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Jennifer Jean Jensen v. Kent Jones : Reply Brief

Utah Supreme Court

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Bradley R. Cahoon, Troy L. Booher, Stewart O. Peay, M. Lane Molen; Snell and Wilmer L.L.P.; Attorneys for Appellant.

Julie I. Valdes, Norman K. Johnson; Assistant Attorneys General; Attorneys for Appellee.

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IN THE UTAH SUPREME COURT

**JENNIFER JEAN JENSON, Executor
and Personal Representative of the
Estate of Marilyn Hamblin,**

Plaintiff/Appellant,

v.

KENT JONES, Utah State Engineer,

Defendant/Appellee.

No. 20090742

**Appeal from Final Judgment by
Fourth Judicial District Court, Utah
County, Honorable Claudia Laycock,
District Court No. 060400639**

REPLY BRIEF OF APPELLANT

**Julie I. Valdes
Norman K. Johnson
Office of the Utah Attorney General
1594 West North Temple #300
Salt Lake City, Utah 84116**

***Attorneys for Defendant/Appellee Kent
Jones, Utah State Engineer***

**Bradley R. Cahoon (5925)
Troy L. Booher (9419)
Stewart O. Peay (9953)
M. Lane Molen (11724)
Snell & Wilmer L.L.P.
15 West South Temple, Suite 1200
Salt Lake City, Utah 84101-1004
Telephone: (801) 257-1900
Facsimile: (801) 257-1800**

***Attorneys for Plaintiff/Appellant
Jennifer Jean Jenson, Executor
and Personal Representative of the
Estate of Marilyn Hamblin***

**FILED
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**Julie I. Valdes
Norman K. Johnson
Office of the Utah Attorney General
1594 West North Temple #300
Salt Lake City, Utah 84116**

***Attorneys for Defendant/Appellee Kent
Jones, Utah State Engineer***

**Bradley R. Cahoon (5925)
Troy L. Booher (9419)
Stewart O. Peay (9953)
M. Lane Molen (11724)
Snell & Wilmer L.L.P.
15 West South Temple, Suite 1200
Salt Lake City, Utah 84101-1004
Telephone: (801) 257-1900
Facsimile: (801) 257-1800**

***Attorneys for Plaintiff/Appellant
Jennifer Jean Jenson, Executor
and Personal Representative of the
Estate of Marilyn Hamblin***

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Introduction

Every argument advanced by the state engineer assumes that no judicial action was required to terminate Ms. Hamblin's water right, and, therefore, with her change application, Ms. Hamblin sought to create a new water right rather than alter an existing water right. Were that assumption correct, every water right unused for any 5-year period before 1996 terminated by operation of law, regardless of its subsequent use. Yet uncertainty over whether an otherwise long-standing water right terminated decades earlier due to nonuse is precisely what motivated the Utah Legislature to clarify in the 1996 amendment to Utah Code section 73-1-4 that, procedurally, "judicial action" is required to forfeit water rights. Absent judicial action declaring forfeiture, then, a documented water right may be altered by a change application.

Section 73-3-8 confirms this by enumerating the bases upon which the state engineer can reject a change application, and "unadjudicated forfeiture of a documented water right" is not among them. Again, any uncertainty on that point was extinguished by the 1996 amendment, which clarified that the procedural mechanism for forfeiture is "judicial action." Here, it is undisputed that no judicial action has declared Ms. Hamblin's water right forfeited. Thus, the state engineer exceeded his ministerial authority when he declared that Ms. Hamblin's documented water right could not be altered by a change application.

The state engineer advances three alternative grounds to affirm, each of which similarly assumes no judicial action is required to forfeit water rights. (Resp. Br. at 29-38.) Because these grounds are based upon the same assumption, they are not "alternative" and fail for the same reasons. This court should reverse.

Argument¹

I. The State Engineer Lacked Authority to Reject a Change Application Based Upon an Unadjudicated Forfeiture of a Water Right

The state engineer's authority to reject a change application is limited to the bases set forth in the statute. The relevant provisions—Utah Code sections 73-3-3, -8—do not authorize rejection of a change application based upon the state engineer's independent assessment that an unadjudicated forfeiture has extinguished a documented water right. Thus, the state engineer lacked authority to reject Ms. Hamblin's change application on that basis in this case.

