

2008

Melvin Bingham v. Roosevelt City Corporation : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

J. Craig Smith; Kathryn J. Steffy; Bryan C. Bryner; Smith Hartvisgsen, PLLC; Attorneys for Plaintiffs/Appellants Melvin Bingham et al..

David L. Church; Blaisdell and Church, P.C.; Attorneys for Defendant/Appellee Roosevelt City.

Recommended Citation

Brief of Appellee, *Melvin Bingham v. Roosevelt City Corporation*, No. 20081061 (Utah Court of Appeals, 2008).
https://digitalcommons.law.byu.edu/byu_ca3/1390

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH SUPREME COURT

MELVIN BINGHAM et al., :
 :
 Plaintiffs/Appellants, : Appellate Case no. 20081061
 :
 vs. :
 :
 ROOSEVELT CITY :
 CORPORATION, a Utah municipal :
 corporation, :
 :
 Defendants/ Appellee. :

BRIEF OF APPELLEE

Appeal from a Judgment entered in the Eighth Judicial District Court, Uintah
County, State of Utah, Honorable Judge John R. Anderson, District Court Judge

J. Craig Smith
Kathryn J. Steffy
Bryan C. Bryner
SMITH HARTVIGSEN, PLLC
215 S. State Street, Suite 600
Salt Lake City, Utah 84111
*Attorneys for Plaintiffs/Appellants
Melvin Bingham et al.*

David L. Church
BLAISDELL & CHURCH, P.C.
5995 South Redwood Rd.
Salt Lake City, UT 84123
*Attorneys for Defendant/Appellee
Roosevelt City*

IN THE UTAH SUPREME COURT

MELVIN BINGHAM et al., :
 :
 Plaintiffs/Appellants, : Appellate Case no. 20081061
 :
 vs. :
 :
 ROOSEVELT CITY :
 CORPORATION, a Utah municipal :
 corporation, :
 :
 Defendants/ Appellee. :

BRIEF OF APPELLEE

Appeal from a Judgment entered in the Eighth Judicial District Court, Uintah
County, State of Utah, Honorable Judge John R. Anderson, District Court Judge

J. Craig Smith
Kathryn J. Steffy
Bryan C. Bryner
SMITH HARTVIGSEN, PLLC
215 S. State Street, Suite 600
Salt Lake City, Utah 84111
*Attorneys for Plaintiffs/Appellants
Melvin Bingham et al.*

David L. Church
BLAISDELL & CHURCH, P.C.
5995 South Redwood Rd.
Salt Lake City, UT 84123
*Attorneys for Defendant/Appellee
Roosevelt City*

Complete List of Parties:

The Plaintiffs are:

Melvin Bingham, Glenda Bingham, Howard Horrocks, Ila Faye Horrocks, Virginia Houston, Fern Oberhansly Labrum, Kent Nelson, George Richins, and Loraine Richins, individuals; Melvin H. Bingham in his capacity as Trustee of the Melvin Bingham Family Living Trust, dated November 19, 1981; Glenda G. Bingham in her capacity as Trustee of Glenda Bingham Family Living Trust, dated November 19, 1981; Virginia C. Houston, in her capacity as Trustee of the Virginia Coltharp Houston Living Trust; Fern Oberhansly Labrum, in her capacity as Trustee of the Mark L. Oberhansly Trust, dated April 17, 1987, as amended; Howard R. Horrocks and Ila Faye Horrocks, in their capacities as Trustees of the Howard R. Horrocks Family Revocable Trust, dated January 11, 1979; and Loraine Richins and Phyllis D. Oberhansly, in their capacities as Trustees of the Phyllis D. Oberhansly Trust Dated November 19, 1992.

The Defendant is:

Roosevelt City, a Utah municipal corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	2
STATUTES WHOSE INTERPRETATION ARE DETERMINATIVE OF THE APPEAL	3
STATEMENT OF THE CASE	4
STATEMENT OF FACTS.....	5
SUMMARY OF ARGUMENT.....	7
ARGUMENT.....	8
POINT ONE. The North Hayden Group property owners do not have a legally protected interest in the water underlying their ground and therefore there was no taking of property without compensation.	8
POINT TWO. The City did not interfere with any of North Hayden Group’s water rights	19
POINT THREE. The court did not err in finding that the City did not owe a duty to refrain from using its properly appropriated water and approved wells and therefore the North Hayden Group does not have negligent cause of action against the City.	21
POINT FOUR. all of North Hayden Group’s claims are barred by the applicable statutes of limitations.	24
POINT FIVE. The City’s use of its water rights does not violate public policy or the public trust doctrine.	28
CONCLUSION	31
SIGNATURE OF COUNSEL	31
PROOF OF SERVICE	32
ADDENDUM.....	33

TABLE OF AUTHORITIES

Cases

<i>American Tierra Corp. v. City of West Jordan</i> , 840 P.2d 757 (Utah 1992),	25
<i>Bagford v. Ephraim City</i> , 904 P.2d 1095, (Utah 1995)	8, 13
<i>Breiggar Properties, L.C. v. H.E. Davis & Sons, Inc.</i> , 2002 UT 53 at ¶ 8, 52 P.3d 1133	26
<i>Estate of Steed v. New Castle Irrigation Co.</i> , 846 P.2d 1223 (Utah 1992).....	22, 23, 29
<i>Ferree v. State of Utah</i> , 784 P.2d 149, 151 (Utah 1989).	21
<i>Green River Canal Co. v. Thayn</i> , 2003, UT 50, 84 P.3d 1134.....	10, 11
<i>In Re Uintah Basin</i> , 133 P.3d 410, 420 (Utah 2006).....	13
<i>J.J.N.P. Co. v. State</i> , 655 P.2d 1133 (Utah 1982)	13

<i>Johnson v. Utah-Idaho Cent. Ry. Co.</i> , 68 Utah 309, 249 P. 1036 (Utah 1926)	24
<i>Riordan v. Westwood</i> , 203 P.2d 922 (Utah 1949)	16, 17, 18
<i>Rocky Mtn. Thrift Stores Inc. v. Salt Lake City Corp.</i> , 887 P.2d 848 (Utah 1994).	21
<i>Salt Lake City v. Silver Fork Pipeline Corp</i> , 2000 UT 3, 5 P.3d 1206 (Utah 2000)	18
<i>Sanguinetti v. United States</i> , 264 U.S. 146 (1924)	9
<i>Sigurd City v. State</i> , 142 P.2d 154 (Utah 1943)	11, 12
<i>Smith v. Price Development Co.</i> , 2005 UT 87, 125 P.3d 945	8
<i>Tolman v. Logan City</i> , 2007 UT App. 260, 167 P.3d 489 (UT 2007)	24
<i>Wayman v. Murray City Corp.</i> , 23 Utah 2d 97, 458 P.2d 861 (1969).....	11, 23, 24, 29
<i>Weber Basin Water Conservancy District v. Gailey</i> , 328 P.2d 175 (Utah 1958).....	13, 14, 15, 16
<i>Weber, By and Through Weber v. Springville City</i> , 725 P.2d 1360 (Utah 1986).....	21
Statutes	
Utah Code 63G-7-402.....	25
Utah Code 73-1-1	13, 30
Utah Code 73-1-3	9
Utah Code 73-2-1	13
Utah Code 73-2-1(3)).....	20
Utah Code 73-5-15.....	30
Utah Code 73-5-15(3)(b).....	31
Utah Code 78B-2-303	24
Utah Code 78B-2-307 (2008).....	24

STATUTES WHOSE INTERPRETATION ARE DETERMINATIVE OF THE APPEAL

The following statutes are determinative of the appeal and are set forth in the Addendum.

