

2003

Green River Canal Company v. Jerry D. Olds : Reply Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

No. 20030156-SC

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WATER, BOTH SURFACE AND UNDERGROUND, WITHIN THE DRAINAGE AREA OF
THE PRICE RIVER AND OF THE DRAINAGE AREA OF THE GREEN RIVER FROM
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SAN RAFAEL RIVER IN UTAH

GREEN RIVER CANAL COMPANY,
Objector and Appellee,

v.

JERRY D. OLDS,
Utah State Engineer and Appellant

REPLY BRIEF OF APPELLANT

On Appeal from a Judgment of the Seventh Judicial District Court for Carbon County
Honorable Bruce K. Halliday

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APR 26 2004

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REPLY BRIEF OF APPELLANT

ARGUMENT

This appeal raises issues of whether the ninety-day objection period begins when the water user signs a Notice, Receipt and Waiver, whether the trial court has discretion retroactively to lengthen the objection period or accept late objections, and whether late amendments must be closely related to a timely objection. At a more fundamental level, however, this case is about the nature of the general adjudication and the way water rights are regarded in Utah. The more fundamental question is whether the proposed determination settles water right issues, with late objections and new issues precluded after the ninety-day objection period. The alternative is an open-ended objection period during which new issues

can be raised and litigated at the discretion of the trial court, and the proposed determination serves to raise issues for later litigation rather than to settle them.

I. THE NINETY-DAY OBJECTION PERIOD IN SECTION 73-4-11 CANNOT BE RETROACTIVELY EXTENDED OR MODIFIED

A. WHEN WATER USERS CHOOSE PERSONAL SERVICE OF THE PROPOSED DETERMINATION AND EXPRESSLY WAIVE SERVICE BY MAIL, THE OBJECTION PERIOD BEGINS TO RUN ON THE DATE OF INDIVIDUAL SERVICE

1. The Company Waived Service by Mail When Delbert Tidwell Signed the Notice, Receipt and Waiver Form

On December 15, 1972, Delbert Tidwell, the Company secretary, signed the Notice, Receipt and Waiver. In one section, the Notice, Receipt and Waiver stated,

[Y]ou are notified that any claimant dissatisfied with said Proposed Determination must file with the Clerk of the above-entitled court a written objection thereto duly verified on oath within ninety (90) days from and after the date of service of this notice upon you.

Notice, Receipt and Waiver, Brief of Appellant Addendum 2. Following that section, immediately above the date and signature, is the following statement:

And the undersigned waives any further service in connection therewith and consents to the entry of a final decree in this cause unless a formal protest is made by the undersigned claimant to the above-entitled court within ninety (90) days from and after date hereof.

Id. The Notice, Receipt and Waiver is dated December 15, 1972, and signed for the Green River Canal Company by “Delbert Tidwell Sec.” *Id.* These notices are in addition to the notice in the proposed determination that objections must be filed within ninety days. (R. 1: inside front cover).

The Company challenged the Notice, Receipt and Waiver, arguing “that Mr. Tidwell’s

signature could not be authenticated, that the document apparently contained the handwriting of two different individuals, that no copy could be found in the Canal Company's records, and that there is no evidence that Mr. Tidwell was ever given a copy." Brief of Appellee at 21 n.8. However, Mr. Tidwell signed other documents, including Diligence Claim No. 46, the basis for the Company's claim to a water right and attached to the Brief of Appellee as Addendum D. Despite available examples of Mr. Tidwell's signature, the Company made no effort to compare the signature on the Notice, Receipt and Waiver with other documents.

The other factors cited by the Company have no bearing on the authenticity of the Notice, Receipt and Waiver. The notation "Green River Canal Company" is a cross reference to the water right owner of record. Such notations are necessary when the owner of record is a corporation, municipality, or association, and numerous examples occur in the compiled Notice, Receipt and Waiver forms. (R. 13, 14, 15). The notation is unrelated to the authenticity of Mr. Tidwell's signature, as is the Company's inability to locate a copy of the Notice, Receipt and Waiver in the Company records and to determine whether Mr. Tidwell received a copy.

The Company argues it would be necessary to remand to the trial court to determine if the Notice, Receipt and Waiver constituted an express waiver. The document, however, is not ambiguous, and this Court is able to determine its meaning as a matter of law. *See Saunders v. Sharp*, 806 P.2d 198, 200 (Utah 1991).