The statute first sets forth the criteria that a change application must satisfy to be considered by the state engineer and then sets forth the criteria that it must satisfy to be approved by the state engineer. Utah Code section 73-3-3 sets forth both the information a change application must contain and who can submit a change application. Utah Code Ann. § 73-3-3(b) (2004). A change application must contain the following information:

(i) the applicant's name; (ii) the water right description; (iii) the water quantity; (iv) the stream or water source; (v) if applicable, the point on the stream or water source where the water is diverted; (vi) if applicable, the point to which it is proposed to change the diversion of the water; (vii) the place, purpose, and extent of the present use; (viii) the place, purpose and extent of the proposed use; and (ix) any other information the state engineer requires.

Id. Additionally, a change application must be submitted by “[a] person entitled to use water.” Id. In other words, the change application containing the required information

¹ Jennifer Jenson has been substituted as executor and personal representative of Ms. Hamblin's estate.

must be submitted by the person holding the water right, not someone else. Once those criteria are satisfied, the state engineer must adjudicate the merits of the application.

Utah Code section 73-3-5 requires the state engineer to apply the criteria set forth in section 73-3-8 in adjudicating the merits of a change application. Utah Code Ann. § 73-3-5(2) (2004) (“The state engineer shall follow the same procedures, and the rights and duties of the applicants with respect to application for permanent changes of point of diversion, place of use, or purpose of use shall be the same, as provided in this title for applications to appropriate water”). Section 73-3-8 sets forth the following criteria that, if satisfied, makes it the “duty of the state engineer to approve” a change application for permanent diversion:

- (i) there is unappropriated water in the proposed source;
- (ii) the proposed use will not impair existing rights or interfere with the more beneficial use of the water;
- (iii) the proposed plan is physically and economically feasible, unless the application is filed by the United States Bureau of Reclamation, and would not prove detrimental to the public welfare;
- (iv) the applicant has the financial ability to complete the proposed works; and
- (v) the application was filed in good faith and not for purposes of speculation or monopoly.

Utah Code Ann. § 73-3-8(1)(a) (2004). Absent from this list is an unadjudicated forfeiture of a documented water right.

Recognizing this problem, the state engineer relies upon the language in section 73-3-3 that a change application must be submitted by the “person entitled to the use of water.” Utah Code Ann. § 73-3-3(2)(a) (2004). However, that language simply requires the applicant to be the person listed as holding the water right recorded with the Utah Division of Water Rights. Thus, the language in section 73-3-3 does not provide

authority for the state engineer to deny a change application based upon his own finding that the documented water right has been extinguished via an unadjudicated forfeiture.

As an alternative, the state engineer attempts to locate that authority in his “general supervisory authority” over Utah water rights. (Resp. Br. at 14). This argument also fails. That general supervisory authority in relation to approving or rejecting change applications is limited to those specifically enumerated powers concerning the approval or rejection of change applications listed in section 73-3-8. Hi-Country Estates Homeowners Ass’n v. Bagley & Co., 901 P.2d 1017, 1021 (Utah 1995) (“When a specific power is conferred by statute upon a tribunal, board, or commission with limited powers, the powers are limited to such as are specifically mentioned.”). At the very least, there is reasonable doubt concerning the state engineer’s authority to reject a change application based upon an unadjudicated forfeiture, which means the state engineer lacks that authority. Williams v. Public Serv. Comm’n, 754 P.2d 41, 50 (Utah 1988) (any reasonable doubt of the existence of agency power must be resolved against the existence of such power). The state engineer therefore lacked authority to reject Ms. Hamblin’s change application on the ground that her water right had been extinguished by an unadjudicated forfeiture.

And because the state engineer lacked the authority to reject Ms. Hamblin’s change application based upon an unadjudicated forfeiture, the district court lacked the authority to grant summary judgment in favor of the state engineer on the same basis. United States v. District Court, 121 Utah 1, 8, 238 P.2d 1132, 1135 (Utah 1951) (the reviewing district court “stands in the same position as the state engineer did”). This court should reverse the entry of summary judgment in favor of the state engineer.

