

2006

William J. Tuttle, Charlene W. Tuttle, J. Kenton Tuttle, Lori M. Tuttle v. Jerry D. Olds, Utah Department of Natural Resources, Terry Monroe :
Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

**WILLIAM J. TUTTLE, CHARLENE W. TUTTLE, J. KENTON
TUTTLE and LORI M. TUTTLE,**

Plaintiffs/Appellants

vs.

**JERRY D. OLDS, Utah State Engineer, UTAH DEPARTMENT OF
NATURAL RESOURCES, and TERRY MONROE,**

Defendants/Appellees,

BRIEF OF APPELLEES

**Appeal from a Final Judgment of Dismissal of the
Third Judicial District Court, Salt Lake County, State of Utah,
the Honorable John Paul Kennedy presiding**

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ORAL ARGUMENT NOT REQUESTED

**FILED
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LIST OF ALL PARTIES

All of the parties are listed on the cover of this Brief.

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Defendants-Appellees Jerry D. Olds, Utah Department of Natural
Resources, and Terry Monroe submit this brief in answer to the brief of
Appellants William J. Tuttle, Charlene W. Tuttle, Kenton Tuttle and
Lori M. Tuttle.

ISSUES PRESENTED

1. Untimely notice of claim

The Tuttles sold their farms at an inflated value allegedly because the defendants negligently failed to discover during a groundwater survey that the Tuttles were illegally irrigating their farms. Did the one year period for filing notice of their negligence claim begin to run when the Tuttles first became aware that the survey was wrong, or later, when they were held liable to the sellers for fraud?

A. Standard of review

Failure to comply with the notice of claim requirement of the Utah Governmental Immunity Act deprives the court of subject matter jurisdiction. *Cedar Profl Plaza, L.C. v. Cedar City Corp.*, 2006 UT App. 36, ¶ 7, 131 P.3d 275, 278. Whether a trial court has subject matter jurisdiction presents a question of law that this Court reviews under a correction of error standard without deference to the trial court. *See, e.g., Case v. Case*, 2004 UT App. 423, ¶ 5, 103 P.3d 171.

B. Preservation of issue

The question of subject matter jurisdiction is a threshold issue that may be raised at any time. *State v. Sun Surety Ins. Co.*, 2004 UT 74, ¶ 7, 99 P.3d 818, 820. Nevertheless, the defendants did raise this issue in their motion to

dismiss, R.60-62, and the trial court granted judgment on the pleadings on this issue. See Order Granting Defendants' Motion for Judgment on the Pleadings. R. 194-96; Addendum A.¹

2. Waiver of procedural error

In their opening brief, the Tuttles failed to specify or provide any analysis concerning the “many matters” outside the pleadings that they claim the trial court improperly relied upon, or the allegations they contend the trial court failed to construe in their favor. Have the Tuttles waived these claims of procedural error?

A. Standard of review

This issue is unique to the appeal and is properly raised for the first time in this brief.

B. Preservation of issue

This issue is unique to the appeal and is properly raised for the first time in this brief.

¹A copy of the Order is included in the addendum to this brief because the Tuttles failed to attach one as required by Rule 24(a)(11)(c) of the Utah Rules of Appellate Procedure.

3. No duty

The state engineer conducted a groundwater survey of the Pahvant Valley to address a concern about significant overdraft of water, some of which was caused by the irrigation of farmland not covered by valid water rights. In conducting the survey, did the engineer owe a duty to the Tuttles to exercise reasonable care to discover their illegal watering?

A. Standard of review

Whether a duty exists is a question of law. *See, e.g., Webb v. University of Utah*, 2005 UT 80, ¶ 9, 125 P.3d 906, 909; *Weber v. Springville City*, 725 P.2d 1360, 1363 (Utah 1986). When reviewing a dismissal under Rule 12(b) or 12(c), this Court should accept all factual allegations in the complaint as true and interpret those facts and all reasonable inferences therefrom in the light most favorable to the plaintiff as the nonmoving party. *See Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, ¶ 3, 108 P.3d 741, 743; *Miller v. Gastronomy, Inc.*, 2005 UT App. 80, ¶ 6, 110 P.3d 144, 146.

B. Preservation of issue

This issue was raised at the hearing on the defendants' Rule 12(b)(6) motion to dismiss. R. 208 at 16-17, 19-21, 55-60. The trial court granted judgment on the pleadings on this issue. See Order Granting Defendants' Motion for Judgment on the Pleadings. R. 194-96; Addendum A.

4. No estoppel

Following steps to prevent farmers in the Pahvant Valley from irrigating without valid water rights, the Division of Water Rights sent farmers a letter expressing the state engineer's opinion that all irrigated land was now covered by a valid water right. Later, the Division discovered that additional farmland was being irrigated without a water right, exposing the fact that the Tuttle had recently sold their farms at an inflated price based on their representations to the sellers that the water rights were sufficient to irrigate the entire farmland. May the Tuttle assert a claim for equitable estoppel against the Division?