Utah Code Ann. § 63G-7-402. Time for filing notice of claim

Utah Code Ann. § 73-1-1. Waters declared property of public.

Utah Code Ann. § 73-1-3. Beneficial use basis of right to use.

Utah Code Ann. § 73-2-1. State engineer -- Term -- Powers and duties -- Qualification for duties.

Utah Code Ann. § 73-5-15. Groundwater management plan.

Utah Code Ann. § 78B-2-303. One year -- Actions on claims against county, city, or town.

Utah Code Ann. § 78B-2-307. Within four years.

STATEMENT OF THE CASE

The complaint in this case contains three causes of action, all arising out of the same set of facts. The causes of action are Interference with Water Rights, Takings, and Negligence. A summary of the factual allegations underlying all three causes of action is that the Appellants (hereinafter called North Hayden Group) are claiming that the pumping by Roosevelt City's of certain of its municipal water wells results in the lowering of the water table under the North Hayden Group's property. They allege that this has caused them to not being able to irrigate their ground as efficiently as they did prior to the City putting its wells into use.

The complaint does not allege that the City has taken any of North Hayden Group's water shares or appropriated water rights or that the City is using any water that it does not have a state approved right to use. The complaint alleges that the North Hayden Group has suffered crop and stock losses because the water rights they own or lease are not sufficient to irrigate their properties as they did prior to the City putting its wells into production.

STATEMENT OF FACTS

The following facts were material to the District Court's grant of summary judgment and are either contained in the allegations of the complaint or derived from the North Hayden Group's answers to the City's discovery. The allegations of the complaint were accepted as true for purposes of the motion for summary judgment.

The individuals and entities that make up what is being referred to as the North Hayden Group own property located in Uintah and Duchesne Counties and either own or lease water rights which they use for irrigation purposes to raise crops and live stock. (Record pgs 3-5; complaint ¶¶ 1-7) None of the North Hayden Group have rights, approved by the office of the Utah State Engineer, to the water located in the water table below their property. (Record pgs. 3-5; Complaint ¶¶ 1-8)

The City is a municipality of the State of Utah located in Duchesne County. (Record pg 5; Complaint ¶8) and holds water rights and operates wells on property located in Duchesne and Uintah Counties for the purposes of supplying residents of the City with culinary water. (Record pgs 5-7; Complaint ¶¶ 8-16)

In 1983 the City purchased land previously owned by Verl and Leah Haslem in the area of the North Hayden Group and Verl and Leah Haslem assigned their interest in some water rights they owned to the City. (Record pg 7; Complaint ¶15)

The City filed various change applications to utilize its water rights from wells beginning in 1983 at what is called in the complaint the “Hayden Well Field” and the applications were all approved prior to May 6, 1994. (Record pgs 7-8; Complaint ¶¶ 15-19)

The North Hayden Group filed protests to some of the applications with the office of the State Engineer and participated in the administrative process regarding those applications. (Record pgs 160, 161; answer to Interrogatory # 17)

By the fall of 1990 all five wells in the Hayden well field were producing water for the City. (Record pgs 7,8; Complaint ¶ 20) The North Hayden Group alleges that after the wells were put into production in the late 1980s and 1990s some trees and grass on their properties died and they could no longer produce crops and cattle in the amounts they had produced previously. (Record pgs 157, 158; answer to Interrogatory 12). The North Hayden Group alleges that this loss of crops and cattle was because the pumping of the Hayden well field had lowered the water table under their property making it inefficient to water their respective properties with the water rights they either own or lease. (Record pgs 157-159; answer to interrogatories 12, 13, and 14).

The North Hayden Group’s complaint does not allege that the City has used any water right or water source for which it does not have an approved certificated

water right through the office of the Utah State Engineer. (Record pgs 6-7 and 8-9; Complaint ¶¶ 11, 12, 14, 15, 16, 17, 33, 34, and 35)

SUMMARY OF ARGUMENT

All of the North Hayden Group's claims for relief and theories of liability depend on them having some kind of property interest in the ground water underlying their respective properties. Their takings claims are dependent on this Court finding that as a matter of law they have a protected property right to use the water under their respective properties. Their interference with water rights claims and their negligence claims are equally dependent on the City having the duty to use its own wells and water rights in a manner which does not interfere with the North Hayden Group's historical use of the ground water under their properties. If the North Hayden Group does not have a property interest, or other legally protected interest in the water underlying their properties, all of their claims fail and the summary judgment in favor of the City must be upheld.

The North Hayden Group does not have a protectable property interest in the groundwater underlying their properties and therefore the City did not take or damage their property in a constitutional sense. The City did not take or damage the beneficial use of the North Hayden Group's properly appropriated or leased irrigation water rights. The City does not have a duty to refrain from the use of its

own approved water rights or wells and therefore did not negligently interfere with the North Hayden Group' water rights.

In addition all of North Hayden Group's claims arose many years prior to the complaint being filed and are therefore barred by the applicable statutes of limitations.

ARGUMENT

POINT ONE. THE NORTH HAYDEN GROUP PROPERTY OWNERS DO NOT HAVE A LEGALLY PROTECTED INTEREST IN THE WATER UNDERLYING THEIR GROUND AND THEREFORE THERE WAS NO TAKING OF PROPERTY WITHOUT COMPENSATION

The North Hayden Group's takings claims are brought under both state and federal constitutions. "To recover under article I, section 22 [of the Utah Constitution], a claimant must possess a protectable interest in property that is taken or damaged for a public use." *Bagford v. Ephraim City*, 904 P.2d 1095, 1097 (Utah 1995). The Fifth Amendment analysis is virtually identical (with the exception that a claim under the Utah Constitution is in one sense broader) and also requires that a claimant possess a protectable interest in property. See *Smith v. Price Development Co.*, 2005 UT 87, 125 P.3d 945.