II. The 1996 Amendment Governs Whether Ms. Hamblin's Water Right Has Been Forfeited

The state engineer conceded in the district court that if a post-1996 version of the forfeiture statute applies, then rejection of the change application was inappropriate because Ms. Hamblin's water right, in fact, has not been forfeited. (R. 1185.) The 1996 amendment requires judicial action to forfeit a water right, and it is undisputed that Ms. Hamblin's water right has not been declared forfeited by judicial action. Because Ms. Hamblin submitted her change application in 2004, the 1996 amendment governs.² This alone demonstrates that a post-1996 version of the forfeiture statute applies and therefore summary judgment was inappropriate.

The state engineer's only response is that forfeiture had already occurred by operation of law prior to 1996, and, therefore, "no subsequent amendment could alter the accomplished forfeiture and reversion." (Resp. Br. at 18.) That argument fails for a number of reasons. Assuming the relevant date is 1985 when 5 years of nonuse accrued instead of 2004 when Ms. Hamblin filed her change application, the 1996 amendment operated retroactively upon all water rights, including Ms. Hamblin's.

The most straightforward reason to recognize retroactive application is that the purpose of the 1996 amendment was to clarify the status of then-existing water rights given possible past nonuse of those water rights. As demonstrated in the opening brief, that clarification was accomplished by requiring judicial action before a water right can be forfeited so the operative date of any forfeiture could be easily ascertained. (AOB at 22.) As the sponsor of the 1996 amendment in the House of Representatives stated, the

² "A water right may not be forfeited unless a judicial action to declare the right forfeited is commenced within 15 years from the end of the latest period of nonuse of at least 5 years." Utah Code Ann. §73-1-4 (1)(b)(i) (2004).

purpose was “to take the cloud off many of the decreed water rights in the State of Utah that someone has always said, ‘Well great-Great Grandfather said that he didn’t use his water for five years so therefore that water right has really been forfeited back to the State.’” (Transcript of January 26, 1996 House Floor debate on H.B. 69, R. 967.) The 1996 amendment removed that cloud by (i) specifying the “process . . . for which the forfeiture finally came closed”—judicial action; and (ii) providing that if nonuse was not challenged within 15 years, then it can no longer form the basis of forfeiture.³ (*Id.*; R. 962, 966.) This history makes clear that the 1996 Amendment was intended to apply retroactively; otherwise great-grandfather’s lack of use would be irrelevant. But if the 1996 amendment is interpreted as the state engineer interprets it—i.e., to require no judicial action for forfeiture based upon nonuse prior to 1996—then the amendment clarified nothing, except perhaps for those few water rights, if any, created after 1996.

Apart from the 1996 amendment making no sense with only prospective effect, the 1996 amendment applies retroactively for two additional reasons. First, the 1996 amendment merely specifies the procedure by which forfeiture occurs—judicial action—and procedural changes apply retroactively. Second, the 1996 amendment merely clarified prior versions of the forfeiture statute, versions that left unspecified how a forfeiture came to be recognized and effective.

A. The 1996 Amendment Is Procedural and Therefore Applies Retroactively

The 1996 amendment was procedural and therefore applies retroactively. The response brief does not respond to this argument set forth in the opening brief, except to

³ Arguably, the latter clarification altered existing rights, but the former did not, and only the former clarification is at issue here.

assert that the 1996 amendment is substantive because it “alters the rights and duties of the parties and imposes a new substantive regulatory scheme.” (Resp. Br. at 23.) In fact, the 1996 amendment does neither. The substantive rights and duties at issue here—the right to use water once appropriated, the duty to use the water beneficially, and the public’s right to use forfeited water—were not changed by the 1996 amendment.

Further, the substantive law governing those rights and duties did not change, as forfeiture required 5 years of nonuse before 1996 and required 5 years of nonuse after 1996. What arguably changed—but more precisely was clarified—was that forfeiture of a water right would be effective only through “judicial action.” Stated differently, the 1996 amendment changed only the “legal machinery by which the substantive law [i.e., forfeiture] is determined.” Harvey v. Cedar Hills City, 2010 UT 12, ¶ 14, 127 P.3d 256.

