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DOES A MUNICIPALITY FORFEIT WATER RIGHTS THROUGH NONUSE?

I. [§ 1] INTRODUCTION

The Utah Supreme Court, emphasizing the importance of water development in Utah stated:

> In this arid state, where water is the heartbeat of our economy, more and more it becomes quite obvious that development of water must require strict adherence to statutory sanctions, without delay or nonconformance thereto,—lest our whole economy lag to the detriment of our future.[1]

Since *Baugh v. Criddle* was decided in 1967 by the Utah Supreme Court, water development has continually become more important because of water demands from the increasing population and continuing industrial development in Utah. The Utah State Legislature has responded to the State's arid water situation by enacting a water forfeiture statute.[2] This statute requires that if a water appropriator does not use the water right for five consecutive years, the water right is subject to forfeiture.[3]

Provo City has been awarded several Provo River water rights. One such water right, awarded by the Morse Decree in 1921[4], has not been

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[1]Baugh v. Criddle, 19 Utah 2d 361, 363-364, 431 P.2d 790, 791 (1967).

[2]UTAH CODE ANN. § 73-1-4 (1980).

[3]When a water user has a water right, he has a property interest in a certain amount of water subject to certain conditions. 1 R. CLARK, WATERS AND WATER RIGHTS 344 (1967). Those conditions are: "an intent to appropriate, notice of the appropriation, compliance with state laws, a diversion of the water from a natural stream, and its [water's] application, with reasonable diligence and within a reasonable time, to a beneficial use." F. TRELEASE, WATER LAW, 36 (3rd Edition, 1979).

[4]The 65 second feet water right as well as other water rights were given to Provo City by the Utah Fourth District Court in Provo Reservoir Co. v. Provo City, No. 2888, (D. Utah May 21, 1921). This decision is commonly known as the Morse Decree, named after Judge Morse who decided the dispute. Judge Morse decree stated in section 4(d):

> During the non-irrigating season of each and every year, subject to the rights of storing water at the several reservoirs of the plaintiff and defendants as hereinafter set forth, sufficient of the waters of Provo River to supply the necessities of Mill owners upon the Factory Race using water under license and grant from said City, not to exceed *65 second feet.*

A second foot of water is the "rate of flow of water equal to one cubic foot each second. . ." 1 R. CLARK, WATER AND WATER RIGHTS, 11 (1967). 1.55 second feet

used since, at least, 1968.[5] Provo City, in a current lawsuit, is claiming that even though Provo has not used the 65 second feet in volume permitted by the water right, the total water right still belongs to Provo City. Provo is seeking quiet title, in the Utah District Courts, to this water right under the Utah Declaratory Judgments Act.[6] In seeking to quiet title, Provo City hopes to secure the water right, thus enabling the city to use or not use the 65 second feet for such municipal purposes as the city sees fit.[7] Provo City contends that the Morse Decree granted a senior right to the water and as a result, Provo City ought to be exempt from the forfeiture statutes and be allowed to reserve this water right for future water needs of the city.[8] If the court grants Provo City's request, the decision would dramatically conflict with the well-established public policy, which for almost 100 years, has been the basis for Utah Supreme Court precedent dealing with Utah water law.

This article discusses whether Provo City should be exempt from the Utah water right statutory forfeiture law. First, the legal concept regarding the nature of water and the historical events leading up to the current water policy as manifested in Utah statutes is discussed; second, the issue of whether Provo City is subject to these laws will be analyzed; and third, the effect the statute will have on Provo City's 65 second feet water right if Provo City is unsuccessful in quieting title is addressed. Although there are many related issues surrounding Provo City's water rights in the Provo River, this article will discuss only the Utah water right statutory forfeiture as it applies to Provo City's 65 second feet water right. The findings of this paper apply not only to Provo City—but to other municipalities in Utah and in neighboring states.

II. [§ 2] THE LEGAL NATURE OF WATER AND THE HISTORICAL EVENTS LEADING UP TO THE CURRENT UTAH STATE WATER FORFEITURE STATUTE.

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per day is equal to 1,000,000 gallons of water. Provo City's 65 second feet water right is equal to approximately 11,340,000,000 gallons per year during the non-irrigating season which is September to April.

