

2009

Marilyn Hamblin v. Kent Jones : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

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

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.

Recommended Citation

Brief of Appellant, *Hamblin v. Jones*, No. 20090742.00 (Utah Supreme Court, 2009).
https://digitalcommons.law.byu.edu/byu_sc2/2967

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court 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

MARILYN HAMBLIN,

Plaintiff/Appellant,

KENT JONES, Utah State Engineer,

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

OPENING BRIEF OF APPELLANT

**Julio 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
Marilyn Hamblin***

IN THE UTAH SUPREME COURT

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

OPENING 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
Marilyn Hamblin*

Table of Contents

Jurisdiction	1
Statement of the Issues and Standards of Review	1
Determinative Provisions.....	2
Statement of the Case.....	3
I. Nature of the Case and Course of the Proceedings.....	3
II. Statement of Facts.....	4
Summary of the Argument.....	5
Argument	7
I. The State Engineer Lacks Authority to Declare Water Rights Forfeited.....	7
II. Ms. Hamblin Is a Person Entitled to the Use of Water Because Her Water Right Was Never Subject to a Judicial Action for Forfeiture.....	12
A. The 1996 Amendment to Section 73-1-4 and the District Court’s Ruling	12
B. The 1996 Amendment Applies to the State Engineer’s Forfeiture Determination Because Ms. Hamblin Submitted Her Change Application in 2004	14
C. The 1996 Amendment Applies Retroactively Because It Is Procedural	15
D. The 1996 Amendment Merely Clarified Existing Law	21
Conclusion	23

Addenda

- Addendum 1: Memorandum Decision and Order on State Engineer’s Motion for
 Summary Judgment and Memorandum Decision and Order on
 Plaintiff’s Cross-Motion for Partial Summary Judgment dated July 13,
 2009 (R. 1196-1217)
- Addendum 2: Utah Code Ann. § 73-1-4 (1980)

- Addendum 3: Utah Code Ann. § 73-1-4 (1995)
- Addendum 4: Utah Code Ann. § 73-1-4 (1996)
- Addendum 5: Utah Code Ann. § 73-1-4 (2004)
- Addendum 6: Utah Code Ann. § 73-3-3 (2004)
- Addendum 7: Utah Code Ann. § 73-3-8 (2004)
- Addendum 8: Application for Permanent Change of Water Number a29341
(R. 1146-54)
- Addendum 9: Order of State Engineer dated January 30, 2006 (R. 777-79)
- Addendum 10: Order of State Engineer dated January 4, 2008 (R. 952-58)
- Addendum 11: Excerpts of Brief of Appellant in *Nephi City v. Hansen*, Utah Supreme
Court No. 860614
- Addendum 12: House Floor Debate, Transcript of Proceedings, January 29, 1996
(R. 960-67)
- Addendum 13: House Floor Debate, Excerpt of Transcript of Proceedings, January 30,
1996
- Addendum 14: Enrolled Copy of Utah House Bill 69, 1996 General Session
(R. 969-78)

Table of Authorities

	Page
<u>Federal Cases</u>	
<u>Dobbert v. Florida</u> , 432 U.S. 282 (1977)	18
<u>In re Penrod</u> , 50 F.3d 459 (7th Cir. 1995)	11
<u>State Cases</u>	
<u>B.A.M. Dev., L.L.C. v. Salt Lake County</u> , 2006 UT 2, 128 P.3d 1161	15, 16
<u>Baugh v. Criddle</u> , 19 Utah 2d 361, 431 P.2d 790 (1967)	10
<u>Butler, Crockett & Walsh Dev. Corp. v. Pinecrest Pipeline Operating Co.</u> , 2004 UT 67, 98 P.3d 1	7
<u>Christensen & Jensen, P.C. v. Barrett & Daines</u> , 2008 UT 64, 194 P.3d 931	2
<u>Davis v. Provo City Corp.</u> , 2008 UT 59, 193 P.3d 86	18
<u>Del Monte Corp. v. Moore</u> , 580 P.2d 224 (Utah 1978)	18
<u>Due South, Inc. v. Department of Alcoholic Beverage Control</u> , 2008 UT 71, 197 P.3d 82	17
<u>Evans & Sutherland Computer Corp. v. Utah State Tax Comm'n</u> , 953 P.2d 435 (Utah 1997)	2, 15, 17, 20
<u>Goebel v. Salt Lake City S. R.R. Co.</u> , 2004 UT 80, 104 P.3d 1185	14, 17, 20
<u>Harvey v. Cedar Hills City</u> , 2010 UT 12, 650 Utah Adv. Rep. 32	14, 15
<u>In re General Determination of Rights to the Use of Water</u> , 2004 UT 106, 110 P.3d 666	20

<u>In re Kaul,</u> 4 P.3d 1170 (Kan. 2000).....	15
<u>Kilpatrick v. Wiley, Rein & Fielding,</u> 2001 UT 107, 37 P. 3d 1130	22
<u>Massey v. Griffiths,</u> 2005 UT App 410, 131 P.3d 243.....	11
<u>Nephi City v. Hansen,</u> 779 P.2d 673 (Utah 1989)	9
<u>Roark v. Crabtree,</u> 893 P.2d 1058 (Utah 1995)	18
<u>Rocky Mountain Thrift Stores, Inc. v. Salt Lake City Corp.,</u> 784 P.2d 459 (Utah 1989)	21-22
<u>Sagewillow, Inc. v. Idaho Dep't of Water Res.,</u> 70 P.3d 669 (Idaho 2003)	11
<u>Schuller v. D'Angelo,</u> 458 N.Y.S.2d 501 (N.Y. Sup. Ct. 1983).....	11
<u>Searle v. Milburn Irrigation Co.,</u> 2006 UT 16, 133 P.3d 382	21
<u>Shields v. Dry Creek Irrigation Co.,</u> 12 Utah 2d 98, 363 P.2d 82 (1961)	7, 10, 13
<u>State v. Burgess,</u> 870 P.2d 276 (Utah Ct. App. 1994).....	16
<u>State v. Carreno,</u> 2006 UT 59, 144 P.3d 1152	18
<u>State v. Jacoby,</u> 1999 UT App 52, 975 P.2d 939.....	18
<u>State v. Lusk,</u> 2001 UT 102, 37 P.3d 1103	18
<u>State v. Norton,</u> 675 P.2d 577 (Utah 1983)	18

<u>United States v. District Court,</u> 121 Utah 1, 238 P.2d 1132 (1951)	8
<u>United States Fuel Co. v. Huntington-Cleveland Irrigation Co.,</u> 2003 UT 49, 79 P.3d 945.....	7
<u>Washington County Water Conservancy Dist. v. Morgan,</u> 2003 UT 58, 82 P.3d 1125	7, 11
<u>Wayman v. Murray City Corp.,</u> 458 P.2d 861 (Utah 1969)	21
<u>Whitmore v. Murray City,</u> 107 Utah 445, 154 P.2d 748 (1944)	7
 <u>State Statutes</u>	
Utah Code Ann. § 73-1-4 (1980)	2
Utah Code Ann. § 73-1-4 (1985)	2, 13, 17, 22
Utah Code Ann. § 73-1-4 (1995)	2
Utah Code Ann. § 73-1-4 (1996)	2, 13, 17, 22
Utah Code Ann. § 73-1-4 (2004)	1, 2, 17
Utah Code Ann. § 73-3-3 (2004)	1, 2, 10
Utah Code Ann. § 73-3-8 (2004)	1, 2, 10
 <u>Other Authorities</u>	
Donald Elliott, <u>Managerial Judging and the Evolution of Procedure</u> , 53 U. Chi. L. Rev. 306, 325 (1986).....	16
<u>Sutherland Statutes and Statutory Construction</u> , § 41.6 (6th ed. 2009)	18

Jurisdiction

This court has jurisdiction under Utah Code section 78A-3-102(3).

Statement of the Issues and Standards of Review

In 2004, the state engineer rejected Marilyn Hamblin's application to change the place of use for her water right. Under Utah law, a state engineer is authorized to reject a change application on the following grounds: (i) there is no unappropriated water in the proposed source; (ii) the change would not impair existing rights or interfere with the more beneficial use of water; (iii) the change is physically or economically infeasible or would be detrimental to the public welfare; (iv) the applicant lacks the financial ability to take advantage of the change; or (v) the application is not made in good faith or is filed for purposes of speculation or monopoly. Utah Code Ann. § 73-3-3, -8(1) (2004). Here, the state engineer rejected Ms. Hamblin's change application on the ground that her water right terminated by operation of law in 1985 due to a failure to use the water right, and therefore, Ms. Hamblin had no right to the use of water that could be changed.

In 1996, the Utah Legislature amended section 73-1-4(2) of the forfeiture statute to clarify that a judicial decree is required to forfeit water rights due to a lack of water use. Utah Code Ann. § 73-1-4(2) (2004). No adjudicative body—judicial or otherwise—has declared that Ms. Hamblin's water right terminated by operation of law in 1985 or thereafter, and the district court here recognized that the state engineer lacks the authority to do so himself. The district court nonetheless ruled that (i) the state engineer did not exceed the scope of his authority because he did not “adjudicate” the status of her water right by denying the change application; and (ii) the 1996 amendment to section

73-1-4(2) does not apply retroactively to the forfeiture of water rights prior to 1996 because the 1996 amendment constituted a substantive change to section 73-1-4.

Issue 1: Whether a state engineer has authority to reject an application to change the place of water use on the sole ground that the state engineer has concluded that the water rights at issue have been forfeited, but there has been no prior finding by any adjudicative body that the water rights have been forfeited.

Standard of Review: The court reviews a district court's grant of summary judgment for correctness. Christensen & Jensen, P.C. v. Barrett & Daines, 2008 UT 64, ¶ 19, 194 P.3d 931.

Issue 2: Whether an amendment that requires a forfeiture of water rights to be declared by the judiciary—instead of by some other, or no other, entity—is procedural in nature because it merely specifies the machinery of how a legal right is adjudicated instead of altering the substance of that legal right.

Standard of Review: Whether a statute operates retroactively is a question of law that this court reviews for correctness. Evans & Sutherland Computer Corp. v. Utah State Tax Comm'n, 953 P.2d 435, 437 (Utah 1997).

Preservation: These issues were preserved at R. 1001-13; 1157-69.

Determinative Provisions

Utah Code Ann. § 73-1-4 (1980) (Add. 2); Utah Code Ann. § 73-1-4 (1985) (Add. 1 at R. 1212); Utah Code Ann. § 73-1-4 (1995) (Add. 3); Utah Code Ann. § 73-1-4 (1996) (Add. 4); Utah Code Ann. § 73-1-4 (2004) (Add. 5); Utah Code Ann. § 73-3-3 (2004) (Add. 6); and Utah Code Ann. § 73-3-8 (2004) (Add. 7).

Statement of the Case

I. Nature of the Case and Course of the Proceedings

Marilyn Hamblin holds title to Water Right 55-11041. (R. 1216.) On August 26, 2004, Ms. Hamblin filed a permanent change application (a29341) with the state engineer, with which she requested approval to change the place of use and point of diversion of her water right from Spring Creek/Provo River to the area of Highland City, Utah. (R. 1146-54, Add. 8.) On January 30, 2006, the state engineer rejected the change application. (R. 777-79, Add. 9.)

On March 1, 2006, Ms. Hamblin filed a petition for judicial review. (R. 1-26.) After the district court ordered the state engineer to issue a new order that “specif[ied] his reasons and any statutory basis for approval or rejection,” the state engineer issued a new order again rejecting the change application on January 4, 2008. (R. 322; 766-71; R. 952-58, Add. 10.) The state engineer justified his rejection on the ground that, among other things,¹ Ms. Hamblin was not a person entitled to the use of water because her water right had been forfeited in 1985 due to a lack of beneficial use. (R. 768.)

The state engineer and Ms. Hamblin stipulated to a set of uncontested facts and filed cross-motions for summary judgment. (R. 1217.) The state engineer argued that Ms. Hamblin’s water right no longer existed at the time of her change application because it had been forfeited by “operation of law” due to a lack of use. (R. 849-52.) Ms. Hamblin responded that her water right had never been subject to any forfeiture

¹ The “other things” are not at issue on appeal. Either the district court rejected the state engineer’s other grounds or the district court’s agreement with the state engineer was based entirely upon the court’s ruling that the state engineer could reject the change application because “Ms. Hamblin’s water right has been forfeited.” (R. 1198.) For this reason, forfeiture is the only issue relevant on appeal.

proceeding, in particular a judicial forfeiture proceeding required under Utah Code section 73-1-4(2). (R. 1004-10.) The state engineer does not dispute that under the 2004 version of the Utah Code, a judicial proceeding would be required, but argued that the current statute did not apply retroactively in this case because the factual predicate for forfeiture—nonuse for 5 consecutive years—was complete in 1985. (R. 1183-85.)

On July 13, 2009, the district court granted the state engineer’s motion for summary judgment and denied Ms. Hamblin’s cross-motion. (R. 1194-1217.) The district court reasoned that “Ms. Hamblin is not a ‘person entitled to the use of water’ because her water right was forfeited by operation of law in 1985, and, thus, her change application cannot be granted.” (R. 1206.) The district court’s ruling was premised on its conclusion that the 1996 amendment to section 73-1-4—which states that a forfeiture of water rights may occur only after a judicial determination concerning forfeiture—is substantive in nature and does not apply retroactively. (R. 1208-09.) The district court further concluded that the state engineer did not “adjudicate” Ms. Hamblin’s water right in rejecting the change application, even though (i) the rejection was premised upon her having forfeited her water right and (ii) no tribunal—judicial or otherwise—has ever declared that her right was forfeited. (R. 1210-12.) Ms. Hamblin appeals. (R. 1220.)

II. Statement of Facts

The relevant facts are undisputed. Ms. Hamblin is the owner of Water Right No. 55-11041, as listed in the state engineer’s water rights database. (R. 1216.) While that water right was not used between January 1, 1980, and January 1, 1985, the right also has not been the subject of a forfeiture proceeding, judicial or otherwise. (R. 1215.) These are the only facts relevant to review of the summary judgment rulings.

Summary of the Argument

The state engineer lacks the authority to reject a change application based upon his own determination that a water right has been forfeited. It is undisputed that a state engineer has never had authority under Utah law to adjudicate water rights and declare a water right forfeited. The state engineer contends, however, that he did not “adjudicate” Ms. Hamblin’s water right by rejecting her change application, even though his sole basis for rejecting her application was that she was no longer a “person entitled to the use of water” under section 73-3-3 because her water right had been forfeited in 1985.

It is difficult to understand how the state engineer could deny Ms. Hamblin something to which she is otherwise entitled on the ground that she forfeited her water rights and yet not have “adjudicated” the issue of whether she forfeited her water right. A county board of adjustment cannot deny a request for a zoning code variance, which the board otherwise has no grounds to deny, on the sole basis that an adjoining landowner could succeed in a boundary by acquiescence were the adjoining owner to file a judicial action to quiet title. The result is no different when the state engineer is asked to vary the point of diversion for a water right. The bases on which the state engineer can deny a change application are enumerated, and that enumeration does not include the state engineer determining that the factual predicate for forfeiture exists. The district court should have rejected the state engineer’s semantic argument concerning the meaning of “adjudicate.”

In addition, since 1996, section 73-1-4(2) has specified that forfeiture of a water right requires “judicial action.” The state engineer does not dispute that if a post-1996 version of section 73-1-4 applied here, then the state engineer lacked authority to reject

the change application. (R. 1183-85.) The district court refused to apply the 1996 amendment by construing the “judicial action” requirement as substantive in nature and, therefore, applicable only prospectively. The district court erred in three ways.

First, retroactive application is beside the point because Ms. Hamblin filed her change application in 2004, well after the 1996 amendment. This case does not involve a change application submitted prior to the 1996 amendment where the applicant now asks the court to apply the later enacted statute to review the state engineer’s rejection of the application. Second, the 1996 amendment is procedural in nature, as it merely specifies that the legal machinery required for forfeiture is a judicial proceeding. Procedural changes to statutes apply retroactively under Utah law. Finally, even if a specification of which entity adjudicates a forfeiture proceeding were otherwise substantive in nature, the 1996 amendment merely clarified an ambiguity in the prior statute by making express the requirement that forfeiture is effective only through judicial action. Clarifications of law also apply retroactively.

For all of these reasons, the district court erred in failing to apply the 1996 amendment to section 73-1-4. Application of the 1996 amendment would mean that the state engineer’s rejection of the change application was improper. This court should reverse the district court’s summary judgment rulings and remand with instructions to enter summary judgment in favor of Ms. Hamblin.

Argument

I. The State Engineer Lacks Authority to Declare Water Rights Forfeited

The state engineer had no authority to reject Ms. Hamblin's change application on the ground that she forfeited her water right in 1985. Under Utah law, "[t]he state engineer is an executive, not a judicial officer, and does not have authority to adjudicate the rights of water users." Butler, Crockett & Walsh Dev. Corp. v. Pinecrest Pipeline Operating Co., 2004 UT 67, ¶ 40, 98 P.3d 1.²

Consistent with this, past state engineers have recognized that they lack authority to determine whether the forfeiture of a water right has rendered a change application inappropriate. For example, the state engineer has rejected applications to appropriate additional water where the application was premised upon the forfeiture of other water rights because, the state engineer explained, "the question as to whether water once appropriated had reverted to the public [by] nonuse or abandonment required legal determinations which are generally beyond the jurisdiction of his office." Shields v. Dry Creek Irrigation Co., 12 Utah 2d 98, 100, 363 P.2d 82, 83 (1961) (emphasis added); see also Washington County Water Conservancy Dist. v. Morgan, 2003 UT 58, ¶ 3, 82 P.3d 1125 (state engineer "did not decide the question of forfeiture, noting and apparently agreeing with the [applicant's] position that a finding of forfeiture requires judicial action and therefore was beyond the state engineer's jurisdiction.") (emphasis added).

² Whitmore v. Murray City, 107 Utah 445, 450, 154 P.2d 748 (1944) (in considering change applications, state engineer "acts in an administrative capacity only and has no authority to determine rights of parties"); United States Fuel Co. v. Huntington-Cleveland Irrigation Co., 2003 UT 49, ¶ 14, 79 P.3d 945 ("[A]s a general rule, the determination of the priority of rights is a judicial function and not among the powers of the state engineer.").

Not only does the state engineer lack authority to determine that a water right has been forfeited in reviewing a change application, courts lack authority to make that determination when reviewing the state engineer's rejection of a change application. Under Utah law, a "court may not determine issues not within the power of the engineer to determine." United States v. District Court, 121 Utah 1, 8, 238 P.2d 1132 (1951). As this court has explained, "[i]n the case of an application to appropriate or to change the place of diversion or use, [the state engineer] merely approves or rejects the application without determining the priorities of the parties, although often the facts recorded or shown by the engineer's records may be conclusive as to the priorities of the rights of the parties." Id. at 8-9. In other words, even if the facts concerning priority are clear, the state engineer, and then the district court on review, lacks authority to reject a change application in a manner that adjudicates the water rights of the applicant.

The state engineer attempts to avoid these straightforward principles by asserting that he did not "adjudicate" Ms. Hamblin's water right when he rejected her change application because facts supporting forfeiture—5 years of nonuse—were undisputed. (R. 850-52.) While undisputed facts may indicate that no facts require adjudication, undisputed facts do not indicate that legal issues based upon those facts do not require adjudication. Otherwise, summary judgment would never adjudicate the merits of a claim because no facts are "adjudicated." For that reason, whether the facts supporting the forfeiture are undisputed is irrelevant to whether the state engineer "adjudicates" a forfeiture issue in rejecting a change application on the ground that the water rights have been forfeited. Undisputed facts concerning nonuse are beside the point.

The more serious argument does not turn on whether facts are undisputed, but instead relies upon this court's implicit approval of a state engineer rejecting a change application on the ground that the water right had been forfeited by operation of law. Nephi City v. Hansen, 779 P.2d 673 (Utah 1989). In Nephi City, this court rejected Nephi City's argument that the forfeiture statute was unconstitutional as applied to municipalities. Nephi City advanced this argument after the state engineer rejected its change application on the ground that its "water rights were forfeited for nonuse by operation of law." Id. at 675. Importantly, Nephi City did not argue, as Ms. Hamblin does here, that the state engineer lacked the authority to adjudicate the issue of forfeiture in reviewing a change application, but instead relied only upon its specific constitutional challenge to the forfeiture statute itself. In other words, Nephi City involved whether the Utah State Constitution requires the exemption of municipalities from the forfeiture statute, not whether the state engineer has the authority to reject a change application based upon his own determination that the forfeiture statute could be satisfied, something that was neither briefed nor decided in Nephi City.³

In fact, because the state engineer's acts are purely ministerial, he lacks authority to reject a change application for a reason other than those specifically enumerated in the statutes governing his review of change applications: (i) there is no unappropriated water

³ Nephi City's brief confirms that the issue was not presented to the court.

The issue raised by this appeal is whether the State Engineer may constitutionally declare a municipal corporation's water right forfeited for non-use pursuant to section 73-1-4 U.C.A. 1953 as amended given the provisions of Article XI Section 6 of the Utah Constitution which in essence states that a municipality within the State of Utah may not transfer or dispose of its water rights except in exchange for a water right or water supply of equal value.

Opening Brief, Nephi City v. Hansen, Utah Supreme Court No. 860614 (Add. 11) at 2.

in the proposed source; (ii) the change would not impair existing rights or interfere with the more beneficial use of water; (iii) the change is physically or economically infeasible or would be detrimental to the public welfare; (iv) the applicant lacks the financial ability to take advantage of the change; or (v) the application is not made in good faith or is filed for purposes of speculation or monopoly.⁴ Utah Code Ann. § 73-3-3, -8(1) (2004).

Establishment of the factual predicate for forfeiture under a different statute, section 73-1-4, is conspicuously absent from that list, something previous state engineers have recognized. Shields v. Dry Creek Irrigation Co., 12 Utah 2d 98, 100, 363 P.2d 82 (1961) (state engineer “ruled that the question as to whether water once appropriated had reverted to the public [by] nonuse or abandonment required legal determinations which are generally beyond the jurisdiction of his office”).⁵

Nor does the state engineer gain that authority because a person submitting a change application must be “a person entitled to the use of water” under section 73-3-3. This language permits the state engineer to reject the application of a person who has no documented water right at all, but it does not permit the state engineer to disregard a documented water right based upon the state engineer’s own application of the forfeiture statute. An example from real property law illustrates the importance of this distinction.

⁴ While the state engineer argued that rejection was also appropriate due to impairment and a lack of unappropriated water in the proposed source, the district court “relie[d] on its . . . forfeiture analysis” in addressing those arguments. The district court reasoned that Ms. Hamblin could not demonstrate that there was unappropriated water at the new proposed source because her right had been forfeited. (R. 1200, Add. 1.)

⁵ It is true, however, that if Ms. Hamblin had failed to challenge the state engineer’s rejection of her change application directly, and later challenged that rejection collaterally in a case in which it was determined that Ms. Hamblin, in fact, had forfeited her water rights, then the state engineer’s rejection of the change application would not be reversed. Baugh v. Criddle, 19 Utah 2d 361, 362, 431 P.2d 790 (1967).

While a person must own real property to request and obtain a variance in the zoning code for that property, a county board of adjustment cannot deny a request for variance on the sole ground that an adjoining landowner could establish the elements of boundary by acquiescence if the adjoining landowner only initiated a quiet title action. For the board of adjustment to deny the request on that basis would be for it to “adjudicate” the boundary by acquiescence claim, something it cannot do.

Similarly here, the state engineer must “adjudicate” the forfeiture issue to reject the change application because the water right has been forfeited.⁶ Yet the state engineer lacks authority to adjudicate a water right, especially while considering a change application. Washington County Water Conservancy Dist. v. Morgan, 2003 UT 58, ¶ 16, 82 P.3d 1125 (“We doubt that the legislature intended the change application process to carry with it an increased risk of losing the rights underlying the application.”).

This court should reject the state engineer’s semantic argument concerning the term “adjudicate” and reverse the district court’s summary judgment rulings. Even if Ms. Hamblin had submitted her change application before the 1996 amendment, the state engineer lacked authority to reject Ms. Hamblin’s change application on the sole ground that the factual predicate for establishing forfeiture existed in 1985.

⁶ The procedures governing forfeiture of a water right must be strictly observed in favor of the owner and against the government. Massey v. Griffiths, 2005 UT App 410, ¶ 8, 131 P.3d 243 (because of harsh effects of tax forfeiture, statutes setting forth antecedents to forfeiting real property are to be construed strictly in favor of owner and against government); see also In re Penrod, 50 F.3d 459, 462 (7th Cir. 1995) (stating that the “forfeiture of [property] rights is disfavored”); Schuller v. D’Angelo, 458 N.Y.S.2d 501, 502 (N.Y. Sup. Ct. 1983) (“the law looks with disfavor on automatic forfeitures of rights”); Sagewillow, Inc. v. Idaho Dep’t of Water Res., 70 P.3d 669, 674 (Idaho 2003) (“This Court has held . . . that abandonments and forfeitures are not favored.”).

II. Ms. Hamblin Is a Person Entitled to the Use of Water Because Her Water Right Was Never Subject to a Judicial Action for Forfeiture

While the fact that the state engineer improperly “adjudicated” Ms. Hamblin’s water right is dispositive, this court need not reach the issue to reverse the district court’s summary judgment rulings. It is undisputed that if the 1996 amendment to section 73-1-4—which clarified that a forfeiture can be effective only through “judicial action”—applies to the state engineer’s forfeiture determination here, then the state engineer lacked authority to reject Ms. Hamblin’s change application. The state engineer, and the district court, reasoned that the 1996 amendment does not apply because the amendment is substantive in nature, and, therefore, cannot apply retroactively to the nonuse of Ms. Hamblin’s water right between 1980 and 1985.

As demonstrated below, the 1996 amendment applies to the state engineer’s forfeiture determination for three reasons. First, Ms. Hamblin filed her change application in 2004, well after the 1996 amendment. Second, the 1996 amendment is procedural in nature, as it merely specifies the legal machinery required for forfeiture—a judicial proceeding. Procedural changes to statutes apply retroactively under Utah law. Finally, the 1996 amendment merely clarified an ambiguity in the prior statute by making express the requirement that forfeiture is effective only through a judicial proceeding. Clarifying amendments also apply retroactively.

Below, Ms. Hamblin will discuss each of these issues, after outlining the relevant statutory language and the district court’s interpretation of that language.

A. The 1996 Amendment to Section 73-1-4 and the District Court’s Ruling

Section 73-1-4 addresses statutory forfeiture of water rights. It provides that a person may forfeit a water right that is unused for a specified period. The state engineer,

and the district court, relied upon the 1985 version of the forfeiture statute, which stated: “When an appropriator or his successor in interest shall abandon or cease to use water for a period of five years the right shall cease and thereupon such water shall revert to the public” Utah Code Ann. § 73-1-4 (1985). The district court interpreted this language to be self-executing and thereby authorizing the state engineer to recognize forfeiture by “operation of law” without adjudicating the water right at issue. (R. 1212.) As discussed above, the state engineer previously has rejected the notion that this language is self-executing and thereby authorizes him to recognize forfeiture by “operation of law” in considering a change application. Shields v. Dry Creek Irrigation Co., 12 Utah 2d 98, 100, 363 P.2d 82 (1961) (state engineer “ruled that the question as to whether water once appropriated had reverted to the public nonuse or abandonment required legal determinations which are generally beyond the jurisdiction of his office”).

In 1996, section 73-1-4 was amended to clarify that a judicial action is the required mechanism to declare forfeiture, something left unclear in the 1985 version. After the 1996 amendment, “[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 five years.” Utah Code Ann. § 73-1-4(2)(b)(i) (1996) (emphasis added).⁷ If the 1996 amendment governs the state engineer’s consideration of Ms. Hamblin’s change application, then the state engineer’s forfeiture determination was an improper basis to reject the application because no judicial action has declared Ms. Hamblin’s rights to be forfeited. (R. 1209.)

⁷ Further clarifying the need for judicial action, in 2008 section 73-1-4(2)(a) was amended to state that the period of nonuse only makes the water right “subject to forfeiture in accordance with Subsection 2(c).”

The district court ruled that the 1996 amendment was substantive in nature because “the legal machinery at work under the former version of the statute was operation of law, and the 1996 amendment changed the legal machinery to judicial action.” (R. 1209.) In making this ruling, the district court apparently misread this court’s case law. This court has made clear that a change is procedural if it pertains to the “legal machinery by which the substantive law is determined or made effective.” Harvey v. Cedar Hills City, 2010 UT 12, ¶ 14, 650 Utah Adv. Rep. 32 (quoting Brown & Root Indus. Serv. v. Indus. Comm’n, 947 P.2d 671, 675 (Utah 1997)).

The district court’s other ground for ruling that the 1996 amendment was substantive is that application of the 1996 amendment would change the outcome of this case. (R. 1207-08.) Of course, any procedural change has the potential to change the outcome of a case—otherwise parties would rarely bother to litigate procedural issues. The fact that procedural changes can be outcome determinative does not thereby transform those changes into substantive changes for purposes of a retroactivity analysis. Goebel v. Salt Lake City S. R.R. Co., 2004 UT 80, ¶ 39, 104 P.3d 1185 (change to notice of claim procedures, although dispositive of plaintiff’s claim, nonetheless was procedural in nature and applied retroactively).

Therefore, the district court’s reasoning is at odds with this court’s case law. And as demonstrated below, the district court erred in refusing to apply the 1996 amendment.

B. The 1996 Amendment Applies to the State Engineer’s Forfeiture Determination Because Ms. Hamblin Submitted Her Change Application in 2004

The 1996 amendment governs because they had become effective nearly a decade before Ms. Hamblin submitted her change application on August 26, 2004. Under Utah

law, lawsuits are governed by the version of the statute in effect “at the time of the events giving rise to the suit.” Harvey, 2010 UT 12 at ¶ 12. Here, because it is undisputed that this case involves the appropriateness of a rejection of a change application, not a forfeiture proceeding, the events giving rise to the suit are events in 2004, when Ms. Hamblin submitted her change application. For this reason, the state engineer should have applied the 2004 version of section 73-1-4, not the 1985 version of the forfeiture statute. Retroactivity is beside the point. This court should reverse.