The 1996 amendment also did not create a new regulatory scheme. The state engineer cites Brown & Root Indus. Serv. v. Industrial Comm’n of Utah as supporting this view. 947 P.2d 671 (Utah 1997). In Brown, a new regulatory scheme was created by an amendment that eliminated coverage such that, if applied retroactively, the “amendment would completely eliminate any further right to medical coverage for recurring or progressive injuries.” Id. at 676 (analyzing statutory amendment wherein employees were required to file claims within three years after their accrual). In contrast, no rights are created or eliminated in this case. The state engineer had no “right” to forfeiture by operation of law. More important, the public’s potential future interest in any water reverting to the public by forfeiture remains completely intact and available upon a “judicial action” declaring forfeiture. The “judicial action” requirement does not create a “new substantive regulatory scheme.” (Resp. Br. at 24.) The 1996 amendment

provides only “a different mode or form of procedure [i.e., judicial action] for enforcing substantive rights.” Brown, 947 P.2d at 676.

The only other argument advanced in the response brief involves the 2008 amendment to the forfeiture statute. (Resp. Br. at 26.) While the state engineer denies that the 2008 amendment applies here, he nonetheless cites its legislative history as settling the matter of retroactivity by revealing that the 2008 amendment did not “validate any invalid water rights.” Utah Code Ann. § 73-1-4 (2008). Of course, whether the 2008 amendment validated invalid water rights is beside the point with regard to whether the 1996 amendment was procedural and therefore applied retroactively. The history of the 2008 amendment, at most, indicates the Legislature’s intent that its 2008 extension of the period of nonuse required for forfeiture from 5 years to 7 years did not apply retroactively to rescue water rights then unused for more than 5 but less than 7 years.

In relation to this case, the 2008 amendment would require that, if a judicial action were commenced to declare Ms. Hamblin’s water right forfeited, then the relevant period of nonuse would be 5 years, not 7 years. It is difficult to understand how this history demonstrates that the 1996 amendment’s requiring judicial action for forfeiture is anything but procedural. Therefore, the 1996 amendment applies retroactively and required “judicial action” for forfeiture of Ms. Hamblin’s water right to become effective. On this additional ground, this court should reverse the entry of summary judgment.

B. The 1996 Amendment Clarified Existing Law

The 1996 amendment also applies retroactively because it clarified an earlier version of the forfeiture statute. A provision “clarif[ing] the meaning of [an] earlier enactment” is one that serves as “an amplification as to how the law should have been

understood prior to its enactment.” Rocky Mountain Thrift Stores, Inc. v. Salt Lake City Corp., 784 P.2d 459, 461-62 (Utah 1989). The state engineer argues that nothing was clarified by the 1996 amendment because this court had recognized forfeiture by operation of law. (Resp. Br. at 22.) This argument fails. The legislature routinely clarifies a statute after courts have interpreted it, as the need for clarification often comes to light in court proceedings.

The legislative history cited in the opening brief demonstrates that the Utah legislature believed the statute as previously written lacked clarity, as there was “no process in place for which forfeiture finally came closed.” (AOB at 22.) The 1996 amendment clarified that forfeiture “finally [be]came closed” through judicial action. (R. 1006.) Thus, the 1996 amendment was clarifying in nature and applies retroactively.

C. Interpreting the 1996 Amendment to Apply Only Prospectively Undermines Its Purpose and Leads to Absurd Results

The state engineer’s claim that only the 2008 amendment to the forfeiture statute could have afforded Ms. Hamblin any relief is puzzling. The state engineer argues that only the 2008 amendment—“representing a sea change”—requires court action to complete forfeiture. (Resp. Br. at 25.) Thus, the state engineer argues, the district court correctly ruled that Ms. Hamblin’s right forfeited under the pre-2008 version of the forfeiture statute. (Resp. Br. at 23-25.)

The state engineer’s brief misconstrues the plain language of the 1996 amendment requiring a “judicial action.”⁴ (Resp. Br. at 25-26.) The state engineer acknowledges the

⁴ Ms. Hamblin acknowledges the applicability of the 2002 amendment, but focuses on the 1996 version because it clarified that judicial action is required for forfeiture. Utah Code Ann. § 73-1-4 (1996). That requirement was unchanged by the 2002 amendment.

language in the 1996 amendment, but contends that the amendment somehow separated forfeiture and reversion. Under the state engineer's interpretation, reversion still took place by operation of law while forfeiture required a judicial proceeding. The state engineer contends that this confusing state of affairs remained the law until 2008.