[5]A Provo City employee stated that the 65 second feet water right has not been used since he has been working with Provo City which has been eighteen years.

[6]Complaint filed by Glen J. Ellis and Jackson Howard for Provo City. Plaintiff's Complaint, Provo City v. U.S., Civil No. 68299 filed on December 14, 1984 (Fourth Judicial District Court of Utah County, State of Utah). The prayer for relief was for the judge to grant Provo City a quiet title to the 65 second feet water right. The Utah Supreme Court, in Daniels Irrigation Co. v. Daniel Summit Co., 571 P.2d 1323, 1324 (Utah 1977), has recognized suits to quiet title as an approach to determine ownership of water rights.

[7]Plaintiff's complaint, Provo City v. U.S., page 3, lines 21 through 24.

[8]SEE GENERALLY Plaintiff's complaint.

A. [§ 2.1] THE LEGAL NATURE OF WATER AND PUBLIC OWNERSHIP.

Long before Utah became a state, legal authorities considered water to be "a movable, wandering thing which because of its nature must remain common property subject to usufructuary rights only."[9] This legal concept was expressed by the U.S. Supreme Court in 1950 when it said that water is "common to all and property of none."[10] Recently, in the same vein, Mr. Robert W. Swenson, Professor of Law at the University of Utah, College of Law, stated that water is "not capable of absolute ownership."[11] Accordingly, water does not belong to any one person or body, but to the public in general.

In 1982, the Utah Supreme Court stated in *J.J.N.P. Company v. State* that: "The state regulates the use of the water, in effect, as trustee for the benefit of the people."[12] The court supported the concept of public ownership of water by stating:

> Public ownership is founded on the principle that water, a scarce and essential resource in this area of the country, is indispensable to the welfare of all the people; and the State must therefore assume the responsibility of allocating the use of water for the benefit and welfare of the people of the State as a whole. The doctrine of public ownership is the basis upon which the State regulates the use of water for the benefit and welfare of the people.[13]

Under the public ownership doctrine, no one really owns water in the state of Utah. A water user, according to the Utah Supreme Court, "does not acquire title thereto but merely obtains the right to the use of a specific quantity of water. . . ."[14] These user rights are governed by state laws as the state serves as a trustee of water resources.

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[9]1 R. CLARK, WATER AND WATER RIGHTS, 8 (1967).

[10]United States v. Gerlach Live Stock Co., 339 U.S. 725, 744 (1950).

[11]R. Swenson, *A Primer of Utah Water Law: Part I*, 5 JOURNAL OF ENERGY LAW AND POLICY 177 (1984).

[12]J.J.N.P. Company v. State, 655 P.2d 1133, 1136 (Utah 1982).

[13]Id.

[14]U.S. v. Caldwell, 64 Utah 490, 500, 231 P. 434, 438 (1924). In 1977, the Utah Supreme Court upheld the earlier decision in U.S. v. Caldwell on two different occasions. On one of those two occasions the court stated:

> No one owns or can own water in this state, regardless of whether that water is found in the form of a spring, stream, lake, pond or under ground. One can only acquire the right to use the water.

Melville v. Salt Lake County, 570 P.2d 687, 688 (Utah 1977). In Daniels Irrigation Co., the court said one month later that "no title is obtained, only a right to use." Daniels Irrigation Co., 571 P.2d at 1324.

B. [§ 2.2] FEDERAL GOVERNMENT'S INVOLVEMENT IN THE DEVELOPMENT OF WATER LAW IN THE WESTERN TERRITORIES OF THE UNITED STATES.

During the early settlement of the western United States, the federal government did not "actively exercise its proprietary interest in [the] waters [of the western territories]."[15] Because of the need for regulation, state and territorial governments developed their own water allocation systems to distribute water resources in this ungoverned area. Control of water by state law was later approved by the U.S. Supreme Court:

> What we hold is that following the Act of 1877 (popularly known as the Desert Lands Act), if not before, all non-navigable waters then a part of the public domain became *publici juris,* subject to the plenary control of the designated states . . . with the right in each to determine for itself to what extent the rule of appropriation or common law rule in respect to riparian rights should obtain. For since 'Congress cannot enforce any rule upon any state,' *the full power of choice must remain with the state.*[16] (Emphasis added).