2. Actual Receipt of the Proposed Determination with Express Waiver of Service by Mail Commences the Ninety-Day Objection Period

The Company argues that section 73-4-11, which states that the State Engineer shall

prepare the proposed determination “and a copy of the same shall be mailed by regular mail to each claimant,” Utah Code Ann. § 73-4-11 (1989), precludes personal service. The Company cites a case in which this Court addressed whether the statutory phrase “the state engineer shall notify the applicant by registered mail” implicitly required actual receipt of the notice. *See Mosby Irrigation Co. v. Criddle*, 354 P.2d 848, 851 (Utah 1960). This Court rejected that argument, but stated, “Undoubtedly, the legislature, in providing for notice by registered mail, contemplated or hoped for actual receipt thereof, but it did not require it.” *Id.* In another case, this Court addressed the question of whether mailing the proposed determination under section 73-4-11 provides adequate service. “This court has held that regular mailing when allowed by statute, as opposed to actual receipt, is sufficient notice.” *Jensen v. Morgan*, 844 P.2d 287, 290 (Utah 1992) (citing *Anderson v. Public Serv. Comm’n*, 839 P.2d 822 (Utah 1992); *Mosby*, 354 P.2d at 852). In both cases, this Court indicated that actual receipt is preferable, even though it is not always required by statute.¹ Personal service is always actual receipt, while service by mail is constructive because there is no assurance of actual receipt. This rationale is consistent with *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

The State Engineer’s practice of allowing water users to obtain the proposed determination in person is not arbitrary. Actual receipt of proposed determinations provides

¹ It is not necessary for this Court to rule that all statutes specifying service by mail implicitly allow actual receipt by personal service. The service of proposed determinations in the general adjudication is unique. A ruling that section 73-4-11 implicitly allows voluntary personal service need not extend to other statutes.

many advantages to water users and in no way works to their detriment.² The problems of mass mailing and incomplete or incorrect addresses are at least partly mitigated. Personal service is more effective than mail because the water user knows when the service occurred without having to determine a mailing date. Though not required by the statute, actual receipt by personal service is voluntary, more certain, and more effective than service by mail.

The Company argues that the case *Longley v. Leucadia Financial Corp.*, 2000 UT 69, 9 P.3d 762, requires strict compliance with the statutes regarding notice. *Longley* addressed the substance of the notice, not the method of delivery. *See id.* at ¶ 22. Because personal delivery of proposed determinations serves the purposes and policies of section 73-4-11 better than service by mail, it does not conflict with *Longley*.

The Company also argues that the *Badger* and *Beggs* cases do not support the State Engineer's position. Brief of Appellee at 23-24. In *Badger*, this Court addressed the question of whether strict compliance or substantial compliance with the notice statute is required:

When determining whether substantial statutory compliance as opposed to strict statutory compliance should be permitted, we must . . . ascertain whether full protection under the statute would still be enjoyed by the party the statute seeks to protect. If "substantial . . . compliance satisfies the policy of the statute[.]"

² The proposed determinations in the Price River general adjudication were distributed in the early 1970s. At that time, no computers were available to the State Engineer's staff for use in the general adjudication. There were no data bases, no automated printing of labels, no storing and retrieval of address information. The State Engineer's staff faced the task of typing mailing labels by hand for the owners of 4,700 water rights. *See* Affidavit of Mark Page (R. 181). One secretary, perhaps assisted by a technician, was available to do this work. *Id.* The secretary or technician generated the list of water users by manually typing each name and address. The potential for error was substantial, and it would have been virtually impossible to mail all the proposed determinations in one day. These problems are exacerbated by the tendency of water users to neglect updating their addresses on the State Engineer's records. *See, e.g., Jensen*, 844 P.2d at 290; *Mosby*, 354 P.2d at 850.

then strict compliance is not in order.

Badger v. Madsen, 896 P.2d 20, 23 (Utah 1995) (citations and quotations omitted).

In this case, the right to notice and the right to participate in the general adjudication are not at issue. The only right affected by personal service is the “right” to receive the proposed determination by mail, which does not affect the ability of water users to participate in the general adjudication. Personal service satisfies the purposes and policies of the statute better than service by mail because it provides the water user with actual receipt of the proposed determination. Under the *Badger* analysis, actual receipt by personal service is substantial compliance with the statute even without express waiver, because it satisfies the policy of the statute and because it protects the water users’ right and ability to participate in the general adjudication.

Badger and *Beggs* also support the State Engineer’s arguments regarding the Company’s waiver of service by mail. In *Badger* and *Beggs*, this Court held that shareholders waive any statutory defects related to notice of a shareholders meeting if they attend and participate in the meeting. *Badger*, 896 P.2d at 24; *Beggs v. Myton Canal & Irrigation Co.*, 179 P. 984, 987 (Utah 1919). In this case, the Company voluntarily took affirmative steps to receive its proposed determination in person, comparable to a shareholder participating in the meetings discussed in *Badger* and *Beggs*. Actual receipt of the proposed determination did not deprive the Company of the opportunity to participate in the general adjudication or prejudice the Company’s participation in any way. By voluntarily opting for personal service, the Company waived service by mail even without the express waiver in the Notice, Receipt

and Waiver.

When the substantial compliance analysis of *Badger* is combined with indications in *Beggs* and *Jensen* that actual receipt is preferable even when service by mail is allowed by statute, personal service of the proposed determination is not inconsistent with section 73-4-11. Following the analysis in *Badger* and *Beggs*, a water user waives any right to complain about the method of service if it voluntarily chooses personal service.