C. The 1996 Amendment Applies Retroactively Because It Is Procedural

The district court’s determination that the 1996 amendment did not operate retroactively is contrary to Utah law. Under Utah law, legislative enactments operate retroactively where they are procedural in nature. Evans & Sutherland Computer Corp. v. Utah State Tax Comm’n, 953 P.2d 435, 437 (Utah 1997). Procedural changes are those “that do not ‘enlarge, eliminate, or destroy’ substantive rights [and] can be applied retroactively.” B.A.M. Dev., L.L.C. v. Salt Lake County, 2006 UT 2, ¶ 20, 128 P.3d 1161; see also In re Kaul, 4 P.3d 1170, 1173 (Kan. 2000) (“Procedural laws are those that concern the manner and order of conducting suits or the mode of proceeding to enforce legal rights”).

Here, the 1996 amendment was procedural in nature for a number of reasons. First, it merely specified who must declare a forfeiture—the judiciary. A few cases illustrate the procedural nature of the amendment. In B.A.M. Development, this court determined that a statutory change that permitted district courts to call witnesses and take evidence when reviewing county land use decisions was procedural in nature because it did not “enlarge, eliminate or destroy substantive rights.” 2006 UT 2 at ¶ 21. Rather, the

change was procedural because it “endeavors to improve the quality and integrity of judicial review of land-use decisions. It is a statute aimed at discovering, evaluating, and preserving substantive rights by improving judicial procedures.” Id. For similar reasons, a statutory amendment that changed who performs evaluations of mentally challenged offenders is procedural. State v. Burgess, 870 P.2d 276, 280 (Utah Ct. App. 1994).

Second, the 1996 amendment did not “enlarge, eliminate, or destroy” Ms. Hamblin’s substantive right. B.A.M. Development, 2006 UT 2 at ¶ 20. Were the state engineer to bring a forfeiture action—something the engineer concedes he could do—the fact that a judicial officer must preside would not change the substantive law applied in that proceeding. (R. 1183.) The district court reasoned that the 1996 amendment was a substantive change because the outcome of the summary judgment motion before the district court hinged upon whether the 1996 amendment applies. (R. 1208-09.) What is significant, however, is whether the substantive law in forfeiture proceedings would be different, not whether the outcome of the motion before the district court is affected by the change. If the district court’s test were the correct one, then all procedural changes would be substantive because, presumably, the only reason parties would raise the issue is that it is dispositive of some motion or claim.⁸ The issue is whether the substantive law governing forfeiture proceedings changes, and it did not, as 5

⁸ Donald Elliott, Managerial Judging and the Evolution of Procedure, 53 U. CHI. L. REV. 306, 325 (1986) (“Ultimately, procedure and substance cannot be divorced: no procedural decision can be completely ‘neutral’ in the sense that it does not affect substance.”)

years of nonuse was sufficient in 1985, was sufficient in 1996, and was sufficient in 2004.⁹ Utah Code Ann. § 73-1-4 (1985, 1996, 2004).

Indeed, the district court’s reasoning cuts against numerous examples of statutory changes that apply retroactively despite having a dispositive impact on the litigation. For instance, standard of review, which can certainly affect outcome, is procedural. Due South, Inc. v. Department of Alcoholic Beverage Control, 2008 UT 71, ¶ 14, 197 P.3d 82 (“The standard of review is a matter of procedural, rather than substantive, law.”); Evans & Sutherland Computer Corp. v. Utah State Tax Comm’n, 953 P.2d 435, 437-38 (Utah 1997) (change to de novo review of Utah State Tax Commission is procedural).

Changing who must receive a notice of claim, while outcome determinative of a motion for summary judgment and subsequent appeal, also does not transform that change from procedural to substantive. Goebel v. Salt Lake City S. R.R. Co., 2004 UT 80, ¶¶ 39-40, 104 P.3d 1185. In Goebel, this court explained that where the statutory change “merely changed the identity of the party receiving the notice of claim from the City’s ‘governing body’ to the city recorder. It would be difficult to conceive of a statutory change that would do less to ‘enlarge, eliminate, or destroy’ a plaintiff’s substantive rights.” Id. at ¶ 40.

⁹ The 1996 amendment requires that a judicial action be commenced within 15 years of nonuse, but this provision is not outcome determinative here because there has been no judicial action commenced at any time to determine whether Ms. Hamblin has forfeited her water right.

In addition, changes in statutes of limitations can be outcome determinative, but they are nonetheless procedural.¹⁰ Davis v. Provo City Corp., 2008 UT 59, ¶ 26, 193 P.3d 86 (“Statutes of limitations are essentially procedural in nature and . . . do not abolish a substantive right to sue.”); State v. Lusk, 2001 UT 102, ¶ 28, 37 P.3d 1103. In Del Monte Corp. v. Moore, this court retroactively applied an extension of the statute of limitations from six years to eight years. 580 P.2d 224, 225 (Utah 1978). The fact that the retroactive application changes the outcome of a case does not compel the conclusion that the statute of limitations was substantive. Id.; see also State v. Jacoby, 1999 UT App 52, ¶ 12, 975 P.2d 939.¹¹

The same is true here. Merely clarifying that judicial action is required to perfect a forfeiture claim and divest someone of vested rights similarly does not “enlarge, eliminate, or destroy” any substantive rights. Therefore, the 1996 amendment was procedural in nature.

Third, the legislative history of the 1996 amendment confirms its procedural nature. State v. Carreno, 2006 UT 59, ¶ 11, 144 P.3d 1152 (“The evolution of a statute

¹⁰ A change to a statute of limitations may be applied retroactively if the change was made before the limitations period for the original statute had run because “after a cause of action has become barred by the statute of limitations the defendant has a vested right to rely on that statute as a defense.” Roark v. Crabtree, 893 P.2d 1058, 1063 (Utah 1995). This exception does not apply here, however, because the expiration of the period of nonuse does not create a vested right in the state engineer. SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION, § 41.6 (6th ed. 2009) (“‘[V]ested right’ means simply a right which under particular circumstances is protected from legislative interference.”).

¹¹ This court has expressed a similar principle in cases involving “ex post facto” challenges: “A statutory amendment does not violate the ex post facto clause merely because it works to the detriment of the accused.” State v. Norton, 675 P.2d 577, 587 (Utah 1983), overruled on other grounds by State v. Hansen, 734 P.2d 421, 424-28 (Utah 1986); see also Dobbert v. Florida, 432 U.S. 282 (1977) (“Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto.”).

through amendment by our Legislature may also shed light on a statute's intended meaning.”). The sponsor of the 1996 amendment, Representative David Ure, stated that the amendment contained a procedural change intended to operate retroactively:¹² “What we did was finally establish a way that water might be forfeited after it's had a five years nonuse in the State of Utah. We did nothing to change that part of the code. We only established a way that the foreclosure might come close – might finally be complete.” (Transcript of January 29, 1996 House Floor Debate on H.B. 69, R. 967, Add. 12.) In response to (then) Representative Valentine's question concerning the purpose of the 1996 amendment, the sponsor stated that “it's to make a way to finally bring it to court – see there is no process in place for which the forfeiture finally came closed and this is the reason for it.” (R. 966 (emphasis added).)

Representative Brown then confirmed the procedural nature of the change: “So, what we're trying to do is put a process in place that protects people, not gives them more exposure. Whether it's individual water owners or municipalities.” (R. 963 (emphasis added).) Instead, under the proposed bill, “the challenge of water rights must be brought about in court action. In other words, if no one says anything about your nonuse, then it is still your water right. But if someone decides that you haven't utilized that water right and wants to challenge it, they can do it through court.” (Id.)

The legislative history confirms that the legislature intended the new procedure in the 1996 amendment to govern all 5-year gaps in water use. As this court has

¹² The district court discounted the legislative history, at least in part, due to the fact that at the end of the floor debate containing the quotations given, the bill was circled. (R. 1208 n.2) However, the bill was un-circled the following day. (See Excerpt from Transcript of January 30, 1996 House Floor Debate, Add. 13.)

recognized, “[t]he intent to have a statute operate retroactively may be indicated by explicit statements that the statute should be applied retroactively or by clear and unavoidable implication that the statute operates on events already past.” Evans & Sutherland Computer Corp. v. Utah State Tax Comm’n, 953 P.2d 435, 437 (Utah 1997). Here, the statements of the sponsors reveal that the 1996 amendment applies to “events already past,” as does its language designed to bring clarity to water rights.

Fourth, principles of “convenience, reasonableness, and justice” confirm that the 1996 amendment was procedural in nature. This court considers factors such as “[c]onvenience, reasonableness, and justice . . . in deciding whether a statute has a merely remedial or procedural purpose.” Goebel, 2004 UT 80 at ¶ 39. Here, retroactive application will promote both convenience and reasonable certainty for water rights holders. In re General Determination of Rights to the Use of Water, 2004 UT 106, ¶ 41, 110 P.3d 666 (recognizing “laudable goal of certainty”).

The legislative purpose in enacting the 1996 amendment was to provide clarity to holders of water rights where there may exist a 5-year gap in use since 1896. If the 1996 amendment did not operate retroactively to require a judicial determination in all cases, then the 1996 amendment solved nothing until at least 2001, after 5 years of nonuse post-enactment; or perhaps until 2011, after 15 years of the failure to bring a judicial proceeding post-enactment. Not only would prospective application not further the legislative purpose of bringing clarity to water rights, but it would affirmatively undermine that purpose, by creating more confusion.

For the same reason, the district court’s interpretation would create greater uncertainty in the review of change applications. For example, it is unclear under the

district court's ruling whether the state engineer can recognize forfeiture only if the 5 years completed before enactment of the 1996 amendment or whether it is enough that the 5 years began prior to enactment. Such uncertainty would hinder the goal of achieving the highest and best possible use of the water. Searle v. Milburn Irrigation Co., 2006 UT 16, ¶ 36, 133 P.3d 382 (change applications can further "policy of putting water to the best use possible"); Wayman v. Murray City Corp., 458 P.2d 861, 863 (Utah 1969) (stating that the rights of persons entitled to the use of water to file a change application "is intended as an affirmative grant of the right to change the diversion in order to put water to the best possible use").

As a result, principles of reasonableness, convenience, and justice also weigh in support of a retroactive application. Retroactive application allows all water rights owners to rely with certainty upon the current statute. There would be no confusion as to which rights already have been forfeited by operation of law. No user would need to face the inconvenience and cost of having to retain legal counsel to determine whether the 15-year limitation on bringing forfeiture actions actually applies to them. They could file a change application without fearing the risk of "non-judicial" forfeiture. For all of these reasons, this court should hold that the 1996 amendment is procedural in nature and apply retroactively.

D. The 1996 Amendment Merely Clarified Existing Law

The 1996 amendment also applies retroactively because it merely clarified existing law. Under Utah law, a statutory change is retroactive when its purpose "is to clarify the meaning of an earlier enactment or is merely 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) (internal citations and quotations omitted); see also Kilpatrick v. Wiley, Rein & Fielding, 2001 UT 107, ¶ 59, 37 P. 3d 1130.

Prior to the 1996 amendment, section 73-1-4 was silent as to the procedure for declaring forfeiture. It read, “When an appropriator or his successor in interest shall abandon or cease to use water for a period of five years the right shall cease and thereupon such water shall revert to the public” Utah Code Ann. § 73-1-4 (1985). The 1996 amendment clarified that “[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 five years.” Utah Code Ann. § 73-1-4(2)(b)(i) (1996) (emphasis added).

The legislative sponsor recognized the unclarity in then-section 73-1-4, stating that the amendment “only established a way that the foreclosure might come close – might finally be complete.” (R. 967.) Prior to the amendment, there was “no process in place for which the forfeiture finally came closed.” (Id.) Under the 1996 amendment, the rights of those holding and those challenging water rights would be clear: “In other words, if no one says anything about your non-use, then it is still your water right. But if someone decides that you haven’t utilized that water right and wants to challenge it, they can do it through court.” Id. Therefore, the purpose of the 1996 amendment was to clarify, not to change, the law. For this additional reason, this court should reverse the district court’s summary judgment rulings.

Conclusion

This court should reverse the district court's order granting summary judgment in favor of the state engineer. First, the state engineer has never had authority to adjudicate the forfeiture of water rights in considering a change application, something he did here. Second, the 1996 amendment to section 73-1-4 clarified that judicial action is required for forfeiture, a change that was not only procedural but also clarifying, both of which warrant retroactive application of the statute. For all of these reasons, the state engineer lacked authority to reject Ms. Hamblin's change application, and the district court erred in its summary judgment rulings. This court should reverse the district court's summary judgment rulings and remand with instructions to enter summary judgment in favor of Ms. Hamblin.

DATED this 18th day of March, 2010.

SNELL & WILMER L.L.P.

A handwritten signature in black ink, appearing to be 'B. Cahoon', written over a horizontal line.

Bradley R. Cahoon

Troy L. Booher

Stewart O. Peay

M. Lane Molen

Attorneys for Appellant Marilyn Hamblin

Certificate of Service

I hereby certify that on the 18th day of March, 2010, two true and correct copies of **OPENING 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



11100006

Index to Addenda

- Addendum 1: Memorandum Decision and Order on State Engineer's Motion for Summary Judgment and Memorandum Decision and Order on Plaintiff's Cross-Motion for Partial Summary Judgment dated July 13, 2009 (R. 1196-1217)
- Addendum 2: Utah Code Ann. § 73-1-4 (1980)
- Addendum 3: Utah Code Ann. § 73-1-4 (1995)
- Addendum 4: Utah Code Ann. § 73-1-4 (1996)
- Addendum 5: Utah Code Ann. § 73-1-4 (2004)
- Addendum 6: Utah Code Ann. § 73-3-3 (2004)
- Addendum 7: Utah Code Ann. § 73-3-8 (2004)
- Addendum 8: Application for Permanent Change of Water Number a29341 (R. 1146-54)
- Addendum 9: Order of State Engineer dated January 30, 2006 (R. 777-79)
- Addendum 10: Order of State Engineer dated January 4, 2008 (R. 952-58)
- Addendum 11: Excerpts of Brief of Appellant in *Nephi City v. Hansen*, Utah Supreme Court No. 860614
- Addendum 12: House Floor Debate, Transcript of Proceedings, January 29, 1996 (R. 960-67)
- Addendum 13: House Floor Debate, Excerpt of Transcript of Proceedings, January 30, 1996
- Addendum 14: Enrolled Copy of Utah House Bill 69, 1996 General Session (R. 969-78)

Tab 1

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

MARILYN HAMBLIN, an individual,

Plaintiff,

vs.

BOYD CLAYTON, P.E., Interim Utah State
Engineer; NEW STATE, INC., a Nevada
non-profit corporation; and UNITED
STATES OF AMERICA, BUREAU OF
RECLAMATION

Defendants.

MEMORANDUM DECISION AND
ORDER ON STATE ENGINEER'S
MOTION FOR SUMMARY
JUDGMENT and

MEMORANDUM DECISION AND
ORDER ON PLAINTIFF'S CROSS-
MOTION FOR PARTIAL
SUMMARY JUDGMENT

CASE NO. 060400639

DATE: 13 July 2009

Judge Claudia Laycock

Division 3

This matter is before the court for ruling on the *State Engineer's Motion for Summary Judgment* and the plaintiff's *Cross Motion for Partial Summary Judgment*. The parties came before the court for oral argument on May 12, 2009. Having read the parties' pleadings and considered the oral arguments, the court now rules in this matter.

PROCEDURAL HISTORY

1. Marilyn Hamblin ("Ms. Hamblin" or "the plaintiff") filed her *Cross-Motion for Partial Summary Judgment* on January 20, 2009.
2. The parties filed their *Joint Stipulation of Uncontested Facts* on January 20, 2009.
3. The State Engineer filed his *Motion for Summary Judgment* on January 21, 2009.
4. The plaintiff filed her *Memorandum in Opposition to State Engineer's Cross-Motion for Partial Summary Judgment* on February 19, 2009.

5. The State Engineer filed his *Memorandum in Opposition to Plaintiff's Cross-Motion for Partial Summary Judgment* on February 23, 2009.

6. The plaintiff filed her *Reply to State Engineer's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment* on March 16, 2009.

7. The State Engineer filed his *Reply Memorandum to Plaintiff's Memorandum in Opposition to State Engineer's Motion for Summary Judgment* on March 18, 2009.

8. The parties came before the court for oral argument on both motions on May 12, 2009.

UNDISPUTED FACTS¹

1. The Provo River Decree, signed by Judge Morse on May 2, 1921, divides the Provo River system (including tributaries) geographically into two divisions, the Provo Division (lower river) and the Wasatch Division (upper river).

2. Each beneficial use in the Provo River Decree was assigned a water right number and given a file by the State Engineer to better administer and distribute the water rights, as well as to track ownership changes.

3. A.L. Tanner's 30 acres of beneficial use from Spring Creek and the Provo River, found on Page 19 of the Provo River Decree, was assigned Water Right No. 55-11041 (the "Water Right") by the Utah Division of Water Rights (water right 11041 in area 55). The file for

¹The facts from the parties' *Joint Stipulation of Uncontested Facts* are found in numbers 3, 4, and 6. The fourth stipulated fact is not listed because the court found it immaterial to its decision, and because the court found it ambiguous. The other facts were not disputed in the parties' briefing on their respective motions.

Water Right No. 55-11041 is located at the State Engineer's office.

4. The Water Right has not been put to beneficial use since January 1, 1980.

5. In 1995 Utah Valley, which includes the area surrounding the Water Right, was closed to all new appropriations of water and was considered fully appropriated.

6. Spring Creek, a point of diversion for the Water Right, flowed continuously with enough water to satisfy all rights until January 1, 2002 and has been completely dry since that date.

7. On August 26, 2004 Ms. Hamblin submitted a change application for the unused Water Right. The application requested a change of the point of diversion for 120 acre-feet of water from the Spring Creek/Provo River to within the water system of Highland City, Utah.

8. On January 30, 2006 the State Engineer issued an order rejecting the Change Application.

9. Subsequently, Ms. Hamblin filed this action. As a result of previous motions in this action, the State Engineer issued a new order on January 4, 2008, containing more specificity about the justification for the rejection of the Change Application.

10. The Water Right has never been the subject of a judicial proceeding for forfeiture.

DISCUSSION

In his motion for Summary Judgment, the State Engineer asserts that the Change Application was properly denied because (1) the Water Right has been forfeited by operation of law, and (2) other water users' rights would be impaired if the Change Application were granted. In her motion for Partial Summary Judgment, Ms. Hamblin asks the court to find (1) that she is a

person entitled to file the Change Application for the Water Right, and (2) that her Change Application complied with the statutory requirements for filing a permanent change application, as found in Utah Code Ann. 73-3-3. (“U.C.A.”) The court will address each of the parties’ arguments in turn.

I. Standard of Review

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Utah R. Civ. P. 56(c). To defeat a motion for summary judgment, any alleged issue of fact must be material. *See Norton v. Blackham*, 669 P.2d 857, 859 (Utah 1983) (citing *Horgan v. Industrial Design Corp.*, 657 P.2d 751 (Utah 1982); *Heglar Ranch, Inc. v. Stillman*, 619 P.2d 1390 (Utah 1980)). Furthermore,

[a] major purpose of summary judgment is to avoid unnecessary trial by allowing the parties to pierce the pleadings to determine whether there is a genuine issue to present to the fact finder. In accordance with this purpose, specific facts are required to show whether there is a genuine issue for trial. The allegations of a pleading or factual conclusions of an affidavit are insufficient to raise a genuine issue of fact.

Overstock.com, Inc. v. SmartBargains, Inc., 2008 UT 55, ¶ 12, 192 P.3d 858 (quoting *Reagan Outdoor Adver., Inc. v. Lundgren*, 692 P.2d 776, 779 (Utah 1984)).

This court has authority to “review by trial de novo all final agency actions resulting from informal agency actions.” Utah Code Ann. § 63G-4-402 (2009). “[R]eview by trial de novo

means a new trial with no deference to the administrative proceedings below.” *Archer v. Bd. of State Lands & Forestry*, 907 P.2d 1142, 1145 (Utah 1995).

[A] district court, when reviewing the state engineer’s decision to approve or reject an application, is not sitting in its capacity as an adjudicator of rights, but is merely charged with ensuring that the state engineer correctly performed an administrative task. . . . [W]hen conducting a de novo review of the state engineer’s approval or rejection of an application, the court simply ‘determines whether the application should be approved or rejected and does not fix the rights of the parties beyond the determination of that matter.’”

Searle v. Milburn Irrigation Co., 2006 UT 16, ¶ 35, 133 P.3d 382 (quoting *Eardley v. Terry*, 77 P.2d 362, 365 (Utah 1938)).

As the Utah Supreme Court recently noted, the term “de novo” is often used imprecisely. *Beller v. Rolfe*, 2008 UT 68, ¶ 9, 194 P.3d 949. “Trial de novo can refer to either a complete retrial upon new evidence or a trial upon the record made by a lower tribunal. The proper meaning largely depends on the context in which it is used.” *Id.* In the context of reviewing decisions by the State Engineer, the court finds that the former meaning is appropriate. In the cases discussed in *Searle*, the district courts received fresh evidence in their respective trials, and they were apparently not bound to simply reviewing the record established before the state engineer. *See* 2006 UT 16 at ¶ 8.

Thus, this court rejects Ms. Hamblin’s contention that the only issues before the court are the three grounds the State Engineer provided for rejecting the Change Application. Rather, the issue before the court is “whether the application should be approved or rejected.” And, currently, the only issues before the court are those set forth in the parties’ respective motions for summary judgment, which the court will decide based on the undisputed facts set forth above.

II. Forfeiture

In sum, the State Engineer argues that Ms. Hamblin lost the Water Right by forfeiture under applicable statutes in effect in 1985. Ms. Hamblin argues that the current amended version of the statute should apply, which would require a judicial proceeding before her right could be considered forfeited.

During the years pertinent to the facts of this case, 1980 to 1985, the forfeiture statute in the Utah Code read as follows:

When an appropriator or his successor in interest shall abandon or cease to use water for a period of five years the right shall cease and thereupon such water shall revert to the public, and may be again appropriated as provided in this title, unless before the expiration of such five-year period the appropriator or his successor in interest shall have filed with the state engineer a verified application for extension of time, not to exceed five years, within which to resume the use of such water. . . . The provisions of this section are applicable whether such unused or abandoned water is used by others without right.

Utah Code Ann. § 73-1-4 (1985). The State Engineer reads this statute in conjunction with U.C.A. 73-3-3, which, in 1980, said the following: “Any person entitled to the use of water may change the place of diversion or use and may use the water for other purposes than those for which it was originally appropriated, but no such change shall be made if it impairs any vested rights without just compensation.” Thus, the State Engineer argues, Ms. Hamblin’s Change Application was appropriately denied because by 2004, when she filed her change application, she was not a person “entitled to the use of water” because her right was forfeited by operation of law in 1985.

In support of this analysis, the State engineer relies on *Nephi City v. Hansen*, 779 P.2d 673 (Utah 1989), which interprets the 1980 version of U.C.A. 73-1-4, which was substantively the same version in place in 1985. In *Nephi City*, the State Engineer rejected Nephi City's applications to change the points of diversion of four claimed water rights on the basis that the water rights had been forfeited. 779 P.2d at 673. Specifically, the State Engineer found that "[b]ecause there were no subsisting water rights, there could be no change in their points of diversion." *Id.* On summary judgment, the trial court upheld the State Engineer's decision, and the Utah Supreme Court affirmed the decision, finding that "[t]here [was] little question that section 73-1-4 works a forfeiture of Nephi City's four nonconsumptive water rights. These rights were unused for about thirty years." *Id.* at 674-75. The court further noted that Nephi City failed to request an extension of time, and thus, concluded that "under the plain terms of section 73-1-4, Nephi City's water rights were forfeited for nonuse by operation of law."

Ms. Hamblin argues that her right has never been forfeited because the legislature has rejected the procedures proposed by the State Engineer and has implemented clarified procedures by amending U.C.A. 73-1-4. The pertinent portions of the 2008 version of that section are as follows:

(2)(a) When an appropriator or the appropriator's successor in interest abandons or ceases to use all or a portion of a water right for a period of seven years, the water right or the unused portion of that water right is subject to forfeiture in accordance with Subsection (2)(c), unless the appropriator or the appropriator's successor in interest files a nonuse application with the state engineer.

(2)(c)(i) A water right or a portion of the 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 seven years.

The judicial forfeiture language was first added with the 1996 amendment. The 2008 amendment removed the words “ceases and the water reverts to the public” from the most recent version of the statute to that point and replaced them with “subject to forfeiture in accordance with Subsection 2(c).” Thus, under the current version of U.C.A. 73-1-4, Ms. Hamblin argues that the Water Right has not been forfeited because no judicial action has ever occurred. The case law the State Engineer relies upon is also inapplicable, she argues, because it is based on the former version of the statute.

The question before the court is which version of the forfeiture statute should apply to Ms. Hamblin’s Water Right. Neither party has been able to direct the court to any cases applying the current forfeiture statute in situations similar to the one in this case. Thus, the question of how the current amended version of the forfeiture statute should be applied to questions of forfeiture periods completed before the 1996 amendments appears to be one of first impression.

In support of applying the former version of the statute, the State Engineer argues that the amendments made substantive changes and cannot be applied retroactively because the legislature did not make the new language retroactive. U.C.A. 68-3-3 states: “No part of these revised statutes is retroactive unless expressly so declared.” The amendments in U.C.A. 73-1-4 contain no language allowing retroactive application.

Ms. Hamblin counters that the legislature was not required to include specific language about retroactivity because the changes were procedural in nature, not substantive. Specifically, she argues that “the rule against retroactivity applies only where a statute implicates substantive laws. By contrast, statutes that do not enlarge, eliminate or destroy substantive rights can be applied retroactively.” *B.A.M. Dev., L.L.C. v. Salt Lake County*, 128 P.3d 1161, 1166 (Utah 2006) (internal citations omitted). Procedural law “prescribes the practice and procedure or the legal machinery by which the substantive law is determined or made effective or simply clarifies the legislature’s previous intentions.” *Wilde v. Wilde*, 969 P.2d 438, 442 (Utah App. 1998) (internal citations omitted). In this case she argues that the changes were procedural, not substantive, because they simply provide that the legal machinery at work is not operation of law, but rather judicial action. She further supports her contention that the change was procedural with citations to the floor debate about the 1996 amendment.

The court is persuaded that the amendments in question were substantive—not procedural—and, therefore, finds Ms. Hamblin’s right was forfeited by operation of law in 1985 and that, as a consequence, the State Engineer appropriately denied her Change Application. In making this finding, the court relies on the language from *Nephi City* stating that “under the plain terms of section 73-1-4, Nephi City’s water rights were forfeited for nonuse *by operation of law*.” 779 P.2d at 674 (emphasis added). Thus, according to the Utah Supreme Court, the legal machinery at work under the former version of the statute was operation of law, and the 1996 amendment changed the legal machinery to judicial action. This court finds that such a change was substantive, not procedural, and therefore, that the amendments should not apply

retroactively to revive Ms. Hamblin's Water Right which was forfeited by operation of law in 1985. In the face of *Nephi City* interpreting the pre-amendment statute, the court does not find the floor debate about the proposed amendment persuasive evidence regarding the proper way to interpret the statute.²

Furthermore, the court finds that the amendments were substantive because *Nephi City* leaves little question about what the outcome of this case would have been if Ms. Hamblin had submitted her change application before the 1996 amendments were enacted. The parties do not dispute that the Water Right has gone unused since at least 1980, and they apparently do not dispute that no one applied for an extension of time before the five-year period of nonuse for the Water Right expired in 1985.³ Thus, if this court had analyzed this case under *Nephi City* anytime from 1986 to 1995, the State Engineer's motion for summary judgment would have been

² This is especially true because the bill was circled after the discussion cited by the plaintiff. See Transcript of January 29, 1996 House Floor Debate on H.B. 69, attached as Exhibit F to *Plaintiff's Memorandum in Opposition to State Engineer's Cross-Motion for Partial Summary Judgment*.

³ In the undisputed facts sections of their memoranda, each party failed to include any information about whether Ms. Hamblin or anyone else filed for an extension of time for the Water Right. However, the parties apparently do not dispute this fact based on the information included in their exhibits. Ms. Hamblin included her Exhibit H, the State Engineer's 2008 order rejecting the Change Application, in which the State Engineer specifically states, "Here, no application for non-use was ever filed." The State Engineer included his Exhibit B, in which John Mann—the Regional Engineer for the Utah Lake Jordan River Region of Utah—states in affidavit form that "[t]he use of water under this water right has been discontinued for several years. No non-use application to prevent forfeiture had ever been filed for this water right pursuant to Utah Code Ann. § 73-1-4." In addition, during oral arguments, neither party argued that an extension had ever been filed.

Therefore, the court assumes that no person, including Ms. Hamblin, filed for an extension of time for the Water Right during the relevant time periods.

granted, because under the clear language of the forfeiture statute in place during those years, Ms. Hamblin's right would have been forfeited by operation of law as of 1985. Therefore, to say that the amendments are simply procedural and "do not enlarge, eliminate or destroy substantive rights" ignores a basic analysis of how the statute was actually applied by the Utah Supreme Court before the amendments were enacted: before the 1996 amendment, this court would have found that the right was forfeited by operation of law, and to grant Ms. Hamblin's request now—because of the current 2008 version of the statute—would renew a right considered forfeited by operation of law more than 20 years ago, thereby "enlarging" a substantive right.

Finally, although the court agrees that the State Engineer does not have the authority to adjudicate water rights, the court does not find that denying a change application based on forfeiture under the previous forfeiture statute qualifies as adjudication where the period of nonuse is undisputed. Ms. Hamblin cites to a case in which the State Engineer declined to determine whether forfeiture had rendered a change application inappropriate. However, in that case, the person requesting the change application asserted that he was applying for an extension of time *before* his five-year period of nonuse expired. *Glenwood Irrigation Co. v. Myers*, 465 P.2d 1013, 1014 (Utah 1970) (emphasis added). The plaintiff filed a protest to the defendant's application, asserting that the defendant had already failed to use the water for more than five years. *Id.* In that context, the State Engineer "stated that the burden of proof rested upon the one asserting abandonment or forfeiture of an existing right and that he could only conclude that the right existed as described in the decree." *Id.* The court finds *Glenwood* is inapposite because, in the case now before the court, the plaintiff admits that she has not used the Water Right since

1980. Therefore, the State Engineer simply recognized this undisputed fact and followed the applicable forfeiture statute.