Under the United States Constitution an injury to property alone does not amount to a taking in violation of the Takings Clause. A taking under the Fifth Amendment requires an invasion that is "actual" and "permanent" and that amounts

to an “appropriation of and not merely an injury to the property.” *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924). Unlike an inverse condemnation claim under the Utah Constitution, a claim under Federal law requires an actual taking rather than mere injury or damages to the property.

The City does not believe that the North Hayden Group has identified any protectable property interest that the City has taken or damaged. The North Hayden Group identifies two property interests that they allege have been taken or damaged without compensation. First, the North Hayden Group claims that the City has taken the right to beneficially use their existing water shares, resulting in damage to the profits from their agricultural land and secondly, that they, by virtue of their ownership of the land, have a property interest in the “near-surface” water underlying their properties. The City’s position is that neither of these is a protectable interest in property nor was taken by the City.

The North Hayden Group’s brief argues that the right to beneficially use water is in itself a protected property right and that the City has taken that right from them. This argument confuses the concept of putting water to a beneficial use with the benefit that one might receive from that use. “Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in the state.” Utah Code Ann. 73-1-3 (2008). It is not a property right in itself.

It is an undisputed fact that the members of the North Hayden Group have the use of all of their leased or owned water rights in the same quantities, amounts, and at the same points of diversion as they did before the City put its Hayden well field into production. The North Hayden Group's claim is that the use of their water rights is not as beneficial economically to them as it once was because of the City pumping its own wells. (Record pgs 9 and 157-158).

Beneficial use in the water law context describes and limits a water right. It is not separate from the water right. There can be no valid water right without beneficial use, but there could be beneficial use of water without a valid water right. Such is the case in this instance-- the North Hayden Group has been making use of the ground water below its property without having any properly appropriated rights to the use of that water and through this litigation is trying to make this use legitimate.

The cases cited by the brief of the North Hayden Group do not support their contention that an expected benefit from the use of water is a protected property right in and of itself, or that the City has taken that use. The *Green River Canal Co. v. Thayn*, 2003, UT 50, 84 P.3d 1134, case does not establish that the beneficial use of water is a separate protectable property right. It is a contract case and is not relevant to the issues raised in this case. It holds that the contract in question did not limit a party's use of his water but the water right held by the

party did. The language in *Green River Canal Co.* that is more relevant to the issues before this Court is that, “the guiding principle behind our water law statutes and the work of the State Engineer is that water must always be put to the most beneficial use. ‘Because of the vital importance of water in this arid region both our statutory and decisional law have been fashioned in recognition of the desirability and of the necessity of insuring the highest possible development and of the most continuous beneficial use of all available water with as little waste as possible.’” *Green River Canal Co. v. Thayne*, 2003, UT 50, 84 P.3d 1134, at ¶34 (quoting *Wayman v. Murray City Corp.*, 23 Utah 2d 97, 458 P.2d 861, 863(1969)) It is apparent from this language that the policy of the State of Utah is in favor of Roosevelt City’s full development of its water rights, even those under the North Hayden Group’s property.

The case of *Sigurd City v. State*, 142 P.2d 154 (Utah 1943) is also not supportive of the position of the North Hayden Group that beneficial use as described by the North Hayden Group’s brief is a protected property right. This case involved a direct taking through eminent domain and the issue for the court involved how much water in a creek the city had to pay for. The court in that case stated, “The defendants were entitled to the use of all the water in Petersons Creek and its tributaries which reached their lands and had been appropriated and beneficially used thereon. To the extent that the plaintiff’s taking of the waters of

Rosses Creek deprived the defendants of the use of water which would otherwise have been used upon their lands the plaintiff has taken the defendants' water.”

Sigurd City v. State, 142 P.2d 154, 157(Utah 1943). The key to this holding is not that beneficial use is a property right, but that a land owner is only entitled to be paid for water that he has both *appropriated and beneficially used*. The North Hayden Group has not appropriated any of the subsurface water under their ground. The members of the North Hayden Group may have been benefiting from the under-ground water but they are not entitled to be compensated for it by the City.

The North Hayden Group also argues that the City must compensate them for the damages caused by the City taking the near surface water underlying the group member's ground. For this argument to be successful this Court must find that as a matter of law the North Hayden Group has a legally protected right to the continued use of the ground water under their properties to assist them in their irrigation. If the North Hayden Group does not have a legally protected interest in the subsurface water, then they have no takings claim against the City for the loss in production from their properties. The fact that the North Hayden Group has alleged that it has lost crop and cattle production is not in itself enough to establish that the City has taken property. Crops and cattle are protectable property interests, but the amount of crops and cattle that land will produce and sustain is

the product of many factors such as the skill of the farmer, the weather, and whether there is drought or not. The amount of crop and cattle expected from a particular property is not a protected property interest. It is a unilateral expectation of the property owner. Utah courts have made it clear that a unilateral expectation in future profits or other interest is not property protected from taking by the constitution. See *Bagford v. Ephraim City*, 904 P.2d 1095, 1096 (Utah 1995).

The North Hayden Group does not have any protectable property interest in the ground water underlying their properties. The North Hayden Group is asserting that they have rights in the water underlying their ground based solely on their ownership of the ground. The law in Utah is that the ownership of land itself does not give the land owner any rights to any water on, adjoining, or below that land. See *J.J.N.P. Co. v. State*, 655 P.2d 1133 (Utah 1982). The first principle of Utah water law is that, "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." *In Re Uintah Basin*, 133 P.3d 410, 420 (Utah 2006). (Quoting U.C.A. § 73-1-1) The State Engineer has been designated as responsible for the administrative supervision of the waters of the state. U.C.A. § 73-2-1.

The North Hayden Groups arguments in this case are similar to the claimants arguments in *Weber Basin Water Conservancy District v. Gailey*, 328 P.2d 175 (Utah 1958). In *Weber Basin Conservancy District*, the land owner

wanted damages from a water district because the root zone water he had been relying on to support the vegetation on his property was taken away from the land by the damming of the Weber River. This case was a direct takings case and the landowner was seeking money damages because the water table under his ground had been adversely affected by the construction of a publicly owned facility a public purpose. In that case the landowner, “maintains that the subsurface waters in his soil are part of the land itself and therefore his private property, and that any diversion of the river which would lower the water table removes moisture from his land is a ‘taking of and a damage to’ his property.” *Weber Basin, supra at, 176*

The landowner had not appropriated any rights in the river or to the underground water in his land. *Id.* at 179. The court found that the landowner had no legally recognizable claim for damages to his property.

The *Weber Basin* case is directly analogous to this case. The North Hayden Group does not hold any water rights in the aquifer below their properties. Just as the plaintiff in *Weber Basin* did not hold any rights in the river. The plaintiff in *Weber Basin* was apparently relying on the root zone water on his land to maintain its utility as pasture. Just as the members of the North Hayden Group were relying on the underlying aquifer to aid in the irrigation of their properties. The plaintiff in *Weber Basin* claimed damages to his land caused by the loss of the percolating waters when the owners of the water rights began to use their rights to

the water. This is the very claim these North Hayden Group is now making against the City.