In *California-Oregon Power Company v. Beaver Portland Cement Co.,* an Oregon landowner obtained a homestead patent from the federal government and claimed his patent carried a common law right to water under the riparian system of water rights.[17] However, the state had an established an appropriation system of water rights. If the Supreme Court had upheld the landowner's contention, Oregon's appropriation system would have been undermined by the common law system of riparian water rights. The Court held that the Desert Lands Act of 1877 and other earlier Acts granted individual states and territories the right to decide

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[15]5 R. CLARK, WATER AND WATER RIGHTS, 41 (1967).

[16]California-Oregon Power Company v. Beaver Portland Cement Co., 295 U.S. 142, 163-164 (1935).

[17]The landowner based his claim on the riparian doctrine which is "[t]he system of law dominant in Great Britain and the eastern United States, in which owners of land along the banks of a stream or waterbody have the right to reasonable use of the waters and a correlative right protecting against unreasonable use by others that substantially diminishes the quantity or quality of water. The right is appurtenant to the land and does not depend upon prior use." 7 R. CLARK, WATER AND WATER RIGHTS, 310 (1967).

At the time of the suit, Oregon used the appropriation doctrine which is also known as prior appropriation. "The [prior appropriation] system of water law dominant in the western United States under which (1) the right to water is acquired by diverting water and applying it to a beneficial use, and (2) a right to water is superior to a similar right acquired later in time. Usually under modern statutes, approval must be secured from some state agency before acquiring a new water right or making a change in use of the water." 7 R. CLARK, WATER AND WATER RIGHTS, 272-273 (1967).

which form of water law would be applied in their own state or territory.[18]

In this same case, the Court stated that the U.S. Congress in the 1860's recognized the "legislation and judicial decisions of the arid states, as the test and measure . . ." of water rights in the western states and territories.[19] Based on this, Congress, through the enactment of the Desert Lands Act, has recognized western state and territorial statutes and judicial opinions as the governing authority of water rights.[20]

C. [§ 2.3] LAWS GOVERNING WATER RIGHTS BEFORE UTAH BECAME A STATE.

Utah, while still a territory, adopted the Colorado doctrine of prior appropriation.[21] This doctrine recognizes that in arid areas, a system of "first in time," under which water must be put to a beneficial use, would lead to maximization of limited water resources. In 1891, the Utah Territorial Supreme Court made clear that the prior appropriation system had always existed and was still recognized as the only water rights system for the territory.[22] Unlike the California Doctrine used in other western states and territories, and which recognizes a mix of riparian and appropriation systems, the Colorado Doctrine "rejects the law of riparian rights *in toto*, and adheres exclusively to the appropriation system whereby relative rights are judged by priority in time of diversion. . . ."[23] Prior appropriation is preferential in arid states like Utah since it, arguably, leads to a maximization of the limited water resources.

In addition, state forfeiture statutes, which require a water user to either beneficially use or lose his water, help achieve the maximum use of water resources in Utah. Forfeiture laws prevent parties from wasting water when it is not put to beneficial use. Such laws were first introduced in the Utah Territory in 1880 when the territorial legislature passed a statute stating that "a continuous failure to use any right to water, for a period of seven years . . . shall be held to be an abandonment and forfeiture of such rights. . . ."[24] This early forfeiture law evidences the legislature's strong desire that water not be wasted through nonuse.

When Utah became a state in 1896, the state constitution recognized existing water rights.[25] Though the exact date Provo City obtained its water right is disputed, the city's rights were appropriated prior to 1896 when Utah achieved statehood. The impact, if any, of Provo City receiving its water right before 1896 will be discussed in § 4.

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[18]California-Oregon Power Company, 295 U.S. at 155-156.

[19]*Id.* at 156.

[20]*Id.* at 156.

[21]5 R. CLARK, WATER AND WATER RIGHTS, 40 (1967).

[22]Stowell v. Johnson, 7 Utah 215, 225-226, 26 P. 290, 291 (1891).

[23]1 R. CLARK, WATER AND WATER RIGHTS, 239 (1967).

[24]Laws of Utah, 24th Session Chapter XX, Section 9, 1880.