Based on the analysis above, the court grants the *State Engineer's Motion for Summary Judgment* by finding that under U.C.A. 73-3-3(2)(a), Ms. Hamblin is not a “person entitled to the use of water” because her Water Right was forfeited by operation of law in 1985, and, thus, her change application cannot be granted. Although the court finds that her change application should be denied on this basis and that the other arguments become moot as a consequence, the court addresses them below.

II. Impairment and Available Water

The State Engineer argues, from two different angles, in the second half of his motion that the Change Application should not be granted because doing so would impair other water users' rights. First, he argues that, because the Water Right has not been beneficially used since 1980, Ms. Hamblin cannot meet the condition for permanent change applications found in U.C.A. 73-3-3 for relinquishment. Second, he argues that the plaintiff's Change Application cannot meet the requirements found in U.C.A. 73-3-3 and -8 to demonstrate available water in the basin and to prove that the change will not impair other water rights.

A. Beneficial Use and Relinquishment Under U.C.A. 73-3-3

The State Engineer cites U.C.A. 73-3-3(1)(a) for the proposition that a permanent change requires water users to relinquish a beneficial use. This section states, “‘Permanent change’ means a change for an indefinite period of time with an intent to relinquish the original point of diversion, place of use, or purpose of use.” Under this section, he argues that the water

right holder must relinquish the current, or recently observable, beneficial use before a permanent change application may be granted. Under that premise, regardless of whether the Water Right has been forfeited (by either operation of law or judicial action), the fact that the Water Right has not been put to beneficial use for at least twenty-eight years means that the water under the right has been freed up for use by other users during that time period. And therefore, he argues, because Ms. Hamblin has no current, beneficial use to relinquish, and because the water under her right has in fact been used by others, she cannot meet the requirements of U.C.A. 73-3-3(1)(a).

Further, the State Engineer argues, because the water in the Utah Valley area has been fully appropriated and the basin closed in 1995 to further appropriations, allowing Ms. Hamblin to put her water right to beneficial use now would necessarily impair the rights of other water users who have been using the water from her right for decades. Because Utah rejects the *de minimus* standard for impairment, any impairment to other users means that a change application must be rejected. See *Piute Reservoir & Irrigation Co. v. West Panguich Irrigation & Reservoir Co.*, 367 P.2d 855, 858 (Utah 1962).

Ms. Hamblin asserts that the State Engineer's impairment arguments are premised on the conclusion that the Water Right has ceased to exist as a result of forfeiture and, therefore, fails for the same reasons she uses to argue that the right has not been forfeited. The forfeiture arguments aside, she argues that her Change Application does meet the requirements of U.C.A. 73-3-3(1)(a) because it sets forth the current right and the equivalent amount of water she requests to use in exchange.

As to impairment, she argues that the State Engineer has incorrectly asserted the burden of proof for establishing impairment for purposes of a change application. A change application may not be denied on the broad assertion that additional draws on the water system would impair other water users. Instead, she argues, under the holding in *Searle v. Milburn Irr. Co.*, the State Engineer should approve the application if there is reason to believe that the change can be accomplished without impairing existing rights. 2006 UT 16, ¶ 31, 133 P.3d 382. Therefore, at this stage, Ms. Hamblin is required to show only that there is reason to believe the change can occur without impairment, and this court should not reject the application unless presented with evidence refuting that reason.

Finally, Ms. Hamblin asserts that the State Engineer's argument that granting the Change Application would impair other water users because the basin has been closed to new appropriations since 1996 hinges on the forfeiture argument. She points out that the State Engineer has offered no evidence suggesting that the Division of Water Rights excluded the Water Right when it calculated the fixed withdrawal amount from then existing water rights appropriated in the Utah Valley system and closed the Utah Valley area to new appropriations.

The court finds that the State Engineer's motion for summary judgment cannot be granted on the basis of the arguments he asserts under U.C.A. 73-3-3(1)(a) or the arguments he asserts regarding impairment. First, although 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. The court is unwilling to interpret the statute in this manner without more authority. 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. (Emphasis added.) As stated elsewhere, the court finds that her Change Application should be denied on other grounds, but the court does not find that U.C.A. 73-3-3(1)(a) can independently support that finding.

Second, the court finds that the State Engineer’s arguments regarding impairment are also not independently sufficient to grant his motion for summary judgment. The standard for determining impairment is succinctly stated in *Searle*, wherein the Utah Supreme Court held

that change applicants are required to show only reason to believe that impairment will not result from application approval, that the burden of persuasion remains on change applicants throughout the application process, and that circumstantial evidence may be sufficiently compelling to make application approval inappropriate.

2006 UT 16 at ¶ 29. Using this standard, the court finds that granting the State Engineer’s motion for summary judgment on the basis of impairment would be inappropriate because the undisputed facts before the court at this stage are insufficient to make an impairment determination.

In essence, the *Searle* holding requires district courts to consider three issues when making an impairment determination, and this court finds that the evidence currently before it is insufficient to make these considerations. The first consideration is whether Ms. Hamblin has

shown a reason to believe that impairment will not result from approving her application. The court finds that the undisputed facts before it on this motion do not provide enough evidence to make this determination. Secondly, this court must be careful to leave the burden of persuasion regarding whether granting Ms. Hamblin's Change Application would not result in impairment with Ms. Hamblin. From the posture of the State Engineer's arguments, he implicitly attempts to assume the burden of persuasion. However, his arguments could also be viewed as bearing on the third consideration, which is providing sufficiently compelling circumstantial evidence that would make application approval inappropriate.

Under this third consideration, the court finds that the State Engineer has failed to provide sufficiently compelling circumstantial evidence that would make application approval inappropriate. The State Engineer has provided the court with explanations about the prior appropriation system and a big-picture analysis of why granting a change application based on an unused water right in a closed system would necessarily impair water users within that system, but that has all been done in the general sense. Based on the court's reading of *Searle*, the court does not find this analysis a sufficiently compelling reason, standing alone, to deny the change application.

In *Searle*, the Court noted that the "district court, hearing evidence de novo, was supplied with testimony from three expert witnesses on the issue of impairment." *Id.* at ¶ 8. These experts provided specific information about how the proposed change might impair specific users' rights. In contrast, this court currently has nothing before it other than general, abstract discussions about impairment that would result, in theory, if the change application were

granted. Furthermore, in discussing the proper standard of review, the *Searle* court noted that “there are myriad factual scenarios, interplaying with complex scientific principles, that can arise when determining whether approval of a change application will result in impairment of vested rights” *Id.* at ¶ 17. At this point, the court has not been provided with enough specific information to aid it in examining the factual scenario in question, *i.e.*, whether water users’ rights in Highland City would actually be impaired if the Change Application were approved. Thus, this court declines to make a determination about impairment at the summary judgment stage on the basis that the parties have not provided enough evidence, in the form of undisputed facts, for the court to conduct a proper analysis.

B. Change Application Requirements Under U.C.A. 73-3-3 and -8.

Under U.C.A. 73-3-3(5)(a), the State Engineer “shall follow the same procedures, and the rights and duties of the applicants with respect to applications 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].” The State Engineer argues that Ms. Hamblin’s change application cannot meet at least two of the requirements found in U.C.A. 73-3-8(1)(a)(i) and (ii)—specifically, that she cannot demonstrate that “there is unappropriated water in the proposed source” and that “the proposed use will not impair existing rights or interfere with the more beneficial use of water.” The court addresses each below.

i. The requirements to demonstrate available water under
U.C.A. 73-3-8(1)(a)

In *Tanner v. Humphreys*, the Utah Supreme Court discussed a change application and found that the applicant demonstrated that there was unappropriated water at the proposed source by exchanging her old use for the new use, not by actually proving that the new source contained sufficient water. 48 P.2d 484, 488 (Utah 1935). The Court further found “that all that the plaintiff asked and all that she could get was an exchange of the waters which she had under her right.” *Id.* at 488. 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. Furthermore, because the parties agree that the basin is fully appropriated, she cannot otherwise demonstrate that unappropriated water exists in the proposed source absent an exchange from another existing water right. Thus, finding that Ms. Hamblin cannot satisfy one of the requirements of U.C.A. 73-3-8(1)(a), the court grants the State Engineer’s motion for summary judgment on this additional basis.

ii. The requirement to demonstrate lack of impairment under
U.C.A. 73-3-8(1)(a)

As discussed in detail above, the court declines to make an impairment determination on summary judgment because the facts before the court are insufficient to properly analyze whether or not impairment would actually occur.

III. Entitlement to File

Having found above that Ms. Hamblin’s Water Right was forfeited by operation of law in 1985, the court also finds that she is not a “person entitled to the use of water,” and,

therefore, that she does not meet the filing prerequisite found in U.C.A. 73-3-3(2)(a). The court finds further support for this conclusion in Utah Supreme Court's clarification in *Strawberry Water Users Assoc. v. Bureau of Reclamation* "that *Prisbrey* should not be read as undermining the importance of use as a basis for filing a change application under Utah's statutory scheme." 2006 UT 19, ¶ 40, 133 P.3d 410 (citing *Prisbrey v. Bloomington Water Co.*, 2003 UT 56, ¶¶ 23–25, 82 P.3d 1119). Thus, the court denies this portion of the *Plaintiff's Cross-Motion for Partial Summary Judgment*.

IV. Compliance with Statutory Requirements to File a Change Application

As an initial matter, the court notes that whether Ms. Hamblin complied with the statutory requirements for filling out the Change Application form under U.C.A. 73-3-3(4)(b) is moot based on its earlier findings regarding forfeiture. Nevertheless, the court finds that she complied with the requirements insofar as was possible and, thus, grants this portion of the *Plaintiff's Cross-Motion for Partial Summary Judgment*.

Under U.C.A. 73-3-3(4)(b), change applicants are required to set forth nine items. The plaintiff complains that the State Engineer incorrectly found that she did not comply with sub-parts (4)(b)(v) and (vii). Under (v), applicants are required to list "if applicable, the point on the stream or water source where the water is diverted." Under (vii), applicants are required to list "the place, purpose, and extent of the present use." The court finds that the former requirement was not applicable because, as the parties agree, there was no point of diversion. Apparently no living person has a memory of the point of diversion, but the court also notes that the point of diversion was not listed in the original decree. The court finds that listing the latter information

listed in sub-part (vii) would have been impossible because, again as the parties agree, there is no present use. The court recognizes that the lack of a present use is necessarily connected to the rest of the State Engineer's arguments, but does not find that, standing alone, the failure of a party to list a present use should be a reason to deny a change application. The underlying reason for denying the change application, which is forfeiture as the court found above, has already been appropriately addressed.

CONCLUSIONS OF LAW

1. Ms. Hamblin's Water Right was forfeited by operation of law as of 1985 because of non-use, and thus, she is not a person entitled to file a change application under U.C.A. 73-3-3(2)(a).

2. The court does not have enough evidence before it on these motions for summary judgment to determine whether granting Ms. Hamblin's Change Application would result in impairment to other water users.

3. Because Ms. Hamblin's water right has been forfeited, she cannot satisfy the requirement in U.C.A. 73-3-8(1)(a) to demonstrate that there is available water in the proposed source.


4. Ms. Hamblin's change application form complied with U.C.A. 73-3-3(4)(b), and her application should not be denied on the basis of missing information on the form.

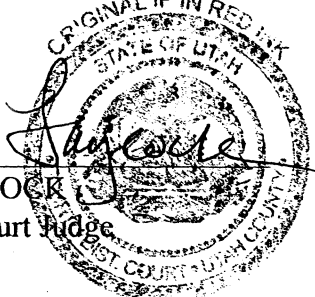
ORDER

1. The court grants the *State Engineer's Motion for Summary Judgment* on the basis of forfeiture.

2. The court denies the *Plaintiff's Cross-Motion for Summary Judgment* concluding that she is not a person entitled to file a change application under U.C.A. 73-3-3(2)(a).

Dated this 13th day of July, 2009


CLAUDIA LAYCOCK
Fourth District Court Judge



Case No. 060400639

MAILING CERTIFICATE


I certify that a true copy of the foregoing ruling was mailed on 14 July 2009 to the following:

Bradley R. Cahoon
Stewart O. Peay
M. Lane Molen
Snell & Wilmer, LLP
15 West South Temple, Suite 1200
Beneficial Life Tower
Salt Lake City, UT 84101-1004

Julie I. Valdes
Norman K. Johnson
Assistant Attorney General
Mark L. Shurtleff
Utah Attorney General
1594 West North Temple, #300
Salt Lake City, UT 84116

New State, Inc.
c/o Stephen C. Bamberger
PO Box 58483
Salt Lake, City, UT 84158-8483

United States Bureau of Reclamation
c/o Jonathan B. Jones
302 East 1860 South
Provo, UT 84606-7317


Deputy Court Clerk

Tab 2

UTAH CODE

ANNOTATED

1953

REPLACEMENT

VOLUME 7C
1980 EDITION

appropriated. However, the appropriator does not own the salt. The salt which it seeks is contained within Great Salt Lake, which is a navigable body of water. Because it is a navigable body of water, its bed belongs to the state subject to the control of Congress for navigation in commerce. *Deseret Livestock Co. v. State* (1946) 110 U 239, 171 P 2d 401.

Waters diverted from natural source, applied to irrigation and recaptured before escaping from original appropriator's control, still belong to original appropriator and, if original appropriator has beneficial use for such waters, he may again reuse them and no one can acquire right superior to that of original appropriator. *Smithfield West Bench Irrigation Co. v. Union Central Life Ins. Co.* (1948) 113 U 356, 195 P 2d 249, prior appeal 105 U 468, 142 P 2d 866, distinguished 2 U 2d 170, 271 P 2d 449.

An appropriator of water may in good faith utilize the quantity of water to which he is entitled, although his previous methods of use were inefficient, and resulted in returning surplus or waste water into the stream. *Lasson v. Seely* (1951) 120 U 679, 238 P 2d 418, distinguished 2 U 2d 170, 271 P 2d 449.

In order to preserve his right to use water which he is entitled to use as a shareholder of an irrigation company, a landowner must keep that water not only on his own land, but also under his control. *Lasson v. Seely* (1951) 120 U 679, 238 P 2d 418.

While irrigation water is under his dominion and control, a shareholder in an irrigation company who has the right to draw on a certain portion of the irrigation canal stream is entitled to use it on his own land in such beneficial manner as he sees fit, or he

may use it or any part thereof on other land under his control, or he may lease to others the right to use such water or some portion thereof. *Lasson v. Seely* (1951) 120 U 679, 238 P 2d 418, distinguished 2 U 2d 170, 271 P 2d 449.

The right of an appropriator of public waters to the use thereof is subject to regulation and limited to the amount required with reasonable efficiency to satisfy the beneficial use of his appropriation. *McNaughton v. Eaton* (1952) 121 U 394, 242 P 2d 570.

A change in place of diversion or the place or nature of use or a combination of such changes cannot be made if the vested rights of lower users would be impaired thereby. *East Bench Irr. Co. v. Deseret Irr. Co.* (1954) 2 U 2d 170, 271 P 2d 449.

Who may complain.

Prior appropriator cannot prevent use of surplus waters; that is, he cannot prevent another from using water while he cannot use it or make it available for use. *Cleary v. Daniels* (1917) 50 U 494, 167 P 820.

The grantor of water rights will not be heard to say that his grantee cannot make beneficial use thereof. *Campbell v. Nunn* (1931) 78 U 316, 2 P 2d 899.

Water which is lost by seepage and evaporation before it gets to adverse claimant's land cannot be beneficially used by him, and, therefore, applicant for appropriation of such water, by taking such waters, cannot deprive claimant thereof. *Sigurd City v. State* (1943) 105 U 278, 142 P 2d 154, criticized in *Moyle v. Salt Lake City* (1947) 111 U 201, 176 P 2d 882.

Law Reviews.

What Is Beneficial Use of Water, by Samuel C. Wiel, 3 Calif. L. Rev. 460.

73-1-4. Reversion to public by abandonment or failure to use within five years — Extending time. When an appropriator or his successor in interest shall abandon or cease to use water for a period of five years the right shall cease and thereupon such water shall revert to the public, and may be again appropriated as provided in this title, unless before the expiration of such five-year period the appropriator or his successor in interest shall have filed with the state engineer a verified application for an extension of time, not to exceed five years, within which to resume the use of such water and unless pursuant to such application the time within which such nonuse may continue is extended by the state engineer as hereinafter provided. The provisions of this section are applicable whether such unused or abandoned water is permitted to run to waste or is used by others without right. The filing of such application for extension of time shall extend the time during which nonuse may continue until the order

of the state engineer thereon. Such application shall be on a blank to be furnished by the state engineer and shall set forth such information as he may require, including but not limiting to the following: The name and address of applicant; the name of the source from which the right is claimed and the point on such source where the water was last diverted; evidence of the validity of the right claimed by reference to application number in the state engineer's office; date of court decree and title of case; or the date when the water was first used; the place, time and nature of past use; the flow of water which has been used in second-feet or the quantity stored in acre-feet and the time the water was used each year; the extension of time applied for, together with a statement of the reason for the nonuse of such water. Similar applications may be made from time to time, before the date of expiration of the extension next theretofore granted.

Upon receipt of such application the state engineer shall cause to be published, once each week for three successive weeks, in a newspaper of general circulation in the county in which source of water supply is located, a notice of the application, which notice shall apprise the public of the nature of the right for which the extension is sought and the reasons therefor.

Any person interested may at any time after the first publication of such notice and prior to the thirtieth day after completion of publication, file with the state engineer a written protest, together with a copy thereof, against the granting of such extension of time, stating the reasons therefor, which shall be duly considered by the state engineer, and, after such further investigation as the state engineer deems necessary, he shall allow or reject the application.

Such applications for extension shall be granted by the state engineer for periods not exceeding five years each, upon a showing of reasonable cause for such nonuse. Financial crisis, industrial depression, operation of legal proceedings or other unavoidable cause, or the holding of a water right without use by any municipality, metropolitan water districts or other public agencies to meet the reasonable future requirements of the public, shall constitute reasonable cause for such nonuse.

Sixty days before the expiration of any such period of extension of time, the state engineer shall notify the applicant by registered mail of the date when such period of extension will expire. Before such date of expiration such applicant shall file a verified statement with the state engineer setting forth the date on which use of the water was resumed, and such further information as may be relevant and be required by the blank form which shall be furnished by the state engineer for said purpose, or such applicant shall make application for further extension of time in which to resume use of the water as provided in this section, otherwise such water right shall cease and thereupon the water shall revert to the public.

History: L. 1919, ch. 67, § 6; R. S. 1933, C. 1943, 100-1-4; L. 1945, ch. 134, § 1; 1959, ch. 100-1-4; L. 1935, ch. 104, § 1; 1939, ch. 111, § 1; 137, § 1.

Tab 3



1 of 1 DOCUMENT

UTAH CODE ANNOTATED
Copyright (c) 1953-1994 by The Michie Company
Copyright (c) 1995 by Michie Butterworth,
a division of Reed Elsevier Inc. and Reed Elsevier Properties Inc.
All rights reserved.

*** THIS SECTION CURRENT THROUGH 1995 SUPPLEMENT ***

*** ARCHIVE MATERIAL ***

TITLE 73. WATER AND IRRIGATION
CHAPTER 1. GENERAL PROVISIONS

Utah Code Ann. § 73-1-4 (1995)

§ 73-1-4. Reversion to public by abandonment or failure to use within five years -- Extending time

(1) (a) When an appropriator or his successor in interest abandons or ceases to use water for a period of five years, the right ceases, unless, before the expiration of the five-year period, the appropriator or his successor in interest files a verified application for an extension of time with the state engineer.

(b) The extension of time to resume the use of that water may not exceed five years unless the time is further extended by the state engineer.

(c) The provisions of this section are applicable whether the unused or abandoned water is permitted to run to waste or is used by others without right.

(2) (a) The state engineer shall furnish an application blank that includes a space for:

- (i) the name and address of the applicant;
- (ii) the name of the source from which the right is claimed and the point on that source where the water was last diverted;
- (iii) evidence of the validity of the right claimed by reference to application number in the state engineer's office;
- (iv) date of court decree and title of case, or the date when the water was first used;
- (v) the place, time, and nature of past use;
- (vi) the flow of water that has been used in second-feet or the quantity stored in acre-feet;

Utah Code Ann. § 73-1-4

- (vii) the time the water was used each year;
- (viii) the extension of time applied for;
- (ix) a statement of the reason for the nonuse of the water; and
- (x) any other information that the state engineer requires.

(b) Filing the application extends the time during which nonuse may continue until the state engineer issues his order on the application for an extension of time.

(c) (i) Upon receipt of the application, the state engineer shall publish, once a week for two successive weeks, a notice of the application in a newspaper of general circulation in the county in which the source of the water supply is located and where the water is to be used.

(ii) The notice may be published in more than one newspaper.

(iii) The notice shall inform the public of the nature of the right for which the extension is sought and the reasons for the extension.

(d) Any interested person may file a written protest with the state engineer against the granting of the application:

- (i) within 20 days after the notice is published, if the adjudicative proceeding is informal; and
- (ii) within 30 days after the notice is published, if the adjudicative proceeding is formal.

(e) In any proceedings to determine whether the application for extension should be approved or rejected, the state engineer shall follow the procedures and requirements of Title 63, Chapter 46b, Administrative Procedures Act.

(f) After further investigation, the state engineer may approve or reject the application.

(3) (a) Applications for extension shall be granted by the state engineer for periods not exceeding five years each, upon a showing of reasonable cause for nonuse.

(b) Reasonable causes for nonuse include:

- (i) financial crisis;
- (ii) industrial depression;
- (iii) operation of legal proceedings or other unavoidable cause; and

(iv) the holding of a water right without use by any municipality, metropolitan water district, or other public agency to meet the reasonable future requirements of the public.

(4) (a) If the appropriator or his successor in interest fails to apply for an extension of time, or if the state engineer denies the application for extension of time, the appropriator's water right ceases.

(b) When the appropriator's water right ceases, the water reverts to the public and may be reappropriated as provided in this title.

(5) (a) Sixty days before the expiration of any extension of time, the state engineer shall notify the applicant by registered mail of the date when the extension period will expire.

(b) Before the date of expiration, the applicant shall either:

(i) file a verified statement with the state engineer setting forth the date on which use of the water was resumed, and whatever additional information is required by the state engineer; or

(ii) apply for a further extension of time in which to resume use of the water according to the procedures and requirements of this section.

HISTORY: L. 1919, ch. 67, § 6; R.S. 1933, 100-1-4; L. 1935, ch. 104, § 1; 1939, ch. 111, § 1; C. 1943, 100-1-4; L. 1945, ch. 134, § 1; 1959, ch. 137, § 1; 1987, ch. 161, § 287; 1988, ch. 72, § 28; 1995, ch. 19, § 1.

NOTES: AMENDMENT NOTES. —The 1987 amendment, effective January 1, 1988, rewrote and redesignated this section to such an extent that a detailed analysis is impracticable.

The 1988 amendment, effective April 25, 1988, substituted "30 days" for "20 days" in Subsection (2)(d) and made minor stylistic changes.

The 1995 amendment, effective May 1, 1995, redesignated the second sentence of Subsection (1)(b) as (1)(c); subdivided Subsection (2)(c); substituted "two" for "three" before "successive weeks" and added "and where water is to be used" in Subsection (2)(c)(i); added Subsections (2)(c)(ii), (2)(d)(i), and (2)(d)(ii); and made related and stylistic changes throughout.

COMPILER'S NOTES. —This section was Comp. Laws 1907, § 1288x23.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.

In general.

Abandonment.

Adverse possession.

Appropriation after forfeiture.

Forfeiture of rights.

Ground water.

Time extension.

Waste water.

CONSTITUTIONALITY.

Forfeiture of water rights by nonuse under this section does not violate Utah Const., Art. XI, § 6, because the constitution only prohibits the voluntary, intentional disposition of water rights, whereas a forfeiture under this section is involuntary. *Nephi City v. Hansen*, 779 P.2d 673 (Utah 1989).

IN GENERAL.

For discussion of the concepts of abandonment and forfeiture of water rights, the distinction between abandonment and forfeiture of water rights and loss of rights to another by prescription or adverse use, and the requirements for and proof of a water right by adverse use, see *Wellsville E. Field Irrigation Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 137 P.2d 634, rehearing denied, 104 Utah 498, 143 P.2d 278 (1943); *In re Drainage Area of Bear River*, 12 Utah 2d 1, 361 P.2d 407 (1961).

The development of water in this arid state requires strict adherence to statutory sanctions, without delay or nonconformance thereto, except in rare and highly equitable instances. *Baugh v. Criddle*, 19 Utah 2d 361, 431 P.2d 790 (1967).

ABANDONMENT.

Abandonment of a water right requires an intent to abandon, coupled with some act of relinquishment by which the intent is carried out. *Promontory Ranch Co. v. Argile*, 28 Utah 398, 79 P. 47 (1904); *Hammond v. Johnson*, 94 Utah 20, 66 P.2d 894 (1937).

In action to determine title to waters of a spring having its source on plaintiffs' land, fact that neither plaintiffs nor their grantors made any use of the water, and permitted it to continue to flow through an artificial watercourse which they had purchased from one having a right thereto, was not sufficient to show abandonment, so as to render the water subject to appropriation, especially in view of other affirmative acts of plaintiffs tending to show that they had no intention of abandoning their rights. *Gill v. Malan*, 29 Utah 431, 82 P. 471 (1905).

Abandonment, as applied to doctrine of appropriation of water to a beneficial use, means an intentional relinquishment of a known right. *Hammond v. Johnson*, 94 Utah 20, 66 P.2d 894 (1937).

Abandonment of water rights is not based upon a time element, and mere nonuse will not establish abandonment for any less time, at least, than the statutory period, the controlling element being a matter of intent. *Hammond v. Johnson*, 94 Utah 20, 66 P.2d 894 (1937).

In action to quiet title to waters of a spring, finding of court that defendants said plaintiff was stealing their water negated an abandonment of the water by defendants, so it could not revert to public and again be subject to appropriation. *Hammond v. Johnson*, 94 Utah 20, 66 P.2d 894 (1937).

Abandonment is a separate and distinct concept from that of a forfeiture. *Wellsville E. Field Irrigation Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 137 P.2d 634, rehearing denied, 104 Utah 498, 143 P.2d 278 (1943); *In re Drainage Area of Bear River*, 12 Utah 2d 1, 361 P.2d 407 (1961).

The burden is on the person asserting abandonment of water rights to prove it and proof of abandonment must fail in absence of showing of an intent to abandon. *Wellsville E. Field Irrigation Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 137 P.2d 634, rehearing denied, 104 Utah 498, 143 P.2d 278 (1943); *Smithfield W. Bench Irrigation Co. v. Union Cent. Life Ins. Co.*, 113 Utah 356, 195 P.2d 249 (1948); *Fairfield Irrigation Co. v. Carson*, 122 Utah 225, 247 P.2d 1004 (1952); *In re Escalante Valley Drainage Area*, 12 Utah 2d 112, 363 P.2d 777 (1961).

Abandonment differs from the nonuse provided by this section in that abandonment requires proof of an intent to abandon the water right. *In re Escalante Valley Drainage Area*, 12 Utah 2d 112, 363 P.2d 777 (1961).

ADVERSE POSSESSION.

Adverse possession is not founded upon or dependent on the doctrines of abandonment, or forfeiture for nonuse, of water rights. *Hammond v. Johnson*, 94 Utah 20, 66 P.2d 894 (1937).

APPROPRIATION AFTER FORFEITURE.

When vested right is forfeited by nonuse, there is reversion to public, and right to use water so abandoned can only be initiated by making new appropriation after water is available for appropriation. *Whitmore v. Welch*, 114 Utah 578, 201 P.2d 954 (1949).

FORFEITURE OF RIGHTS.

Nonuser of appropriated waters for statutory period, as well as intentional abandonment, results in loss of rights thereto. *Deseret Livestock Co. v. Hoopiania*, 66 Utah 25, 239 P. 479 (1925).

Forfeiture of a water right for nonuser during the statutory time may occur despite a specific intent not to surrender the right, since it is based, not upon an act done, or an intent had, but upon failure to use the right for the statutory time. *Hammond v. Johnson*, 94 Utah 20, 66 P.2d 894 (1937).

Forfeiture will not operate when the failure to use is a result of physical causes beyond the control of the appropriator, such as floods that destroy his dams and ditches, troughs, and the like, if the appropriator is ready and willing to divert the water when it is naturally available. *Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co.*, 104 Utah 202, 135 P.2d 108 (citing textbooks, decisions from other western states, and federal court cases), rehearing denied, 104 Utah 216, 140 P.2d 638 (1943).

Under Laws of 1880 (Laws 1880, ch. 20, § 9), failure to keep a dam in repair, or failure to use the water for seven years, would work a forfeiture. *Wellsville E. Field Irrigation Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 137

P.2d 634, rehearing denied, *104 Utah 498*, *143 P.2d 278* (1943).

Under this section a forfeiture is based upon the failure to use the water. Accordingly, there is no forfeiture where there is no showing that appropriator or his successor in interest has failed to use the water for a beneficial purpose for a period of five years. This principle does not, however, imply that an appropriator can, without getting the approval of the state engineer, change the nature of the use or the place of diversion. Nor may an appropriator who has a supplemental storage right, without completing construction of storage facilities in the allotted time, and without getting an extension of time for the completion of construction, keep his storage right alive indefinitely by making direct flow diversions from the river. *Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co.*, *104 Utah 216*, *140 P.2d 638* (1943).

Pledgee of certificate of mutual irrigation company cannot be charged with abandonment by nonuser because certificate was not used for a period of more than five years, where certificate was void, and, therefore, the holder thereof was never entitled to any water rights thereunder. In other words, the right to the use of water cannot logically be said to have been lost by nonuse when in fact the right never had any legal existence. *Commercial Bank v. Spanish Fork S. Irrigation Co.*, *107 Utah 279*, *153 P.2d 547* (1944).