The normal method of commencing an action is personal service of summons, but service by mail is allowable in a few limited circumstances. *See* Utah R. Civ. P. 4(d). Section 73-4-3, however, allows service of summons by mail as a general rule rather than only in the limited circumstances of Rule 4(d)(2). *See* Utah Code Ann. § 73-4-3 (1989). Just because section 73-4-3 allows the less certain method of service by mail as an exception to the general rule does not mean that section 73-4-11 precludes the more certain method of personal service.

B. THE NINETY-DAY OBJECTION PERIOD APPLIES TO EACH WATER USER INDIVIDUALLY

The Company argues that all water users should receive the proposed determination at the same time. The statutes do not require simultaneous service, and it is improper to infer that requirement into the statute. *See Associated Gen. Contractors v. Board of Oil, Gas and Mining*, 2001 UT 112, ¶ 30, 38 P.2d 291 (court will not infer substantive terms into statute). Although there may be superficial appeal to the idea of a uniform objection period, it is not required by statute and it is not necessary because water users can participate in objections that affect their water rights without filing a counter-objection. *See Plain City Irrigation Co. v.*

Hooper Irrigation Co., 51 P.2d 1069, 1072 (Utah 1935) (claimants whose rights may be affected are entitled to notice of hearing of objection). In any event, no one forced the Company to receive its proposed determination in person. If the Company were convinced by its own argument, it would have foregone personal service and waited for the State Engineer to mail the proposed determination.

C. UTAH SUPREME COURT CASE LAW PREVENTS LATE OBJECTIONS FROM BEING LITIGATED IN THE GENERAL ADJUDICATION

The Company argues that statements in the case *United States Fuel Co. v. Huntington-Cleveland Irrigation Co.*, 2003 UT 49, 79 P.3d 945, “indicate that late objections may be excused.” Brief of Appellee at 39.

In *United States Fuel*, this Court interpreted sections 73-4-11 and 73-4-12 to preclude litigation of an issue not raised in a timely objection. *See, e.g., United States Fuel*, 2003 UT 49, ¶ 15 (“The clear mandate of section 73-4-12 is that courts must render judgment in accordance with the proposed determination where the proposed determination is uncontested at the close of the ninety-day statutory period.”).³ At the same time, this Court directed United States Fuel Company (USF) to seek relief for its untimely objection in the general

³ *See also United States Fuel*, 2003 UT 49, ¶ 13 (“Section 73-4-12 of the Utah Code describes the consequences of failing to lodge a timely objection”); *id.* at ¶ 17 (“By the plain language of the statute, USF had ninety days from the date of service of the proposed determination to file an objection USF filed an objection one day late. Its tardiness had consequences.” (citations omitted)); *id.* at ¶ 20 (“When USF failed to timely contest HCIC’s claim . . . it took on the status of a defaulting party in the general adjudication.”); *id.* at ¶ 21 (“USF did not contest the proposed determination within the statutorily-mandated period.”); *id.* at ¶ 22 (“[S]ection 73-4-12 mandates that courts enter judgment in accordance with the proposed determination . . . when the proposed determination has not been contested within the statutorily-mandated period.”).

adjudication. *See, e.g., id.* at ¶ 17 (“Unless and until USF sought and obtained leave of court in the general adjudication to excuse its tardy objection, HCIC was entitled to judgment perfecting the state engineer’s proposed award to HCIC . . .”).⁴

The statements directing USF to seek relief for its untimely objection in the general adjudication trial court are seemingly at odds with the statements about the finality of the ninety-day objection period and the effect of section 73-4-12. In *United States Fuel*, however, this Court faced the question of whether USF could use a private action to circumvent the general adjudication. *Id.* at ¶ 22. The particular issues of timeliness and validity of the USF objection were before a different trial court in a different case, and they were not briefed and argued before this Court in the *United States Fuel* case. This Court referred USF to the proper court for a decision about whether the objection was actually late, which would determine whether USF could litigate the objection.

There are two ways to interpret the statements in *United States Fuel* directing USF to apply to the adjudication trial court. One is that the trial court has discretion to allow litigation of late objections, the other is that the issue was before the adjudication trial court and not before this Court. One of those interpretations is directly at odds with this Court’s statements regarding sections 73-4-11 and -12, and the other is consistent with those statements. If the adjudication trial court had discretion to accept late objections, the proper ruling in *United States Fuel* would have been that USF had not yet sought acceptance of its objection in the

⁴ *See also id.* at ¶ 18 (“To this day, USF has not sought to have its untimely objection accepted in the general adjudication.”); *id.* at ¶ 20 (“It is in [the general adjudication] that USF should be compelled to seek relief for its untimely-filed objection . . .”).

adjudication trial court – and nothing more. The Court’s reliance on section 73-4-12, which requires judgment in accordance with the proposed determination for uncontested water rights, *see* Utah Code Ann. § 73-4-12 (1989), would be superfluous, even misleading, because the adjudication trial court could retroactively postpone the effect of section 73-4-12 by allowing late objections. Section 73-4-12 would play no effective role in the general adjudication until the moment the final decree is entered. The discussion about the ninety-day objection period in section 73-4-11 would also lack purpose, because the trial court could void the effect of section 73-4-11 by allowing late objections. Sections 73-4-11 and 73-4-12 would only apply at the discretion of the trial court.