As an initial matter, it is worth noting that the state engineer's argument is beside the point, as the issue here involves forfeiture, not reversion. Moreover, the state engineer's construction of the 1996 amendment leads to an absurd result in which reversion would necessarily predate forfeiture, meaning both the public and individual simultaneously hold the same water right. Dowling v. Bullen, 2004 UT 50, ¶ 11, 94 P.3d 915 (duty to avoid statutory constructions that lead to absurd results); Berneau v. Martino, 2009 UT 87, ¶ 12, 223 P.3d 1128 (“avoid an interpretation that would embrace a result so absurd that it could not have been intended by the legislature”).

Further, interpreting the 1996 amendment to have only prospective application would render parts of that amendment meaningless. The amendment provided a 15-year safe harbor for water rights.⁵ If 15 years have elapsed since the end of a 5-year period of nonuse, then that period of nonuse can no longer serve as a basis for forfeiture. The

⁵ “(i) A water right may not be forfeited unless a judicial action to declare the right forfeited is commenced within 15 years from the end of the latest period of nonuse of at least 5 years.

(ii) If forfeiture is asserted in an action for general determination of rights in conformance with the provisions of Chapter 4, Determination of Water Rights, the 15-year limitation period shall commence to run back in time from the date the state engineer's proposed determination of rights is served upon each claimant.

(iii) A decree entered in an action for general determination of rights under Chapter 4, Determination of Water Rights, shall bar any claim of forfeiture for prior nonuse against any right determined to be valid in the decree, but shall not bar a claim for periods of nonuse that occur after the entry of the decree.” Utah Code Ann. §73-1-4 (1)(b) (2004).

amendment further specified how the 15-year time period would be calculated in “general adjudications”—actions brought by the state engineer under section 73-4-1 to adjudicate the rights and priority of multiple water right holders in a particular source of water. If the effect of those provisions were only prospective, then, according to the logic of the state engineer, the “safe harbor” provisions would not have any practical effect until 2011 because the 15-year safe harbor provision would have no application to nonuse for 5-year periods prior to 1996. For any general adjudication instituted between 1996 and 2011, all rights with a 5-year period of nonuse would either (i) have terminated by “operation of law” prior to 1996 and could not be revived, according to the state engineer; or (ii) terminated by “judicial action” between 1996 and 2011, and no relevant 15-year period could have accrued. This court should not interpret the 1996 amendment to render large portions of the statute, in essence, meaningless. Lund v. Brown, 2000 UT 75, ¶ 23, 11 P.3d 277 (following “well-established principle of statutory construction requiring us to give meaning, where possible, to all provisions of a statute”).⁶

The absurd results, virtually inoperative provisions, and thwarting of the legislative purpose of clarifying when water rights are forfeited for nonuse, all suggest this court should interpret the 1996 amendment to have retroactive application. Evans &

⁶ If these “safe harbor” provisions are applied only prospectively and the state engineer were correct in his assertion that water rights became void by “operation of law” upon 5 years of nonuse, then when the state engineer declares water right priority in a general adjudication after 1996, he would be creating new water rights if one of those rights had, unbeknownst to anyone, been unused for some prior 5-year period. Under section 73-1-4(1)(b)(iii), a “decree entered in an action for general determination of rights . . . shall bar any claim of forfeiture for prior nonuse against any right determined to be valid in the decree.” If the 1996 amendment is not retroactive, then this language saves only those water rights involved in the general adjudication that were unused for 5 years after 1996, an absurd result.

Sutherland Computer Corp. v. Utah State Tax Comm’n, 953 P.2d 435, 437 (Utah 1997)

(courts should apply a statute retroactively to respect a “clear and unavoidable implication that the statute operates on events already past”). For this additional reason, this court should vacate the district court’s entry of summary judgment.

III. This Court Should Reject the State Engineer’s Alternative Grounds

The state engineer is not entitled to summary judgment on alternative grounds either. The district court refused to grant summary judgment in favor of the state engineer on any alternative grounds independent of forfeiture. (R. 1198-1206.) The state engineer has not appealed those aspects of the district court’s ruling, but nonetheless argues that this court should uphold his rejection of the change application on those alternative grounds. (Resp. Br. at 29-30.) As explained below, each of the state engineer’s alternative grounds should be rejected, primarily because they all require the state engineer already to have prevailed on his claim that the 1996 amendment is prospective only. In other words, the grounds are not “alternative” and do not provide independent grounds to affirm.