Statutes fixing the maximum time limit for the nonuser of a water right, when free from ambiguity, should be strictly construed, and a case clearly made out before any relief should be extended to the delinquent thereunder. *Baugh v. Criddle*, *19 Utah 2d 361*, *431 P.2d 790* (1967).

Town's leasing of its water right in violation of Utah Const., Art. XI, § 6, did not work a statutory forfeiture of the town's water right where the water was apparently contaminated and generally unsuitable for culinary use and the lease arrangement at least insured that the water was beneficially used for irrigation, with no actual loss to the town's citizens because the technology to render the water usable for town purposes was apparently not available during the term of the lease. *Eskelsen v. Town of Perry*, *819 P.2d 770* (Utah 1991).

GROUND WATER.

Before the 1945 amendment, this section did not apply to underground or subterranean waters. *Fairfield Irrigation Co. v. Carson*, *122 Utah 225*, *247 P.2d 1004* (1952).

The prior exemption of underground waters in this section indicated a recognition of some kind of personal right to such waters and this legislative disposition to protect the right was emphasized by the passage of the statute giving landowners one year in which to file claims to such waters (§ 73-5-10, repealed by Laws 1955, ch. 160, § 2). *In re Escalante Valley Drainage Area*, *6 Utah 2d 344*, *313 P.2d 803* (1957).

TIME EXTENSION.

State engineer's proposed determination in a drainage area which disallowed plaintiffs' water rights in their wells interrupted the running of this section against the plaintiffs and the fact that plaintiffs did not file a protest within five years after the effective date of the statute was not controlling since they did file within the time extended by the court. *In re Escalante Valley Drainage Area*, *12 Utah 2d 112*, *363 P.2d 777* (1961).

Right to use water nonconsumptively to run power mill wheel lapsed when owner failed to file engineer's form stating that beneficial use had been resumed within extension of time to resume granted when mill burned down, notwithstanding argument that resumption of use had actually occurred within extension period. *Baugh v. Criddle*, *19 Utah 2d 361*, *431 P.2d 790* (1967).

Party applying to state engineer for extension of time in which to resume use of water does not have to pay filing fee in advance. *Glenwood Irrigation Co. v. Myers*, *24 Utah 2d 78*, *465 P.2d 1013* (1970).

In action to have defendant's right to use water declared forfeited for nonuse and to enjoin any further use, trial court improperly granted summary judgment for plaintiff since state engineer had granted extension of time for defendant to resume use and plaintiff did not use proper remedy of civil action in district court for review of state engineer's decision, but rather filed action to have defendant's rights declared forfeited, which resulted in an attempt by plaintiff to exercise authority granted specifically to state engineer to enjoin unlawful diversion. *Glenwood Irrigation Co. v. Myers*, *24 Utah 2d 78*, *465 P.2d 1013* (1970).

WASTE WATER.

Portion of appropriated water allowed to run waste cannot be appropriated by another unless owner intentionally

abandons right to its use, or fails to apply it to beneficial purpose for statutory period, and owner may reclaim exclusive rights to such water by applying it to beneficial use at any time before lapse of statutory period, in absence of earlier intentional abandonment of rights thereto. *Torsak v. Rukavina*, 67 Utah 166, 246 P. 367 (1926).

Question of waste water or excess water is discussed at length in majority and concurring opinions in *Smithfield W. Bench Irrigation Co. v. Union Cent. Life Ins. Co.*, 105 Utah 468, 142 P.2d 866 (1943).

COLLATERAL REFERENCES

UTAH LAW REVIEW. --The Failure of Subdivision Control in the Western United States: A Blueprint for Local Government Action, 1988 *Utah L. Rev.* 569.

JOURNAL OF ENERGY LAW AND POLICY. --Legal Impediments to Interstate Water Marketing: Application to Utah, 9 *J. Energy L. & Pol'y* 237 (1989).

Nephi City v. Hansen : The Utah Supreme Court Sidesteps Public Trust Principles in Allowing Forfeiture of Municipal Water Rights, 11 *J. Energy L. & Pol'y* 369 (1991).

AM. JUR. 2D. --78 Am. Jur. 2d Waters §§ 240, 342.

C.J.S. --93 C.J.S. Waters § 193.

KEY NUMBERS. --Waters and Water Courses KEY 151.

Tab 4



1 of 1 DOCUMENT

UTAH CODE ANNOTATED
Copyright (c) 1953-1996 by Michie,
a division of Reed Elsevier Inc. and Reed Elsevier Properties Inc.
All rights reserved.

*** ARCHIVE MATERIAL ***

*** THIS SECTION CURRENT THROUGH THE 1996 SUPPLEMENT ***
*** (1996 SECOND SPECIAL SESSION) ***

TITLE 73. WATER AND IRRIGATION
CHAPTER 1. GENERAL PROVISIONS

Utah Code Ann. § 73-1-4 (1996)

§ 73-1-4. Reversion to public by abandonment or forfeiture for nonuse within five years -- Extension of time

(1) (a) When an appropriator or the appropriator's successor in interest abandons or ceases to use water for a period of five years, the water right ceases and the water reverts to the public, unless, before the expiration of the five-year period, the appropriator or the appropriator's successor in interest files a verified application for an extension of time with the state engineer.

(b) (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 five years.

(ii) If forfeiture is asserted in an action for general determination of rights in conformance with the provisions of Chapter 4, 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 shall bar any claim of forfeiture for prior nonuse against any right determined to be valid in the decree.

(c) The extension of time to resume the use of that water may not exceed five years unless the time is further extended by the state engineer.

(d) The provisions of this section are applicable whether the unused or abandoned water is permitted to run to waste or is used by others without right.

(2) (a) The state engineer shall furnish an application blank that includes a space for:

(i) the name and address of the applicant;

(ii) the name of the source from which the right is claimed and the point on that source where the water was last

diverted;

(iii) evidence of the validity of the right claimed by reference to application number in the state engineer's office;

(iv) date of court decree and title of case, or the date when the water was first used;

(v) the place, time, and nature of past use;

(vi) the flow of water that has been used in second-feet or the quantity stored in acre-feet;

(vii) the time the water was used each year;

(viii) the extension of time applied for;

(ix) a statement of the reason for the nonuse of the water; and

(x) any other information that the state engineer requires.

(b) Filing the application extends the time during which nonuse may continue until the state engineer issues his order on the application for an extension of time.

(c) (i) Upon receipt of the application, the state engineer shall publish, once a week for two successive weeks, a notice of the application in a newspaper of general circulation in the county in which the source of the water supply is located and where the water is to be used.

(ii) The notice may be published in more than one newspaper.

(iii) The notice shall inform the public of the nature of the right for which the extension is sought and the reasons for the extension.

(d) Any interested person may file a written protest with the state engineer against the granting of the application:

(i) within 20 days after the notice is published, if the adjudicative proceeding is informal; and

(ii) within 30 days after the notice is published, if the adjudicative proceeding is formal.

(e) In any proceedings to determine whether the application for extension should be approved or rejected, the state engineer shall follow the procedures and requirements of Title 63, Chapter 46b, Administrative Procedures Act.

(f) After further investigation, the state engineer may approve or reject the application.

(3) (a) Applications for extension shall be granted by the state engineer for periods not exceeding five years each, upon a showing of reasonable cause for nonuse.

(b) Reasonable causes for nonuse include:

(i) financial crisis;

(ii) industrial depression;

(iii) operation of legal proceedings or other unavoidable cause; and

(iv) the holding of a water right without use by any municipality, metropolitan water district, or other public

agency to meet the reasonable future requirements of the public.

(4) (a) Sixty days before the expiration of any extension of time, the state engineer shall notify the applicant by registered mail of the date when the extension period will expire.

(b) Before the date of expiration, the applicant shall either:

(i) file a verified statement with the state engineer setting forth the date on which use of the water was resumed, and whatever additional information is required by the state engineer; or

(ii) apply for a further extension of time in which to resume use of the water according to the procedures and requirements of this section.

(5) (a) The appropriator's water right ceases and the water reverts to the public if the:

(i) appropriator or the appropriator's successor in interest fails to apply for an extension of time;

(ii) state engineer denies the application for extension of time; or

(iii) appropriator or the appropriator's successor in interest fails to apply for a further extension of time.

HISTORY: L. 1919, ch. 67, § 6; R.S. 1933, 100-1-4; L. 1935, ch. 104, § 1; 1939, ch. 111, § 1; C. 1943, 100-1-4; L. 1945, ch. 134, § 1; 1959, ch. 137, § 1; 1987, ch. 161, § 287; 1988, ch. 72, § 28; 1995, ch. 19, § 1; 1996, ch. 98, § 1.

NOTES: AMENDMENT NOTES. —The 1987 amendment, effective January 1, 1988, rewrote and redesignated this section to such an extent that a detailed analysis is impracticable.

The 1988 amendment, effective April 25, 1988, substituted "30 days" for "20 days" in Subsection (2)(d) and made minor stylistic changes.

The 1995 amendment, effective May 1, 1995, redesignated the second sentence of Subsection (1)(b) as (1)(c); subdivided Subsection (2)(c); substituted "two" for "three" before "successive weeks" and added "and where water is to be used" in Subsection (2)(c)(i); added Subsections (2)(c)(ii), (2)(d)(i), and (2)(d)(ii); and made related and stylistic changes throughout.

The 1996 amendment, effective April 29, 1996, in Subsection (1)(a), substituted "water right ceases and the water reverts to the public" for "the right ceases"; added Subsection (1)(b), and redesignated subsequent subsections accordingly; redesignated former Subsection (5) as Subsection (4) and former Subsection (4) as Subsection (5); added Subsection (5)(iii); and made stylistic changes throughout the section.

COMPILER'S NOTES. —This section was Comp. Laws 1907, § 1288x23.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.

In general.

Abandonment.

Adverse possession.

Appropriation after forfeiture.

Forfeiture of rights.

Ground water.

Time extension.

Waste water.

CONSTITUTIONALITY.

Forfeiture of water rights by nonuse under this section does not violate Utah Const., Art. XI, § 6, because the constitution only prohibits the voluntary, intentional disposition of water rights, whereas a forfeiture under this section is involuntary. *Nephi City v. Hansen*, 779 P.2d 673 (Utah 1989).

IN GENERAL.

For discussion of the concepts of abandonment and forfeiture of water rights, the distinction between abandonment and forfeiture of water rights and loss of rights to another by prescription or adverse use, and the requirements for and proof of a water right by adverse use, see *Wellsville E. Field Irrigation Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 137 P.2d 634, rehearing denied, 104 Utah 498, 143 P.2d 278 (1943); *In re Drainage Area of Bear River*, 12 Utah 2d 1, 361 P.2d 407 (1961).

The development of water in this arid state requires strict adherence to statutory sanctions, without delay or nonconformance thereto, except in rare and highly equitable instances. *Baugh v. Criddle*, 19 Utah 2d 361, 431 P.2d 790 (1967).

ABANDONMENT.

Abandonment of a water right requires an intent to abandon, coupled with some act of relinquishment by which the intent is carried out. *Promontory Ranch Co. v. Argile*, 28 Utah 398, 79 P. 47 (1904); *Hammond v. Johnson*, 94 Utah 20, 66 P.2d 894 (1937).

In action to determine title to waters of a spring having its source on plaintiffs' land, fact that neither plaintiffs nor their grantors made any use of the water, and permitted it to continue to flow through an artificial watercourse which they had purchased from one having a right thereto, was not sufficient to show abandonment, so as to render the water subject to appropriation, especially in view of other affirmative acts of plaintiffs tending to show that they had no intention of abandoning their rights. *Gill v. Malan*, 29 Utah 431, 82 P. 471 (1905).

Abandonment, as applied to doctrine of appropriation of water to a beneficial use, means an intentional relinquishment of a known right. *Hammond v. Johnson*, 94 Utah 20, 66 P.2d 894 (1937).

Abandonment of water rights is not based upon a time element, and mere nonuse will not establish abandonment for any less time, at least, than the statutory period, the controlling element being a matter of intent. *Hammond v. Johnson*, 94 Utah 20, 66 P.2d 894 (1937).

In action to quiet title to waters of a spring, finding of court that defendants said plaintiff was stealing their water negated an abandonment of the water by defendants, so it could not revert to public and again be subject to appropriation. *Hammond v. Johnson*, 94 Utah 20, 66 P.2d 894 (1937).

Abandonment is a separate and distinct concept from that of a forfeiture. *Wellsville E. Field Irrigation Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 137 P.2d 634, rehearing denied, 104 Utah 498, 143 P.2d 278 (1943); *In re Drainage Area of Bear River*, 12 Utah 2d 1, 361 P.2d 407 (1961).

The burden is on the person asserting abandonment of water rights to prove it and proof of abandonment must fail in absence of showing of an intent to abandon. *Wellsville E. Field Irrigation Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 137 P.2d 634, rehearing denied, 104 Utah 498, 143 P.2d 278 (1943); *Smithfield W. Bench Irrigation Co. v. Union Cent. Life Ins. Co.*, 113 Utah 356, 195 P.2d 249 (1948); *Fairfield Irrigation Co. v. Carson*, 122 Utah 225, 247 P.2d 1004 (1952); *In re Escalante Valley Drainage Area*, 12 Utah 2d 112, 363 P.2d 777 (1961).

Abandonment differs from the nonuse provided by this section in that abandonment requires proof of an intent to abandon the water right. *In re Escalante Valley Drainage Area*, 12 Utah 2d 112, 363 P.2d 777 (1961).

ADVERSE POSSESSION.

Adverse possession is not founded upon or dependent on the doctrines of abandonment, or forfeiture for nonuse, of water rights. *Hammond v. Johnson*, 94 Utah 20, 66 P.2d 894 (1937).

APPROPRIATION AFTER FORFEITURE.

When vested right is forfeited by nonuse, there is reversion to public, and right to use water so abandoned can only be initiated by making new appropriation after water is available for appropriation. *Whitmore v. Welch*, 114 Utah 578, 201

P.2d 954 (1949).

FORFEITURE OF RIGHTS.

Nonuser of appropriated waters for statutory period, as well as intentional abandonment, results in loss of rights thereto. *Deseret Livestock Co. v. Hooppiana*, 66 Utah 25, 239 P. 479 (1925).

Forfeiture of a water right for nonuser during the statutory time may occur despite a specific intent not to surrender the right, since it is based, not upon an act done, or an intent had, but upon failure to use the right for the statutory time. *Hammond v. Johnson*, 94 Utah 20, 66 P.2d 894 (1937).

Forfeiture will not operate when the failure to use is a result of physical causes beyond the control of the appropriator, such as floods that destroy his dams and ditches, troughs, and the like, if the appropriator is ready and willing to divert the water when it is naturally available. *Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co.*, 104 Utah 202, 135 P.2d 108 (citing textbooks, decisions from other western states, and federal court cases), rehearing denied, 104 Utah 216, 140 P.2d 638 (1943).

Under Laws of 1880 (Laws 1880, ch. 20, § 9), failure to keep a dam in repair, or failure to use the water for seven years, would work a forfeiture. *Wellsville E. Field Irrigation Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 137 P.2d 634, rehearing denied, 104 Utah 498, 143 P.2d 278 (1943).

Under this section a forfeiture is based upon the failure to use the water. Accordingly, there is no forfeiture where there is no showing that appropriator or his successor in interest has failed to use the water for a beneficial purpose for a period of five years. This principle does not, however, imply that an appropriator can, without getting the approval of the state engineer, change the nature of the use or the place of diversion. Nor may an appropriator who has a supplemental storage right, without completing construction of storage facilities in the allotted time, and without getting an extension of time for the completion of construction, keep his storage right alive indefinitely by making direct flow diversions from the river. *Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co.*, 104 Utah 216, 140 P.2d 638 (1943).

Pledgee of certificate of mutual irrigation company cannot be charged with abandonment by nonuser because certificate was not used for a period of more than five years, where certificate was void, and, therefore, the holder thereof was never entitled to any water rights thereunder. In other words, the right to the use of water cannot logically be said to have been lost by nonuse when in fact the right never had any legal existence. *Commercial Bank v. Spanish Fork S. Irrigation Co.*, 107 Utah 279, 153 P.2d 547 (1944).

Statutes fixing the maximum time limit for the nonuser of a water right, when free from ambiguity, should be strictly construed, and a case clearly made out before any relief should be extended to the delinquent thereunder. *Baugh v. Criddle*, 19 Utah 2d 361, 431 P.2d 790 (1967).

Town's leasing of its water right in violation of Utah Const., Art. XI, § 6, did not work a statutory forfeiture of the town's water right where the water was apparently contaminated and generally unsuitable for culinary use and the lease arrangement at least insured that the water was beneficially used for irrigation, with no actual loss to the town's citizens because the technology to render the water usable for town purposes was apparently not available during the term of the lease. *Eskelsen v. Town of Perry*, 819 P.2d 770 (Utah 1991).

GROUND WATER.

Before the 1945 amendment, this section did not apply to underground or subterranean waters. *Fairfield Irrigation Co. v. Carson*, 122 Utah 225, 247 P.2d 1004 (1952).

The prior exemption of underground waters in this section indicated a recognition of some kind of personal right to such waters and this legislative disposition to protect the right was emphasized by the passage of the statute giving landowners one year in which to file claims to such waters (§ 73-5-10, repealed by Laws 1955, ch. 160, § 2). *In re Escalante Valley Drainage Area*, 6 Utah 2d 344, 313 P.2d 803 (1957).

TIME EXTENSION.

State engineer's proposed determination in a drainage area which disallowed plaintiffs' water rights in their wells interrupted the running of this section against the plaintiffs and the fact that plaintiffs did not file a protest within five years after the effective date of the statute was not controlling since they did file within the time extended by the court. *In re Escalante Valley Drainage Area*, 12 Utah 2d 112, 363 P.2d 777 (1961).

Right to use water nonconsumptively to run power mill wheel lapsed when owner failed to file engineer's form stating that beneficial use had been resumed within extension of time to resume granted when mill burned down, notwithstanding argument that resumption of use had actually occurred within extension period. *Baugh v. Criddle*, 19 Utah 2d 361, 431 P.2d 790 (1967).

Party applying to state engineer for extension of time in which to resume use of water does not have to pay filing fee in advance. *Glenwood Irrigation Co. v. Myers*, 24 Utah 2d 78, 465 P.2d 1013 (1970).

In action to have defendant's right to use water declared forfeited for nonuse and to enjoin any further use, trial court improperly granted summary judgment for plaintiff since state engineer had granted extension of time for defendant to resume use and plaintiff did not use proper remedy of civil action in district court for review of state engineer's decision, but rather filed action to have defendant's rights declared forfeited, which resulted in an attempt by plaintiff to exercise authority granted specifically to state engineer to enjoin unlawful diversion. *Glenwood Irrigation Co. v. Myers*, 24 Utah 2d 78, 465 P.2d 1013 (1970).

WASTE WATER.

Portion of appropriated water allowed to run waste cannot be appropriated by another unless owner intentionally abandons right to its use, or fails to apply it to beneficial purpose for statutory period, and owner may reclaim exclusive rights to such water by applying it to beneficial use at any time before lapse of statutory period, in absence of earlier intentional abandonment of rights thereto. *Torsak v. Rukavina*, 67 Utah 166, 246 P. 367 (1926).

Question of waste water or excess water is discussed at length in majority and concurring opinions in *Smithfield W. Bench Irrigation Co. v. Union Cent. Life Ins. Co.*, 105 Utah 468, 142 P.2d 866 (1943).

COLLATERAL REFERENCES

UTAH LAW REVIEW. --The Failure of Subdivision Control in the Western United States: A Blueprint for Local Government Action, 1988 Utah L. Rev. 569.

JOURNAL OF ENERGY LAW AND POLICY. --Legal Impediments to Interstate Water Marketing: Application to Utah, 9 J. Energy L. & Pol'y 237 (1989).

Nephi City v. Hansen : The Utah Supreme Court Sidesteps Public Trust Principles in Allowing Forfeiture of Municipal Water Rights, 11 J. Energy L. & Pol'y 369 (1991).

AM. JUR. 2D. --78 Am. Jur. 2d Waters §§ 240, 342.

C.J.S. --93 C.J.S. Waters § 193.

KEY NUMBERS. --Waters and Water Courses KEY 151.

Tab 5



1 of 1 DOCUMENT

UTAH CODE ANNOTATED

Copyright (c) 2004 by Matthew Bender & Company, Inc. a member of the LexisNexis Group.
All rights reserved.

*** ARCHIVE DATA ***

*** STATUTES CURRENT THROUGH THE 2004 FOURTH SPECIAL SESSION ***

*** ANNOTATIONS CURRENT THROUGH 2005 UT 7, 2005 UT APP 37 ***

*** AND JANUARY 27, 2005 (FEDERAL CASES) ***

TITLE 73. WATER AND IRRIGATION
CHAPTER 1. GENERAL PROVISIONS

Utah Code Ann. § 73-1-4 (2004)

§ 73-1-4. Reversion to the public by abandonment or forfeiture for nonuse within five years -- Extension of time

(1) In order to further the state policy of securing the maximum use and benefit of its scarce water resources, a person entitled to the use of water has a continuing obligation to place all of a water right to beneficial use. The forfeiture of all or part of any right to use water for failure to place all or part of the water to beneficial use makes possible the allocation and use of water consistent with long established beneficial use concepts. The provisions of Subsections (2) through (6) shall be construed to carry out the purposes and policies set forth in this Subsection (1).

(2) As used in this section, "public water supply entity" means an entity that supplies water as a utility service or for irrigation purposes and is also:

(a) a municipality, water conservancy district, metropolitan water district, irrigation district created under Section 17A-2-701.5, or other public agency;

(b) a water company regulated by the Public Service Commission; or

(c) any other owner of a community water system.

(3) (a) When an appropriator or the appropriator's successor in interest abandons or ceases to use all or a portion of a water right for a period of five years, the water right or the unused portion of that water right ceases and the water reverts to the public, unless, before the expiration of the five-year period, the appropriator or the appropriator's successor in interest files a verified nonuse application with the state engineer.

(b) (i) A nonuse application may be filed on all or a portion of the water right, including water rights held by mutual irrigation companies.

(ii) Public water supply entities that own stock in a mutual water company, after giving written notice to the water company, may file nonuse applications with the state engineer on the water represented by the stock.

Utah Code Ann. § 73-1-4

(c) (i) A water right or a portion of the 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 five 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.

(iv) A proposed determination by the state engineer 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 proposed to be valid, unless a timely objection has been filed within the time allowed in Chapter 4, Determination of Water Rights.

(d) The extension of time to resume the use of that water may not exceed five years unless the time is further extended by the state engineer.

(e) The provisions of this section are applicable whether the unused or abandoned water or a portion of the water is permitted to run to waste or is used by others without right with the knowledge of the water right holder, provided that the use of water pursuant to a lease or other agreement with the appropriator or the appropriator's successor shall be considered to constitute beneficial use.

(f) The provisions of this section shall not apply:

(i) to those periods of time when a surface water source fails to yield sufficient water to satisfy the water right, or when groundwater is not available because of a sustained drought;

(ii) to water stored in reservoirs pursuant to an existing water right, where the stored water is being held in storage for present or future use; or

(iii) when a water user has beneficially used substantially all of a water right within a five-year period, provided that this exemption shall not apply to the adjudication of a water right in a general determination of water rights under Chapter 4, Determination of Water Rights.

(g) Groundwater rights used to supplement the quantity or quality of other water supplies may not be subject to loss or reduction under this section if not used during periods when the other water source delivers sufficient water so as to not require use of the supplemental groundwater.

(4) (a) The state engineer shall furnish an application requiring the following information:

(i) the name and address of the applicant;

(ii) a description of the water right or a portion of the water right, including the point of diversion, place of use, and priority;

(iii) the date the water was last diverted and placed to beneficial use;

(iv) the quantity of water;

(v) the period of use;

Utah Code Ann. § 73-1-4

- (vi) the extension of time applied for;
- (vii) a statement of the reason for the nonuse of the water; and
- (viii) any other information that the state engineer requires.

(b) Filing the application extends the time during which nonuse may continue until the state engineer issues his order on the nonuse application.

(c) (i) Upon receipt of the application, the state engineer shall publish a notice of the application once a week for two successive weeks in a newspaper of general circulation in the county in which the source of the water supply is located and where the water is to be used.

(ii) The notice shall:

(A) state that an application has been made; and

(B) specify where the interested party may obtain additional information relating to the application.

(d) Any interested person may file a written protest with the state engineer against the granting of the application:

(i) within 20 days after the notice is published, if the adjudicative proceeding is informal; and

(ii) within 30 days after the notice is published, if the adjudicative proceeding is formal.

(e) In any proceedings to determine whether the application for extension should be approved or rejected, the state engineer shall follow the procedures and requirements of Title 63, Chapter 46b, Administrative Procedures Act.

(f) After further investigation, the state engineer may approve or reject the application.

(5) (a) Nonuse applications on all or a portion of a water right shall be granted by the state engineer for periods not exceeding five years each, upon a showing of reasonable cause for nonuse.

(b) Reasonable causes for nonuse include:

(i) demonstrable financial hardship or economic depression;

(ii) the initiation of recognized water conservation or efficiency practices, or the operation of a groundwater recharge recovery program approved by the state engineer;

(iii) operation of legal proceedings;

(iv) the holding of a water right or stock in a mutual water company without use by any public water supply entity to meet the reasonable future requirements of the public;

(v) situations where, in the opinion of the state engineer, the nonuse would assist in implementing an existing, approved water management plan;

(vi) situations where all or part of the land on which water is used is contracted under an approved state agreement or federal conservation following program;

(vii) the loss of capacity caused by deterioration of the water supply or delivery equipment if the applicant submits, with the application, a specific plan to resume full use of the water right by replacing, restoring, or improving the equipment; or

Utah Code Ann. § 73-1-4

(viii) any other reasonable cause.

(6) (a) Sixty days before the expiration of any extension of time, the state engineer shall notify the applicant by registered mail or by any form of electronic communication through which receipt is verifiable, of the date when the extension period will expire.

(b) Before the date of expiration, the applicant shall either:

(i) file a verified statement with the state engineer setting forth the date on which use of the water was resumed, and whatever additional information is required by the state engineer; or

(ii) apply for a further extension of time in which to resume use of the water according to the procedures and requirements of this section.

(c) Upon receipt of the applicant's properly completed, verified statement, the state engineer shall conduct investigations necessary to verify that beneficial use has resumed and, if so, shall issue a certificate of resumption of use of the water as evidenced by the resumed beneficial use.

(7) The appropriator's water right or a portion of the water right ceases and the water reverts to the public if the:

(a) appropriator or the appropriator's successor in interest fails to apply for an extension of time;

(b) state engineer denies the nonuse application; or

(c) appropriator or the appropriator's successor in interest fails to apply for a further extension of time.

HISTORY: L. 1919, ch. 67, § 6; R.S. 1933, 100-1-4; L. 1935, ch. 104, § 1; 1939, ch. 111, § 1; C. 1943, 100-1-4; L. 1945, ch. 134, § 1; 1959, ch. 137, § 1; 1987, ch. 161, § 287; 1988, ch. 72, § 28; 1995, ch. 19, § 1; 1996, ch. 98, § 1; 2001, ch. 136, § 1; 2002, ch. 20, § 1; 2003, ch. 99, § 1.

NOTES: AMENDMENT NOTES. —The 1995 amendment, effective May 1, 1995, redesignated the second sentence of Subsection (1)(b) as (1)(c); subdivided Subsection (2)(c); substituted "two" for "three" before "successive weeks" and added "and where water is to be used" in Subsection (2)(c)(i); added Subsections (2)(c)(ii), (2)(d)(i), and (2)(d)(ii); and made related and stylistic changes throughout.

The 1996 amendment, effective April 29, 1996, in Subsection (1)(a), substituted "water right ceases and the water reverts to the public" for "the right ceases"; added Subsection (1)(b), and redesignated subsequent subsections accordingly; redesignated former Subsection (5) as Subsection (4) and former Subsection (4) as Subsection (5); added Subsection (5)(a)(iii); and made stylistic changes throughout the section.

The 2001 amendment, effective April 30, 2001, in Subsection (4)(a) added "or by any form of electronic communication through which receipt is verifiable," in Subsection (4)(b)(i) added "in a manner prescribed by the state engineer," and made stylistic changes.

The 2002 amendment, effective May 6, 2002, rewrote this section.

The 2003 amendment, effective May 5, 2003, substituted "Section 17A-2-701.5" for "Section 17A-2-7" in Subsection (2)(a); in Subsection (4)(c)(ii), deleted "inform the public of the nature of the right for which the extension is requested and the reasons for the extension," and added Subsections (4)(c)(ii)(A) and (4)(c)(ii)(B); and made stylistic and related changes.

COMPILER'S NOTES. —This section was Comp. Laws 1907, § 1288x23.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.
 Abandonment.
 Adverse possession.
 Appropriation after forfeiture.
 Forfeiture of rights.
 In general.
 Proof of forfeiture.
 Standing.
 Time extension.
 Waste water.

CONSTITUTIONALITY.

Forfeiture of water rights by nonuse under this section does not violate Utah Const., Art. XI, § 6, because the constitution only prohibits the voluntary, intentional disposition of water rights, whereas a forfeiture under this section is involuntary. *Nephi City v. Hansen*, 779 P.2d 673 (Utah 1989).

ABANDONMENT.

Abandonment of a water right requires an intent to abandon, coupled with some act of relinquishment by which the intent is carried out. *Promontory Ranch Co. v. Argile*, 28 Utah 398, 79 P. 47 (1904); *Hammond v. Johnson*, 94 Utah 20, 66 P.2d 894 (1937).

In action to determine title to waters of a spring having its source on plaintiffs' land, fact that neither plaintiffs nor their grantors made any use of the water, and permitted it to continue to flow through an artificial watercourse which they had purchased from one having a right thereto, was not sufficient to show abandonment, so as to render the water subject to appropriation, especially in view of other affirmative acts of plaintiffs tending to show that they had no intention of abandoning their rights. *Gill v. Malan*, 29 Utah 431, 82 P. 471 (1905).

Abandonment, as applied to doctrine of appropriation of water to a beneficial use, means an intentional relinquishment of a known right. *Hammond v. Johnson*, 94 Utah 20, 66 P.2d 894 (1937).

In action to quiet title to waters of a spring, finding of court that defendants said plaintiff was stealing their water negated an abandonment of the water by defendants, so it could not revert to public and again be subject to appropriation. *Hammond v. Johnson*, 94 Utah 20, 66 P.2d 894 (1937).