Trial court discretion is also inconsistent with the *Jensen* case. Although Mr. Jensen apparently did not seek an extension under section 73-4-10, he pursued his late objection in the adjudication trial court, which denied his section 73-4-24 petition because the objection was late. *See Jensen v. Morgan*, 844 P.2d 287, 288 (Utah 1992). If the adjudication trial court had discretion to entertain late objections, either generally or under section 73-4-10, the proper reasoning would have been to uphold the trial court decision as a proper exercise of discretion. That, however was not the basis for the *Jensen* decision. Instead, this Court based its decision on the finality of the ninety-day objection period in section 73-4-11, stating, “Since it is clear that Jensen received book 2 and did not file a timely protest against WUC 93-1091, his petition was properly dismissed.” *Id.* at 291.

In both *United States Fuel* and *Jensen*, this Court cited section 73-4-11 as a limit of ninety days for filing objections. Although the final outcomes in both cases could be justified

if the adjudication trial court has discretion to accept late objections for litigation, such a ruling would be inconsistent with the rationale of these cases.

D. SECTION 73-4-10 ALLOWS PROSPECTIVE BUT NOT RETROACTIVE EXTENSIONS

1. The Relationship Between the Extension Provision and the Deadline is the Same for Sections 63-30-11 and -12, Utah Rule of Appellate Procedure 4(a) and 4(e), and Sections 73-4-10 and -11

The Company argues that comparisons to sections 63-30-11 and -12 and Rule 4 of the Utah Rules of Appellate Procedure are inapplicable because the trial court already had jurisdiction over the Company. Brief of Appellee at 37-38. However, retroactive extensions would be precluded by lack of subject matter jurisdiction, not personal jurisdiction. *See, e.g., Rushton v. Salt Lake County* 1999 UT 36, ¶ 18, 977 P.2d 1201 (failure to file notice of claim under section 63-30-11(2) deprives the trial court of subject matter jurisdiction).

The State Engineer cited sections 63-30-11 and -12 and Rule 4 as examples of statutes or rules with a structure similar to sections 73-4-10 and -11. Brief of Appellant at 25-26. All three have a deadline in one section and an extension provision in another. Courts have issued rulings on both section 63-30-11 and Utah Rule of Appellate Procedure 4(e), as cited in the Brief of Appellant at 25-26. This Court has consistently reconciled such provisions by recognizing that a litigant may obtain an extension prospectively by applying before the deadline expires, but retroactive extensions are not allowed. This approach preserves the integrity of the deadline while allowing the extension provision to function.

The Company argues that the comparison is not valid because both section 63-30-12 and Rule 4 require notice of intent to file an action or appeal, which amounts to a pre-condition

to suit. Brief of Appellee at 38. That is exactly the point. A water user must satisfy the precondition of timeliness before it can litigate an objection.

The Company cites *T.S. v. State*, 2003 UT 54, 82 P.3d 1104, for the proposition that Rule 4 of the Utah Rules of Appellate procedure need not be inflexible. Brief of Appellee at 38. In *T.S.*, it is not clear that the motion for extension was filed before the second deadline in Rule 4(e). See Utah R. App. P. 4(e). In *T.S.*, however, this Court did not indicate a departure from cases holding that the second deadline is jurisdictional, nor did it overrule those cases. Flexibility applies before the second deadline, but not after.

2. The Company did not Meet the Due Cause Standard

The Company devotes considerable effort to argue for a due cause standard favorable to its position. Brief of Appellee at 31-34. The Company cites cases from Pennsylvania and New Mexico where courts enunciated a very lenient due cause standard. Those cases involve the authority of a municipality to revise taxes, *In re Petition to Increase Millage Limit Levied on Real Estate From 25 Mills to 30 Mills*, 646 A.2d 61 (Pa. Commw. Ct. 1994); *In re City of Clairton*, 694 A.2d 372 (Pa. Commw. Ct. 1997), and the standard by which a company can deny a franchise to a prospective franchisee, *Key v. Chrysler Motors Corp.*, 918 P.2d 350 (N.M. 1996).

The State Engineer urges this Court to define “due cause” as used in section 73-4-10 to reflect the character of the general adjudication in Utah. See *Mammoth Canal & Irrigation Co. v. Burton*, 259 P. 408, 411 (Utah 1927) (discussing the unique nature of the general adjudication). Because of the combination of statutory procedure, complex issues, sheer size

of the undertaking, and limited resources, general adjudications in Utah are unique among Utah civil cases and among other state general adjudications. In particular, there have historically been long periods of time between publication of the proposed determination and entry of a decree, a problem largely mitigated by the finality of the ninety-day limit for filing objections. Retroactive extensions coupled with a weak due cause standard would make that problem worse, not better.