A. *Standard of review*

The dismissal of a claim for equitable estoppel should be reviewed for correctness, without deference to the decision below. *See Holland v. CSRB*, 856 P.2d 678, 682 (Utah 1993); *Prows v. State*, 822 P.2d 764, 768-69 (1991). When reviewing the propriety of dismissal under Rule 12(b) or 12(c), this Court should accept all factual allegations in the complaint as true and interpret those facts and all reasonable inferences therefrom in the light most favorable to the plaintiff as the nonmoving party. *See Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, ¶ 3, 108 P.3d 741, 743; *Miller v. Gastronomy, Inc.*, 2005 UT App. 80, ¶ 6, 110 P.3d 144, 146.

B. Preservation of issue

This issue was raised in the defendants' motion to dismiss. R. 180-81. The trial court granted the motion as one for judgment on the pleadings, without specifically addressing the estoppel claim. See Order Granting Defendants' Motion for Judgment on the Pleadings. R. 194-96; Addendum A.

5. No takings violation

Following steps to prevent farmers in the Pahvant Valley from irrigating without valid water rights, the Division of Water Rights sent farmers a letter expressing the state engineer's opinion that all irrigated land was now covered by a valid water right. Later, the Division discovered that additional farmland was being irrigated without a water right. Did the Division's action to prevent continued illegal irrigation of the farmland constitute a violation of the Utah takings clause?

A. Standard of review

The interpretation and application of the Utah takings clause present questions of law, which should be reviewed for correctness. *See View Condo. Owners Ass'n v. MSICO, L.L.C.*, 2005 UT 91, ¶¶ 29-30, 127 P.3d 697, 704-05; *Strawberry Elec. Serv. Dist. v. Spanish Fork City*, 918 P.2d 870, 876 (Utah 1996).

B. Preservation of issue

This issue was raised in the defendants' motion to dismiss. R.68-69. The trial court granted the motion as one for judgment on the pleadings, without specifically addressing the takings claim. See Order Granting Defendants' Motion for Judgment on the Pleadings. R. 194-96; Addendum A.

**DETERMINATIVE CONSTITUTIONAL
PROVISIONS, STATUTES AND RULES**

The following provisions are central to the issues on appeal and are included in Addendum B to this Brief.

Rule 10(c), Utah Rules of Civil Procedure

Rule 12(c), Utah Rules of Civil Procedure

Rule 24(a)(9), Utah Rules of Appellate Procedure

Utah Code Ann. § 73-2-1 (West 2004)

Utah Code Ann. § 73-2-15 (West 2004)

Utah Code Ann. § 73-2-17 (West 2004)

Utah Code Ann. § 73-5-9 (West 2004)

Utah Code Ann. § 73-3-17 (West 2004)

Utah Code Ann. § 73-4-1(a) (West 2004)

STATEMENT OF THE CASE

Nature of the Case

This action arose from the Tuttles' sale of farmland in Millard County, Utah, to Arizona residents Grant and Fern Ellsworth. After the sale, the Ellsworths learned that, contrary to the Tuttles' representations, the water rights appurtenant to the farms were insufficient to water a substantial part of the farm acreage. The Ellsworths sued the Tuttles in federal court and won a judgment against them for about \$ 1.4 million based on fraud, breach of warranty, wrongful conversion, breach of contract, punitive damages, attorney fees and costs.

The Tuttles then brought this action against the state engineer,² alleging that when he conducted a groundwater survey in the mid-1990s, he negligently failed to discover that they were illegally irrigating a substantial portion of their farms. About a year before the Tuttles sold their farms, the Division of Water Rights³ informed them that it could not identify any water right for a large irrigation well on one of the farms. Nevertheless, the Tuttles allege that they relied on the groundwater survey when they sold the farms

²State Engineer Olds is sued in his official capacity only because the events on which the Tuttles base their claims occurred before Olds took the position.

³The Division of Water Rights is part of the Department of Natural Resources.

to the Ellsworths. The Tuttle further claim that when the Division refused to allow the Ellsworths to continue to irrigate land not covered by a valid water certificate, it took the Tuttle's property without due process of law. The Tuttle assert claims in negligence, estoppel, and violation of the takings clause of the Utah Constitution.

The trial court dismissed the Tuttle's claims on two grounds: first, the court held that, as the landowners, the Tuttle were charged with knowing the water rights appurtenant to their land and that the state engineer owed no duty to the Tuttle to use reasonable care to discover their illegal watering. Second, the trial court held that the Tuttle's claims were barred because they had failed to file a timely notice of claim as required by the Utah Governmental Immunity Act. Defendants urge this Court to affirm the decision below.

Course of the Proceedings and Disposition Below

On July 28, 2005, the Tuttle commenced this action by filing their Complaint. R. 1-33. The defendants filed a motion to dismiss in lieu of an answer. R. 48-50. The motion was fully briefed, R. 51-125, 131-74, & 175-83, and the parties presented oral argument. R. 193, 208. At the hearing, the trial court granted the motion under Rule 12(c), as a judgment on the

pleadings. On March 31, 2006, the trial court entered an Order Granting Defendants' Motion for Judgment on the Pleadings. R. 194-96; Addendum A.