Abandonment is a separate and distinct concept from that of a forfeiture. *Wellsville E. Field Irrigation Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 137 P.2d 634, rehearing denied, 104 Utah 498, 143 P.2d 278 (1943); *In re Drainage Area of Bear River*, 12 Utah 2d 1, 361 P.2d 407 (1961).

The burden is on the person asserting abandonment of water rights to prove it and proof of abandonment must fail in absence of showing of an intent to abandon. *Wellsville E. Field Irrigation Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 137 P.2d 634, rehearing denied, 104 Utah 498, 143 P.2d 278 (1943); *Smithfield W. Bench Irrigation Co. v. Union Cent. Life Ins. Co.*, 113 Utah 356, 195 P.2d 249 (1948); *Fairfield Irrigation Co. v. Carson*, 122 Utah 225, 247 P.2d 1004 (1952); *In re Escalante Valley Drainage Area*, 12 Utah 2d 112, 363 P.2d 777 (1961).

Abandonment differs from the nonuse provided by this section in that abandonment requires proof of an intent to abandon the water right. *In re Escalante Valley Drainage Area*, 12 Utah 2d 112, 363 P.2d 777 (1961).

ADVERSE POSSESSION.

Adverse possession is not founded upon or dependent on the doctrine of abandonment or forfeiture for nonuse of water rights. *Hammond v. Johnson*, 94 Utah 20, 66 P.2d 894 (1937).

APPROPRIATION AFTER FORFEITURE.

When a vested right is forfeited by nonuse, there is reversion to the public, and the right to use water so abandoned can only be initiated by making a new appropriation after the water is available for appropriation. *Whitmore v. Welch*, 114 Utah 578, 201 P.2d 954 (1949).

FORFEITURE OF RIGHTS.

Nonuse of appropriated waters for statutory period, as well as intentional abandonment, results in loss of rights thereto. *Deseret Livestock Co. v. Hooppiana*, 66 Utah 25, 239 P. 479 (1925).

Forfeiture of a water right for nonuse during the statutory time may occur despite a specific intent not to surrender the right, since it is based, not upon an act done, or an intent had, but upon failure to use the right for the statutory time. *Hammond v. Johnson*, 94 Utah 20, 66 P.2d 894 (1937).

Forfeiture will not operate when the failure to use is a result of physical causes beyond the control of the appropriator, such as floods that destroy his dams and ditches, troughs, and the like, if the appropriator is ready and willing to divert the water when it is naturally available. *Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co.*, 104 Utah 202, 135 P.2d 108 (citing textbooks, decisions from other western states, and federal court cases), rehearing denied, 104 Utah 216, 140 P.2d 638 (1943).

Under this section a forfeiture is based upon the failure to use the water. Accordingly, there is no forfeiture where there is no showing that appropriator or his successor in interest has failed to use the water for a beneficial purpose for a period of five years. This principle does not, however, imply that an appropriator can, without getting the approval of the state engineer, change the nature of the use or the place of diversion. Nor may an appropriator who has a supplemental storage right, without completing construction of storage facilities in the allotted time, and without getting an extension of time for the completion of construction, keep his storage right alive indefinitely by making direct flow diversions from the river. *Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co.*, 104 Utah 216, 140 P.2d 638 (1943).

Pledgee of certificate of mutual irrigation company could not be charged with abandonment by nonuse because certificate was not used for a period of more than five years, where certificate was void, and, therefore, the holder thereof was never entitled to any water rights thereunder. *Commercial Bank v. Spanish Fork S. Irrigation Co.*, 107 Utah 279, 153 P.2d 547 (1944).

Statutes fixing the maximum time limit for the nonuse of a water right, when free from ambiguity, should be strictly construed, and a case clearly made out before any relief should be extended to the delinquent thereunder. *Baugh v. Criddle*, 19 Utah 2d 361, 431 P.2d 790 (1967).

Town's leasing of its water right in violation of Utah Const., Art. XI, § 6, did not work a statutory forfeiture of the town's water right where the water was apparently contaminated and generally unsuitable for culinary use and the lease arrangement at least insured that the water was beneficially used for irrigation, with no actual loss to the town's citizens because the technology to render the water usable for town purposes was apparently not available during the term of the lease. *Eskelsen v. Town of Perry*, 819 P.2d 770 (Utah 1991).

IN GENERAL.

For discussion of the concepts of abandonment and forfeiture of water rights, the distinction between abandonment and forfeiture of water rights and loss of rights to another by prescription or adverse use, and the requirements for and proof of a water right by adverse use, see *Wellsville E. Field Irrigation Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 137 P.2d 634, rehearing denied, 104 Utah 498, 143 P.2d 278 (1943); *In re Drainage Area of Bear River*, 12 Utah 2d 1, 361 P.2d 407 (1961).

The development of water in this arid state requires strict adherence to statutory sanctions, without delay or nonconformance thereto, except in rare and highly equitable instances. *Baugh v. Criddle*, 19 Utah 2d 361, 431 P.2d 790 (1967).

PROOF OF FORFEITURE.

Because the party asserting forfeiture did not challenge the trial court's ruling that it was required to prove forfeiture by clear and convincing evidence, the company accepted that burden, which it failed to meet. The reviewing court declined to address the issue of whether "clear and convincing" was the correct burden of proof. *Butler, Crockett & Walsh Dev. Corp. v. Pinecrest Pipeline Operating Co.*, 2004 UT 67, 506 Utah Adv. 17, 98 P.3d 1.

STANDING.

A water conservancy district lacked standing under the traditional test to bring an action under this section because its evidence regarding the connection between its own water use and that of the water right owner's was inconclusive.

Wash. County Water Conservancy Dist. v. Morgan, 2003 UT 58, 489 Utah Adv. Rep. 7, 82 P.3d 1125.

Water conservancy district's challenge to the state engineer's approval of a water right owner's change application and its forfeiture action against the water right owner did not qualify for the public importance exceptions to the traditional standing rule, as the district made no showing that the validity of the water right owner's right to use groundwater was an issue of sufficient public importance to justify departure from traditional standing requirements. *Wash. County Water Conservancy Dist. v. Morgan*, 2003 UT 58, 489 Utah Adv. Rep. 7, 82 P.3d 1125.

The Utah Water Conservancy Act, § 17A-2-1401 et seq., did not confer standing on a water conservancy district to bring a forfeiture action against a private water right owner under this section; the broad purpose statements in § 17A-2-1401 were insufficient to establish statutory standing to seek to overturn approved change applications or to press forfeiture claims in cases where the district's own uses were not affected and the district's express powers in § 17A-2-1413 did not include the power to enforce beneficial water use through the water forfeiture statute. *Wash. County Water Conservancy Dist. v. Morgan*, 2003 UT 58, 489 Utah Adv. Rep. 7, 82 P.3d 1125.

TIME EXTENSION.

State engineer's proposed determination in a drainage area which disallowed plaintiffs' water rights in their wells interrupted the running of this section against the plaintiffs and the fact that plaintiffs did not file a protest within five years after the effective date of the statute was not controlling since they did file within the time extended by the court. *In re Escalante Valley Drainage Area*, 12 Utah 2d 112, 363 P.2d 777 (1961).

Right to use water nonconsumptively to run power mill wheel lapsed when owner failed to file engineer's form stating that beneficial use had been resumed within extension of time to resume granted when mill burned down, notwithstanding argument that resumption of use had actually occurred within extension period. *Baugh v. Criddle*, 19 Utah 2d 361, 431 P.2d 790 (1967).

Party applying to state engineer for extension of time in which to resume use of water does not have to pay filing fee in advance. *Glenwood Irrigation Co. v. Myers*, 24 Utah 2d 78, 465 P.2d 1013 (1970).

In action to have defendant's right to use water declared forfeited for nonuse and to enjoin any further use, trial court improperly granted summary judgment for plaintiff since state engineer had granted extension of time for defendant to resume use and plaintiff did not use proper remedy of civil action in district court for review of state engineer's decision, but rather filed action to have defendant's rights declared forfeited, which resulted in an attempt by plaintiff to exercise authority granted specifically to state engineer to enjoin unlawful diversion. *Glenwood Irrigation Co. v. Myers*, 24 Utah 2d 78, 465 P.2d 1013 (1970).

WASTE WATER.

Portion of appropriated water allowed to run waste cannot be appropriated by another unless owner intentionally abandons right to its use, or fails to apply it to beneficial purpose for statutory period, and owner may reclaim exclusive rights to such water by applying it to beneficial use at any time before lapse of statutory period, in absence of earlier intentional abandonment of rights thereto. *Torsak v. Rukavina*, 67 Utah 166, 246 P. 367 (1926).

Question of waste water or excess water is discussed at length in majority and concurring opinions in *Smithfield W. Bench Irrigation Co. v. Union Cent. Life Ins. Co.*, 105 Utah 468, 142 P.2d 866 (1943).

COLLATERAL REFERENCES

UTAH LAW REVIEW. --The Failure of Subdivision Control in the Western United States: A Blueprint for Local Government Action, 1988 Utah L. Rev. 569.

Recent Legislative Developments in Utah Law -- Water Forfeiture Amendments, 2003 Utah L. Rev. 790.

JOURNAL OF ENERGY LAW AND POLICY. --Legal Impediments to Interstate Water Marketing: Application to Utah, 9 J. Energy L. & Pol'y 237 (1989).

Nephi City v. Hansen : The Utah Supreme Court Sidesteps Public Trust Principles in Allowing Forfeiture of Municipal Water Rights, 11 J. Energy L. & Pol'y 369 (1991).

TREATISES. --Thomas and Backman, *Utah Real Property Law* (LexisNexis 1999), § 9.04.

AM. JUR. 2D. --78 *Am. Jur. 2d Waters* §§ 240, 342.

C.J.S. --93 C.J.S. *Waters* § 193.

110NGG

***** Print Completed *****

Time of Request: Monday, March 15, 2010 14:35:03 EST

Print Number: 2862:209966586

Number of Lines: 253

Number of Pages: 8

Send To: MOLEN, LANE
SNELL & WILMER
GATEWAY TOWER WEST
15 WEST S TEMPLE STE 1200

Tab 6



1 of 1 DOCUMENT

UTAH CODE ANNOTATED

Copyright (c) 2004 by Matthew Bender & Company, Inc. a member of the LexisNexis Group.
All rights reserved.

*** ARCHIVE DATA ***

*** STATUTES CURRENT THROUGH THE 2004 FOURTH SPECIAL SESSION ***

*** ANNOTATIONS CURRENT THROUGH 2005 UT 7, 2005 UT APP 37 ***

*** AND JANUARY 27, 2005 (FEDERAL CASES) ***

TITLE 73. WATER AND IRRIGATION

CHAPTER 3. APPROPRIATION

Utah Code Ann. § 73-3-3 (2004)

§ 73-3-3. Permanent or temporary changes in point of diversion, place of use, or purpose of use

(1) For purposes of this section:

(a) "Permanent changes" means changes for an indefinite length of time with an intent to relinquish the original point of diversion, place of use, or purpose of use.

(b) "Temporary changes" means changes for fixed periods not exceeding one year.

(2) (a) Any person entitled to the use of water may make permanent or temporary changes in the:

(i) point of diversion;

(ii) place of use; or

(iii) purpose of use for which the water was originally appropriated.

(b) A change may not be made if it impairs any vested right without just compensation.

(3) Both permanent and temporary changes of point of diversion, place of use, or purpose of use of water, including water involved in general adjudication or other suits, shall be made in the manner provided in this section.

(4) (a) A change may not be made unless the change application is approved by the state engineer.

(b) Applications shall be made upon forms furnished by the state engineer and shall set forth:

(i) the name of the applicant;

(ii) a description of the water right;

Utah Code Ann. § 73-3-3

- (iii) the quantity of water;
- (iv) the stream or source;
- (v) the point on the stream or source where the water is diverted;
- (vi) 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 that the state engineer requires.

(5) (a) The state engineer shall follow the same procedures, and the rights and duties of the applicants with respect to applications 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.

(b) The state engineer may, in connection with applications for permanent change involving only a change in point of diversion of 660 feet or less, waive the necessity for publishing a notice of application.

(6) (a) The state engineer shall investigate all temporary change applications.

(b) If the state engineer finds that the temporary change will not impair any vested rights of others, he shall issue an order authorizing the change.

(c) If the state engineer finds that the change sought might impair vested rights, before authorizing the change, he shall give notice of the application to any person whose rights may be affected by the change.

(d) Before making an investigation or giving notice, the state engineer may require the applicant to deposit a sum of money sufficient to pay the expenses of the investigation and publication of notice.

(7) (a) The state engineer may not reject applications for either permanent or temporary changes for the sole reason that the change would impair the vested rights of others.

(b) If otherwise proper, permanent or temporary changes may be approved for part of the water involved or upon the condition that conflicting rights are acquired.

(8) (a) Any person holding an approved application for the appropriation of water may either permanently or temporarily change the point of diversion, place of use, or purpose of use.

(b) A change of an approved application does not:

- (i) affect the priority of the original application; or
- (ii) extend the time period within which the construction of work is to begin or be completed.

(9) Any person who changes or who attempts to change a point of diversion, place of use, or purpose of use, either permanently or temporarily, without first applying to the state engineer in the manner provided in this section:

(a) obtains no right; and

(b) is guilty of a class B misdemeanor, each day of the unlawful change constituting a separate offense, separately punishable.

(10) (a) This section does not apply to the replacement of an existing well by a new well drilled within a radius of 150 feet from the point of diversion of the existing well.

(b) Any replacement well must be drilled in accordance with the requirements of Section 73-3-28.

(11) (a) In accordance with the requirements of this section, the Division of Wildlife Resources or Division of Parks and Recreation may file applications for permanent or temporary changes for the purpose of providing water for instream flows, within a designated section of a natural stream channel or altered natural stream channel, necessary within the state of Utah for:

(i) the propagation of fish;

(ii) public recreation; or

(iii) the reasonable preservation or enhancement of the natural stream environment.

(b) Applications may be filed for changes on:

(i) perfected water rights presently owned by the respective division;

(ii) perfected water rights purchased by the respective division for the purpose of providing water for instream flows, through funding provided for that purpose by legislative appropriation or acquired by lease, agreement, gift, exchange, or contribution; or

(iii) appurtenant water rights acquired with the acquisition of real property by either division.

(c) A physical structure or physical diversion from the stream is not required to implement a change for instream flow use.

(d) Subsection (11) does not allow enlargement of the water right sought to be changed nor may the change impair any vested water right.

(e) In addition to the other requirements of this section, an application filed by either division shall:

(i) set forth the legal description of the points on the stream between which the necessary instream flows will be provided by the change; and

(ii) include appropriate studies, reports, or other information required by the state engineer that demonstrate the necessity for the instream flows in the specified section of the stream and the projected benefits to the public that will result from the change.

(f) The Division of Wildlife Resources and Division of Parks and Recreation may:

(i) purchase water rights for the purposes provided in Subsection (11)(a) only with funds specifically appropriated by the Legislature for water rights purchases; or

(ii) accept a donated water right without legislative approval.

(g) Subsection (11) does not authorize either division to:

(i) appropriate unappropriated water under Section 73-3-2 for the purpose of providing instream flows; or

(ii) acquire water rights by eminent domain for instream flows or for any other purpose.

(h) Subsection (11) applies only to change applications filed on or after April 28, 1986.

(12) (a) Sixty days before the date on which proof of change for instream flows under Subsection (11) is due, the state engineer shall notify the applicant by registered mail or by any form of electronic communication through which receipt is verifiable of the date when proof of change is due.

(b) Before the date when proof of change is due, the applicant must either:

(i) file a verified statement with the state engineer that the instream flow uses have been perfected, which shall set forth:

(A) the legal description of the points on the natural stream channel or altered natural stream channel between which the necessary instream flows have been provided;

(B) detailed measurements of the flow of water in second feet changed;

(C) the period of use; and

(D) any additional information required by the state engineer; or

(ii) apply for a further extension of time as provided for in Section 73-3-12.

(c) Upon approval of the verified statement required under Subsection (12)(b)(i), the state engineer shall issue a certificate of change for instream flow use.

HISTORY: L. 1919, ch. 67, § 8; R.S. 1933, 100-3-3; L. 1937, ch. 130, § 1; 1939, ch. 111, § 1; C. 1943, 100-3-3; L. 1949, ch. 97, § 1; 1959, ch. 137, § 1; 1986, ch. 40, § 1; 1987, ch. 161, § 289; 1992, ch. 208, § 1; 2001, ch. 136, § 3.

NOTES: AMENDMENT NOTES. --The 2001 amendment, effective April 30, 2001, added "or by any form of electronic communication through which receipt is verifiable" in Subsection (12)(a).

CROSS-REFERENCES. --Division of Wildlife Resources, § 23-14-1 et seq.

Fees of state engineer, § 73-2-14.

Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301.

NOTES TO DECISIONS

ANALYSIS

Adjudication of rights.

Assigning application for appropriation.

Burden of proof.

Change in place of diversion.

Change in use.

Conditions imposed to protect vested rights.

Consequences of noncompliance.

Decisions of engineer.

-- Aggrieved persons.

Enforcement.

Necessity of application for change.

Notice by engineer.

Partial approval of changes.

Powers and duties of state engineer.

Public policy.
 Right of appropriator to make changes.
 Vested rights.
 -- Impairment.
 Waiver of impairment claim.
 Cited.

ADJUDICATION OF RIGHTS.

The statute leaves the adjudication of the rights that the applicant may have or may acquire under the application, and the rights of the protestants, to the courts in a different proceeding, and not to the engineer who is merely an executive officer. *United States v. District Court*, 121 Utah 18, 242 P.2d 774 (1952).

The engineer does not adjudicate the rights of the protestants or the applicant to the use of the waters in question, nor the rights the applicant may obtain under the application. *United States v. District Court*, 121 Utah 18, 242 P.2d 774 (1952).

Ownership of shares in a nonprofit mutual water corporation did not confer a right to "the use of the water" as contemplated by Subsection (2). Any change in point of diversion could have been initiated only by the corporation itself, since it alone owned the right as an appropriator to the use of public waters. *East Jordan Irrigation Co. v. Morgan*, 860 P.2d 310 (Utah 1993).

ASSIGNING APPLICATION FOR APPROPRIATION.

Where prior assignment of application to appropriate unappropriated public water was valid and entitled to preference over subsequent assignment, neither state engineer nor court could approve subsequent assignee's application for change in diversion point and place of use of water to be appropriated under application, since he did not own application to appropriate. *McGarry v. Thompson*, 114 Utah 442, 201 P.2d 288 (1948).

BURDEN OF PROOF.

In action to change point of diversion of water from a river to tributaries upon which power company's dam was located, burden of proving a prima facie case rested on plaintiff. *Tanner v. Humphreys*, 87 Utah 164, 48 P.2d 484 (1935).

In an action for a change of use as to already appropriated direct flow irrigation water, from an early season use, to storage in a proposed dam for later use in irrigating more valuable later season crops, the plaintiff has the duty to prove that vested rights will not be impaired by approval of his application; but such duty must not be made unreasonably onerous to the point where every remote but presently indeterminable vested right must be pinpointed. *American Fork Irrigation Co. v. Linke*, 121 Utah 90, 239 P.2d 188 (1951).

If the evidence shows that there is reason to believe that the proposed change can be made without impairing vested rights the application should be approved. A change application cannot be rejected without a showing that vested rights will thereby be substantially impaired. While the applicant has the general burden of showing that no impairment of vested rights will result from the change, the person opposing such an application must fail if the evidence does not disclose that his rights will be impaired. *Salt Lake City v. Boundary Springs Water Users' Ass'n*, 2 Utah 2d 141, 270 P.2d 453 (1954).

The applicant must show reason to believe that the proposed change in direct flow water rights to storage can be made without impairing vested rights, and, if vested rights will be impaired by the change, the application should not be approved. *Piute Reservoir & Irrigation Co. v. West Panguitch Irrigation & Reservoir Co.*, 13 Utah 2d 6, 367 P.2d 855 (1962).

CHANGE IN PLACE OF DIVERSION.

Where corporation distributed water to its shareholders by means of ditches, transfer of water to shareholders from one ditch to another was not a change of place of diversion. *Arnold v. Huntington Canal & Reservoir Ass'n*, 64 Utah 534, 231 P. 622 (1924).

A shareholder in a mutual water corporation had no right to file to change the place of diversion in its own name

without the consent of the corporation under the statutory scheme governing the appropriation of public waters, the principles of corporate law allowing boards of directors to manage corporate affairs in the interest of shareholders as a whole, or public policy. *East Jordan Irrigation Co. v. Morgan*, 860 P.2d 310 (Utah 1993).

CHANGE IN USE.

Where the appropriator of water for irrigation uses the water without waste, and in accordance with his appropriation, no one can complain, and no court can change his manner of using the water. *Nephi Irrigation Co. v. Vickers*, 29 Utah 315, 81 P. 144 (1905).

CONDITIONS IMPOSED TO PROTECT VESTED RIGHTS.

In action to change point of diversion of water from a river to tributaries upon which power company's dam was located, if exchange of waters could be made without affecting vested right of power company or if decree could be entered with conditions that would safeguard rights of power company, plaintiff should succeed. *Tanner v. Humphreys*, 87 Utah 164, 48 P.2d 484 (1935).

CONSEQUENCES OF NONCOMPLIANCE.

The failure of a city to file a change application merely subjects it to this section's enforcement provision and can not alone deprive it of rights to waters to which it is otherwise entitled. *Salt Lake City v. Silver Fork Pipeline Corp.*, 2000 UT 3, 386 Utah Adv. Rep. 18.

DECISIONS OF ENGINEER.

In granting an application, the engineer does not determine that the applicant's rights are prior to the rights of the protestant; he only finds that there is reason to believe that some water may be beneficially used thereunder without interfering with the rights of others. *United States v. District Court*, 121 Utah 1, 238 P.2d 1132 (1951).

The decision of the engineer is administrative in nature and purpose. *United States v. District Court*, 121 Utah 1, 238 P.2d 1132 (1951).

The engineer's findings and decision are limited to the authority delegated by law to his office. *American Fork Irrigation Co. v. Linke*, 121 Utah 90, 239 P.2d 188 (1951).

Although the findings and decisions of the engineer, administrative in nature, merit studied consideration and great weight, nevertheless the judiciary is the sole ultimate arbiter of law and fact in water cases, bound neither by the nature, extent or content of his decision, nor as to the character, quantum or quality of proof, evidence or data adduced at hearings before him or accumulated independently by his office. *American Fork Irrigation Co. v. Linke*, 121 Utah 90, 239 P.2d 188 (1951).

It is the state engineer's obligation, before approving a change application, to determine that no vested water right will be impaired by the proposed change. *Crafts v. Hansen*, 667 P.2d 1068 (Utah 1983).

The state engineer is required to undertake the same investigation in permanent change applications that the statute mandates in applications for water appropriations. *Bonham v. Morgan*, 788 P.2d 497 (Utah 1989).

The state engineer must investigate and reject an application for either appropriation or permanent change of use or place of use if approval would interfere with more beneficial use, public recreation, the natural stream environment, or the public welfare. *Bonham v. Morgan*, 788 P.2d 497 (Utah 1989).

-- AGGRIEVED PERSONS.

Plaintiffs, who alleged that the state engineer failed to conduct an investigation as required by § 73-3-8 to determine what damage a change application would have on private and public property, and failed to comply with this section by not considering the "duties" of the applicants, were "aggrieved persons" within the meaning of § 73-3-14. *Bonham v. Morgan*, 788 P.2d 497 (Utah 1989).

ENFORCEMENT.

This section provides its own enforcement clause, and nowhere in the statutes does it appear that unauthorized change in the place of diversion or in the nature of the use shall constitute a forfeiture of the water. *Rocky Ford Irrigation Co. v.*

Kents Lake Reservoir Co., 104 Utah 216, 140 P.2d 638 (1943).

NECESSITY OF APPLICATION FOR CHANGE.

An application is necessary in order to perfect a right to change the use of water from use for mining purposes to use for domestic and irrigation purposes. *Fairfield Irrigation Co. v. Carson*, 122 Utah 225, 247 P.2d 1004 (1952).

NOTICE BY ENGINEER.

Since any action by state engineer in granting application for change of diversion, use or place cannot affect any vested right, it follows that notice by publication, instead of personal service of notice of such application, does not violate the due process clause of state Constitution. *Whitmore v. Murray City*, 107 Utah 445, 154 P.2d 748 (1944).

PARTIAL APPROVAL OF CHANGES.

In action to change point of diversion of water from a river to tributaries upon which power company's dam was located and to change use from an irrigation to a domestic or municipal purpose, court erred in nonsuiting plaintiff on ground that plaintiff's use would be enlarged, since decree could prevent such enlargement. *Tanner v. Humphreys*, 87 Utah 164, 48 P.2d 484 (1935).

If there is reason to believe that only a part of the waters covered by the application may be diverted at the proposed new diversion place without interfering with the rights of others, the state engineer in the first place and the court on appeal should approve the application to change the diversion place of only such amount of water as there is reason to believe may be changed without impairing the rights of others, regardless of the amount specified in the application. *United States v. District Court*, 121 Utah 18, 242 P.2d 774 (1952).

POWERS AND DUTIES OF STATE ENGINEER.

Although the engineer is required, as are courts, to exercise discretion, determine facts after a hearing, and approve or reject applications accordingly, his duties are administrative in nature and purpose. *United States v. District Court*, 121 Utah 1, 238 P.2d 1132 (1951).

PUBLIC POLICY.

As long as vested rights are not impaired by its completion, a plan for the more beneficial use of water contemplates a most desirable result fully consistent with progress and change, and reflecting the established policy of this state. *American Fork Irrigation Co. v. Linke*, 121 Utah 90, 239 P.2d 188 (1951).

The legislature invested the engineer with important but not conclusive discretionary powers and duties deserving of great respect, but as a safeguard against possible injustice, and by plenary review on trial de novo, it also invested the court with the ultima ratio and final say as to conflicting contentions of applicant and protestant. *American Fork Irrigation Co. v. Linke*, 121 Utah 90, 239 P.2d 188 (1951).

RIGHT OF APPROPRIATOR TO MAKE CHANGES.

Prior appropriator's right to change the place of diversion is not absolute or vested right, but is only conditional, since no such change can be made if public, or any other appropriator, prior or subsequent, is adversely affected, and neither can a prior appropriator prevent a subsequent appropriator from using any of the unappropriated waters of the state to the fullest extent possible merely because prior appropriator in future may desire to change his place of diversion. *United States v. Caldwell*, 64 Utah 490, 231 P. 434 (1924); *Moyle v. Salt Lake City*, 111 Utah 201, 176 P.2d 882 (1947).

Prior appropriator could make changes in place of diversion and in use of water that neither enlarged nor diminished any existing right but merely made use of existing right at another place, without detriment or impairment of any vested right of junior appropriator. *Lehmitz v. Utah Copper Co.*, 118 F.2d 518 (10th Cir. 1941).

In determining damages recoverable for diversion of water, the fact that ranch owners had used the water for irrigation purposes does not limit the value of the water to them since this section provides that upon application an appropriator may change the use of his water. *Sigurd City v. State*, 105 Utah 278, 142 P.2d 154 (1943).

Although this section clearly indicates that one has right to improve his method of taking his entitlement of water,

other factors must be taken into account in authorizing change in order to implement "beneficial use" policy of state. *Wayman v. Murray City Corp.*, 23 Utah 2d 97, 458 P.2d 861 (1969).

VESTED RIGHTS.

The owner of a water right has a vested right to the quality as well as the quantity that he has beneficially used. *Salt Lake City v. Boundary Springs Water Users Ass'n*, 2 Utah 2d 141, 270 P.2d 453 (1954).

A lower user of water of a natural stream acquires a vested right as against all upper users that they shall not increase the amount of water consumed after he makes his appropriation by a change of place of diversion or place or manner of use and thereby deprive him of the use of such water. *East Bench Irrigation Co. v. Deseret Irrigation Co.*, 2 Utah 2d 170, 271 P.2d 449 (1954); *Piute Reservoir & Irrigation Co. v. West Panguitch Irrigation & Reservoir Co.*, 13 Utah 2d 6, 367 P.2d 855 (1962).

When a reservoir is constructed, the amount of water that lower users are entitled to is what they had a right to under the old system, and an application by the reservoir operators for a change in the diversion and use of water should be granted when it does not affect the vested rights of other users. *Provo Bench Canal & Irrigation Co. v. Linke*, 5 Utah 2d 53, 296 P.2d 723 (1956).

-- IMPAIRMENT.

A change in the place of diversion or the place or nature of use or a combination of such changes cannot be made if the lower users, whether prior or subsequent to the rights of the parties making the change, will thereby be deprived of the use of water which they would have had under the use which the upper appropriators made before the change. Such a change would enlarge the rights of the upper appropriators and impair the vested rights of the lower users because their rights were established on the basis that no such enlargement or changes of use would be made after the lower users had perfected their appropriation and this is true of storage as well as direct flow waters. *East Bench Irrigation Co. v. Deseret Irrigation Co.*, 2 Utah 2d 170, 271 P.2d 449 (1954).

WAIVER OF IMPAIRMENT CLAIM.

In a protest hearing involving an application for a change in diversion point, private well owners waived claims of impairment to their rights when they failed to make known the nature of those rights. *Badger v. Brooklyn Canal Co.*, 966 P.2d 844 (Utah 1998).

CITED in *Estate of Steed v. New Escalante Irrigation Co.*, 846 P.2d 1223 (Utah 1992); *Badger v. Brooklyn Canal Co.*, 922 P.2d 745 (Utah 1996).

COLLATERAL REFERENCES

UTAH LAW REVIEW. --Recent Developments in Utah Law -- Legislative Enactments --Water Law, 1987 *Utah L. Rev.* 322.

The Failure of Subdivision Control in the Western United States: A Blueprint for Local Government Action, 1988 *Utah L. Rev.* 569.

Recent Developments in Utah Law -- Judicial Decisions -- Water Law, 1990 *Utah L. Rev.* 195.

Recent Developments in Utah Law -- Judicial Decisions -- Water Law, 1995 *Utah L. Rev.* 1.