[25]UTAH CONST. Art. XVII, § 1.

III. [§ 3] FORFEITURE OF WATER RIGHTS UNDER CURRENT UTAH STATE LAW.

A. [§ 3.1] ABANDONMENT AND FORFEITURE: TWO DIFFERENT WAYS TO LOSE A WATER RIGHT.

Abandonment of a water right is separate and distinct from forfeiture of a water right. The Idaho Supreme Court stated:

> Although abandonment and forfeiture share certain common features, this Court . . . [has] made clear that the two are distinct legal concepts. Abandonment is a common law doctrine involving the occurrence of (1) an intent to abandon and (2) an actual relinquishment or surrender of the water right. Forfeiture, on the other hand, is predicted upon the statutory declaration that all rights to use water are lost where the appropriator fails to make beneficial use of the water for a continuous five year period.[26]

Thus, for some states, abandonment is based on the common law doctrine while forfeiture is based on state statutes. As stated by the Utah Supreme Court, "abandonment requires proof of an intent to abandon a water right."[27] Mere nonuse does not mean that a water right has been abandoned unless there is some intent shown by the appropriator.[28] Conversely, intent is not an issue with a statutory forfeiture.[29]

An appropriator may abandon his water right by making his intention to abandon manifest.[30] Forfeiture occurs only when an appropriator fails to use his water right for a statutory time period.[31] Based on this, an appropriator can abandon his water right shortly after he receives it, while under the statutory forfeiture, the statutory time period must run before the water right is forfeited.

The burden of proof is different for abandonment and for statutory forfeiture. Under abandonment, the challenging party has the burden of proving that the water appropriator intended to abandon his water right.[32] The burden of proof is also with the challenging party under

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[26]Sears v. Berryman, 101 Idaho 843, 847, 623 P.2d 455, 459 (1981).

[27]*In Re* Escalante Valley Drainage Area, 12 Utah 2d 112, 115, 363 P.2d 777, 779 (1961). See also *In Re* Drainage Area of Bear River in Rich County, 12 Utah 2d 1, 361 P.2d 407 (1961).

[28]*In Re* Escalante Valley Drainage Area, 12 Utah 2d at 115.

[29]Hammond v. Johnson, 94 Utah 20, 31, 66 P.2d 894, 899, (1937), *reh'g denied*, 94 Utah 33, 75 P.2d. 164 (1938).

[30]*Id.*

[31]*Id.*

[32]Wellsville East Field Irrigation Co. v. Lindsay Land & Livestock Co., 104 Utah 448, 468, 137 P.2d 634, 643 (1943).

statutory forfeiture, but the focus is on the amount of time of nonuse instead on the intent of the appropriator.[33]

B. [§ 3.2] CURRENT UTAH STATE FORFEITURE STATUTE.

In 1919, the Utah State Legislature enacted a forfeiture statute which superseded the forfeiture statute passed by the territorial legislature in 1880.[34] The current forfeiture statute, which has been left unchanged since 1919, provides that when an appropriator (one who has a water right) ceases to use his water right for five consecutive years, the water right ceases to exist and the water reverts back to the public;[35] allowing the water to be available to other appropriators depending upon their seniority.[36]

Unlike the 1880 statute, the current forfeiture statute allows for an extension of five years to give the appropriator a chance to maintain his water right. This extension has two basic conditions. First, the appropriator has the obligation to file with the state engineer before the expiration of the initial consecutive five year period of nonuse. Second, the extension, which cannot exceed five years, can only be granted by the state engineer "upon the showing of reasonable cause for such nonuse."[37] Reasonable cause is statutorily defined as: "Financial crisis, industrial depression, operation of legal proceedings or other unavoidable cause, or the holding of a water right without use by any municipality, metropolitan water districts or other public agencies to meet the reasonable future requirement of the public. . . ."[38]

Drought years are treated as if non-existent when calculating the initial five years of consecutive nonuse under the forfeiture statutes.[39] In *Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co.*, a water right was challenged by another water user under the Utah forfeiture law. During a ten year period, there were three drought years during which no water was available. The Utah Supreme Court determined that the appropriator failed to use his water right to the full extent for seven non-drought years instead of ten years. The court held that although the drought years were not included in the total number of years considered as partial or total nonuse, they did stop the counting of the five years necessary for forfeiture.[40]

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[33]For example, see Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co., 104 Utah 202, 210-211, 135 P.2d 108, 112-113 (1943), *reh'g denied*, 104 Utah 216, 140 P.2d 638 (1943).