A. Approving Ms. Hamblin’s Change Application Would Not Impair Other Users’ Rights

The state engineer first argues that this court can uphold the rejection on the alternative ground that approval of the change application would impair existing water rights. (Resp. Br. at 30-33.) This argument presupposes that Ms. Hamblin is asking the state engineer to recognize a terminated water right; otherwise, Ms. Hamblin is requesting no more water than her water right has entitled her to use for years. Thus, for all the reasons the state engineer’s forfeiture arguments fail, this alternative ground fails.

The state engineer's argument also fails because Ms. Hamblin satisfied the initial burden placed upon change applicants. The state engineer should approve an application so long as the applicant shows "reason to believe that no impairment will result from application approval." Searle v. Milburn Irrigation Co., 2006 UT 16, ¶ 31, 133 P.3d 382. Once that initial burden is satisfied, the presumption of no impairment can be overcome by a protestant who produces "either direct or circumstantial evidence that sufficiently undermines the applicant's showing that the use proposed can be accomplished without impairing vested rights." Id. ¶ 2.

Because Ms. Hamblin proposed to give up her right to draw water from the original point of diversion, Ms. Hamblin satisfied the initial burden of showing that drawing water from the proposed location in Highland City would cause no impairment. The state engineer therefore should not have rejected the application absent evidence to the contrary. Neither the state engineer nor any protestant has provided evidence that water users' rights at the proposed source would be impaired.

Instead, the state engineer asserts that general impairment would be the natural result of using a water right that has gone unused "in a system closed to appropriation." (Resp. Br. at 31.) Put differently, because the Utah Valley system has been "closed" to new appropriations of water, permitting Ms. Hamblin to change the point of diversion of her water right would necessarily impair other water rights. This argument not only assumes Ms. Hamblin's water right has already been forfeited but also assumes the state engineer excluded Ms. Hamblin's water right from his accounting of the existing water rights in the Utah Valley system. Yet the state engineer provided no evidence that he did not take Ms. Hamblin's water right into account when he calculated the "fully

appropriated amount” from then existing water rights appropriated in the Utah Valley system and closed the Utah Valley area to new appropriations.⁷

To the contrary, Ms. Hamblin’s water right must have been included in the state engineer’s calculation of existing water rights in the Utah Valley system because it was listed as a valid right in the state engineer’s water rights database. (R. 988.) There is no indication that the state engineer was aware of any nonuse in 1995, nearly a decade before Ms. Hamblin submitted her change application at issue here. Therefore, it was with good reason that the district court did not find the state engineer’s “analysis a sufficiently compelling reason, standing alone, to deny the change application.” (R. 1202.)

B. Unappropriated Water Exists in the Proposed Source

Ms. Hamblin’s change application also satisfies her burden of showing that there is unappropriated water in the proposed source. Water use would be unchanged by her changing the old point of diversion and place of use in Provo City for a new point of diversion and place of use in Highland City. The district court found that there was no unappropriated water solely on the grounds that Ms. Hamblin’s water right had been forfeited.⁸ Thus, the state engineer’s argument concerning unappropriated water also is

⁷ The closure to new appropriations is based on the fully-appropriated status of the area, a condition that has persisted, apparently, “for over 40 years.” (R. 767.) That time predates the period of nonuse for Ms. Hamblin’s water right. Thus, in the absence of contrary evidence, there is reason to believe that Ms. Hamblin’s right can be used at a different location without impairment of other rights.

⁸ The district court stated: “This court relies on its earlier forfeiture analysis and finds that because Ms. Hamblin no longer has a valid right to exchange, she cannot demonstrate that there is unappropriated water at the proposed source.” (R. 1200.)

not an “alternative” ground to affirm. Instead, it requires that the state engineer already have prevailed on his argument that the 1996 amendment does not apply retroactively.

The case cited by the state engineer, Tanner v. Humphreys, indicates that an applicant satisfies the requirement to show unappropriated water at the proposed source by exchanging old use for new use, not by actually proving that the new source contains sufficient water. 87 Utah 164, 173-174, 48 P.2d 484, 488 (Utah 1935) (“We think that all that the plaintiff asked and all that she could get was an exchange of the waters which she had under her right.”). Here, Ms. Hamblin would exchange her right to use water at the old location for the new proposed location. The state engineer admits that this is the correct standard, but bases his argument again upon Ms. Hamblin’s forfeiture, not upon any independent ground.