JOURNAL OF ENERGY NATURAL RESOURCES AND ENVIRONMENTAL LAW. --Note, *Bonham v. Morgan*: Utah's "New" Criteria for Water Right Change Applications, 11 *J. Energy, Nat. Resources & Envtl. L.* 143 (1990).

The Upstream Battle in the Protection of Utah's Instream Flows, 14 *J. Energy, Nat. Resources, & Envtl. L.* 113 (1994).

JOURNAL OF ENERGY LAW AND POLICY. --A Primer of Utah Water Law, 5 *J. Energy L. & Pol'y* 165 (1984).

A Primer of Utah Water Law: Part II, 6 *J. Energy L. & Pol'y* 1 (1985).

Water Planning: Untapped Opportunity for the Western States, 9 *J. Energy L. & Pol'y* 1 (1988).

Legal Impediments to Interstate Water Marketing: Application to Utah, 9 *J. Energy L. & Pol'y* 237 (1989).

AM. JUR. 2D. —78 *Am. Jur. 2d Waters* §§ 332, 336.

C.J.S. —93 C.J.S. Waters § 189.

Tab 7



1 of 1 DOCUMENT

UTAH CODE ANNOTATED

Copyright (c) 2004 by Matthew Bender & Company, Inc. a member of the LexisNexis Group.
All rights reserved.

*** ARCHIVE DATA ***

*** STATUTES CURRENT THROUGH THE 2004 FOURTH SPECIAL SESSION ***

*** ANNOTATIONS CURRENT THROUGH 2005 UT 7, 2005 UT APP 37 ***

*** AND JANUARY 27, 2005 (FEDERAL CASES) ***

TITLE 73. WATER AND IRRIGATION
CHAPTER 3. APPROPRIATION

Utah Code Ann. § 73-3-8 (2004)

§ 73-3-8. Approval or rejection of application -- Requirements for approval -- Application for specified period of time
-- Filing of royalty contract for removal of salt or minerals

(1) It shall be the duty of the state engineer to approve an application if: (a) there is unappropriated water in the proposed source; (b) the proposed use will not impair existing rights or interfere with the more beneficial use of the water; (c) 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; (d) the applicant has the financial ability to complete the proposed works; and (e) the application was filed in good faith and not for purposes of speculation or monopoly. If the state engineer, because of information in his possession obtained either by his own investigation or otherwise, has reason to believe that an application to appropriate water will interfere with its more beneficial use for irrigation, domestic or culinary, stock watering, power or mining development or manufacturing, or will unreasonably affect public recreation or the natural stream environment, or will prove detrimental to the public welfare, it is his duty to withhold his approval or rejection of the application until he has investigated the matter. If an application does not meet the requirements of this section, it shall be rejected.

(2) An application to appropriate water for industrial, power, mining development, manufacturing purposes, agriculture, or municipal purposes may be approved for a specific and certain period from the time the water is placed to beneficial use under the application, but in no event may an application be granted for a period of time less than that ordinarily needed to satisfy the essential and primary purpose of the application or until the water is no longer available as determined by the state engineer. At the expiration of the period fixed by the state engineer the water shall revert to the public and is subject to appropriation as provided by Title 73. The state engineer may extend any limited water right upon a showing that the essential purpose of the original application has not been satisfied, that the need for an extension is not the result of any default or neglect by the applicant, and that water is still available; except no extension shall exceed the time necessary to satisfy the primary purpose of the original application. A request for extension must be filed in writing in the office of the state engineer not later than 60 days before the expiration date of the application.

(3) Before the approval of any application for the appropriations of water from navigable lakes or streams of the

Utah Code Ann. § 73-3-8

state which contemplates the recovery of salts and other minerals therefrom by precipitation or otherwise, the applicant shall file with the state engineer a copy of a contract for the payment of royalties to the state of Utah. The approval of an application shall be revoked in the event of the failure of the applicant to comply with terms of his royalty contract.

HISTORY: L. 1919, ch. 67, § 48; R.S. 1933, 100-3-8; L. 1939, ch. 111, § 1; 1941, ch. 96, § 1; C. 1943, 100-3-8; L. 1959, ch. 137, § 1; 1971, ch. 187, § 1; 1976, ch. 32, § 1; 1985, ch. 139, § 1.

NOTES: AMENDMENT NOTES. --The 1985 amendment added the subsection designations (1) through (3); in Subsection (1), redesignated the internal subsections (1) through (4) as (a) through (d) and added the designation (e); substituted "If" for "provided, that where" at the beginning of the second sentence of Subsection (1); inserted "agriculture, or municipal purposes" near the beginning of Subsection (2); substituted "may" for "shall" in the middle of the first sentence of Subsection (2); inserted "or until the water is no longer available" near the end of the first sentence of Subsection (2); inserted "and that water is still available" in the third sentence of Subsection (2); divided Subsection (3) into two sentences, substituting "The approval" for "provided that approval" at the beginning of the second sentence; and made minor changes in phraseology.

CROSS-REFERENCES. --Fees of state engineer, § 73-2-14.

NOTES TO DECISIONS

Object of state engineer's office under this section is to maintain order and efficiency in appropriation, distribution and conservation of water and to allow as much water to be beneficially used as possible. *Bullock v. Hanks*, 22 Utah 2d 308, 452 P.2d 866 (1969).

ANALYSIS

Basis for approval of application.

Burden of proof.

Contracts.

Determination by engineer.

Duty of state engineer.

-- Aggrieved persons.

Effect of approval.

Existing rights impaired.

In general.

Interference with more beneficial use.

Limitations.

Mineral royalties.

Monopoly.

Mutual water and irrigation corporations.

Necessity for approval of application.

Proceeding to change diversion or use.

Public welfare affected.

Rehearings.

Review of engineer's decision.

Speculation.

Unappropriated water in source.

BASIS FOR APPROVAL OF APPLICATION.

Under former statute, applicant to state engineer for appropriation of certain unappropriated waters of stream was entitled, as matter of right, to have his application approved and allowed if unappropriated water existed. *Brady v.*

McGonagle, 57 Utah 424, 195 P. 188 (1921).

BURDEN OF PROOF.

When application to appropriate water is up for approval or rejection, applicant is not required to prove to state engineer that he can make an appropriation by the same kind and quantum of proof that would be required were he making final proof under § 73-3-16. *Eardley v. Terry*, 94 Utah 367, 77 P.2d 362 (1938).

In determining whether application to appropriate water should be approved or rejected, general negative by applicant as to injury to protestant would be sufficient to require protestant to prove that he would be injured. *Eardley v. Terry*, 94 Utah 367, 77 P.2d 362 (1938).

CONTRACTS.

Agreement between water users was interpreted so as not to impose unreasonable restraints in conflict with the beneficial use doctrine. *Green River Canal Co. v. Thayn*, 2003 UT 50, 486 Utah Adv. Rep. 34, 84 P.3d 1134.

DETERMINATION BY ENGINEER.

When application to appropriate water is filed, state engineer is called upon to determine preliminarily whether there is probable cause to believe that an application can be perfected, having due regard to whether there is unappropriated water available for appropriation, whether it can be put to beneficial use, and whether it can be diverted and so used without injuring or conflicting with prior rights of others, which if determined, application is approved, and applicant proceeds to demonstrate by actual use of rights sought to be acquired that he is entitled to such rights. *Eardley v. Terry*, 94 Utah 367, 77 P.2d 362 (1938); *Tanner v. Bacon*, 103 Utah 494, 136 P.2d 957 (1943); *Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co.*, 104 Utah 202, 135 P.2d 108 (1943); *Whitmore v. Welch*, 114 Utah 578, 201 P.2d 954 (1949).

The engineer in making a decision under this section exercises an executive function. He determines whether there is reason to believe from the evidence that there are unappropriated waters in the proposed source which can be appropriated to a beneficial use without impairing existing rights or interfering with a more beneficial use and whether the proposed plan is feasible and within the financial ability of the applicant. The court's decision on appeal has only the effect of authorizing or denying the applicant the right to proceed with this plan to appropriate the water the same as though it were made by the engineer without an appeal. It is not an action to adjudicate the rights of the parties to the use of the water. *Bullock v. Tracy*, 4 Utah 2d 370, 294 P.2d 707 (1956).

DUTY OF STATE ENGINEER.

The state engineer is required to undertake the same investigation in permanent change applications that the statute mandates in applications for water appropriations. *Bonham v. Morgan*, 788 P.2d 497 (Utah 1989).

-- AGGRIEVED PERSONS.

Plaintiffs, who alleged that the state engineer failed to conduct an investigation as required by this section to determine what damage a change application would have on private and public property, and failed to comply with § 73-3-3 by not considering the "duties" of the applicants, were "aggrieved persons" within the meaning of § 73-3-14. *Bonham v. Morgan*, 788 P.2d 497 (Utah 1989).

EFFECT OF APPROVAL.

The approval of an application to appropriate is only a preliminary step. It confers upon the applicant no perfected right to use the water. It does not in any degree impair or diminish the existing rights of others. It merely clothes the applicant with authority to proceed and perfect, if he can, his proposed appropriation by the actual diversion and application of the water claimed to a beneficial use. *Little Cottonwood Water Co. v. Kimball*, 76 Utah 243, 289 P. 116 (1930); *Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co.*, 104 Utah 202, 135 P.2d 108 (1943).

Any application to appropriate water is subject to all rights accrued prior to filing, and filing application does not give applicant right or license to proceed to the injury of prior rights. *Eardley v. Terry*, 94 Utah 367, 77 P.2d 362 (1938).

The state engineer in approving or denying an application for appropriation of water rights acts in an administrative

capacity only, and has no authority to determine rights of parties. The same reasoning applies to the extent of the state engineer's authority when he determines to grant or deny an application for change of diversion, use or place. *Whitmore v. Murray City*, 107 Utah 445, 154 P.2d 748 (1944); *United States v. District Court*, 121 Utah 1, 238 P.2d 1132 (1951).

EXISTING RIGHTS IMPAIRED.

The determination of existing rights, in many cases, involves intricate and difficult questions of both law and fact, and is peculiarly a judicial function. It cannot, therefore, be said that the legislature intended, by this section, to vest the power to make such adjudication in the state engineer. *Little Cottonwood Water Co. v. Kimball*, 76 Utah 243, 289 P. 116 (1930).

Unless it appears that the approval of the application will injure vested rights of prior appropriators, the application to appropriate should be approved. *Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co.*, 104 Utah 202, 135 P.2d 108 (1943); *Whitmore v. Welch*, 114 Utah 578, 201 P.2d 954 (1949).

IN GENERAL.

The history of this section is recited in *Tanner v. Bacon*, 103 Utah 494, 136 P.2d 957 (1943).

INTERFERENCE WITH MORE BENEFICIAL USE.

This section does not provide that one of the uses mentioned is a more beneficial use than any other use mentioned. It does not indicate that the uses mentioned first are more beneficial than those mentioned later. It refers to each use mentioned as the more beneficial use, thus indicating that such use under certain circumstances may be a more beneficial use, and limiting the possible more beneficial uses to those mentioned. It mentions almost all possible beneficial uses, thus indicating that under certain circumstances one of the mentioned uses might be more beneficial than another, and not limiting the uses which are not more beneficial to uses other than those mentioned. Evidently the legislature intended that upon the filing of an application to appropriate water the state engineer should determine from the facts and circumstances of each case whether the approval thereof would interfere with the more beneficial use of the water, for one of the purposes mentioned, whether the purpose proposed in the application was for one of the purposes mentioned or for some other purpose. *Tanner v. Bacon*, 103 Utah 494, 136 P.2d 957 (1943).

LIMITATIONS.

State engineer may approve applications subject to limitations. *Tanner v. Bacon*, 103 Utah 494, 136 P.2d 957 (1943).

Where application for appropriation for power purposes provided for return of the water to the stream at a point below the intake point of a lower prior appropriator, where there was no reasonable probability that water above such intake point was open to appropriation absent abandonment of the prior appropriation, where there was no allegation of such an abandonment, and where application was granted with condition that water be returned at or above such intake point, it was improper to limit such condition "unless and until it is determined by a competent tribunal that the rights of" the prior appropriator "have been lost by reason of nonuse." *Whitmore v. Welch*, 114 Utah 578, 201 P.2d 954 (1949).

MINERAL ROYALTIES.

As the state is the owner of the salt contained in the waters of Great Salt Lake, the 1941 amendment to this section is not unconstitutional, because it takes no right which could have been acquired by the filing of an application for the appropriation of water before its enactment, but merely provides a method by which rights to the salt may be acquired from the state land board, and thus puts one in a position to put the water to a beneficial use, and also provides a check with the state engineer, so that no water may be appropriated from navigable bodies of water, the beds of which belong to the state, for the sole purpose of taking therefrom the minerals which do not belong to the appropriator. *Deseret Livestock Co. v. State*, 110 Utah 239, 171 P.2d 401 (1946).

MONOPOLY.

Where application covered a relatively small segment of a stream and there was no evidence that it was for substantially more water than essential to the capacity of the contemplated power plant, the application was not designed to monopolize the water of the stream. *Whitmore v. Welch*, 114 Utah 578, 201 P.2d 954 (1949).

MUTUAL WATER AND IRRIGATION CORPORATIONS.

In the context of mutual water or irrigation corporations, "existing rights," as that term is used in this section, refers to the right held by the corporation representing its shareholders as a body; therefore, the statutory authority of the state engineer does not extend to the resolution of disputes between shareholders and their corporations regarding the distribution of their shares. *Badger v. Brooklyn Canal Co.*, 922 P.2d 745 (Utah 1996).

NECESSITY FOR APPROVAL OF APPLICATION.

Unless his application has been approved, applicant is without interest in the subject matter, and unable to prosecute his claim or to question prior claims. *Little Cottonwood Water Co. v. Kimball*, 76 Utah 243, 289 P. 116 (1930).

No vested right to use of water is acquired by mere filing of application to appropriate water unless approved either by state engineer or by court on appeal therefrom. *McGarry v. Thompson*, 114 Utah 442, 201 P.2d 288 (1948); *Whitmore v. Welch*, 114 Utah 578, 201 P.2d 954 (1949).

PROCEEDING TO CHANGE DIVERSION OR USE.

In action to change point of diversion of water from a river to tributaries upon which power company's dam was located and to change use from an irrigation to a domestic or municipal purpose, court erred in nonsuiting plaintiff on ground that plaintiff's use would be enlarged, since decree could prevent such enlargement. *Tanner v. Humphreys*, 87 Utah 164, 48 P.2d 484 (1935), applying this section prior to the 1939 amendment.

In granting applicant right to change its point of diversion and return, state engineer did not adjudicate the priority to the use of water at that point of diversion, but merely determined that applicant could use the water at that point as long as it did not interfere with the prior rights of others. The determination of the priority of rights is a judicial function and not among the powers of the state engineer. *Whitmore v. Murray City*, 107 Utah 445, 154 P.2d 748 (1944).

PUBLIC WELFARE AFFECTED.

Under this section, where the approval of the application would prove detrimental to the public welfare, the state engineer is directed to reject the same. In other words, the state may reject or limit applications to appropriate its unappropriated waters, and state engineer may reject or limit priority of plaintiff's application in the interest of the public welfare. *Tanner v. Bacon*, 103 Utah 494, 136 P.2d 957 (1943), citing many cases from other states.

The decisions in Nebraska and Oregon holding that anything not for the best interest of the public would be "detrimental to the public welfare" within the meaning of those words as used in this section have been followed in this state in *Tanner v. Bacon*, 103 Utah 494, 136 P.2d 957 (1943).

REHEARINGS.

State engineer has authority to grant a rehearing of his decision to grant an application for appropriation of water rights. *Clark v. Hansen*, 631 P.2d 914 (Utah 1981).

REVIEW OF ENGINEER'S DECISION.

A landowner was not entitled to mandamus to compel state engineer to grant the right to perfect the irrigation ditch of a third person, so as to avoid waste of water by seepage and to permit the landowner to use the water saved. *Tanner v. Beers*, 49 Utah 536, 165 P. 465 (1917), applying Comp. Laws 1907, § 1288x10.

This state follows the California rule that where the state engineer does not act arbitrarily or capriciously his action must be upheld. *Tanner v. Bacon*, 103 Utah 494, 136 P.2d 957 (1943).

"The state engineer may not arbitrarily reject one application and approve another one for the same thing, even though the latter is not protested." Of course, however, plaintiff cannot complain where district court directs state engineer to approve plaintiff's application without making it subject to another and subsequent application to appropriate waters of same river, where diversion point in both applications was approximately the same, and application was not protested and was approved by state engineer. *Tanner v. Bacon*, 103 Utah 494, 136 P.2d 957 (1943).

In a review of a decision of the state engineer, the court may try all pertinent issues to determine whether the applicant has met its burden of showing that the necessary conditions exist to warrant approval of his application to appropriate

water, and the district court review is not limited to the particular issues as determined by the state engineer. *Shields v. Dry Creek Irrigation Co.*, 12 Utah 2d 98, 363 P.2d 82 (1961).

The proceeding to review a decision of the state engineer rejecting an application to appropriate water is equitable in nature and, where there was a finding that the applicant failed to show a feasible plan for the diversion of water, the finding could be reversed only if the evidence clearly preponderated against it. *Shields v. Dry Creek Irrigation Co.*, 12 Utah 2d 98, 363 P.2d 82 (1961).

The Supreme Court will affirm the trial court's approval of an application to appropriate waters if, from the evidence, the court finds probable cause to believe that there are unappropriated waters available for appropriation and that the applicants can make the appropriation without interfering with prior rights to the use of the water by others. *Reimann v. Richards*, 12 Utah 2d 109, 363 P.2d 499 (1961).

SPECULATION.

Where applicant testified without contradiction that he intended no profit for himself and where he sold his rights for practically what he spent apparently receiving nothing for his own efforts and time, the application could not be considered made for speculative purposes. *Whitmore v. Welch*, 114 Utah 578, 201 P.2d 954 (1949).

A land sale contract providing that water rights acquired by the buyer or his assignee be considered appurtenant to the land and that title to such rights pass to the seller on default did not constitute speculation in water rights by the seller. *Frailey v. McGarry*, 116 Utah 504, 211 P.2d 840 (1949).

Speculation in the public waters of this state is against the best interests of its people. Although the legislature has given formal expression to this principle, the principle would be equally true in the absence of statute. *Frailey v. McGarry*, 116 Utah 504, 211 P.2d 840 (1949).

UNAPPROPRIATED WATER IN SOURCE.

In a doubtful case the application should be approved, since the policy of the law is to prevent waste and promote the largest beneficial use of water. Therefore new appropriations should be favored and not hindered. If it is apparent from the findings that there is a substantial quantity of unappropriated water in the source, it is erroneous to deny application. *Little Cottonwood Water Co. v. Kimball*, 76 Utah 243, 289 P. 116 (1930); *Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co.*, 104 Utah 202, 135 P.2d 108 (1943); *Whitmore v. Welch*, 114 Utah 578, 201 P.2d 954 (1949).

Under this section it is not a prerequisite to the approval of an application that the state engineer find affirmatively that there is unappropriated water in the proposed source. Stated negatively, it is only when there is no unappropriated water in the source that the application is to be rejected. *Little Cottonwood Water Co. v. Kimball*, 76 Utah 243, 289 P. 116 (1930).

Where claim of abandonment is advanced, state engineer should approve application for appropriation, since question whether there is unappropriated water in proposed source depends upon determination in proper proceeding of fact of legal abandonment, and approval of application would be condition precedent to subsequent claimant asserting right to water involved. *Whitmore v. Welch*, 114 Utah 578, 201 P.2d 954 (1949).

If there is unappropriated water in proposed source, or if it is not clear that there is no unappropriated water in proposed source, then state engineer should approve application, provided applicant satisfies other requirements of this section. *Lehi Irrigation Co. v. Jones*, 115 Utah 136, 202 P.2d 892 (1949).

Applications should be approved if the evidence shows reasonable grounds to believe that unappropriated waters may be appropriated under the application. *Little Cottonwood Water Co. v. Sandy City*, 123 Utah 242, 258 P.2d 440 (1953).

Where the applicant seeks to appropriate underground waters which are part of the source of a surface stream, which surface stream is already appropriated and there is evidence giving reasonable grounds to believe that unappropriated waters may be appropriated under the application, the application should be granted. It is not necessary that the applicant show that a new source of water has been found, but only that additional water can be beneficially used without interfering with prior rights. *Little Cottonwood Water Co. v. Sandy City*, 123 Utah 242, 258 P.2d 440 (1953).

COLLATERAL REFERENCES

UTAH LAW REVIEW. --Recent Developments in Utah Law -- Judicial Decisions -- Water Law, 1990 Utah L. Rev.

195.

JOURNAL OF ENERGY LAW AND POLICY. --A Primer of Utah Water Law, 5 *J. Energy L. & Pol'y* 165 (1984).

A Primer of Utah Water Law: Part II, 6 *J. Energy L. & Pol'y* 1 (1985).

Water Planning: Untapped Opportunity for the Western States, 9 *J. Energy L. & Pol'y* 1 (1988).

JOURNAL OF ENERGY NATURAL RESOURCES AND ENVIRONMENTAL LAW. --Note, *Bonham v. Morgan*: Utah's "New" Criteria for Water Right Change Applications, 11 *J. Energy, Nat. Resources & Envtl. L.* 143 (1990).

The Upstream Battle in the Protection of Utah's Instream Flows, 14 *J. Energy, Nat. Resources, & Envtl. L.* 113 (1994).

Ability and Responsibility of State Engineer Regarding Reallocation of Water Rights, 20 *J. Land, Resources & Envtl. L.* 41.

110NGG

***** Print Completed *****

Time of Request: Monday, March 15, 2010 17:42:59 EST

Print Number: 1842:210012152

Number of Lines: 242

Number of Pages: 7

Send To: MOLEN, LANE
SNELL & WILMER
GATEWAY TOWER WEST
15 WEST S TEMPLE STE 1200

Tab 8

APPLICATION FOR PERMANENT CHANGE OF WATER

STATE OF UTAH

Rec. by 28

Fee Paid \$125.00

Receipt # 04-03604

For the purpose of obtaining permission to make a permanent change of water in the State of Utah, application is hereby made to the State Engineer, based upon the following showing of facts, submitted in accordance with the requirements of Section 73-3-3 Utah Code Annotated 1953, as amended.

RECEIVED

AUG 26 2004

CHANGE APPLICATION NUMBER:
(c2183NJANKO)

WATER RIGHTS
SALT LAKE

WATER RIGHT NUMBER: 55-11041

This Change Application proposes to change the POINT(S) OF DIVERSION and PLACE OF USE.

1. OWNERSHIP INFORMATION.

A. NAME: Marilyn Hamblin
ADDRESS: 2242 North 390 East
Provo UT 84604

INTEREST: 100%

NAME: GCII Investments
ADDRESS: 242 S 200 E
Salt Lake City, UT 84111
REMARKS: INTERESTED PARTY

NAME: Highland City Corporation
ADDRESS: 5378 W 10400 N
Highland, UT 84058
REMARKS: INTERESTED PARTY

NAME: Highland Water Company
ADDRESS: 5378 W 10400 N
Highland, UT 84058
REMARKS: INTERESTED PARTY

B. PRIORITY OF CHANGE:

FILING DATE:

C. EVIDENCED BY:
55-11041

* DESCRIPTION OF CURRENT WATER RIGHT: *

2. SOURCE INFORMATION.

A. QUANTITY OF WATER: 0.6 cfs

B. SOURCE: Spring Creek and Provo River

COUNTY: Utah

C. POINT(S) OF DIVERSION.

3. WATER USE INFORMATION.

IRRIGATION: from Apr 1 to Oct 31. IRRIGATING: 30.0000 acres.

4. PLACE OF USE.

THE FOLLOWING CHANGES ARE PROPOSED:

5. SOURCE INFORMATION.

A. QUANTITY OF WATER: 120.0 acre-feet

B. SOURCE: Underground Wells (9)(Existing)

COUNTY: Utah

C. POINT(S) OF DIVERSION. Changed as Follows:

POINTS OF DIVERSION -- UNDERGROUND:

- | | | |
|--------------------------|--|-------------------------------|
| (1) S 740 feet | 0 feet from N $\frac{1}{4}$ corner, Section 23, T 4S, R 1E, SLBM | WELL DEPTH: 100 to 1,000 feet |
| WELL DIAMETER: 16 inches | | |
| (2) N 90 feet E | 600 feet from S $\frac{1}{4}$ corner, Section 25, T 4S, R 1E, SLBM | WELL DEPTH: 598 feet |
| WELL DIAMETER: 16 inches | | |
| (3) S 1,150 feet | 0 feet from N $\frac{1}{4}$ corner, Section 26, T 4S, R 1E, SLBM | WELL DEPTH: 100 to 1,000 feet |
| WELL DIAMETER: 16 inches | | |
| (4) S 1,490 feet W | 1,500 feet from NE corner, Section 34, T 4S, R 1E, SLBM | WELL DEPTH: 100 to 1,000 feet |
| WELL DIAMETER: 16 inches | | |
| (5) N 1,671 feet E | 58 feet from S $\frac{1}{4}$ corner, Section 35, T 4S, R 1E, SLBM | WELL DEPTH: 200 to 700 feet |
| WELL DIAMETER: 16 inches | | |
| (6) N 950 feet E | 310 feet from W $\frac{1}{4}$ corner, Section 36, T 4S, R 1E, SLBM | WELL DEPTH: 601 feet |
| WELL DIAMETER: 16 inches | | |
| (7) S 180 feet E | 1,210 feet from NW corner, Section 01, T 5S, R 1E, SLBM | WELL DEPTH: 200 to 700 feet |
| WELL DIAMETER: 16 inches | | |
| (8) N 2,490 feet E | 900 feet from S $\frac{1}{4}$ corner, Section 02, T 5S, R 1E, SLBM | WELL DEPTH: 200 to 500 feet |
| WELL DIAMETER: 16 inches | | |
| (9) S 84 feet W | 190 feet from NE corner, Section 03, T 5S, R 1E, SLBM | WELL DEPTH: 585 feet |
| WELL DIAMETER: 20 inches | | |

D. COMMON DESCRIPTION: In Highland City, UT Cty

6. WATER USE INFORMATION. Same as HERETOFORE.

7. PLACE OF USE. Changed as Follows:

(Which includes all or part of the following legal subdivisions:)

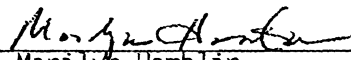
BASE	TOWN	RANG	SEC	NORTH-WEST ¼				NORTH-EAST ¼				SOUTH-WEST ¼				SOUTH-EAST ¼			
				NW	NE	SW	SE	NW	NE	SW	SE	NW	NE	SW	SE	NW	NE	SW	SE
SL	4S	1E	23				***					***		X		X	***	X	
			26		X		***					***				***			
SL	7S	2W	25				***					***	X	X	X	X	***		

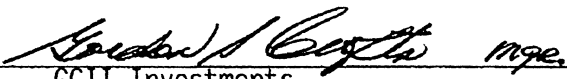
8. EXPLANATORY.

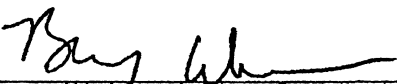
GCII Investments, Highland Water Company and Highland City Corporation have an agreement under which the water from water right 55-11041 will be diverted from the identified wells and used for irrigation on lands owned by GCII Investments.

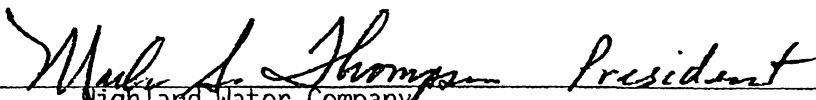
9. SIGNATURE OF APPLICANT(S).

The undersigned hereby acknowledges that even though he/she/they may have been assisted in the preparation of the above-numbered application, through the courtesy of the employees of the Division of Water Rights, all responsibility for the accuracy of the information contained herein, at the time of filing, rests with the applicant(s).

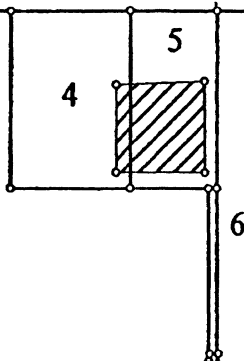

Marilyn Hamblin


GCII Investments


Highland City Corporation


Highland Water Company

Section 26, Township 4 South, Range 1 East



I hereby Submit This Map In Support Of
Location SS-11041 As A Tr
presentation Of My Knowledge And Belief.

(Print Name) _____

Title:

Date: 08-12-2004

Scale: 1 inch = 698 feet

File: Hamblin - Change Application Hereafter POU - Section 26.des

Data and Deed Call Listing of File: Hamblin - Change Application Hereafter POU - Section 26.des

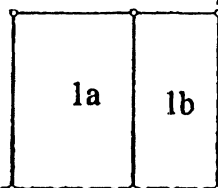
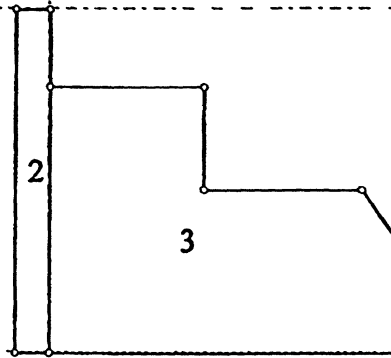
Tract 1: 640.000 Acres: 27878400 Sq Feet: Closure = n00.0000e 0.00 Feet: Precision >1/999999: Perimeter = 21120 Feet
Tract 2: 7.000 Acres: 304920 Sq Feet: Closure = n00.0000e 0.00 Feet: Precision >1/999999: Perimeter = 2244 Feet
Tract 3: 2.581 Acres: 112434 Sq Feet: Closure = n00.1804e 0.10 Feet: Precision =1/13230: Perimeter = 1342 Feet
Tract 4: 5.000 Acres: 217800 Sq Feet: Closure = n00.0000e 0.00 Feet: Precision >1/999999: Perimeter = 1980 Feet
Tract 5: 0.500 Acres: 21780 Sq Feet: Closure = n00.0000e 0.00 Feet: Precision >1/999999: Perimeter = 1386 Feet
Tract 6: 0.033 Acres: 1416 Sq Feet: Closure = s30.5229e 0.01 Feet: Precision =1/20743: Perimeter = 160 Feet

001=/SE,SE,SE,26,4S,1E
002=/N00E 5280.00
003=/N90W 0.00
004=S00W 5280.00
005=N90W 5280.00
006=N00E 5280.00
007=N90E 5280.00
008=@0
009=/n90w 2640
010=/n0e 5280
011=/n90w 20p
012=s0e 40p
013=n90w 28p
014=n0e 40p
015=n90e 28p
016=@0
017=/n90w 2640
018=/n0e 5280
019=/s00.1603e 258.99
020=/s87.3957w 50.03
021=s00.1603e 339.84
022=s89.5949w 338.48
023=n00.0011w 326.02
024=n87.3957e 337.19
025=@0
026=/n90w 2640
027=/n0e 5280
028=s0e 40p
029=n90w 20p
030=n0e 40p
031=n90e 20p
032=@0
033=/n90w 2640
034=/n0e 5280
035=/s0e 10c
036=s0e 10c
037=n90w 50l
038=n0e 10c
039=n90e 50l
040=@0
041=/n90w 2640
042=/n0e 5280
043=/s00.1603e 1279.28
044=n89.5639w 33
045=s00.1603e 29.18
046=s89.5657w 6.11
047=s0e 11.58
048=n90e 39.16
049=n00.1603w 40.74

Section 23, Township 4, South, Range 1 East

Surveyed and Map Is Correct Of
Set on 55-11041 As A - 6
Presentation Of My Knowledge And Belief.