[34]UTAH CODE ANN. § 73-1-4 (1980).

[35]*Id.*

[36]*Id.*

[37]*Id.*

[38]*Id.*

[39]Rocky Ford Irrigation Co., 104 Utah at 209-210.

[40]*Id.* at 209-211.

C. [§ 3.3] NEIGHBORING STATES' FORFEITURE STATUTES.

Each of Utah's neighboring states have statutory forfeiture or abandonment laws in some form. Colorado, Nevada, and Wyoming consider nonuse resulting in abandonment of the water right after a statutory time period. These states use forfeiture and abandonment synonymously. Idaho is like Utah in that Idaho statutory forfeiture laws make a distinction between forfeiture and abandonment.

Under the Arizona statutory forfeiture law, if a water user has not "beneficially used all or a portion of the water right for a period of five or more consecutive years," the appropriator will be notified and required to appear at a hearing to justify the nonuse or lose the water right.[41] Under Colorado's abandonment statute, with the "failure for a period of ten years or more to apply to a beneficial use, the water available under a water right when needed by the person entitled to use the same shall create a rebuttable presumption of abandonment of a water right with respect to the amount of such available water which has not been so used."[42] Thus, a water right is presumed abandoned in Colorado if not used for ten years.

Idaho has a statutory forfeiture provision similar to Utah's. The Idaho Code states that if a water right is not put to beneficial use for five years, the water right is lost.[43] Idaho, like Utah, allows for an extension, which may not exceed five years. Nevada has the strictest forfeiture statute of all Utah's neighboring states. The Nevada statute states that if a water right is not put to beneficial use "during 5[five] successive years, the right to so use shall be deemed as having been abandoned, and any such owner or owners thereupon forfeit all water rights. . . ."[44] Nevada provides for no possible extensions. Under Wyoming statutes, if a water right is not used for five successive years, the water right is considered abandoned.[45] Wyoming allows for extensions with a five year maximum limit.

Although each state's forfeiture statute is distinct, each recognized that water is a scarce resource. In light of this, each state's statute is aimed at taking water rights from those who do not use them thus allowing others access to limited water resources.

D. [§ 3.4] FORFEITURE LAWS ARE FOUNDED UPON THE BENEFICIAL USE DOCTRINE.

The Utah forfeiture law is founded on the "beneficial use doctrine" which states that if an appropriator cannot use a water right, the water

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[41] ARIZ. REV. STAT. ANN. § 45-190 (1985).
[42] COLO. REV. STAT. § 37-92-402 (j) (1973).
[43] IDAHO CODE § 42-222 (2) (1985).
[44] NEV. REV. STAT. § 533.060 (2) (1979).
[45] WYO. STAT. § 41-3-401 (a) (1977).

right ought to be made available to another appropriator.[46] The concept of "beneficial use" is evasive but generally is defined as an "[a]pplication of a [water] resource to a purpose that produces economic benefits, tangible or intangible. . . ."[47] Examples of beneficial use include "water for domestic supply, irrigation, industrial supply, power generation or recreation."[48] The Utah Supreme Court has stated that "a prior appropriator cannot rightfully deprive another of a beneficial use of water when he is unable to beneficially use such water himself."[49] In *Adams v. Portage Irrigation Reservoir & Power Co.*, the Utah Supreme Court further stated:

> [T]he appropriator [water right] is not absolute and without limitation. The right is only a preferential use, commonly called a priority, a right against subsequent appropriators, to first divert and use beneficially the quantity or volume of water he has theretofore diverted and used beneficially and economically. . . And even though the flow be within the quantum of water to the use of which an appropriator has a preferential right, during any time it is not being used beneficially and economically, it (the water) still is, remains, or becomes *publici juris*, subject to all common rights of the public and to appropriation and use by another, for the appropriator's right is merely a preferential right to the beneficial and economical use of water. . . .[50]

Thus, an appropriator can only maintain a superior right over another potential user when the first appropriator puts the water right to beneficial use. If the water right is not beneficially used, the water reverts back to the public and is available for other appropriators depending on seniority.