The Court in *Weber Basin* said in deciding the case in against the land owner and in favor of the governmental entity the following:

In addition to the other difficulties encountered in permitting defendant to insist upon benefits to his property because it lies on the banks of the stream, there is the additional consideration that it would allow him to accomplish by indirection what he cannot do directly: that is, to assert and maintain rights to control of the water in question, including to some degree the water in the Weber River, without ever having met the recognized legal requirements prerequisite to the establishment of such rights.

Under the circumstances described, to endow defendant or others similarly situated downstream owners, who in some instances might be great in number, with the right to demand damages because use of the river by owners of upstream water rights may effect the moisture in their soil, would not only impair the right of prior appropriators to use waters rightfully theirs, but may well in some instances present such obstacles as to make it practically impossible to impound and use such waters. This clearly runs counter to the basic policy of our water and irrigation law of facilitating and encouraging the conservation, development and continuous application of water resources to useful purposes.

Supporting in principle the conclusion we reach herein, and quite impossible to reconcile with the defendant's position, is the consistent policy of the law followed by this court of requiring that there be some action taken to appropriate and control waters in order to establish rights to its use. We have never gone so far as to base water

rights on the mere acceptance of benefits incidental to the presence of water on or adjacent to one's land. *Weber Basin Conservancy District v. Gailey, supra, at 179.*

The North Hayden Group's arguments for damages are almost identical to those rejected in *Weber Basin*. The North Hayden Group is trying to control the City's use of its properly appropriated water indirectly through claims for damages. The City has developed its wells. Once the wells were put into production the North Hayden Group claimed their lands dried up and they suffered damages. The North Hayden Group is claiming rights based solely on their prior acceptance of benefits incidental to the presence of water under their ground.

If the position of the North Hayden Group is adopted it will result in the complete reversal of long established principles of Utah water law and result in property owners having rights in water based on their ownership of the ground adjoining or above the water source.

The North Hayden Group relies on the case of *Riordan v. Westwood*, 203 P.2d 922 (Utah 1949) for the proposition that there is a category of water, lying near the surface of property, that is private water, that does not belong to the public, and is not subject to appropriation through the State of Utah. This reliance is misplaced.

Even to the extent that *Riordan* is still good law (a point that can certainly be argued) the North Hayden Group do not have any private right, or property

interest, in the water that they claim the City has deprived them of. *Riordan*, in relevant part, limits its own application to waters which “course cannot be traced onto the lands of any person other than the owner of the land where it is found . . .” (*Riordan*, supra at 929) The North Hayden Group’s expert has opined that the water that the City is using comes from the “Neola-Whiterocks Aquifer which is an unconfined aquifer underlying the Hayden area that supports a near surface water table.” (Record at 198-200). He has is also of the opinion that the City’s pumping of the water has lowered the water table under North Hayden Group’s lands from 14.3 feet to 94.6 feet. (Record at 266-67) Because the water the North Hayden Group are claiming is part of an established aquifer, which extends well beyond the North Hayden Group’s lands, they cannot have any property interest in that water under the *Riordan* rationale.

In addition, in *Riordan* the private water was limited to only that water that was necessary to maintain the natural plant life on the land. *Riordan*, at pg. 231. All other water under the *Riordan* case was public water and subject to appropriation. In the case at hand the North Hayden Group’ claims for damages are all from crop and stock loss occasioned by the legal, state sanctioned, use by the City of ground water under the North Hayden Group’ land which use the North Hayden Group allege has made their irrigation efforts ineffective. (Record at 9) The North Hayden Group are not alleging damages to the natural vegetation. They

are in essence relying on the *Riordan* case to “boot strap” themselves from a private right in the root zone water to control over the public water contained in the aquifer.

Riordan is probably not even good law on the issue the North Hayden Group are relying on it for in this case. A better statement of what the law in Utah is regarding public or private ownership of the near surface water table is that found in *Salt Lake City v. Silver Fork Pipeline Corp*, 2000 UT 3, 5 P.3d 1206 (Utah 2000) wherein the Utah Supreme Court stated:

As we have since indicated, the public has always owned percolating waters in spite of statements to the contrary in earlier cases. In *Provo River*, we rejected the characterization of percolating water as “privately owned.” We acknowledged that some pre-1935 decisions “characterized diffused groundwater and isolated springs and seeps as subject to private ownership,” However, we expressly agreed with the statement by Chief Justice Wolfe, made in 1952, that public ownership of all water in the state, even that which percolates underground, “must have always been so.... But the fact that the State progressively applied regulation to the acquisition of use rights in water does not disturb the fundamental principle that all water...at least from the time it reaches land within the confines of this state belongs to the public—the people of this state.” *Salt Lake City v. Silver Fork Pipeline Corp*, ¶ 31, at page 1216. (Citations omitted)

Because the members of the North Hayden Group do not have any property rights to the ground water under their lands, the City has not taken the beneficial use of their existing rights nor has it taken any property from the North Hayden Group.

The North Hayden Group was using water they did not have a right to. There is no valid takings claim under either state or federal constitutions.

POINT TWO. THE DEFENDANT CITY DID NOT INTERFERE WITH ANY OF NORTH HAYDEN GROUP'S WATER RIGHTS

The Court was correct in dismissing North Hayden Group' First Cause of Action for interference with water rights. The complaint in this matter alleges that the City has interfered with the "quantity and quality" of the North Hayden Group's water. (Record pg. 11). There is no allegation in the complaint that the City has prevented the North Hayden Group from getting or using their appropriated or leased water. The North Hayden Group is asserting that their owned and leased water rights are not as effective in irrigating their properties as they were prior to the City putting it own water into production. Their brief admits that this is a novel theory and one of first impression in Utah. (Brief at page 29). This Court should not create this new cause of action.

The alleged interference with water rights is not analogous to the cases cited in the North Hayden Group's brief concerning artesian and flowing wells. In each of these cases the dispute was between junior and senior appropriators of water rights in the same aquifers. In the case before this court the North Hayden Group does not have any appropriated rights to the water beneath their ground. The City is not junior to any ground water rights of the North Hayden Group and the

complaint in this matter does not allege so. The North Hayden Group does not have any rights to the water that has been sub-irrigating their property for the same reasons expressed in the prior sections of this brief.