If the due cause standard is to be fair to claimants who “ask permission” by prospectively requesting an extension before the ninety day deadline, it should not be excessively difficult to meet. On the other hand, claimants who “ask forgiveness” by waiting years or decades to seek a retroactive extension should have to meet a much higher standard. This duality is avoided if there are no retroactive extensions.⁵

In Utah, the case law that most nearly reflects the “due cause” standard is the “good cause” standard in Rule 4 of the Utah Rules of Appellate Procedure. The courts have extensive experience with the “good cause” standard. *See, e.g., T.S. v. State*, 2003 UT 54, 82 P.3d 1104. The factors that can be considered for extensions under section 73-4-11, however, should be limited. In *T.S.* and other cases, this court limited the “good cause” standard to reasons why the notice of appeal was late. *See, e.g., id.*, at ¶¶ 4-10. In this case, the Company has tried to shift the focus of the due cause standard away from its delay in filing the objections and toward the State Engineer’s delay in filing the motion to dismiss. Essentially, the Company asserts

⁵ This duality is built into Rule 4 of the Utah Rules of Appellate Procedure because of the two deadlines. *See Reisbeck v. HCA Health Servs. of Utah, Inc.*, 2000 UT 48, ¶ 11, 2. P.3d 447.

that “due cause” means only the passage of time. *Compare Serrato v. Utah Transit Auth.*, 2000 UT App. 299, ¶ 12, 13 P.3d 616 (“it is unfair to allow an extension for what amounts to no excuse”). That definition makes no sense and would damage and lengthen, rather than facilitate, the purposes and procedures of the general adjudication.

E. THE COMPANY’S EQUITABLE ARGUMENTS DO NOT JUSTIFY THE TRIAL COURT’S INTERPRETATION OF SECTION 73-4-11 OR SATISFY THE DUE CAUSE REQUIREMENT IN SECTION 73-4-10

1. The Ninety Day Objection Period Began When The Company Signed the Notice, Receipt, and Waiver, and no Equitable Remedy Was Necessary

The Company argues that the trial court was compelled to “fashion an equitable remedy to resolve the issue of timing.” Brief of Appellee at 26. The statutory ninety-day objection period for the Company began on December 15, 1972. The trial court erred by failing to acknowledge that the signed Notice, Receipt and Waiver commenced the objection period, and the equitable remedy was not warranted.

2. The Company has not been Prejudiced by the Delay

The Company argues it has been prejudiced by the long delay following distribution of the proposed determinations. Brief of Appellee at 27-28. The prejudice, it argues, was because of a possible loss of documents that might excuse the late filing and the loss of witnesses whose testimony might have excused the late filing.

It is critical to understand that the only documents or testimony relevant to this argument are documents that would have excused the late filing. Mr. Tidwell and the Company’s previous attorney had no authority unilaterally to excuse the Company from complying with the statute. The testimony of Mr. Tidwell and the attorney, while perhaps

enlightening, by itself could not excuse the late filing, and Mr. Tidwell's testimony about receipt of the proposed determination would almost certainly contradict the Company's present position. In addition, Mr. Vetere, who signed the 1973 Objection, is still alive. The supposed testimony of unavailable witnesses therefore does not actually contribute to any prejudice.

The Company searched its own records, the district court records, and the State Engineer's records. *See* Affidavit of Rodney K. Dean (R.152-53). Those searches revealed no documents that excused the filing and no reference to documents that excused the late filing. The logical, reasonable explanation is that such documents never existed, a much more reasonable conclusion than the chain of unlikely speculation upon which the Company relies.

The Company speculated for the first time in this case what kind of document might have excused the late filing. *See* Brief of Appellant at 27-28. The remote possibility that the Company filed a timely objection that is now lost is undermined by John Vetere, who was president of the Company in 1973 and who signed the 1973 Objection.⁶ Mr. Vetere did not remember anything that would excuse the late filing of the 1973 Objection. Affidavit of John Vetere (R. 144-146).

If the Company thought it was losing evidence through the passage of time, it could have sought resolution of its objection under section 73-4-24. *See United States Fuel Co. v. Huntington-Cleveland Irrigation Co.*, 2003 UT 49 ¶18, 79 P.3d 945. It did not, and by filing

⁶ John Vetere, (also John Vetere Jr.), who was president of the Company in 1973, received a proposed determination for his own water rights and signed a Notice, Receipt and Waiver on December 14, 1972, one day before Mr. Tidwell received the proposed determination on behalf of the Company. (R.14: subsection "V").

the later objections in 1993 and 1999, it took advantage of the delay while complaining it was prejudiced. The Company's repeated assertions should be recognized for what they are – an attempt to divert attention from the Company's disregard for the statutory ninety-day objection period and to imbue these arguments with a sense of reasonableness they do not deserve.

The Company now claims it did not know until 2000 that the 1973 Objection was late. Brief of Appellee at 44. Water users, like other citizens of the state of Utah, are presumed to know the law regarding their rights and property interests. *See, e.g., Smith v. Mahoney*, 590 P.2d 323, 324 (Utah 1979). This Court recently held that members of the water-right holding community are presumed to understand certain basic aspects of water rights. *See Primbrey v. Bloomington Water Co.*, 2003 UT 56, ¶ 20, 82 P.3d 1119. Water users should also be presumed to be able to count days from a calendar.