E. [§ 3.5] AN APPROPRIATOR CAN FORFEIT HIS WATER RIGHT DUE TO PARTIAL NONUSE.

Utah's statutory forfeiture laws are not limited to complete nonuse of a water right. An appropriator can partially forfeit a water right even

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[46]Utah law requires that "beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state." UTAH CODE ANN. § 73-1-3 (1980).

[47]7 R. CLARK, WATER AND WATER RIGHTS, 321 (1967).

[48]*Id.*

[49]Bear River, 12 Utah 2d at 7.

[50]Adams v. Portage Irrigation Reservoir & Power co., 95 Utah 1, 13-14, 72 P.2d 648, 654 (1937) *Reh'g denied,* 95 Utah 20, 81 P.2d 368 (1938). The holding in the Adams case specifically applies to Provo City because the Utah Supreme Court applies this holding to situations where the appropriator receives an water right either from decree or by certificate from the state engineer. This should dispel any special privilege which might be given to Provo because its water right was given by decree (Morse Decree) instead of by certification from the state engineer.

though part of the water right is used.[51] In *Rocky Ford Irrigation Co.,* Kents Lake had previously received an appropriation by judicial decree that granted them a water right of 1,660 acre feet. In this case, the Utah Supreme Court reviewed water use by Kents Lake for a ten year period and found that Kents Lake had used between 1,660 acre feet and 950 acre feet. Although the Utah Supreme Court found there had been no forfeiture in this case, the court said ". . . if there were a five years continuous period during which Kents Lake failed to use material amounts of available water, we should hold that a forfeiture of at least part of its right has occurred by virtue of this nonuse."[52]

Partial forfeiture seems logical when considering the beneficial use doctrine. If an appropriator is not using a material amount of water, the beneficial use doctrine suggests that the unused portion belongs to the public and ought to be subject to reappropriation. This partial forfeiture would be governed by the Utah statute in the same way as a total forfeiture. By applying a partial forfeiture, Utah could avoid wasting its water resources due to partial nonuse. Partial forfeiture corresponds to the beneficial use of Utah's limited water resources as articulated by Utah's State and Territorial Legislature and by the Utah courts. Professor Swenson has said, "In all the arid west, courts solemnly maintain that an appropriator cannot waste water and that waste is non-beneficial use."[53]

IV. [§ 4] PROVO CITY FORFEITED ITS RIGHTS TO THE 65 SECOND FEET THROUGH NONUSE SINCE 1968.

Provo City's water rights are governed by Utah State law. As previously mentioned, the U.S. Supreme Court has recognized that western state and territorial legislatures have the power to decide what water laws apply to their state or territory. See § 2.2. The Utah Territorial Legislature established a system of prior appropriation (Colorado Doctrine) which was recognized by the territorial courts. Exactly when Provo City received its water appropriation is disputed, but the water right, like all others, is governed by the laws passed by the Utah Territorial Legislature and enforced in the Utah Territorial Courts. The Morse Decree formally recognized several different water rights belonging to Provo City including the Provo River 65 second feet water right.

Some Provo civic leaders suggest that Provo City received its water rights from the federal government when the city of Provo was chartered by the federal government. Provo City's charter is similar to many others granted by President Grant in the late 1860's. These city charters gave cities the power to provide for necessary appurtenances which might be

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[51]93 C.J.S. Water § 193 (1955).

[52]Rocky Ford Irrigation Co., 104 Utah at 209.

[53]SWENSON, *supra* note 11, at 180.

understood to include water. These same civic leaders assert that since Provo received its water grant from the federal government, Provo owns certain water rights and these rights are not subject to state water laws. This view runs contrary to the United States Supreme Court in *California-Oregon Power Co.* which recognized that the federal government did not actively exercise its proprietary interest in western water law, but rather recognized the state and territorial courts decisions and legislative laws as deciding which system of water law would be applied.[54] Under the holding in *California-Oregon Power Co.*, it is questionable that Provo City could have received a water right from the federal government.