Print Name) _____



Title:

Date: 08-12-2004

Scale: 1 inch = 698 feet

File: Hamblin - Change Application Hereafter POU - Section 23.des

Data and Deed Call Listing of File: Hamblin - Change Application Hereafter POU - Section 23.des

Tract 1: 640.000 Acres: 27878400 Sq Feet: Closure = n00.0000e 0.00 Feet: Precision >1/999999: Perimeter = 21120 Feet
Tract 2: 7.000 Acres: 304920 Sq Feet: Closure = n00.0000e 0.00 Feet: Precision >1/999999: Perimeter = 2244 Feet
Tract 3: 5.000 Acres: 217800 Sq Feet: Closure = n00.0000e 0.00 Feet: Precision >1/999999: Perimeter = 1980 Feet
Tract 4: 4.000 Acres: 174240 Sq Feet: Closure = n00.0000e 0.00 Feet: Precision >1/999999: Perimeter = 2904 Feet
Tract 5: 27.780 Acres: 1210098 Sq Feet: Closure = n00.0013w 298.96 Feet: Precision =1/16: Perimeter = 4891 Feet

001=/SE,SE,SE,23,4S,1E
002=/N00E 5280.00
003=/N90W 0.00
004=S00W 5280.00
005=N90W 5280.00
006=N00E 5280.00
007=N90E 5280.00
008=@0
009=/n90w 2640
010=/n90w 20p
011=n90w 28p
012=n0e 40p
013=n90e 28p
014=s0e 40p
015=@0
016=/n90w 2640
017=n90w 20p
018=n0e 40p
019=n90e 20p
020=s0e 40p
021=@0
022=/n90w 2640
023=/n0e 2640
024=s0e 80p
025=n90w 8p
026=n0e 80p
027=n90e 8p
028=@0
029=/n90w 2640
030=/n0e 2640
031=s0e 1320
032=n90e 1320
033=n0e 435.7
034=n34.46w 231.1
035=n90w 598.2
036=n0e 395.5
037=n90w 590

Section 25, Township 7 South, Range 2 West

I hereby certify this Map In Support Of
Section SS 11041 As A T la
presentation Of My Knowledge And Belief.

(Print Name) _____

Title:

Date: 08-12-2004

Scale: 1 inch = 698 feet

File: Hamblin - Change Application Hereafter POU - Section 25.des

Data and Deed Call Listing of File: Hamblin - Change Application Hereafter POU - Section 25.des

Tract 1: 640.000 Acres: 27878400 Sq Feet: Closure = n00.0000e 0.00 Feet: Precision >1/999999: Perimeter = 21120 Feet

Tract 2: 160.000 Acres: 6969600 Sq Feet: Closure = n00.0000e 0.00 Feet: Precision >1/999999: Perimeter = 10560 Feet

001=/SE,SE,SE,25,4S,1E

002=/N00E 5280.00

003=/N90W 0.00

004=S00W 5280.00

005=N90W 5280.00

006=N00E 5280.00

007=N90E 5280.00

008=@0

009=/n90w 2640

010=n0e 2640

011=n90w 2640

012=s0e 2640

013=n90e 2640

Tab 9



JON M. HUNTSMAN, JR.
Governor

GARY R. HERBERT
Lieutenant Governor

State of Utah

DEPARTMENT OF NATURAL RESOURCES

Division of Water Rights

MICHAEL R. STYLER
Executive Director

JERRY D. OLDS
State Engineer/Division Director

ORDER OF THE STATE ENGINEER

For Permanent Change Application Number 55-11041 (a29341)

Permanent Change Application Number 55-11041 (a29341) in the names of Marilyn Hamblin, GCII Investments, and Highland City Corporation was filed on August 26, 2004 to change the point of diversion and place of use of 0.6 cfs of water as evidenced by Water Right Number 55-11041, an award in the Provo River Decree. Heretofore, the water has been diverted from the Provo River. The water was used for the irrigation of 30.00 acres from April 1 to October 31.

Hereafter, it is proposed to divert 120.00 acre-feet from the following locations: (1) Well - North 90 feet and East 600 feet from the S $\frac{1}{4}$ Corner of Section 25, T4S, R1E, SLB&M (existing 16-inch, 598 feet deep); (2) Well - North 1671 feet and East 58 feet from the S $\frac{1}{4}$ Corner of Section 35, T4S, R1E, SLB&M (16-inch, 200-700 feet deep); (3) Well - South 84 feet and West 190 feet from the NE Corner of Section 3, T5S, R1E, SLB&M (existing 20-inch, 585 feet deep); (4) Well - South 1150 feet and 0 feet from the N $\frac{1}{4}$ Corner of Section 26, T4S, R1E, SLB&M (16-inch, 100-1000 feet deep); (5) Well - South 1490 feet and West 1500 feet from the NE Corner of Section 34, T4S, R1E, SLB&M (16-inch, 100-1000 feet deep); (6) Well - North 950 feet and East 310 feet from the W $\frac{1}{4}$ Corner of Section 36, T4S, R1E, SLB&M (existing 16-inch, 601 feet deep); (7) Well - South 180 feet and East 1210 feet from the NW Corner of Section 1, T5S, R1E, SLB&M (16-inch, 200-700 feet deep); (8) Well - North 2490 feet and East 900 feet from the S $\frac{1}{4}$ Corner of Section 2, T5S, R1E, SLB&M (16-inch, 200-500 feet deep); (9) Well - South 740 feet and 0 feet from the N $\frac{1}{4}$ Corner of Section 23, T4S, R1E, SLB&M (16-inch, 100-1000 feet deep). The nature of use of the water will remain the same as heretofore. The place of use of the water is being changed to all or a portion(s) of Section 23, T4S, R1E, SLB&M; Section 26, T4S, R1E, SLB&M; and Section 25, T7S, R2W, SLB&M.

Notice of the application was published in the New Utah on September 9 and September 16, 2004, and protests were received from New State, Inc. and United States Bureau of Reclamation. The protestants expressed concern about interference with their water rights and that the underlying water right not be enlarged by approval of this change application. A hearing was not held.

Field reviews of the underlying water right were conducted by staff of the State Engineer's Office on October 5, 2004, and in the summer of 2005. While the original diversion structure and conveyance ditch were observed to still exist, the place of use has changed to Brigham Young University's facilities for producing cinema films. The improvements on the property, including some limited irrigation, are being supplied by a public water supply system. The ditch and diversion structure were not in use. Observation of the area and conversation with people now on the property indicates that this water right has not been used for over 20 years.

ORDER OF THE STATE ENGINEER
Permanent Change Application Number
55-11041 (a29341)
Page 2

It appears that the extended period of nonuse of this water right may have resulted in the water right ceasing pursuant to Section 73-1-4 UCA. Inasmuch as beneficial use is the measure and limit of a water right, the underlying water right would be enlarged by approval of this change application causing a detriment to other rights and the hydrologic system.

Under the provisions of Section 73-1-4, Utah Code Annotated, "When an appropriator of the appropriator's successor in interest abandons or ceases to use all or a portion of a water right for a period of five years, the water right or unused portion of that water right ceases..." It is believed that it has been several years since this water right was used; therefore, it may be subject to non-use. As a result, this change application would result in an enlargement and cannot be approved.

It is the opinion of the State Engineer that this application should be rejected because no current uses of water are being made and can be abandoned in order to effect the change proposed.


In evaluating the various elements of the underlying right, it is not the intention of the State Engineer to adjudicate the extent of this right, but rather to provide sufficient definition of it to assure that other vested rights are not impaired by the change and/or no enlargement occurs. If, in a subsequent action, the court adjudicates that this right is entitled to either more or less water, the State Engineer will adjust the figures accordingly.

It is, therefore, **ORDERED** and Permanent Change Application Number 55-11041 (a29341) is hereby **REJECTED**.

Your contact with this office, should you need it, is with the Utah Lake/Jordan River Regional Office. The telephone number is 801-538-7240.

This Order is subject to the provisions of Administrative Rule R655-6-17 of the Division of Water Rights and to Sections 63-46b-13 and 73-3-14 of the Utah Code which provide for filing either a Request for Reconsideration with the State Engineer or an appeal with the appropriate District Court. A Request for Reconsideration must be filed with the State Engineer within 20 days of the date of this Order. However, a Request for Reconsideration is not a prerequisite to filing a court appeal. A court appeal must be filed within 30 days after the date of this Order, or ^{not} if a Request for Reconsideration has been filed, within 30 days after the date the Request for ^{03/01/06} Reconsideration is denied. A Request for Reconsideration is considered denied when no action is taken 20 days after the Request is filed.

Dated this 30th day of January, 2006.


Jerry D. Olds, P.E., State Engineer

ORDER OF THE STATE ENGINEER
Permanent Change Application Number
55-11041 (a29341)
Page 3

Mailed a copy of the foregoing Order this 30th day of January, 2006 to:

Marilyn Hamblin
2242 North 390 East
Provo, UT 84604

GCII Investments
242 South 200 East
Salt Lake City, UT 84111

Highland City Corporation
5378 West 10400 North
Highland, UT 84058

Brad Cahoon, Attorney for Marilyn Hamblin
15 West South Temple, Suite 1200
Salt Lake City, UT 84101

New State, Inc.
c/p Stephen C. Bamberger
PO Box 58483
Salt Lake City, UT 84158-8483

United States Bureau of Reclamation
c/o Jonathan B. Jones
302 East 1860 South
Provo, UT 84606-7317

BY: Kelly K. Horne
Kelly K. Horne, Appropriation Secretary

Tab 10



JON M. HUNTSMAN, JR.
Governor
GARY R. HERBERT
Lieutenant Governor

State of Utah
DEPARTMENT OF NATURAL RESOURCES
Division of Water Rights

MICHAEL R. STYLER JERRY D. OLDS
Executive Director State Engineer/Division Director

ORDER OF THE STATE ENGINEER

JAN 4 2008

For Permanent Change Application Number 55-11041 (a29341)

Permanent Change Application Number 55-11041 (a29341) in the names of Marilyn Hamblin, GCII Investments, and Highland City Corporation was filed on August 26, 2004 to change the point of diversion and place of use of 0.6 cfs of water as evidenced by Water Right Number 55-11041, an award in the Provo River Decree. Heretofore, the water has been diverted from Spring Creek and Provo River. The water was used for the irrigation of 30.00 acres from April 1 to October 31.

Hereafter, it is proposed to divert 120.00 acre-feet from the following locations: (1) Well - North 90 feet and East 600 feet from the S¼ Corner of Section 25, T4S, R1E, SLB&M (existing 16-inch, 598 feet deep); (2) Well - North 1671 feet and East 58 feet from the S¼ Corner of Section 35, T4S, R1E, SLB&M (16-inch, 200-700 feet deep); (3) Well - South 84 feet and West 190 feet from the NE Corner of Section 3, T5S, R1E, SLB&M (existing 20-inch, 585 feet deep); (4) Well - South 1150 feet and 0 feet from the N¼ Corner of Section 26, T4S, R1E, SLB&M (16-inch, 100-1000 feet deep); (5) Well - South 1490 feet and West 1500 feet from the NE Corner of Section 34, T4S, R1E, SLB&M (16-inch, 100-1000 feet deep); (6) Well - North 950 feet and East 310 feet from the W¼ Corner of Section 36, T4S, R1E, SLB&M (existing 16-inch, 601 feet deep); (7) Well - South 180 feet and East 1210 feet from the NW Corner of Section 1, T5S, R1E, SLB&M (16-inch, 200-700 feet deep); (8) Well - North 2490 feet and East 900 feet from the S¼ Corner of Section 2, T5S, R1E, SLB&M (16-inch, 200-500 feet deep); (9) Well - South 740 feet and 0 feet from the N¼ Corner of Section 23, T4S, R1E, SLB&M (16-inch, 100-1000 feet deep). The nature of use of the water will remain the same as heretofore. The place of use of the water is being changed to all or a portion(s) of Section 23, T4S, R1E, SLB&M; Section 26, T4S, R1E, SLB&M; and Section 25, T7S, R2W, SLB&M.

Notice of the application was published in the *New Utah* on September 9 and September 16, 2004, and protests were received from New State, Inc. and United States Bureau of Reclamation. The protestants expressed concern about interference with their water rights and that the underlying water right not be enlarged by approval of this change application.

By Order of the State Engineer dated January 30, 2006, this application was rejected. An administrative hearing was not held prior to the issuance of that decision. The applicants sought *de novo* review of the decision in the Fourth District Court before Judge Fred D. Howard. Judge Howard remanded the matter to the State Engineer for further administrative review. Accordingly, on December 5, 2007, the State Engineer conducted a hearing on the application. At the hearing, the applicants presented legal theories and interpretations of various Sections of 73-3 of the Utah Code including that Ms. Hamblin is entitled to the use of water solely by virtue of asserting ownership of an award to A.L. Tanner in the Provo River Decree (the Decree) and

ORDER OF THE STATE ENGINEER
Permanent Change Application Number
55-11041 (a29341)
Page 2

that the State Engineer cannot consider the historical use of water within his administrative review of change applications filed under Utah Code Section 73-3-3.

In her Report of Conveyance submitted to the State Engineer in 2004, Hamblin asserted she acquired ownership of Water Right No. 55-11041 from Brigham Young University in 2002 – approximately 45 years after the property to which the water was appurtenant was conveyed to BYU.¹ The 30 acres believed to have been irrigated by A.L. Tanner in the 1921 Decree is now the “film studio” property of BYU campus. From discussions between the State Engineer’s Office and BYU employees, personal observation during site visits by State Engineer staff, and as represented in documents received from BYU, no use of any water from 55-11041 has been made by BYU since at least 1980.² Although the 1921 Decree lists the right for 30 acres of irrigation in A.L. Tanner, none of the parties to this change application, including Hamblin, were able to provide any personal knowledge of the use of the water sought to be changed, and did not offer any information to contradict that BYU has not used the water right. Applicants have alleged that because the water in Spring Creek has recently ceased to flow due to urbanization in the area, they were excused from beneficially using the water. However, the Decree states that Spring Creek users may take water from Spring Creek and/or the Provo River. No evidence has been submitted to assert that water under this right was diverted from the Provo River to supplement or replace any deficiency in Spring Creek.

Section 73-1-3, unchanged since 1919, sums up a bedrock principle of Utah water law. “Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state.” Not only is this principle codified in statute, it appears several times in the Decree. For example, page 75, section 124 of the Decree says:

It is further ordered adjudged and decreed, that all the rights declared and decreed herein are founded upon appropriation of water necessary for some beneficial use, and all such rights are subject in their exercise to the conditions that they are required and necessary for beneficial uses and all such rights are expressly subject to the limitations and conditions that all of such water is used for some beneficial purpose and is used economically, without waste, and with due care, and is reasonably and fairly necessary for such use.

¹ Prior to the December 5th hearing, the State Engineer provided to all parties copies of documents obtained from BYU that indicate how Hamblin approached BYU about 55-11041 which led to Hamblin’s acquisition of the right. To BYU, Hamblin asserted ownership of the water right through a 1913 deed, and because of that “cloud” on BYU’s title, offered to lease the water under the right to BYU. After obtaining a quitclaim deed from BYU, Hamblin then submitted a report of conveyance to the State Engineer claiming ownership through BYU. When asked for additional information on the discrepancy between the ownership claims to BYU and to the State Engineer, Hamblin offered no explanation.

² BYU employees seriously doubt they have ever used water from 55-11041 since acquiring the property — but from first hand employee knowledge, they have not used the right since at least 1980.

That all the rights declared and decreed herein are awarded for the beneficial uses specified and none of the parties hereto, or their successors in interest, whether heirs, executors, administrators, successors or assigns, shall divert any of the waters of said Provo River, or any of its tributaries, except for beneficial use, and whenever such use has ceased such party or parties shall cease to divert, and shall have no right to divert, the said waters, or any part thereof[.]

Decree, page 75, section 124

The beneficial use of water establishes the measure and limit of all Utah water rights.³ As the Decree reiterates, water users have an ongoing responsibility to fully use the water to which they are entitled. Use of water is a litmus test for whether a right remains valid and a framework to evaluate the water right when a change application is filed. Without the beneficial use of water, other water users cannot determine the existence of a water right or its validity and the State Engineer cannot administer the uses of water or fulfill other statutory duties. Filing for an extension of time or a non-use application pursuant to 73-1-4 notifies the public of a water user's intent to maintain the validity of a right when he is not actually beneficially using it. Here, no application for non-use was ever filed.

Since Section 73-1-3 states that beneficial use is the basis, the measure, and limit of a water right, inasmuch as these applicants cannot confirm that water has been beneficially used under the right sought to be changed and the State Engineer's investigation found no evidence of beneficial use, the State Engineer cannot quantify the right or determine if any water use under this right continues to exist which can be changed.

Just as beneficial use is the measure and limit of a right, beneficial use is the standard by which changes are measured under Section 73-3-3 – the statute by which the State Engineer addresses change applications.

³ The applicants argue that water law principles are controverted where the Provo River Decree, before delineating water rights and associated acreage for each, notes: "Spring Creek. As tenants in common in the right to the use of water from Spring Creek and Provo River, in Utah County, Utah." Page 19, section 22. Contrary to their application form and title report, Applicants now argue that the subsequent separated rights are held together as one right, and that the use of one of those rights acts to preserve them all. In other words, the argument seems to be that one user, entitled to irrigate perhaps 5 acres, may – by irrigating only his own 5 acres - thereby preserve his own use for 5 acres of irrigated land, and preserve the use for 30 acres under Water Right No. 55-11041, and innumerable other acreage plots. This runs directly contrary to not only the Utah Code, 73-1-3, but also established case law and the Decree itself. A water user cannot claim or preserve a right to more than he beneficially uses.

Further, the Spring Creek water users are not (and are not decreed to be) an association which holds a common beneficial use. The Decree, which elsewhere defines a "[j]ointly and undivided" common use to an acreage amount (pages 22-23, section 23), defines each Spring Creek right by its own beneficial use. Although the Spring Creek users have a common right to the water source (and thereby take turns using the whole of it), each number of irrigated acres (each beneficial use), is individually listed and must be independently maintained by its own beneficial use. For many reasons, applicants' argument that the tenancy in common language allows some unknown user to preserve all the Spring Creek rights fails.

Section 73-3-3 has several subsections that apply to Hamblin's application. Section 73-3-3(1)(a) states,

"Permanent changes" means changes for an indefinite length of time with an intent to relinquish the original point of diversion, place of use, or purpose of use.

Likewise, Section 73-3-3(4)(b)(v), mandates that the applicant identify and set forth "the point on the stream or source where the water is diverted" and Section 73-3-3(4)(b)(vii), requires that the applicant identify and set forth "the place, purpose, and extent of the present use." Of particular importance is Section 73-3-3(2)(a) which allows a "person entitled to the use of water" to file a change application. Also important are the provisions of Section 73-1-4(3)(a) which provides that where water use under a water right ceases for a five year period, the "water right ceases."

Just as the need for an ongoing beneficial use pervades the water statutes, a water user seeking approval of a change application must provide the location of the existing point of diversion, the place of use and the extent of the present use of the water sought to be changed. The statute requires applicants to supply such information and that information must be considered by the State Engineer in evaluating an application for change.

As mentioned, Ms. Hamblin has established no beneficial use under the water right for Change Application Number 55-11041 (a29341) since at least 1980. Based on the Section 73-3-3 (and 73-3-1) requirements to identify and establish current beneficial use, Ms. Hamblin's failure to present such information on her application form as required in Section 73-3-3(4)(b)(v) and (vii), and because Ms. Hamblin is not a "person entitled to the use of water" under Section 73-3-3(2)(a) for the purpose of filing a change application, the State Engineer must reject this application.

Nevertheless, the Fourth District Court November 26, 2007 Order directed that the State Engineer "will specify his reasons and any statutory basis for approval or rejection of, Plaintiff's Permanent Change Application No. a29341 filed August 26, 2004 in a revised order." The State Engineer interprets this to mean he should evaluate the application based on all criteria in Section 73-3-3 and 73-3-8.

The State Engineer has considered the criteria for approval of a change application contained in Section 73-3-8(1). The decision in *Bonham v. Morgan*, 788 P.2d 497 (Utah 1989), as well as 73-3-3(5)(a), require the state engineer to review and evaluate change applications based on essentially the same criteria as applications to appropriate. The requirements for approval, and the State Engineer's reasoning with respect to each, follow.

Subsection (a)(i), "there is unappropriated water in the proposed source." In a water system that is fully appropriated like Utah Valley,⁴ all available water is being placed to beneficial use or covered by valid existing water rights. Therefore, as applied to change applications, the only "unappropriated water" available for use in a new location must be the water use discontinued in the original place of use. New uses of water not accompanied by discontinued uses take water from other users in the system. Where neither BYU, Ms. Hamblin, nor any other water user has beneficially used water under Water Right No. 55-11041 at its original place of use or any other location, there is no water from any current use to act as the necessary "unappropriated water" to fulfill the need for water which is used in the new location. Therefore, the application fails to meet this requirement.

Subsection (a)(ii) "the proposed use will not impair existing rights or interfere with the more beneficial use of the water." Generally, absent localized interference problems, if a proposed change does not create a situation where more water will be diverted or depleted from the hydrologic system than has been beneficially used under the historic water right, impairment of other rights within the system will not occur. However, granting a change application where no valid current use can be discontinued to support the change creates a new depletion from the system. In a system that is fully appropriated, existing rights are therefore inescapably impaired by any new depletion. In the case of this application, the historic use of the water cannot be identified and therefore cannot be discontinued. Therefore, the application fails to meet this requirement.

Subsection (a)(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." The proposed plan would be physically feasible if historic uses could be identified and discontinued. Where there is no use to discontinue, this requirement is not met. The State Engineer presumes the proposal is economically feasible since the new diversion requires only the use of existing diversion works. Therefore, the application meets this requirement.

Subsection (a)(iv) "the applicant has the financial ability to complete the proposed works." The State Engineer presumes the applicant or co-applicants have the financial ability to implement this application. Therefore, the application meets this requirement.

Subsection (a)(v) "the application was filed in good faith and not for purposes of speculation or monopoly." Solely for the purposes of this application, it is the opinion of the State Engineer that there is reason to believe that filing this application to establish additional irrigation water rights for Highland City meets this criteria assuming the City is in need of such water. Should a court desire to further investigate if the applicants are

⁴ No application to appropriate water such as the volume involved in 55-11041 has been approved in Utah Valley for over 40 years. Small domestic applications were approved for some time after that, but even those have long been discontinued.

acting in good faith or for the purpose of speculation, the State Engineer could assist as directed in this matter.

Subsection (b)(i) states that if the state engineer has reason to believe that an application will interfere with its more beneficial use, unreasonably affect public recreation or the natural stream environment, or prove detrimental to the public welfare, approval or rejection of the application is to be withheld until the state engineer has investigated the matter. As explained under the (a)(i) requirement, since this application is for a change in a fully or over appropriated system and no valid existing use is being retired, this application would prove detrimental to other valid existing water uses and the fully-appropriated ground water resource, and therefore the public welfare, if it were approved. Until the state engineer and other water users are provided the historic place of use and can evaluate those uses, it is the opinion of the state engineer that this application is detrimental to the public welfare and therefore fails to meet this requirement.

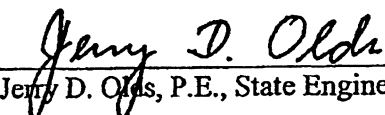
Subsection (b)(ii) directs the state engineer to reject any application that does not meet the criteria of this section.

After carefully considering the merits of the water right and the assertions of the applicants, it remains the opinion of the State Engineer that this application must be rejected because it fails to meet the criteria of Sections 73-3-3 and 73-3-8 as outlined above.

It is, therefore, **ORDERED** and Permanent Change Application Number 55-11041 (a29341) is hereby **REJECTED**.

This Order is subject to the provisions of Administrative Rule R655-6-17 of the Division of Water Rights and to Sections 63-46b-13 and 73-3-14 of the Utah Code which provide for filing either a Request for Reconsideration with the State Engineer or for *de novo* review in an appropriate Utah State district court. A Request for Reconsideration must be filed with the State Engineer within 20 days of the date of this Order. However, a Request for Reconsideration is not a prerequisite to filing for *de novo* review. *De novo* judicial review must be sought within 30 days after the date of this Order, or if a Request for Reconsideration has been filed, within 30 days after the date the Request for Reconsideration is denied. A Request for Reconsideration is considered denied when no action is taken 20 days after the Request is filed.

Dated this 4 day of January, 2008.



Jerry D. Olds, P.E., State Engineer

ORDER OF THE STATE ~~ENGINEER~~
Permanent Change Application Number
55-11041 (a29341)
Page 7

Mailed a copy of the foregoing Order this 4 day of January, 2008 to:

Marilyn Hamblin
2242 North 390 East
Provo, UT 84604

GCII Investments
242 South 200 East
Salt Lake City, UT 84111

Highland City Corporation
5378 West 10400 North
Highland, UT 84058

Brad Cahoon, Attorney for Marilyn Hamblin
15 West South Temple, Suite 1200
Salt Lake City, UT 84101

New State, Inc.
c/p Stephen C. Bamberger
PO Box 58483
Salt Lake City, UT 84158-8483

United States Bureau of Reclamation
c/o Jonathan B. Jones
302 East 1860 South
Provo, UT 84606-7317

BY: Kelly K. Horne
Kelly K. Horne, Appropriation Secretary

Tab 11

IN THE SUPREME COURT

OF THE

STATE OF UTAH

- - - - -

NEPHI CITY, a municipal :
corporation, :

Plaintiff-Appellant, :

vs. :

CASE NO. 860614

DEE C. HANSEN, State Engineer :
of the State of Utah; and :
Utah State Division of :
Wildlife Resources, :

13 b

Defendant-Respondents. :

BRIEF OF APPELLANT

Appeal from Order and Judgment of the Fourth Judicial
District Court, Juab County, State of Utah, the Honorable
Boyd L. Park, District Judge.

David L. Wilkinson, No. 3472
Utah Attorney General
Michael M. Quealy, No. 2667
Assistant Attorney General
1636 West North Temple
Suite 300
Salt Lake City, Utah 84116
Telephone: (801) 533-4446
Attorneys for Respondent

Donald J. Eyre Jr., No. 1021
Nephi City Attorney
125 North Main
Nephi, Utah 84648
Telephone: (801) 623-1141
Attorney for Appellant

FILED

MAR 9 1987

Clerk, Supreme Court, Utah

IN THE SUPREME COURT FOR THE STATE OF UTAH

NEPHI CITY, a municipal corporation,	:	
	:	
Plaintiff-Appellant	:	
vs.	:	
	:	No. 860614
DEE C. HANSEN, State Engineer of the State of Utah; and Utah State Division of Wildlife Resources,	:	
	:	
Defendant-Respondents.	:	

NATURE OF THE CASE

This case is an appeal by Nephi City from an Order and Judgment of the Fourth Judicial District Court in and for Juab County, State of Utah, the Honorable Boyd L. Park presiding, thereby upholding certain decisions of the State Engineer of the State of Utah rejecting Nephi City's Change Applications for a permanent change of point of diversion with respect to certain water rights.

DISPOSITION IN LOWER COURT

Nephi City timely brought this action to appeal certain decisions of the State Engineer rejecting Nephi City's Change Applications for a permanent change of point of

diversion with respect to certain water rights. Nephi City subsequently filed a Motion for Summary Judgment and the defendants then filed a cross-motion for Summary Judgment. Each party submitted a Memorandum of Law in support of their Motions for Summary Judgment. A hearing was held before the District Court where the Court heard oral arguments, after which the District Court entered its Order and Judgment granting the defendant's Motion for Summary Judgment and denying Nephi City's Motion for Summary Judgment, from which this appeal is taken.

STATEMENT OF ISSUES

The issue raised by this appeal is whether the State Engineer may constitutionally declare a municipal corporation's water right forfeited for non-use pursuant to section 73-1-4 U.C.A. 1953 as amended given the provisions of Article XI Section 6 of the Utah Constitution which in essence states that a municipality within the State of Utah may not transfer or dispose of its water rights except in exchange for a water right or water supply of equal value.

CONSTITUTIONAL PROVISIONS AND STATUTES

ARTICLE XI SECTION 6, UTAH CONSTITUTION

Tab 12

Utah Legislative Session
HB 69
House Floor Debate
Day 15 – 1/29/1996

House
Speaker
(HS) Madam Reading Clerk.

Clerk HB 69, Forfeiture of Water Rights by David Ure. Committee vote, 12 yes, 1 no, 5 absent.