The Company waited until 1999, when it was engaged in litigation against its neighbor, Mr. Thayn, before it filed the 1999 Objection contending it needed 80 cfs rather than the 60 cfs recognized in the proposed determination.⁷ Yet the Company knew in 1972 that it was

⁷ While the timeliness of the 1999 Objection is at issue in this appeal, the underlying merits are not. However, contrary to the Company's implication, the State Engineer has never agreed with the merits of the 1999 Objection. Simple arithmetic demonstrates that 60 cfs times 214 days (from April 1 to October 31) times 1.983 acre-feet per cfs per day equals 25,461.72 acre-feet of water each year. The Company irrigates 1443.5 acres. (R. 1:1143). That means the Company diverts 17.6 acre-feet of water for each acre of irrigated land. At an irrigation duty of six acre-feet of water per acre, the Company diverts 34% of its water for irrigation and 66% for carry water, including sluicing. At the 80 cfs the Company seeks, it would divert 23.52 acre-feet per acre, and would use about 25.5% for irrigation. The irrigation duty of 6 acre-feet per acre, as revised in the Addendum, already includes an allowance for conveyance losses. Brief of Appellee, Addendum H, Preamble ¶ 2. The amount of water used by stock, at a generous 25 gallons per day for cattle and horses and 5 gallons per day for sheep, is 0.10 cfs, about 0.5% of the 20 cfs for stock water during the winter. (R. 171 n. 2). By its objection, the Company seeks to add that 20 cfs to the summer season carry water. By

limited to 60 cfs by the proposed determination.

The Affidavit of Rodney K. Dean is particularly damaging to the Company. Mr. Dean, a paralegal employed by the Company's attorneys, searched the district court records and the State Engineer records. (R. 152-53). He did not find any documents that excused the late filing of the 1973 Objection, either of the 1993 Objections, or the 1999 Objection. (R. 153). He also did not find any reference to any documents that were missing. *Id.* Under Utah Rule of Evidence 803(10), "testimony that a diligent search failed to disclose the record" is admissible evidence of the nonexistence of the record or the nonoccurrence of the event. Utah R. Evid. 803(10). The Company's own investigation is admissible evidence that no relevant documents ever existed.

The Company argues that the State Engineer had a "policy" to consider all objections regardless of whether they were late, citing the Affidavit of Harold Donaldson. Brief of Appellee at 22 n.10, 33 n.13. Contrary to the Company's assertion, the State Engineer challenged the Donaldson Affidavit. (R. 454:70) If Mr. Donaldson told water users it was unnecessary to comply with section 73-4-11 of the Utah Code, he was acting beyond his authority and contrary to the interest of his employer. In any case, Mr. Donaldson's assertions are contradicted by the State Engineer's actions. While Mr. Donaldson was employed, the State Engineer commenced the case of *Jensen v. Morgan*, 844 P.2d 287 (Utah 1992), in

comparison, the water right for Mr. Thayn, claim number 91-113 in the Proposed Determination under the name of Wilson Produce, allows diversion of 35.0 cfs from the same source at the same point of diversion for irrigation of 1543.04 acres. (R. 1:1144). Mr. Thayn therefore irrigates more land than the Company with less than half of the water the Company contends it needs.

which the State Engineer sought dismissal on grounds that Mr. Jensen filed his objection after the statutory ninety-day objection period. Furthermore, the State Engineer used the Notice, Receipt and Waiver forms throughout the time Mr. Donaldson was employed, which would have been a pointless exercise if the State Engineer had a policy of allowing litigation of late objections.

The Company argues that the State Engineer should be forced to litigate the 1999 Objection because in some cases, the State Engineer agreed to attempt to correct certain errors that were raised in late objections.⁸ The Company seems to complain that “You did it for them, so you have to do it for me.”

The Company’s arguments related to other objections should be disregarded for three reasons. First, merely because other means exist to address problems raised in a late objection does not mean the ninety-day objection period has been disregarded or that it should be disregarded. In many cases, including this case, there are other ways to address concerns raised by a late objection without litigating it. For example, in response to timely objections, the State Engineer published an Addendum to the Proposed Determination to amend the irrigation duty in the Price River drainage. Brief of Appellee, Addendum H. One beneficiary was the Company, which raised that issue in two of its late objections. Those objections were not litigated. Several thousand other water users also benefitted, even though they filed no objections whatsoever. The availability of solutions other than litigation of late objections does not diminish the importance of the statutory ninety-day objection period.

⁸ As with the company’s objections, the State Engineer disagreed with the substance of other late objections and sought complete dismissal. (R. 350, 358-59).

Second, the Company has referred to the State Engineer's authority to correct mistakes by re-publishing the water right in an addendum or revised proposed determination. Brief of Appellee at 28-30, 36. The State Engineer believes it has authority to correct a mistake, not unilaterally as the Company suggests, but by re-publishing the water right. However, whether the State Engineer has authority to re-publish water rights to correct mistakes is a different case. It is not an issue in this case.