There is no obligation for this Court to balance the rights of the City to use its water with the interest of the North Hayden Group. The City's right to use the contested water and its wells has already been evaluated and balanced against the interests of others, including the North Hayden Group, by the Utah State Engineer. The complaint in this matter recites that City filed the appropriate applications for both the amount, use, and the points of diversion of its water rights with the office of the State Engineer and that these applications were all approved. (Record at pg 7). The duties of the State Engineer include being responsible for the "general administrative supervision of the waters of the state and the measurement, appropriation, apportionment, and distribution of those waters" and to "secure the equitable apportionment and distribution of the water according to the respective rights of appropriators." (U.C.A. 73-2-1(3)) The North Hayden Group did protest the drilling of the wells and the change in the point of diversion through the process of the State Engineer. (Record pgs 160, 161; answers to interrogatory number 17). Any balancing of interests required by the law occurred in that forum.

The North Hayden Group in this case does not claim to have appropriated the groundwater under their own land. The only water rights the North Hayden

Group allege that they own are water rights for irrigation. Roosevelt City has not interfered with these water rights appropriated by the North Hayden Group; Roosevelt has merely used water for which it has appropriated water rights under procedures recognized by law.

POINT THREE. THE COURT DID NOT ERR IN FINDING THAT THE CITY DID NOT OWE A DUTY TO REFRAIN FROM USING ITS PROPERLY APPROPRIATED WATER AND APPROVED WELLS AND THEREFORE THE NORTH HAYDEN GROUP DOES NOT HAVE A NEGLIGENT CAUSE OF ACTION AGAINST THE CITY

The Third Cause of Action is in negligence and the North Hayden Group is arguing that their First Cause of Action, interference with water rights, is also a claim based in negligence. The elements of a negligence action have been clearly defined in Utah to include a duty of reasonable care owed by the defendant to the plaintiff. See *Weber, By and Through Weber v. Springville City*, 725 P.2d 1360, 1363 (Utah 1986). To succeed in a negligence cause of action a plaintiff must first establish that they are owed a duty of care by the defendant. See *Ferree v. State of Utah*, 784 P.2d 149, 151 (Utah 1989). The question of whether a duty exists is a question of law to be decided by the court. *Weber*, 725 P.2d at 1363. If the plaintiff is unable to clearly establish that they are owed a duty of reasonable care by the defendant then “there can be no negligence as a matter of law, and summary judgment is appropriate.” *Rocky Mtn. Thrift Stores Inc. v. Salt Lake City Corp.*, 887 P.2d 848, 852 (Utah 1994).

The North Hayden Group has not identified any specific law or case that creates a duty for the City to not use the ground water under the property of the North Hayden Group. Rather the North Hayden Group argues from analogy that the City has a general duty to do no harm. A more specific and direct analogy to this situation is found in the cases involving competing water users when one user changes its use to the detriment of the other. These cases argue against the City having a duty to maintain the water table at historic levels.

In *Estate of Steed v. New Castle Irrigation Co.*, 846 P.2d 1223, 1224 (Utah 1992) the defendant changed its irrigation system from flood irrigation to a sprinkler system. The plaintiff had come to rely on the runoff and seepage flow from the flood irrigation. Once the Irrigation Company changed its method of irrigation, the plaintiff argued that it had a right to receive the same amount of runoff and seepage flow that it previously received. The court held that it was unfortunate that the plaintiff lost some of the water that had previously found its way onto their land, but that they had no right to compel the Irrigation Company to allow water to runoff the shareholder's land. *Id.* at 1229. The court stated that the Irrigation Company was not required to ensure that the flow of water was maintained at its historic level. *Id.* at 1226.

In the case before this court it is undisputed that the City has properly appropriated water rights and approved wells. The allegation of the North Hayden

Group is that once the City put its rights into production they, the North Hayden Group, lost the use of the ground water to supplement their irrigation efforts. This is directly analogous to the claims of the plaintiff in *Estate of Steed*. The City is under no legal duty to refrain from the full use of its water and well rights.

In *Wayman v. Murray City Corp*, 458 P.2d 861, 862 (Utah 1969), the plaintiffs were owners of private residences who had established water rights in an underground water basin. Murray City purchased the rights to seven old wells in the same underground water basin. Later, Murray City received permission from the State Engineer to improve its old wells and to drill a new well. The plaintiffs later brought suit on the ground that Murray City's wells had diminished the flow in their own wells. *Id.* at 862. The plaintiffs argued that Murray City should have at its own cost permanently replaced plaintiffs' water in an amount and quality equal to the level of their prior use. *Id.* at 864. The court disagreed with the plaintiffs stating that to grant the plaintiffs' request for relief would impose upon Murray City a "sweeping and pervasive responsibility." *Id.* The plaintiffs' proposed solution would "seriously curtail the fullest utilization of the ground-water supply" and "prove to be economically impracticable." *Id.* at 865-66. At no point did the court suggest that Murray City had a duty to maintain the groundwater level or cease operating its pumps.

Roosevelt City had the right to install the new wells and use the water consistent with the City's water rights. It does not have the duty to maintain the water table at its historic level. Because the City has no duty to maintain the water table at its historic levels, the members of the North Hayden Group cannot succeed on their negligence cause of action nor their negligent interference with water rights cause of action and it was proper for the District Court to dismiss them as a matter of law.

POINT FOUR. ALL OF NORTH HAYDEN GROUP'S CLAIMS ARE BARRED BY THE APPLICABLE STATUTES OF LIMITATIONS

The North Hayden Group' complaint contains three causes of action all from one set of facts. The longest statute of limitations for any of the claims brought is for the takings claims and is the catchall four year statute of limitations now found in Utah Code 78B-2-307 (formerly 78-12-25). In the *Tolman v. Logan City*, 2007 UT App. 260, 167 P.3d 489 (UT 2007), the Utah Court of Appeals specifically held that the catchall four year statute of limitations is applied to takings claims. See *Tolman* at ¶10. The Court of Appeals relied on *Johnson v. Utah-Idaho Cent. Ry. Co.*, 68 Utah 309, 249 P. 1036 (Utah 1926) The statute of limitations for the tort claims at the time of the filing of the complaint in this matter was Utah Code 78-12-30 (now codified as Utah Code 78B-2-303). It is one year after the first rejection of the claim by the City. The notice of claim was required to have been

filed with the City within one year from when the claim arose. (Utah Code 63G-7-402; formerly 63-30-13)

The complaint alleges that the City began using all five wells of the Hayden Well Field in the fall of 1990. (Complaint ¶ 20; Record at pages 7,8). In their answers to discovery the North Hayden Group allege they observed problems with their fields and crops as early as 1984 and allege that after development of the Hayden Well Field, in the late 1980s and early 1990s the trees and grass on the affected properties died and the North Hayden Group could no longer produce hay as they had done before. (Record pgs. 153-155, 157-159).