HS Rep. Ure

Rep. Ure Thank you Mr. Speaker. The following two bills, both were came through an ad hoc task force that was appointed by the chairmen of the Natural Resource Committee during interim. It was chaired by Ted Stewart with Bob Morgan as assistant, who was the State Water Engineer, there were various interests from all over the State of Utah, we had probably five or six of the best water attorneys in the State of Utah attend these hearings. We had all the different major water controllers in Utah, the Weber Davis Water Basin, the Salt Lake City Water District, the CUP was involved. We tried to cover most everyone we could in this ad hoc task force. What we did was finally establish a way that water might be forfeited after it's had a five years non-use in the State of Utah. We did nothing to change that part of the code. We only established a way that the foreclosure might come close – might finally be complete. We did this for several reasons; Number one, probably number one, 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. Well, the same problem was also greatly addressed by the financial institutions. Water stock has been used or decreed water has been used as a collateral for many of the financial institutions in the State of Utah. And with that cloud back there, thirty, forty, fifty years, and Great Grandpa died a year ago so we can't use him for verification whether it was right or wrong. We needed to do something to bring that cloud to a close, and this is what we have done. We have said that if a person starts to store up their water rights, or reuse them again, then if they have harmed someone downstream, then they have twenty years to protest that. And when I say protest it, I mean they have to take them to court and prove that this person did not use their water rights for five years during such and such an era. And it's only through the court system that this can be completed. And this is virtually what we have done, this has been through the Natural Resource Committee now three times. It has never received a negative vote, it has been questioned by the people at the Natural Resources and hopefully all of the bugs have been worked out of it. Any amendments that have been proposed have always gone back to the original committee so that all of the attorneys agreed that the words that were being

used were exactly what they meant. And so these are the words, these are the – this is the amendment that has been proposed by this ad hoc task force and they're all feeling comfortable with what they have done. With that Mr. Speaker, I would hope that no questions would come forth.

HS If you could see what I could see [laughter], Rep. Valentine

Rep. Valentine Thank you Mr. Speaker, will the sponsor yield to some questions?

Rep. Ure Yes.

HS Yes, you may proceed.

Rep. Valentine Sorry about that Representative. I've gotta understand it and I have to almost make a record to make certain that I understand it. Under House Bill 69 as you have it drafted, does this forfeit municipal and county water rights if they are not used in accordance with – as outlined in this bill?

Rep. Ure There is no one exempt, but it has to be a decreed water right. If you own water in say the Beaver Creek Water Company, this will not pertain to you, but if you have a decreed water right, yes. No one is exempt from this.

Rep. Valentine So even a municipality could lose its decreed water rights if it is not being used?

Rep. Ure Correct. But Representative, it's already in place. If they have not used it now, then it still reverts back to the State of Utah.

Rep. Valentine So what is the purpose of the bill?

Rep. Ure It's to make a way to finally bring it to court – see there is no process in place for which the forfeiture finally came closed and this is the reason for it. If a municipality already has not been using their water rights, by state law it has already been forfeited. But no one has used – used the way to show that it has been forfeited.

Rep. Valentine So there is no way presently to actually show a forfeiture of water rights?

Rep. Ure Correct.

Rep. Valentine So there has never been any water right forfeited in the state since the day we were made a state?

Rep. Ure Uh – I could not answer that question. I don't know, I'd have to ask the Water Engineer who's over here next to Representative Harwood - if he would nod yes or no?

Rep. Valentine It looks like he's on the phone at this moment.

Rep. Ure Well –

Rep. Valentine Obviously water is one of the very most important things in this whole state, and before we go and do something to water, I really feel like I oughta understand it. I've read the bill, I've read it a couple times, I'm not sure I understand it anymore than I did before. But it is one that I'm concerned about, I also need to declare a potential conflict of interest to this body; I am presently on the Orem Metropolitan Water Board. Thank you Mr. Speaker.

HS Thank you. Representative Garn

Rep. Garn Thank you Mr. Speaker, will the sponsor yield to some questions?

Rep. Ure Yes I will.

HS Yes, you may proceed.

Rep. Garn I guess I'm like Representative Valentine, I'm trying to understand this bill and the concern that I have is the notification. Let's assume somebody goes five years without using their water. Tell me the notification process that occurs?

Rep. Ure Now you're saying that Kevin Garn has gone five years without using his water?

Rep. Garn Yes.

Rep. Ure There is not a notification, but had Kevin Garn applied for an extension of his water rights that would have been granted by the State of Utah. To further, uh, carry out your water rights for non-use. See there haven't been notifications sent out, but you haven't been using your water. See if you have your well and you have 380 acre feet of decreed water in your well, the State of Utah doesn't know whether you use that or not.

Rep. Garn I guess what I'm concerned about is that the state is terminating water rights without notification and -

Rep. Ure Only, no – okay, I see what your question is. There would be notification, if I were to protest you, there would be notification sent to you that I was taking you to court

for forfeiture of your water. The due process is taking place; all parties are being notified that the court hearing is taking place. No water rights will be taken away without your knowledge.

Rep. Garn Okay, so if I don't use my water, then I am notified that the state could terminate that right?

Rep. Ure Yes, in the final court action, you will be notified yes.

Rep. Garn Okay now over on page 3, line 18, it says: "the appropriator's water right ceases and the water reverts to the public if they"- and then down to 22, "if the State Engineer denies the application for an extension of time." What does that mean? Are we vesting an authority with the State Engineer that maybe goes beyond what we really want to have happen?

Rep. Ure Give me that question again please?

Rep. Garn Well, the concern that I have is are we giving too much power to the State Engineer? It says, "if the State Engineer denies the application for extension of time." What's the basis for that denial if that happens?

Rep. Ure Well, first of all, the State Water Engineer already has that authority now. This is just being put in another place, but he already has that authority now and it's been granted to him since the State Water Engineer was put into place. Well, if a person comes in and asks twice for an extension of his water right, he does deny that. But everything is still – ask me the question again so I can remember this time.

Rep. Garn I guess the concern is that the State Engineer can deny applications for the extension of time. Is there due process somewhere in there? Can he just do it at will? Is there some procedure he has to follow?

Rep. Ure Well, yes he has his rules already written out, he falls under the Administrative Rules Code, and so the rules are already in place the first five years of extension, he has to give that to you automatically. If you have some extenuating circumstances, like you had a broken leg for four years, and you were going to use it the next four years, then he could take that as a process and which he could give you an extension extending your rights.

Rep. Garn Okay, I think you've answered my concerns. I was concerned about the notification process, and if it was –

Rep. Ure They are all in place.

Rep. Garn Alright, thank you.

HS Representative Brown.

Rep. Brown Fellow Representatives, let me give you a little bit of background on this bill. Last year I actually sponsored this bill and in the process there were a number who felt they needed some time to negotiate and come up with the right proposal so that both the municipalities -and this was the question asked by Representative Valentine and others- had some protection. Under the current law, let me give you the scenario that exists. If you buy a piece of land, or you think you own a water right and when title is changed to a piece of property that has water attached to it, if anywhere in the history of that water right they can go back and find that that water hadn't been used for five years, that right is automatically forfeited under current law. In other words, if Representative Hickman bought a ranch, he's turned into a big cattle baron now, and with that came a water right, a decreed water right, but in the process of exchanging the deeds and so on, somebody said "hey this right wasn't used, because some little old lady that owned the land didn't put the water to the correct use," they could challenge the legality of his water rights and say that its now publically owned because it wasn't used. So, what we're trying to do is put a process in place that protects people, not gives them more exposure. Whether it's individual water owners or municipalities or what. Now even in this bill, the challenge of your water rights must be brought about in court action. In other words, if no one says anything about your non-use, then it is still your water right. But if someone decides that you haven't utilized that water right and wants to challenge it, they can do it through court. Now, you can apply for an extension and that notification clause in this bill just deals with the extension. You have to be notified when your extension is expiring. And so the whole premise of this bill is not to put at risk a water right, but is to put into place a process so that water rights can be better and more easily protected so that they can't be lost just from non-use without any recourse. Thank you.

Thank you. Rep. Johnston. The Motion to Abolish a Majority Caucus.

Rep. Johnston [chuckles] I've got a little different motion than that one. The motion that I have is an amendment. This bill has been explained to you pretty well and it's been unanimously received. It's been during legislative interim it was discussed very well. There has only been one question that's ever been raised and that's what the period of time should be -

HS Rep. Johnston, are you speaking to the amendment?

Rep. Johnston Right, let me give you the amendment.

HS Give me the amendment and then reserve the right to speak to us.

Rep. Johnston Okay, on page one, line 21, change twenty years to ten. On page one, line 23, the same thing, twenty to ten. Now I think that most of the body really understands

what this bills doing, are very supportive of the bill, this is absolutely necessary, the only question is, How long should it be? And that's what we've discussed and I've come to the opinion that most people are decided that ten years is a better number, it just gives quicker protection, it makes it better for the people that own the water, it also makes it more legitimate for a banker to be able to use it as collateral. During the period of time I've worked on this I come to the opinion that ten years is better and most everyone agree including the sponsor of the legislation. I'm open for any questions.

HS Thank you Representative. I've cleared the board to Representative Johnston's motion to amend to strike twenty and replace with ten at line 21 and again at line 23 of the bill. Representative Davis.

Rep. Davis Thank you Mr. Speaker. Would the sponsor of the amendment yield for a question please?

Rep. Ure Yes.

Rep. Davis Thank you, [inaudible] let me declare a conflict of interest myself. I am an irrigation user on an old agreement within our area, The Parley's Water Users' Association. If I take a look at this, irrigation water in my instance is brought by conveyance to the property, it's not an irrigation company or anything, it's conveyed to the property. Then knowing that the property in this area changes hands roughly every fifteen to twenty years, one might sell their property. If one does not use that and a new property owner comes into effect fifteen years later they would have no chance to reestablish their water rights? That was pertinent to the land under your motion, but if we left it for twenty years, they could reestablish those rights, is that right?

Rep. Ure Well, actually you're confusing the issue just a little bit, this doesn't change any of the risk that you have to lose the water rights, the only thing this does is increase your ability to prove up on those rights and make them absolutely 100% proved. If we take the example that has been presented, say 100 years ago there's someone that didn't use your water for five years, you know this water's allocated and then it comes to you, that person didn't use that and someone discovers that it wasn't used, then they could file a lawsuit against you to forfeit your water rights that you now have. This bill provides that if after that time that if it has been used for ten years correctly and you can prove it's been used for ten years then your water right is safe, so it actually makes your water right safer than if you have the twenty year period.

Rep. Davis Okay, thank you.

HS Representative Wright.

Rep. Wright Thank you, I'd like to write in support of the amendment. That's a good amendment. When you are in jeopardy of losing a water right [inaudible] that's

been mentioned, from ten to twenty years puts that water right in limbo for a long time. If we lower this down to ten, it has a shorter window on this and someone can prove up on their water, have the ability to use that water and protect that water right. As Representative Johnston has mentioned, when you have it open for twenty years, then it puts some liability on property, it puts some liability on water because of financing or any other mortgages that you might want to use to operate, this puts them in limbo and there's some jeopardy of losing that. There are lots of changes we know with development in the State of Utah, there are lots of changes and those changes are fast coming, it's almost inappropriate to be able to go out there twenty years and someone be able file a lien or something on your water rights. I'd encourage your support of the amendment down to ten years. Thank you.

HS Thank you Rep. Wright. Any further debate on the motion to amendment?
Representative Knutson?

Rep. Knutson Thank you Mr. Speaker, I appreciate that, I have a question for the sponsor if he will yield?

HS Will you yield?

Rep. Ure Yes.

Rep. Knutson Thank you very much. The question I have is, "How does one define use?" and before you answer that, if a person is paying for the use of the water but is not using it, does that constitute he's using the water? He is paying for it, but maybe not using it.

Rep. Ure We've got the State Engineer here that could answer that. Maybe [inaudible] can. What - as you know, water is from the very beginning is predicated on use. The first one that used it developed that right, if there is water left over then the next one, and so on. So, beneficial use is the key word. What's beneficial? I can't answer that, but Bob Morgan could, we may can get him to do that but actually if you use the water, whatever you're using it for, if it's a beneficial use, that constitutes that.

Rep. Knutson Thank you. The reason I ask the question Mr. Speaker is that there are some circumstances of which I'm aware wherein a property owner is paying for the right to use water, but because facilities have been built that prevent his use at the current time, he can't use it but would use it if he could. Now, maybe someday down the road that access or ability to access that water will change and he will be able to do so, and he continues to pay for the water right. Is that considered a use?

Rep. Ure We'll get that answer in just a second that is a real concern because I know there's a lot of water that's in that particular limbo situation. This legislation doesn't address that question.

Rep. I understand that, but where on the law it states that if he's not using the water he'll

Knutson forfeit it, it doesn't seem right if he can't access it.

Rep. Ure We'll find out.

Rep.
Knutson Thank you.

Rep. Ure Thank you Representative. Representative Harwood.

Rep.
Knutson Thank you Mr. Speaker. I move to circle the bill, and I'm doing it particularly not as a substitute so this amendment will still be pending when we un-circle it, if we can un-circle it today. The reason that I'm making the motion is because in discussion with John and with the State Engineer and others, there needs to be at least one clarifying amendment to have this operate the way that it needs to operate and that language needs to be worked out. So, if you wouldn't mind I would anticipate un-circling it just as quickly as we've got the language ready to go.

HS Okay, thank you Representative. Motion to circle? Representative Iverson?

Rep.
Iverson Thank you Mr. Speaker, I would just - was going to stand to speak in favor of the amendment.

HS Thank you. Motion to circle? We'll get back to you. Representative Ure.

Rep. Ure Do I get to add on to the discussion?

HS Yes.

Rep. Ure I would go along with – concur with the motion to circle right now.

HS Anyone else in favor of the motion to circle? All those in favor of the motion to circle say aye.

[ayes]

HS Opposed?

[nays]

HS It's circled.

**** END ****

Tab 13

Utah Legislative Session
HB 69
Excerpt of House Floor Debate
Day 16 – 1/30/1996

House Speaker Representative Ure.

Rep. Ure Thank you Mr. Speaker. I move to un-circle HB 69.

House Speaker I have a motion to un-circle HB 69. Would you state the title of the bill?

Rep. Ure Forfeiture of water rights.

House Speaker Forfeiture of water rights. [inaudible] . . . motion to un-circle. Any and all in favor say 'aye.'

[ayes]

House Speaker Opposed, no ...

House Speaker Motion carries, the bill's un-circled, you may proceed . . .

Tab 14

WATER RIGHT AMENDMENTS

2008 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Patrick Painter**Senate Sponsor: Margaret Dayton****Cosponsors:**

Sheryl L. Allen

Sylvia S. Andersen

Ron Bigelow

Jim Bird

Jackie Biskupski

DeMar Bud Bowman

Melvin R. Brown

Rebecca Chavez-Houck

David Clark

Stephen D. Clark

Tim M. Cosgrove

Bradley M. Daw

Brad L. Dee

Glenn A. Donnelson

Jack R. Draxler

Carl W. Duckworth

Janice M. Fisher

Julie Fisher

Lorie D. Fowlke

Craig A. Frank

Gage Froerer

Kevin S. Garn

James R. Gowans

Richard A. Greenwood

Keith Grover

Neil A. Hansen

Wayne A. Harper

Lynn N. Hemingway

Neal B. Hendrickson

Christopher N. Herrod

Gregory H. Hughes

Christine A. Johnson

Bradley G. Last

David Litvack

Rebecca D. Lockhart

Steven R. Mascaro

Rosalind J. McGee

Kay L. McIff

Ronda Rudd Menlove

Karen W. Morgan

Michael T. Morley

Carol Spackman Moss

Paul A. Neuenschwander

Merlynn T. Newbold

Michael E. Noel

Curtis Oda

Paul Ray

Phil Riesen

Stephen E. Sandstrom

Jennifer M. Seelig

LaWanna Lou Shurtliff

Gordon E. Snow

Kenneth W. Sumsion

Aaron Tilton

Stephen H. Urquhart

Mark W. Walker

R. Curt Webb

Mark A. Wheatley

Larry B. Wiley

Carl Wimmer

LONG TITLE**General Description:**

This bill protects specific entities from forfeiting a water right because of nonuse.

Highlighted Provisions:

This bill:

- defines terms;
- changes the nonuse period of a water right from five to seven years;
- clarifies the forfeiture procedure and the distribution of water after a forfeiture;
- allows a shareholder to file a nonuse application;

- 37 ▶ protects a water right from forfeiture if:
- 38 • a public water supplier holds the water for the reasonable future water
- 39 requirements of the public and in some cases, receives approval of a change
- 40 application;
- 41 • the land where the water is used is under a fallowing program;
- 42 • water is not available because of distribution based on priority date;
- 43 • the water is stored in an aquifer;
- 44 • a storage water right is not used in certain circumstances; and
- 45 • another water source is available for the beneficial use;
- 46 ▶ establishes how the reasonable future water requirements of the public are
- 47 determined;
- 48 ▶ describes how a community water system's projected service area is determined;
- 49 ▶ changes the requirements for a nonuse application;
- 50 ▶ clarifies the effect of a nonuse application;
- 51 ▶ allows an applicant to file a subsequent nonuse application;
- 52 ▶ authorizes the state engineer to use fees to hire staff; and
- 53 ▶ makes technical changes.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:**AMENDS:**

73-1-4, as last amended by Laws of Utah 2007, Chapters 136 and 329

73-2-14, as last amended by Laws of Utah 2007, Chapter 314

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **73-1-4** is amended to read:

73-1-4. Reversion to the public by abandonment or forfeiture for nonuse within seven years -- Nonuse application.

~~[(1) (a) In order to further the state policy of securing the maximum use and benefit of its scarce water resources, a person entitled to the use of water has a continuing obligation to place all of a water right to beneficial use.]~~

~~[(b) The forfeiture of all or part of any right to use water for failure to place all or part of the water to beneficial use makes possible the allocation and use of water consistent with long established beneficial use concepts.]~~

~~[(c) The provisions of Subsections (2) through (6) shall be construed to carry out the purposes and policies set forth in this Subsection (1).]~~

~~[(2)]~~ (1) As used in this section[, "public water"]:

(a) "Public entity" means:

(i) the United States;

(ii) an agency of the United States;

(iii) the state;

(iv) a state agency;

(v) a political subdivision of the state; or

(vi) an agency of a political subdivision of the state.

(b) "Public water supplier" means an entity that:

(i) supplies water, directly or indirectly, to the public for municipal, domestic, or industrial use; and

(ii) is: .

(A) a public entity;

(B) a water corporation, as defined in Section 54-2-1, that is regulated by the Public Service Commission;

(C) a community water system;

(I) that:

(Aa) supplies water to at least 100 service connections used by year-round residents; or

(Bb) regularly serves at least 200 year-round residents; and

(II) whose voting members:

(Aa) own a share in the community water system;

(Bb) receive water from the community water system in proportion to the member's share in the community water system; and

(Cc) pay the rate set by the community water system based on the water the member receives; or

(D) a water users association:

(I) in which one or more public entities own at least 70% of the outstanding shares; and

(II) that is a local sponsor of a water project constructed by the United States Bureau of Reclamation.

(c) "Shareholder" is as defined in Section 73-3-3.5.

(d) "Water company" is as defined in Section 73-3-3.5.

(e) "Water supply entity" means an entity that supplies water as a utility service or for irrigation purposes and is also:

~~[(a)]~~ (i) a municipality, water conservancy district, metropolitan water district, irrigation district, or other public agency;

~~[(b)]~~ (ii) a water company regulated by the Public Service Commission; or

~~[(c)]~~ (iii) any other owner of a community water system.

~~[(3)]~~ (2) (a) When an appropriator or the appropriator's successor in interest abandons or ceases to use all or a portion of a water right for a period of ~~[five]~~ seven years, the water right or the unused portion of that water right ~~[ceases and the water reverts to the public]~~ is subject to forfeiture in accordance with Subsection (2)(c), unless~~[, before the expiration of the five-year period,]~~ the appropriator or the appropriator's successor in interest files a ~~[verified]~~ nonuse application with the state engineer.

(b) (i) A nonuse application may be filed on all or a portion of the water right, including water rights held by ~~[mutual irrigation companies]~~ a water company.

(ii) ~~[Public water supply entities that own stock in a mutual water company, after]~~ After

giving written notice to the water company, a shareholder may file a nonuse [applications]
application with the state engineer on the water represented by the stock.

(c) (i) A water right or a portion of the 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 ~~[five]~~ seven 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]~~ does not bar a claim for periods of nonuse
that occur after the entry of the decree.

(iv) A proposed determination by the state engineer in an action for general
determination of rights under Chapter 4, Determination of Water Rights, ~~[shall bar any]~~ bars a
claim of forfeiture for prior nonuse against any right proposed to be valid, unless a timely
objection has been filed within the time allowed in Chapter 4, Determination of Water Rights.

~~[(d) The extension of time to resume the use of that water may not exceed five years
unless the time is further extended by the state engineer.]~~

~~[(e) The provisions of this section are applicable]~~

(v) If in a judicial action a court declares a water right forfeited, on the date on which
the water right is forfeited:

(A) the right to use the water reverts to the public; and

(B) the water made available by the forfeiture:

(I) first, satisfies other water rights in the hydrologic system in order of priority date;

and

(II) second, may be appropriated as provided in this title.

(d) This section applies whether the unused or abandoned water or a portion of the

water is:

(i) permitted to run to waste; or [is]

(ii) used by others without right with the knowledge of the water right holder;

~~provided that the use of water pursuant to a lease or other agreement with the appropriator or the appropriator's successor shall be considered to constitute beneficial use].~~

~~[(f)] (e) [The provisions of this] This section [shall] does not apply to:~~

~~(i) the use of water according to a lease or other agreement with the appropriator or the appropriator's successor in interest;~~

~~(ii) a water right if its place of use is contracted under an approved state agreement or federal conservation following program;~~

~~[(f) to] (iii) those periods of time when a surface water or groundwater source fails to yield sufficient water to satisfy the water right[, or when groundwater is not available because of a sustained drought];~~

~~(iv) a water right when water is unavailable because of the water right's priority date;~~

~~[(ii)] (v) [to water stored in reservoirs pursuant to an existing water right, where] a water right to store water in a surface reservoir or an aquifer, in accordance with Title 73, Chapter 3b, Groundwater Recharge and Recovery Act, if:~~

~~(A) the [stored] water is [being held in storage] stored for present or future use; or~~

~~(B) storage is limited by a safety, regulatory, or engineering restraint that the appropriator or the appropriator's successor in interest cannot reasonably correct;~~

~~[(iii) when] (vi) a water right if a water user has beneficially used substantially all of [a] the water right within a [five] seven-year period, provided that this exemption [shall] does not apply to the adjudication of a water right in a general determination of water rights under Chapter 4, Determination of Water Rights[-];~~

~~(vii) except as provided by Subsection (2)(g), a water right:~~

~~(A) (I) owned by a public water supplier;~~

~~(II) represented by a public water supplier's ownership interest in a water company; or~~

~~(III) to which a public water supplier owns the right of use; and~~

177 (B) conserved or held for the reasonable future water requirement of the public, which
178 is determined according to Subsection (2)(f);

179 ~~[(g)] (viii) [Groundwater rights used to supplement the quantity or quality of other~~
180 ~~water supplies may not be subject to loss or reduction under this section if not used] a~~
181 supplemental water right during ~~[periods]~~ a period of time when ~~[the other water source~~
182 ~~delivers sufficient water]~~ another water right available to the appropriator or the appropriator's
183 successor in interest provides sufficient water so as to not require use of the supplemental
184 ~~[groundwater-]~~ water right; or

185 (ix) a water right subject to an approved change application where the applicant is
186 diligently pursuing certification.

187 (f) (i) The reasonable future water requirement of the public is the amount of water
188 needed in the next 40 years by the persons within the public water supplier's projected service
189 area based on projected population growth or other water use demand.

190 (ii) For purposes of Subsection (2)(f)(i), a community water system's projected service
191 area:

192 (A) is the area served by the community water system's distribution facilities; and

193 (B) expands as the community water system expands the distribution facilities in
194 accordance with Title 19, Chapter 4, Safe Drinking Water Act.

195 (g) For a water right acquired by a public water supplier on or after May 5, 2008,
196 Subsection (2)(e)(vii) applies if:

197 (i) the public water supplier submits a change application under Section 73-3-3; and

198 (ii) the state engineer approves the change application.

199 ~~[(4)]~~ (3) (a) The state engineer shall furnish [an] a nonuse application form requiring the
200 following information:

201 (i) the name and address of the applicant;

202 (ii) a description of the water right or a portion of the water right, including the point of
203 diversion, place of use, and priority;

04 ~~[(iii) the date the water was last diverted and placed to beneficial use;]~~

205 ~~[(iv)]~~ (iii) the quantity of water;

206 ~~[(v)]~~ (iv) the period of use;

207 ~~[(vi)]~~ (v) the extension of time applied for;

208 ~~[(vii)]~~ (vi) a statement of the reason for the nonuse of the water; and

209 ~~[(viii)]~~ (vii) any other information that the state engineer requires.

210 (b) (i) Filing the nonuse application extends the time during which nonuse may continue
211 until the state engineer issues ~~[his]~~ an order on the nonuse application.

212 (ii) Approval of a nonuse application protects a water right from forfeiture for nonuse
213 from the application's filing date until the approved application's expiration date.

214 (c) (i) Upon receipt of the application, the state engineer shall publish a notice of the
215 application once a week for two successive weeks in a newspaper of general circulation in the
216 county in which the source of the water supply is located and where the water is to be used.

217 (ii) The notice shall:

218 (A) state that an application has been made; and

219 (B) specify where the interested party may obtain additional information relating to the
220 application.

221 (d) Any interested person may file a written protest with the state engineer against the
222 granting of the application:

223 (i) within 20 days after the notice is published, if the adjudicative proceeding is
224 informal; and

225 (ii) within 30 days after the notice is published, if the adjudicative proceeding is formal.

226 (e) In any proceedings to determine whether the nonuse application ~~[for extension]~~
227 should be approved or rejected, the state engineer shall follow the procedures and requirements
228 of Title 63, Chapter 46b, Administrative Procedures Act.

229 (f) After further investigation, the state engineer may approve or reject the application.

230 ~~[(5)]~~ (4) (a) ~~[Nonuse applications]~~ The state engineer shall grant a nonuse application
231 on all or a portion of a water right [shall be granted by the state engineer for periods] for a
232 period of time not exceeding [five] seven years [each, upon a showing of] if the applicant shows

233 a reasonable cause for nonuse.

234 (b) ~~[Reasonable causes]~~ A reasonable cause for nonuse ~~[include]~~ includes:

235 (i) a demonstrable financial hardship or economic depression;

236 (ii) the initiation of ~~[recognized]~~ water conservation or efficiency practices, or the
237 operation of a groundwater recharge recovery program approved by the state engineer;

238 (iii) operation of legal proceedings;

239 (iv) the holding of a water right or stock in a mutual water company without use by any
240 ~~[public]~~ water supply entity to meet the reasonable future requirements of the public;

241 (v) situations where, in the opinion of the state engineer, the nonuse would assist in
242 implementing an existing, approved water management plan; or

243 ~~[(vi) situations where all or part of the land on which water is used is contracted under
244 an approved state agreement or federal conservation fallowing program;]~~

245 ~~[(vii)]~~ (vi) the loss of capacity caused by deterioration of the water supply or delivery
246 equipment if the applicant submits, with the application, a specific plan to resume full use of the
247 water right by replacing, restoring, or improving the equipment~~[-or].~~

248 ~~[(viii) any other reasonable cause.]~~

249 ~~[(6)]~~ (5) (a) Sixty days before the expiration of ~~[any extension of time]~~ a nonuse
250 application, the state engineer shall notify the applicant by mail or by any form of electronic
251 communication through which receipt is verifiable, of the date when the ~~[extension period]~~
252 nonuse application will expire.

253 (b) An applicant may file a subsequent nonuse application in accordance with this
254 section.

255 ~~[(b) Before the date of expiration, the applicant shall either:]~~

256 ~~[(i) file a verified statement with the state engineer setting forth the date on which use
257 of the water was resumed, and whatever additional information is required by the state engineer;
258 or]~~

259 ~~[(ii) apply for a further extension of time in which to resume use of the water according
260 to the procedures and requirements of this section.]~~

~~[(c) Upon receipt of the applicant's properly completed, verified statement, the state engineer shall conduct investigations necessary to verify that beneficial use has resumed and, if so, shall issue a certificate of resumption of use of the water as evidenced by the resumed beneficial use.]~~

~~[(7) The appropriator's water right or a portion of the water right ceases and the water reverts to the public if the:]~~

~~[(a) appropriator or the appropriator's successor in interest fails to apply for an extension of time;]~~

~~[(b) state engineer denies the nonuse application; or]~~

~~[(c) appropriator or the appropriator's successor in interest fails to apply for a further extension of time.]~~

Section 2. Section 73-2-14 is amended to read:

73-2-14. Fees of state engineer -- Deposited as a dedicated credit.

(1) The state engineer shall charge fees pursuant to Section 63-38-3.2 for the following:

(a) applications to appropriate water;

(b) applications to temporarily appropriate water;

(c) applications for permanent or temporary change;

(d) applications for exchange;

(e) applications for an extension of time in which to resume use of water;

(f) applications to appropriate water, or make a permanent or temporary change, for use outside the state filed pursuant to Title 73, Chapter 3a, Water Exports;

(g) groundwater recovery permits;

(h) diligence claims for surface or underground water filed pursuant to Section 73-5-13;

(i) republication of notice to water users after amendment of application where required by this title;

(j) applications to segregate;

(k) requests for an extension of time in which to submit proof of appropriation not to exceed 14 years after the date of approval of the application;

289 (l) requests for an extension of time in which to submit proof of appropriation 14 years
290 or more after the date of approval of the application;

291 (m) groundwater recharge permits;

292 (n) applications for a well driller's license, annual renewal of a well driller's license, and
293 late annual renewal of a well driller's license;

294 (o) certification of copies;

295 (p) preparing copies of documents; and

296 (q) reports of water right conveyance.

297 (2) Fees for the services specified in Subsections (1)(a) through (i) shall be based upon
298 the rate of flow or volume of water. If it is proposed to appropriate by both direct flow and
299 storage, the fee shall be based upon either the rate of flow or annual volume of water stored,
300 whichever fee is greater.

301 (3) Fees collected under this section:

302 (a) shall be deposited in the General Fund as a dedicated credit to be used by the
303 Division of Water Rights; and

304 (b) may only be used by the Division of Water Rights to:

305 (i) meet the publication of notice requirements under this title; [~~and~~]

306 (ii) process reports of water right conveyance[-]; and

307 (iii) hire an employee to assist with processing an application.