected to these other issues, and the detractors’ voices can be loud! Legislators try to balance interests for all stakeholders, making for a tricky needle to thread when talking about public safety.

Still, driving at .05 BAC is a dangerous activity.

Many groups and organizations advocated for the adoption of the per se .05 policy prior to Utah’s legislative action. For example, for nearly the last decade, the National Traffic Safety Board (“NTSB”) has officially recommended all states to adopt .05 as the per se level for impaired driving offenses.⁶ NTSB played an integral part in Utah passing this legislation in 2017. Other national and worldwide groups supporting the change included the American Medical Association, the World Health Organization, National Safety Council, Advocates for Highway and Auto Safety.⁷ Additionally, according to a 2015 AAA survey, 63% of Americans supported reducing the per se BAC level to .05.⁸

Still, driving at .05 BAC is a dangerous activity.⁹ Research has shown that at .05 g/100 mL BAC, people exhibit reduced coordination, reduced ability to track moving objects, difficulty steering, and reduced response to emergency driving situations.¹⁰ These effects are widely known and policy makers acknowledge those dangers, as demonstrated in similar policy decisions and laws. In fact, a BAC threshold less than .08 g/100 mL is not something new in our country at all. For example, the Federal Code of Regulations place an even lower

⁴ *Id.* at page 2.

⁵ Impaired driving offenses include driving while impaired by alcohol and/or drugs and are commonly referred to as DUI, DWI, OUIL, etc., depending on the language of the relevant state statute. This article uses “DUI” as reflected in Utah law and, in its generic sense, refers to other similar offenses as well.

⁶ In 2013, the NTSB recommended all states adopt the .05 standard. See National Transportation Safety Board. 2013. *Reaching Zero: Actions to Eliminate Alcohol-Impaired Driving*. Safety Report NTSB/SR-13/01. Washington, DC: NTSB.

⁷ For a list of organizations and people that supported lowering the BAC to .05, please visit the bill sponsor’s webpage at www.normthurston.com/dui/, accessed April 26, 2023.

⁸ AAA Foundation for Traffic Safety. (2016). *2015 Traffic Safety Culture Index* (Technical Report). Washington, D.C.: AAA Foundation for Traffic Safety, at p. 7.

⁹ This is not to suggest anything below .05 is per se safe. Quite the contrary, as we know impairment begins at the first drink.

¹⁰ For a brief analysis of the effects of alcohol at different BAC levels, and how these effects may impact one’s ability to safely drive, see www.nhtsa.gov/risky-driving/drunk-driving, accessed April 26, 2023.

threshold of .04 g/100 mL BAC on commercial motor vehicle drivers.¹¹ Likewise, airplane pilots also have a .04 BAC threshold and may not fly within 8 hours of consuming any amount of alcohol at all.¹² Additionally, these federal regulations are largely incorporated into states' impaired driving statutes.

Ultimately, Utah stakeholders determined that dropping the per se BAC level to .05 g/100 mL would save lives. When this issue was presented to the full legislature, the bill's legislative sponsor made a concerted effort to keep the discussion based in fact and data. Representative Norm Thurston gathered data from all around the world and presented it in a clear, factual manner. The message to his colleagues was about the need to change the culture around drinking and driving. For example, stakeholders needed to cease referencing the BAC as the "legal limit;" using this terminology gives the false sense that with a BAC less than .08, a person's ability to drive would not be impaired. This common belief is dangerous and incorrect. His focus was not to create a policy to facilitate law enforcement arresting our way out of this problem; in fact, he acknowledged throughout the process this was not possible. The best way to save lives is to decrease impaired driving trips, and one way to achieve that goal was to decrease the per se level for DUI to .05 BAC. This messaging, along with all the accompanying data, convinced the legislature to make Utah the first state to adopt the .05 BAC level as the per se level for DUI. It was signed into law by Utah Governor Gary Herbert on March 23, 2017.¹³ While passed in early 2017, the effective date of the .05 law was delayed until December 30, 2018, to provide an opportunity for public education about it before enforcement started.

Debunking the Myths Against Reducing the per se BAC from .08 to .05

While a policy like this seems logical in traffic safety circles, there were many groups opposed to the change.¹⁴ The following arguments were, and continue to be, the most frequently-raised concerns, along with the facts to explain why the claims are merely "myths."

Myth 1: "Standardized Field Sobriety Tests ("SFSTs") are not validated at .05, so law enforcement will not be able to detect or enforce at .05 BAC."