The allegations in North Hayden Group' Complaint and their answers to discovery make clear that they had knowledge of the City's use of its wells and water rights, and of the damage that they now allege was caused by that use, in the 1980s and 1990s. The complaint was filed in June 2004. In *American Tierra Corp. v. City of West Jordan*, 840 P.2d 757, 761 (Utah 1992), the Court held that "the limitation period begins to run as of the date on which the action could have been maintained to a successful conclusion." All of North Hayden Group' Causes of Action could have been brought when the North Hayden Group' first observed that their problems with irrigation were associated with the use of the City's wells. This occurred, by their own admission, as early as 1984. The complaint was filed too late and must be dismissed.

The North Hayden Group's brief seems to concede that their claims were not filed within the appropriate statutes of limitations but argues that the statutes of limitation should not apply under the continuous tort exception. This exception should not apply in this case. The North Hayden Group has cited no cases directly on point in arguing for the continuous tort and their brief does not analyze the differences among the three causes of action in the North Hayden Group's complaint. They have relied primarily by analogy to cases in continuing trespass or nuisance.

The analogy to a continuing trespass actually argues against the North Hayden Group's position. "When a cause of action for nuisance or trespass accrues for statute of limitations purposes depends on whether the nuisance or trespass is permanent or continuing. Where a nuisance or trespass is of such character that it will presumably continue indefinitely it is considered permanent, and the limitations period runs from the time the nuisance or trespass is created." *Breiggar Properties, L.C. v. H.E. Davis & Sons, Inc.*, 2002 UT 53 at ¶ 8, 52 P.3d 1133. In determining whether a trespass is permanent or continuing, "we look solely to the *act* constituting the trespass, and not to the *harm* resulting from the act." *Id.* at ¶ 10.

All three of the North Hayden Group's causes of action stem from the City establishing wells in what they have described as an unconfined aquifer. This was accomplished, and it was admittedly known to the North Hayden Group, many

years prior to the complaint in this matter having been filed. In this case the North Hayden Group is focusing for purposes of their statute of limitations argument on the harm allegedly caused by the wells and not on the act of drilling and placing the wells into production. If their damage is being caused by the City's wells or well design then that cause of action accrued when they were first placed in production, which according to the complaint was in the 1990s. (Record pgs 7,8)

Using an example of a more typical takings claim shows the fallacy of applying the continuing tort analysis to a takings claim. If the City had been accused of taking a person's property for use as a public road it would be absurd to conclude that each day's use of the road by the public would start a new statute of limitations running. Yet, in this case the North Hayden Group is asking this court to do just that. They are asserting that even though the City took their property for public use beginning in 1980's, and that they knew about this use, the statute of limitations did not start to run when the taking first took place, but each time the use occurs. If this Court were to agree with the North Hayden Group' argument on this matter it will effectively do away with any statute of limitations for a claim of taking of property for public use without compensation.

In the case at hand it is undisputed that the act of the City complained about by the North Hayden Group is the City's acquisition of water rights and its development of wells in an unconfined aquifer. It is alleged that the use of these

rights and wells results in the damages claimed by the North Hayden Group. The claimed interference with water rights and taking of North Hayden Group' property will continue indefinitely into the future. The statute of limitations must begin to run when the North Hayden Group knew or should have known of their claims. Which they admit was more than four years ago.

POINT FIVE. THE CITY'S USE OF ITS WATER RIGHTS DOES NOT VIOLATE PUBLIC POLICY OR THE PUBLIC TRUST DOCTRINE.

The North Hayden Group and the Amicus Curiae argue that the City's use of its water rights is "mining the aquifer" and violate public policy and the public trust doctrine. The public trust doctrine as posited by the Amicus Curiae is not implicated in this case. This is not a case where the public interest in maintaining a healthy natural environment is in conflict with the private development of water. This is a case where two water users are in a contest over two unnatural uses of the water. The City wishes to use water for urban municipal purposes and the North Hayden Group' wish to use the water for irrigation of their land.

The North Hayden Group's claimed damages are for the loss to crops and profits from grazing. The North Hayden Group is not maintaining this case to preserve the natural flora and fauna that may rely on the natural underground water. There is no claim in the complaint that the natural environment or the public's interest in protecting the natural flora and fauna (if such an interest exists)

is or will be harmed by the City's lowering of the aquifer from 14 feet to 94 feet as is claimed by the North Hayden Group, therefore the State of Utah's interest in this case, and how it might apply to the underground water of the Snake Valley, is tenuous, if not non-existent.

The public policy in the State of Utah regarding what the North Hayden Group's brief calls "mining the aquifer" has already been established by the Utah Legislature and interpreted by this Court. This public policy can be summarized in the following statements of law. "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." (U.C.A. 73-1-1) "First in time, first in right for beneficial use is the basis of the acquisition of water rights." (*Estate of Steed v. New Escalante Irrigation Co*, 846 P.2d 1223, 1224 (Utah 1992) "Because of the vital importance of water... both our statutory and decisional law have been fashioned in recognition of the desirability and of the necessity of insuring the highest possible development and of the most continuous beneficial use of all available water with as little waste as possible." *Wayman v. Murray City Corp*, 23 Utah 2d 97, 100, 458 P.2d 861, 863 (1969) (citations omitted).

The City's use of its appropriated water right is consistent with this public policy and the North Hayden Group's efforts to prevent this is in violation of public policy. All of the North Hayden Group's claims hinge on them having an

ownership right in the ground water under their respective properties. This claim of private ownership of the water underlying their ground is clearly against the policy that all waters belong to the public.

It is undisputed that the City has been appropriated the water rights it is using through the office of the Utah State Engineer, in accordance with the statutory and administrative procedure in existence for that office to allocate out rights to use of the public's water. (Record at pgs 7, 8) It is also undisputed that that the members of the North Hayden Group do not have appropriated rights in the ground water underlying their ground and therefore the City's right to water is "first in time, first in right for beneficial use." In addition the North Hayden Group is attempting through this litigation to prevent the City from the highest possible development of its water rights and from using all available water with no waste. The North Hayden Group has taken the position that for their own economic interest the City must leave the water underlying their ground without use.


The provisions of Utah Code 73-5-15 allowing the state engineer to establish a ground water management plan for groundwater basins does not establish a public policy that precludes the City's use of it underground water right in this case, nor does it support the North Hayden Group's claim in this matter. While this section does give the State Engineer tools to limit groundwater withdrawals to what is called a safe yield, the section specifically requires the State Engineer to

“base the provisions of a groundwater management plan on the principles of prior appropriation.” (U.C.A. 73-5-15(3) (b)) The principles of prior appropriation in this case support the City’s use of the groundwater over the North Hayden Group’s reliance on groundwater for which they have no appropriated right.

CONCLUSION

This lawsuit is an attempt by the North Hayden Group to avoid the processes established by Utah law for obtaining and protecting water rights. They have either substantively or procedurally failed in the administrative processes of the Office of the State Engineer and are now attempting to use these damages claims to obtain rights in water. This effort should be rejected out of hand by this court through summary dismissal of their complaint.

Dated this 13th day of July, 2009.