Third, regardless of other means to address the substance of late objections or the State Engineer's authority to publish corrections, the real issue is simple: if a water user wants to be certain it can litigate an objection, it must file the objection within ninety days from the date it receives the proposed determination. The Company controlled its own destiny with regard to long delays, possible lost documents and testimony, laches, waiver, and equitable solutions. It could have avoided all the problems of which it now complains if it had filed its objections on time.

If the trial court had discretion to modify the objection period, it abused its discretion because the "equitable remedy" is not equitable. First, some water users, such as the Company, had more than a year to examine the proposed determination and file objections, while only one water user had ninety days. Second, the trial court solution did nothing to resolve the problem of water users who received proposed determinations on different days, because the solution is retroactive and no one knew in advance that they had more time to file objections. Third, the equitable remedy is unnecessary because water users can participate in the resolution of objections that affect their water rights. Fourth, it is unwarranted because the

evidence never existed and the Company's claims of prejudice are baseless.

There are no documents to excuse the late objections, so the Company asserts they must have been lost by the passage of time. There are no references to such documents, so the Company asserts that those references must also have been lost. The people who filed the 1973 objection cannot remember any reason why it might be excused, so the Company asserts that people who are deceased must have done something. The signed Notice, Receipt and Waiver establishes December 15, 1972 as the date the Company received the proposed determination, so the Company asserts it cannot verify Mr. Tidwell's signature. Mr. Tidwell's signature is available, so the Company asserts the Notice, Receipt and Waiver is suspect because it cannot find a copy in its records. The Company's arguments spin around and around but go nowhere. The prejudice, like the speculated lost evidence, never existed.

3. The Doctrine of Laches is Inapplicable

The Company argues that the district court decision could be upheld on the alternative grounds of laches. Brief of Appellee at 41-44. Laches, however, does not apply as an equitable doctrine in this case because by its terms it applies to delay in filing an action, as the Company's citations demonstrate. *See, e.g., Nilson-Newey & Co. v. Utah Resources Int'l*, 905 P.2d 312, 314 (Utah Ct. App. 1995) ("To successfully assert laches one must establish (1) plaintiff unreasonably delayed in bringing an action . . ."). By its terms, laches does not apply to a motion to dismiss brought within an ongoing action.

Second, the Company is trying to turn the doctrine of laches on its head. The underlying claim or right at issue is not the State Engineer's "right" to dismiss, it is the Company's

assertions in its 1973 Objection. The State Engineer is not pursuing a right or claim by filing a motion to dismiss, it is defending the proposed determination against the Company's claim. The Company, similar in position to a plaintiff in a civil suit, did nothing to pursue its claim for twenty-seven years or so, but argues that the State Engineer, who is defending against the claim, cannot seek dismissal of the Company's claim because it waited too long to file the motion to dismiss. The Company could have pursued its claim long ago by filing a petition pursuant to section 73-4-24. *See United States Fuel v. Huntington-Cleveland Irrigation Co.*, 2003 UT 49, ¶ 18, 79 P.3d 945; *Murdock v. Springville Mun. Corp.*, 878 P.2d 1147, 1150 (Utah 1994). The Company chose not to do so, and it cannot now complain it has been prejudiced by the passage of time.

Third, the Company's assertions that it has suffered prejudice are completely without substance. In a case cited by the Company, this Court discussed an unsupported assertion that the passage of time had caused a loss of evidence, stating, "Argument alone is insufficient to persuade us that Chandler was prejudiced, and he had made no factual showing to support the argument." *Borland v. Chandler*, 733 P.2d 144, 147 (Utah 1987); *see also Anderson v. Doms*, 984 P.2d 392, 396 (Utah Ct. App. 1999) ("Although it is true that one party to the original transaction, D.C. Anderson, had died and other witnesses may have become unavailable . . . these findings do not demonstrate that plaintiffs were deprived of any specific evidence or testimony or how lack of that evidence would adversely affect plaintiffs."). In the *Nilson-Newey* case cited by the Company, the defendants were able to identify specific documents that were missing. *Nilson-Newey & Co. v. Utah Resources Int'l.*, 905 P.2d 312, 316 (Utah Ct.

App. 1995) (defendant had engaged in numerous transactions, but records and witnesses were no longer available). In this case, the Company has made no factual showing that any relevant documents ever existed. If the Company cannot effectively counter the motion to dismiss, it is because of the non-existence of documents and events, not the passage of time.

4. The State Engineer did not Waive the Defense of Lateness

The Company's arguments in support of waiver by the State Engineer fail because the Company's failure to file a timely objection deprived the trial court of subject matter jurisdiction, which cannot be waived. *See Barnard v. Wasserman*, 855 P.2d 243, 248 (Utah 1993) ("challenges to subject matter jurisdiction may be raised at any time and cannot be waived by the parties").