Even if Provo had obtained a federal water grant, no federal water law exists which could govern the city's water right. Therefore, Utah state water laws apply to Provo City as it does to any other water appropriator. These laws include the beneficial use doctrine, which governs water rights, and the forfeiture statute, which includes partial forfeiture.

Provo City has not used the 65 second feet water right since at least 1968. Before that time, Provo civic leaders suggest that only a small portion of the water right was used from the 1940's to 1968. Although the forfeiture statute provides for a possible five year extension to give municipalities a chance to plan for future needs, Provo did not take advantage of the extension. Therefore, under Utah state law Provo City has forfeited all of the 65 second feet water right.

Provo City has filed a complaint to quiet title to the 65 second feet water right.[55] The city is seeking the power to maintain the water right "for such other municipal purposes as it sees fit."[56] The Utah District Court should refuse to grant quiet title because Provo City has forfeited all of the 65 second feet through nonuse. Provo might argue that between 1940 and 1968 the city used part of the water right and is therefore only subject to partial forfeiture. This argument is not persuasive because Provo has not used any portion of the 65 second feet since at lest 1968, long past the statutory time limit of five years.

V. [§ 5] PROVO CITY SHOULD NOT BE ALLOWED SPECIAL STATUS AND IMMUNITY FROM THE STATE FORFEITURE LAWS.

Municipalities like Provo City should be protected from forfeiture laws to allow for city planning for future growth. It would be unrealistic to allow any municipality only enough water to meet its current demands. In response to such concern, the Utah State Legislature created an extension for municipalities like Provo. The current forfeiture statutes have given

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[54]5 R. Clark, Water and Water Rights, 41-42 (1967). *See also* Nevada v. United States, 463 U.S. 110, 124 (1983).

[55]Plaintiff's Complaint, Provo City v. U.S., page 3 line 24-25.

[56]*Id.*

municipalities an opportunity to plan for the future by not requiring the municipality to put all of its water to beneficial use immediately. These statutes, as previously mentioned, allow for a maximum five years of nonuse. A municipal can then file for an extension of five more years upon showing reasonable cause such as "future requirements of the public."[57]

Though Provo City has forfeited its 65 second feet water right under the current statutory forfeiture law, Provo City can still provide the necessary water for economic and population growth in the future. When the need arises, Provo has at least three options available to help meet future water demands. First, the city could challenge some of the water rights in the Provo River currently used by Salt Lake County. If Provo needs the water and Salt Lake County has either partially or fully forfeited the water rights due to nonuse, Provo could sue to have the forfeiture laws applied to Salt Lake County and then apply as a junior appropriator for the water made available due to Salt Lake County's forfeiture. Second, Provo could, when needed, purchase water rights that exist in the Provo River belonging to non-governmental appropriators like irrigation companies. Other municipalities have gained water rights in this manner. Third, Provo City could appeal to the Utah State Legislature to change the current forfeiture laws, creating a special status for municipalities allowing them to reserve water rights for future needs for more than the current five years. Since Provo City has already forfeited the 65 second feet, the legislature would have to include a special provision allowing Provo City to claim a water right to the 65 second feet in question. However, the legislature might resist amending the current statutory forfeiture because the statutes already grant municipalities a special privilege as manifested by the five year extension in the current statute.

VI. [§ 6] SUMMARY.

Water rights are a sensitive issues in every community. Water is of special importance to states like Utah since the arid climate puts a strain on available water resources. In an arid state, like Utah, public policy requires that water appropriators either use their water rights or allow the water rights to be given to others who can put the water to beneficial use. From this doctrine of "beneficial use," the Utah state forfeiture laws were enacted. If an appropriator does not use his water right for five consecutive years, the forfeiture laws require the water right to revert back to the public so that the state engineer can grant the water right to others.

In the 1800's, water law in western United States was not governed by federal law, but by local state and territorial law. During this time period Provo City received several water rights that were later recognized in the Morse Decree in 1921. One of these water rights was for 65 second feet.

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[57]UTAH CODE ANN. § 73-1-4 (1980).

Provo City has not used this water right in the past eighteen years. Therefore, the Utah statutory forfeiture law should apply to Provo City and this 65 second feet should be considered forfeited.

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