C. Ms. Hamblin Properly Demonstrated an Intent to Relinquish

The state engineer argues that Ms. Hamblin’s change application was properly rejected on the alternative ground that she did not relinquish a current beneficial use. This argument fails because the statute does not require an applicant to show a current use is being relinquished as opposed to a current right to use is being relinquished. In other words, it is not an enumerated basis to reject a change application.

Section 73-3-3(1)(a) defines a “permanent change” for purposes of a change application, requiring an applicant to show “an intent to relinquish the original point of diversion, place of use, or purpose of use.” Utah Code Ann. § 73-3-3(1)(a) (2004). This language must be read in contrast with a “temporary change,” in which an applicant can resume the original use after the temporary application has expired. Thus, Ms. Hamblin

was required by the statute only to have an intent to relinquish the original use, not to prove current use that would be relinquished.⁹

Ms. Hamblin's change application satisfies the requirements of section 73-3-3(1)(a) because it states that she will surrender her right to divert and use water in Provo for irrigation in exchange for the right to divert and use the same quantity of water in Highland City. Nothing more is required to satisfy the relinquishment standard.

The district court agreed with Ms. Hamblin on this point:

[A]lthough the State Engineer argues that U.C.A. 73-3-3(1)(a) requires the relinquishment of a current beneficial use, the court does not find that language anywhere in the statute. Rather, the statute requires the water user to "relinquish the original point of diversion, place of use, or purpose of use." The State Engineer would have the court add the requirement that the relinquishment must be of a current proven beneficial use, but does not point the court to any authority in case law supporting this proposition. . . . Instead, the court finds that a plain reading of the statute requires Ms. Hamblin to "relinquish the *original* point of diversion, place of use, or purpose of use," which she is apparently willing to do.

(R. 1203.)¹⁰

Nor does the requirement found in section 73-3-3(4)(b)(vii) describing the extent of "present use" impose this requirement upon a change applicant as the state engineer suggests. (Resp. Br. at 34-36.) That provision refers only to how much water the applicant is presently entitled to use at the current location. Ms. Hamblin is required only to relinquish her right to draw water from the original point of diversion. Because Ms.

⁹ By the state engineer's reasoning, a change application could be rejected where a right had not been used within the past year, month, or even week. In fact, it is difficult to see where the state engineer would draw any line as to what "current use" means. Moreover, under the state engineer's interpretation, a water right that was subject to a timely filed nonuse application would not be eligible for a change application.

¹⁰ The state engineer has not cross-appealed this issue.

Hamblin's right has not been forfeited, she can "give up one to get one." (Resp. Br. at 35.) This court should reject this alternative ground.

Conclusion

The state engineer lacks the statutory authority to reject a change application based upon his own determination that there has been an unadjudicated forfeiture. And because the 1996 amendment applies retroactively, Ms. Hamblin's water right has not been forfeited under Utah law. For both reasons, the state engineer should have approved Ms. Hamblin's change application. This court should reverse the district court's entry of summary judgment in favor of the state engineer.

DATED this 22nd day of July, 2010.

SNELL & WILMER L.L.P.

A handwritten signature in black ink, appearing to read 'Bradley R. Cahoon', is written over a horizontal line.

Bradley R. Cahoon

Troy L. Booher

Stewart O. Peay

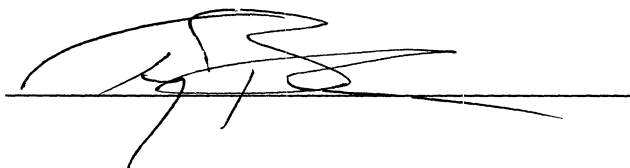
M. Lane Molen

*Attorneys for Plaintiff/Appellant Jennifer Jean
Jenson, Executor and Personal Representative
of the Estate of Marilyn Hamblin*

Certificate of Service

I hereby certify that on the 22nd day of July, 2010, two true and correct copies of **REPLY BRIEF OF APPELLANT** were served via U.S. Mail, postage-prepaid, upon the following:

Julie I. Valdes
Norman K. Johnson
Office of the Utah Attorney General
1594 West North Temple #300
Salt Lake City, UT 84116
Attorneys for Defendant/Appellee Kent Jones

A handwritten signature in black ink, appearing to be "J. Valdes", is written over a horizontal line.

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