Second, the Company attempts to twist the doctrine of waiver. Waiver involves "intentional relinquishment of a known right." *U.S. Realty 86 Assocs. v. Security Inv., Ltd.*, 2002 UT 14, ¶ 16, 40 P.3d 586. In this case, the underlying right is the Company's challenge to the proposed determination. The Company could have filed a petition pursuant to section 73-4-24, but did nothing to pursue its claim. If mere passage of time constitutes waiver, as the Company argues, it bars the 1973 Objection because the Company waited too long to pursue it and the three later objections because the Company waited too long to file them.

Third, the doctrine of waiver requires intent to relinquish a known right, and "the intent to relinquish a right must be distinct." *Soter's, Inc. v. Deseret Fed. Sav. & Loan Assoc.*, 857 P.2d 935, 942 (Utah 1993). This court has elaborated on the element of distinct intent, stating that "courts must be 'especially careful in their examination of the evidence in questions of

waiver and option performances, especially where such waiver is merely implied.” *U.S. Realty*, 2002 UT 14, ¶ 16 (quoting *Geisdorf v. Doughty*, 972 P.2d 67, 72 (Utah 1998)). This Court stated that courts should exercise caution in finding waiver “unless the totality of the circumstances demonstrates an unambiguous intent to waive.” *Id.*

In this case, there are reasonable explanations for the delay other than intent to waive. Despite the Company’s assertion to the contrary, the longest period of delay in most general adjudications in Utah has been the resolution of legal questions, not the technical work of preparing the proposed determination. *See, e.g., Provo River Water User’s Ass’n. v. Morgan*, 857 P.2d 927, 928-29 & n.2 (Utah 1993) (Weber River general adjudication commenced 1921; proposed determination filed 1924; final decree for main part of Weber River entered June 2, 1937).⁹ There are presently several active general adjudications in Utah, all requiring legal attention. Delays occurred because of a lack of funding and the corresponding lack of manpower, factors controlled by the legislature. The least likely explanation is that the State Engineer delayed addressing the Company’s objections because it intended to litigate them rather than dismiss them for lateness.

II. SECTION 73-4-11 DOES NOT ALLOW LATE OBJECTIONS TO BE CONSIDERED AMENDMENTS OR SUPPLEMENTS OF A TIMELY OBJECTION UNLESS THEY ARE CLOSELY RELATED TO THE TIMELY OBJECTION

The State Engineer argued that this Court should interpret section 73-4-11 such that

⁹ To clarify a minor point, the 1937 Weber River Decree did not cover the entire Weber River basin. On April 1, 1948, the court signed an additional decree covering the Ogden River and part of the lower Weber River, thus completing the general adjudication of the Weber River basin. *See Plain City Irrigation Co. v. Hooper Irrigation Co.*, District Court of the Second Judicial District in and for Weber County, No. 7487.

amendments or supplements to a timely objection must be closely related to the subject of the timely objection. Otherwise, amendments and supplements can be a subterfuge to circumvent the statutory ninety-day objection period. Brief of Appellant at 34-36. In response, the Company argues that liberal amendment should be allowed. Brief of Appellee at 46-50.

This Court should consider the unique character of the general adjudication in Utah and support the policies and procedures of the general adjudication. Rule 15 of the Utah Rules of Civil Procedure is a poor analogy because it does not have a companion deadline provision like the ninety-day limit on objections in section 73-4-11, and because the policy considerations are much different. A weak standard for amending objections invites abuse. The Company's 1999 Objection is an example of a water user using an essentially meaningless (and late) objection to tack on, much later, an issue that has become more important to the water user.

The cases cited by the Company do not support the kind of unlimited amendments the Company seeks. In one case, the summons stated that an answer had to be filed within twenty days, but the long-arm statute allowed thirty days. *Meyers v. Interwest Corp.*, 632 P.2d 879, 880 (Utah 1981). This court held "the defect was inconsequential" and the trial court had discretion to entertain a motion to amend the summons. *Id.* at 881. Similarly, in the *Lawson* case, the motion was to amend the complaint to conform to the evidence at trial. The water user sought to change the time when he could divert water from April 1 of each year to "early spring." *Lawson v. McBride*, 264 P. 727, 729 (Utah 1928). Similarly, minor amendments to clarify or enhance the issue in the original objection might well be allowed, but not "amendments" such as the 1999 Objection that are completely unrelated to the original

objection.


Another case the Company cites indicates that the trial court in this case erred when it considered the later objections as amendments. Factors justifying denial of a motion to amend include that the movant sought to amend late in the litigation, was aware of the underlying facts long before filing for amendment, gave no adequate explanation or justification for delay, and the amendment raised new issues of which movant had long been aware. *See Attcitty v. Board of Education*, 967 P.2d 1261, 1264-65 (Utah Ct. App. 1998). All of these factors apply against the Company's 1993 Objections and in particular against the 1999 Objection.

CONCLUSION

The trial court erred by not ruling that the ninety-day objection period for the Company began when it signed the Notice, Receipt and Waiver and by not granting the State Engineer's motion to dismiss. The State Engineer respectfully requests that this Court reverse the trial court decision and remand for dismissal of the Company's objections.

Dated this 26th day of April, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** were mailed by United States Mail first class postage prepaid, this 26th day of April, 2004, to the following:

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