David L. Church
Attorney for Defendant/ Appellee

MAILING CERTIFICATE

The undersigned certifies that true and correct copies of the foregoing Brief were mailed, postage prepaid, this 13th day of July 2009 to the following:

J. Craig Smith
Kathryn J. Steffy
Bryan C. Bryner
SMITH HARTVIGSEN, PLLC
215 S. State Street, Suite 600
Salt Lake City, Utah 84111
*Attorneys for Plaintiffs/Appellants
Melvin Bingham et al.*

Donald E. McCandless
SCRIBNER & McCANDLESS, P.C.
2696 North University Avenue, Suite 220
Provo, UT 84604
*Attorneys for Amici Curiae Living Rivers
and Great Basin Water Network*



ADDENDUM

Utah Code Ann. § 63G-7-402. Time for filing notice of claim.

A claim against a governmental entity, or against an employee for an act or omission occurring during the performance of the employee's duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed with the person and according to the requirements of Section 63G-7-401 within one year after the claim arises regardless of whether or not the function giving rise to the claim is characterized as governmental.

Utah Code Ann. § 73-1-1 . Waters declared property of public. 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.

Utah Code Ann. § 73-1-3. Beneficial use basis of right to use.

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. § 73-2-1. State engineer -- Term -- Powers and duties -- Qualification for duties.

- (1) There shall be a state engineer.
- (2) The state engineer shall:
 - (a) be appointed by the governor with the consent of the Senate;
 - (b) hold office for the term of four years and until a successor is appointed; and
 - (c) have five years experience as a practical engineer or the theoretical knowledge, practical experience, and skill necessary for the position.
- (3) (a) The state engineer shall be responsible for the general administrative supervision of the waters of the state and the measurement, appropriation, apportionment, and distribution of those waters.
 - (b) The state engineer may secure the equitable apportionment and distribution of the water according to the respective rights of appropriators.
- (4) The state engineer shall make rules, in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, consistent with the purposes and provisions of this title, regarding:
 - (a) reports of water right conveyances;
 - (b) the construction of water wells and the licensing of water well drillers;
 - (c) dam construction and safety;
 - (d) the alteration of natural streams;
 - (e) sewage effluent reuse;

- (f) geothermal resource conservation; and
 - (g) enforcement orders and the imposition of fines and penalties.
- (5) The state engineer may make rules, in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, consistent with the purposes and provisions of this title, governing:
- (a) water distribution systems and water commissioners;
 - (b) water measurement and reporting;
 - (c) ground-water recharge and recovery;
 - (d) the determination of water rights; and
 - (e) the form and content of applications and related documents, maps, and reports.
- (6) The state engineer may bring suit in courts of competent jurisdiction to:
- (a) enjoin the unlawful appropriation, diversion, and use of surface and underground water without first seeking redress through the administrative process;
 - (b) prevent theft, waste, loss, or pollution of those waters;
 - (c) enable him to carry out the duties of the state engineer's office; and
 - (d) enforce administrative orders and collect fines and penalties.
- (7) The state engineer may:
- (a) upon request from the board of trustees of an irrigation district under Title 17B, Chapter 2a, Part 5, Irrigation District Act, or another local district under Title 17B, Limited Purpose Local Government Entities - Local Districts, or a special service district under Title 17D, Chapter 1, Special Service District Act, that operates an irrigation water system, cause a water survey to be made of all lands proposed to be annexed to the district in order to determine and allot the maximum amount of water that could be beneficially used on the land, with a separate survey and allotment being made for each 40-acre or smaller tract in separate ownership; and
 - (b) upon completion of the survey and allotment under Subsection (7)(a), file with the district board a return of the survey and report of the allotment.
- (8) (a) The state engineer may establish water distribution systems and define their boundaries.
- (b) The water distribution systems shall be formed in a manner that:
 - (i) secures the best protection to the water claimants; and
 - (ii) is the most economical for the state to supervise.

Utah Code Ann. § 73-5-15. Groundwater management plan.

(1) As used in this section:

- (a) "Critical management area" means a groundwater basin in which the

groundwater withdrawals consistently exceed the safe yield.

(b) "Safe yield" means 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.

(2) (a) The state engineer may regulate groundwater withdrawals within a specific groundwater basin by adopting a groundwater management plan in accordance with this section for any groundwater basin or aquifer or combination of hydrologically connected groundwater basins or aquifers.

(b) The objectives of a groundwater management plan are to:

- (i) limit groundwater withdrawals to safe yield;
- (ii) protect the physical integrity of the aquifer; and
- (iii) protect water quality.

(c) The state engineer shall adopt a groundwater management plan for a groundwater basin if more than 1/3 of the water right owners in the groundwater basin request that the state engineer adopt a groundwater management plan.

(3) (a) In developing a groundwater management plan, the state engineer may consider:

- (i) the hydrology of the groundwater basin;
- (ii) the physical characteristics of the groundwater basin;
- (iii) the relationship between surface water and groundwater, including whether the groundwater should be managed in conjunction with hydrologically connected surface waters;
- (iv) the geographic spacing and location of groundwater withdrawals;
- (v) water quality;
- (vi) local well interference; and
- (vii) other relevant factors.

(b) The state engineer shall base the provisions of a groundwater management plan on the principles of prior appropriation.

(c) (i) The state engineer shall use the best available scientific method to determine safe yield.

(ii) As hydrologic conditions change or additional information becomes available, safe yield determinations made by the state engineer may be revised by following the procedures listed in Subsection (5).

(4) (a) (i) Except as provided in Subsection (4)(b), the withdrawal of water from a groundwater basin shall be limited to the basin's safe yield.

(ii) Before limiting withdrawals in a groundwater basin to safe yield, the state engineer shall:

- (A) determine the groundwater basin's safe yield; and
- (B) adopt a groundwater management plan for the groundwater basin.

(iii) If the state engineer determines that groundwater withdrawals in a groundwater basin exceed the safe yield, the state engineer shall regulate groundwater rights in that groundwater basin based on the priority date of the water rights under the groundwater management plan, unless a voluntary arrangement exists under Subsection (4)(c) that requires a different distribution.

(b) When adopting a groundwater management plan for a critical management area, the state engineer shall, based on economic and other impacts to an individual water user or a local community caused by the implementation of safe yield limits on withdrawals, allow gradual implementation of the groundwater management plan.

(c) (i) In consultation with the state engineer, water users in a groundwater basin may agree to participate in a voluntary arrangement for managing withdrawals at any time, either before or after a determination that groundwater withdrawals exceed the groundwater basin's safe yield.

(ii) A voluntary arrangement under Subsection (4)(c)(i) shall be consistent with other law.

(iii) The adoption of a voluntary arrangement under this Subsection (4)(c) by less than all of the water users in a groundwater basin does not affect the rights of water users who do not agree to the voluntary arrangement.