While it is true that the SFSTs are not validated at .05, previous scientific studies demonstrated the SFSTs are sensitive to detecting lower BAC levels. Both the Colorado (1995) and San Diego (1998) studies preliminarily looked at SFST performance at .05 and .04 BAC levels, respectively.¹⁵ While the sample sizes were small and validation at these lower levels was not the intent of the studies, they did show that the SFSTs have promise in detecting lower-level BACs. Further, the SFSTs were initially validated at .10, but by the time the National Highway Traffic Safety Administration (NHTSA) conducted the Florida study evaluating the SFSTs at .08 BAC, 15 states had already adopted the .08 BAC threshold.¹⁶ The Florida study was published 14 years after Utah and Oregon became the first states in the country to adopt the .08 BAC threshold, a standard widely accepted across the country today, but was very controversial at the time.

Even before a suspect is asked to perform the SFSTs, a law enforcement officer will have observed clues of impairment based on what the officer sees, hears, and smells. The officer will have seen bad driving, smelled the odor of alcohol, etc. The SFSTs are a tool used to evaluate impairment and the studies demonstrated if there is to be an error in the arrest decision, it is more likely an officer will inappropriately release an impaired individual than to incorrectly arrest a nonimpaired one.

¹¹ See 49 CFR § 383.5.

¹² 14 CFR § 91.17.

¹³ See full bill along with links to votes and debates at [le.utah.gov/~2017/bills/static/HB0155.html](https://leg.utah.gov/~2017/bills/static/HB0155.html).

¹⁴ While not identified specifically, some in opposition to the reduced BAC included some members of the defense bar, some in the hospitality industry and the tourism industry, for example.

¹⁵ See Burns, M. & Anderson, E. (November 1995). *A Colorado Validation Study of the Standardized Field Sobriety Test Battery*, and Stuster, J. & Burns, M. (August 1998). *Validation of the Standardized Field Sobriety Test Battery at BACs Below 0.10 Percent*.

¹⁶ Burns, M. & Diogino, T. (1997). *A Florida Validation Study of the Standardized Field Sobriety Test (S.F.S.T.) Battery*.

Myth 2: “Being the first and only state to decrease the per se BAC level for impaired driving will make Utah look weird and will hurt its tourism industry.”

A common refrain from the alcohol, service, and tourism industries was that lowering the BAC would make Utah an outlier and perpetuate a negative stereotype about Utah and its alcohol laws which would, in turn, damage its tourism industry. These arguments did, in fact, concern Utah legislators and were exasperated by full-page advertisements running in both local newspapers and in surrounding states trying to influence Utah to not adopt this new policy.¹⁷

Ultimately, Utah has experienced no measurable, negative economic impact on the tourism industry from the lowered BAC law. In fact, a report by the University of Utah stated that in 2021, Utah received “\$10.56 billion in direct visitor spending and \$9.12 billion in additional indirect and induced spending generated an estimated \$1.81 billion in total tax revenue.”¹⁸ This amount of visitor spending is a record for the state.

Myth 3: “The focus of impaired driving enforcement will change from the most dangerous drivers at high BAC levels to lower-level BACs that are not as dangerous.”

During the time the proposed legislation was discussed, traffic safety stakeholders and the legislature agreed law enforcement would not change their proactive impaired driving enforcement tactics based upon the reduction of the per se BAC from .08 to .05. Even with the lower BAC level, law enforcement officers would continue to rely on their training, experience, and the other available tools to detect impaired drivers, administer SFSTs, and arrest drivers believed to be impaired, regardless of a driver's BAC.

Prior to the legislation's effective date in 2018, the average BAC for an individual arrested for alcohol-impaired driving in Utah was approximately .15 g/100 mL. Since the law took effect, the average BAC for those arrested in Utah has not significantly changed. In fact, most recently the average BAC of arrested individuals was .14.¹⁹

Further, the percentage of drivers arrested with BACs between .05-.079 g/100 mL has not drastically changed since the law was amended. In 2018, the final year before the .05 per se BAC law's effective date, 2.2% of the drivers arrested for DUI had a BAC between .05-.079 g/100 mL, and in 2022 that number was 3.1%.²⁰

Myth 4: “We will overwhelm the courts with increased DUI cases resulting in a negative impact on judicial economy.”

The average number of DUI arrests in Utah during the five years prior to implementation of the per se .05 BAC was 10,720.²¹ The average number of DUI arrests in Utah over the three years since implementation is 10,320.²² While there are a multitude of reasons playing a role in this average reduction in DUI arrests, it is clear the implementation of a reduced per se BAC of .05 has not increased the number of DUI arrests in Utah.

¹⁷ One example warned people not to visit Utah with the headline saying: “Utah: Come on Vacation, Leave on Probation;” see Russell, Betsy Z., “Group hits back at stringent new Utah alcohol law with ads proclaiming, ‘UTAH: Come for vacation, leave on probation,’” *The Spokesman Review*, April 25, 2017.

¹⁸ Leaver, Jennifer. (February 2023). *The State of Utah's Travel and Tourism Industry 2021*, available at gardner.utah.edu/wp-content/uploads/TT-Report-Feb2023.pdf, accessed on April 26, 2023.