(5) To adopt a groundwater management plan, the state engineer shall:

(a) give notice as specified in Subsection (7) at least 30 days before the first public meeting held in accordance with Subsection (5)(b):

(i) that the state engineer proposes to adopt a groundwater management plan;

(ii) describing generally the land area proposed to be included in the groundwater management plan; and

(iii) stating the location, date, and time of each public meeting to be held in accordance with Subsection (5)(b);

(b) hold one or more public meetings in the geographic area proposed to be included within the groundwater management plan to:

(i) address the need for a groundwater management plan;

(ii) present any data, studies, or reports that the state engineer intends to consider in preparing the groundwater management plan;

(iii) address safe yield and any other subject that may be included in the groundwater management plan;

(iv) outline the estimated administrative costs, if any, that groundwater users are likely to incur if the plan is adopted; and

(v) receive any public comments and other information presented at the public meeting, including comments from any of the entities listed in Subsection (7)(a)(iii);

(c) receive and consider written comments concerning the proposed groundwater management plan from any person for a period determined by the state engineer of not less than 60 days after the day on which the notice required by Subsection (5)(a) is given;

(d) (i) at least 60 days prior to final adoption of the groundwater management plan, publish notice:

(A) that a draft of the groundwater management plan has been proposed; and

(B) specifying where a copy of the draft plan may be reviewed; and

(ii) promptly provide a copy of the draft plan in printed or electronic form to each of the entities listed in Subsection (7)(a)(iii) that makes written request for a copy; and

(e) provide notice of the adoption of the groundwater management plan.

(6) A groundwater management plan shall become effective on the date notice of adoption is completed under Subsection (7), or on a later date if specified in the plan.

(7) (a) A notice required by this section shall be:

(i) published:

(A) once a week for two successive weeks in a newspaper of general circulation in each county that encompasses a portion of the land area proposed to be included within the groundwater management plan; and

(B) in accordance with Section 45-1-101 for two weeks;

(ii) published conspicuously on the state engineer's Internet website; and

(iii) mailed to each of the following that has within its boundaries a portion of the land area to be included within the proposed groundwater management plan:

(A) county;

(B) incorporated city or town;

(C) improvement district under Title 17B, Chapter 2a, Part 4, Improvement District Act;

(D) service area, under Title 17B, Chapter 2a, Part 9, Service Area Act;

(E) drainage district, under Title 17B, Chapter 2a, Part 2, Drainage District Act;

(F) irrigation district, under Title 17B, Chapter 2a, Part 5, Irrigation District Act;

(G) metropolitan water district, under Title 17B, Chapter 2a, Part 6, Metropolitan Water District Act;

(H) special service district providing water, sewer, drainage, or flood control services, under Title 17D, Chapter 1, Special Service District Act;

(I) water conservancy district, under Title 17B, Chapter 2a, Part 10, Water Conservancy District Act; and

(J) conservation district, under Title 17D, Chapter 3, Conservation District Act.

(b) A notice required by this section is effective upon substantial compliance with Subsections (7)(a)(i) through (iii).

(8) A groundwater management plan may be amended in the same manner as a groundwater management plan may be adopted under this section.

(9) The existence of a groundwater management plan does not preclude any otherwise eligible person from filing any application or challenging any decision made by the state engineer within the affected groundwater basin.

(10) (a) A person aggrieved by a groundwater management plan may challenge any aspect of the groundwater management plan by filing a complaint within 60 days after the adoption of the groundwater management plan in the district court for any county in which the groundwater basin is found.

(b) Notwithstanding Subsection (9), a person may challenge the components of a groundwater management plan only in the manner provided by Subsection (10)(a).

(c) An action brought under this Subsection (10) is reviewed de novo by the district court.

(d) A person challenging a groundwater management plan under this Subsection (10) shall join the state engineer as a defendant in the action challenging the groundwater management plan.

(e) (i) Within 30 days after the day on which a person files an action challenging any aspect of a groundwater management plan under Subsection (10)(a), the person filing the action shall publish notice of the action:

(A) in a newspaper of general circulation in the county in which the district court is located; and

(B) in accordance with Section 45-1-101 for two weeks.

(ii) The notice required by Subsection (10)(e)(i)(A) shall be published once a week for two consecutive weeks.

(iii) The notice required by Subsection (10)(e)(i) shall:

(A) identify the groundwater management plan the person is challenging;

(B) identify the case number assigned by the district court;

(C) state that a person affected by the groundwater management plan may petition the district court to intervene in the action challenging the groundwater management plan; and

(D) list the address for the clerk of the district court in which the action is filed.

(iv) (A) Any person affected by the groundwater management plan may petition to intervene in the action within 60 days after the day on which notice is last published under Subsections (10)(e)(i) and (ii).

(B) The district court's treatment of a petition to intervene under this Subsection (10)(e)(iv) is governed by the Utah Rules of Civil Procedure.

(v) A district court in which an action is brought under Subsection (10)(a) shall consolidate all actions brought under that Subsection and include in the consolidated action any person whose petition to intervene is granted.

(11) A groundwater management plan adopted or amended in accordance with this section is exempt from the requirements in Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

(12) Recharge and recovery projects permitted under Chapter 3b, Groundwater Recharge and Recovery Act, are exempted from this section.

(13) Nothing in this section may be interpreted to require the development, implementation, or consideration of a groundwater management plan as a prerequisite or condition to the exercise of the state engineer's enforcement powers under other law, including powers granted under Section 73-2-25.

(14) A groundwater management plan adopted in accordance with this section may not apply to the dewatering of a mine.

(15) (a) A groundwater management plan adopted by the state engineer before May 1, 2006, remains in force and has the same legal effect as it had on the day on which it was adopted by the state engineer.

(b) If a groundwater management plan that existed before May 1, 2006, is amended on or after May 1, 2006, the amendment is subject to this section's provisions.

Utah Code Ann. § 78B-2-303. One year -- Actions on claims against county, city, or town.

Actions on claims against a county, city, or incorporated town, which have been rejected by the county executive, city commissioners, city council, or board of trustees shall be brought within one year after the first rejection.

Utah Code Ann. § 78B-2-307. Within four years.

An action may be brought within four years:

(1) after the last charge is made or the last payment is received:

(a) upon a contract, obligation, or liability not founded upon an instrument in writing;

(b) on an open store account for any goods, wares, or merchandise; or

(c) on an open account for work, labor or services rendered, or materials furnished;

(2) for a claim for relief or a cause of action under the following sections of Title 25, Chapter 6, Uniform Fraudulent Transfer Act:

(a) Subsection 25-6-5(1)(a), which in specific situations limits the time for action to one year, under Section 25-6-10;

- (b) Subsection 25-6-5(1)(b); or
- (c) Subsection 25-6-6(1); and
- (3) for relief not otherwise provided for by law