¹⁹ See the Utah Commission on Criminal and Juvenile Justice Annual DUI Report to the Legislature each year for average BAC for arrested individuals by visiting justice.utah.gov/wp-content/uploads/2022-DUI-Annual-Report-Final.pdf, accessed April 26, 2023.

²⁰ *Report on Utah's 0.05 BAC Law: Enforcement Outcomes, Arrests & Alcohol-Related Crash Data*, Utah Department of Public Safety, Revised May 10, 2022.

²¹ Utah Commission on Criminal and Juvenile Justice *19th Annual DUI Report to the Utah Legislature*.

²² *Id.*

The Early Results on the .05 per se BAC Are that Utah Roads Are Safer

In early 2022, NHTSA published a study based on an in-depth review of available data intended to determine if the reduction in the per se BAC for impaired driving from .08 to .05 resulted in a quantifiable increase to public safety in Utah.²³ The report included the following summary:

“Overall, the study’s findings indicate that passage of the .05 per se law had demonstrably positive impacts on highway safety in Utah. The crash analyses highlighted reliable reductions in crash rates and alcohol involvement in crashes associated with the new law that were consistent with, or greater than, those observed or predicted by prior research. While the concerns about the impact of the law change on the State’s economy were certainly understandable, the data reviewed for this study indicate none of the potential negative effects of concern came to fruition. In fact, alcohol sales and per capita consumption appeared to continue their increasing trends under the new law as did tourism and tax revenues. Similarly, DUI arrests for alcohol did not climb sharply after the law went into effect as some had feared.”²⁴

“... [p]assage of the .05 per se law had demonstrably positive impacts on highway safety in Utah.”

While more time is needed to see if these benefits will hold in the long term, the findings of this NHTSA report are encouraging.

Conclusion

The deadly consequences of alcohol-impaired driving remain a serious problem in this country. Reducing alcohol-related traffic fatalities is a goal every policy maker should have. Unfortunately, though, there is no single policy “silver bullet” to fix this problem. Traffic safety generally, and impaired driving specifically, is a complicated issue that requires input and support from all traffic safety partners. Policy makers should utilize all available tools and resources to help reduce impaired driving. Reducing a state’s per se BAC from .08 to .05 is providing positive results for highway safety in Utah and is demonstrating it’s a tool that can benefit all states.

About the Author

Tyson Skeen aspires to one day retire and take up fishing full-time. He only needs three more years before he starts thinking like a fish. Unfortunately, it will be much longer than that before his ultimate dreams are realized. While he prepares for that future calling, he currently works for the Utah Prosecution Council as the Utah Traffic Safety Resource Prosecutor (TSRP). He has been in this position since January 2016. Prior to that, Tyson began his legal career as a defense attorney for a short time before moving into a role as a prosecutor in multiple jurisdictions in Utah. He loves the work and is passionate about it, particularly with impaired driving prosecution.



²³ Thomas, F. D., Blomberg R., Darrah, J., Graham, L., Southcott, T., Dennert, R., Taylor, E., Treffers, R., Tippetts, S., McKnight, S., & Berning, A. (2022, February). *Evaluation of Utah’s .05 BAC per se law* (Report No. DOT HS 813 233). National Highway Traffic Safety Administration.

²⁴ *Id.* at 48.

> FREE WEBINAR <

.05—Utah's Experiment in Saving Lives

Tuesday, June 20, 2023

2:00 p.m.–3:30 p.m. ET

For further information about Utah's .05 law, please join the free webinar on June 20, 2023.

Utah Traffic Safety Resource Prosecutor Tyson Skeen and Utah Highway Patrol Sgt. Jared Cornia will discuss how Utah became the first state in the country to enact legislation limiting a driver's BAC to .05. What happened? What is happening now? Where is this going?

In this webinar session, they will describe the law enforcement mandatory training included in the .05 statute. They will also review how police, prosecutors, and the courts have responded to the change and provide an evaluation of the law now four years after its implementation.

There is NO CHARGE to attend this webinar; however, you must REGISTER IN ADVANCE using the below link. After registering, you will receive a confirmation email containing instructions on how to join the webinar. Please make sure to retain the confirmation email and be careful to enter your email address correctly; you will not be able to join the webinar if you do not receive a confirmation email.

If you will be unable to attend this webinar at the scheduled time but WOULD STILL LIKE TO WATCH, please go ahead and register. Everyone who is registered will receive a link to the recording of the webinar regardless of whether they attended.

Presenters

Tyson Skeen, Utah TSRP

Sgt. Jared Cornia, Utah Highway Patrol

Registration

attendee.gotowebinar.com/register/6598825014514268683

Questions

If you have any questions or need assistance registering for the webinar, please [click here](#).

This webinar is being conducted by the National TSRP Program utilizing the National TSRP Program webinar account. The account is funded through the NAPC/NHTSA Cooperative Agreement, Project Number 693JJ92050011.