STATEMENT OF THE FACTS

The following facts are taken from the allegations in the Complaint and, pursuant to Rule 10(c) of the Utah Rules of Civil Procedure, from record facts established by documents that were either attached to the Complaint or that are central to the allegations.

In 1994, in response to evidence of a significant overdraft of water in the Pahvant Valley in Millard County, Utah, the Utah Division of Water Rights proposed a groundwater management plan for the area. R.20-24. The Division estimated the annual recharge to the groundwater system to be 65,000 acre-feet, while the annual discharge was 100,000 acre-feet—a loss of 35,000 acre-feet each year. *Id.* at 20. About 80 per cent of the discharge was from irrigation wells and, of 36,000 total acres of farmland, about 8,800 were being irrigated without a valid or properly recorded water right. *Id.* The proposed plan stated, “this issue is very serious and will be addressed first to see if, by eliminating the illegal acreage, the well withdrawals can be reduced.” *Id.* Therefore, “the initial phase [of the plan] deals with elimination of any irrigated acreage which does not have a water right and controlling

wasting wells.” R.21.

To implement the plan, the Division surveyed the irrigated acreage of the Pahvant Valley, where the Tuttles owned two farms. R.9 at ¶50.⁴ Aware that some of their neighbors had received warning letters regarding illegal irrigation, the Tuttles “became anxious about whether their water usage would be deemed improper.” *Id.* at ¶¶53-55. They went to the Division’s regional office in Richfield, Utah and inquired whether they were in violation. Unidentified employees of the regional office told the Tuttles that if they had not received a warning letter, “there was no cause for concern.” *Id.* at ¶¶56-59. The employees also showed the Tuttles a map of the Pahvant Valley with the areas of suspected violations shaded red. The Tuttles’ farms were not shaded red. R.9-10 at ¶¶60-62.

In March 1996, then state engineer Robert Morgan sent a letter to water users in Pahvant Valley, including the Tuttles, to inform them of the progress of the groundwater management plan. Among other things, Morgan reported that “[d]uring the spring of 1994, the acreage survey was completed and all water users who were irrigating land without a water right were notified. As a result of this effort and with the cooperation of water users, all irrigated lands are now covered by valid water rights.” R.25; Appellants’ Br.,

⁴William and Charlotte Tuttle owned a farm consisting of over 1,000 acres. R. 2 at ¶ 8. Their son Kenton and his wife Lori owned a smaller farm of about 640 acres. R. 2 at ¶ 9. Both farms included substantial acreage not covered by a certificate of beneficial use. R. 134 at ¶¶ 17-18.

Addendum A.

During this time, the Tuttles had been irrigating their entire farmland of about 1,700 acres, but held valid water rights for only 935.2 acres. R.12 at ¶89; R. 13 at ¶¶ 98-99; R.134 at ¶¶18-19.⁵ The groundwater survey, however, did not discover the shortage and therefore the Tuttles did not receive notification of their illegal irrigation. R.9 at ¶ 51. In 1998, however, Assistant Regional Engineer Terry L. Monroe sent a letter to William J. Tuttle notifying him that Monroe had been unable to identify any water right associated with a “large irrigation well” equipped with a diesel motor (“the Diesel Well”) located on Tuttle’s farm and requesting assistance in locating a water right for the well. R.27.

The Tuttles received Monroe’s letter while they were in negotiations to sell their farms, including their water rights, to the Ellsworths. R.10 at ¶70 & R.27. When the Ellsworths inquired about water rights, the Tuttles gave them documentation of their water rights and the 1996 letter from Morgan. *Id.* at ¶¶68-69. The sale of the farm and water rights closed on July 1, 1999. R.11 at ¶¶76-77.

Several months after the sale, Monroe sent the Ellsworths a letter about

⁵At hearing below, the Tuttles refused to concede that a substantial portion of their farms was not covered by water rights. R. 208 at 29-30. That refusal contradicted their own allegations. R. 12 at ¶ 89; R 13 at ¶¶ 98-99; R. 134 at ¶¶ 18-19. More importantly, a substantial shortage in water rights is a necessary premise of their claim that the defendants negligently conducted the survey.

concerns he had with water rights on the farms. R.11 at ¶ 78 & R.28-30. In the letter, Monroe stated that the Diesel Well was an improper point of diversion and analyzed the various water rights associated with the farms, concluding that rights existed for the sole supply of only 861.10 of 1700 acres. R.28-30. Monroe informed the Ellsworths that “[i]t is important that these issues be resolved before the upcoming irrigation season as this office will not allow the continued use of a well with no water rights in it and the continued irrigation of land that is not covered by a valid water right.” *Id.* at 30.

The Ellsworths filed suit against the Tuttles in November 2001. R.12 at ¶ 85. A jury verdict against the Tuttles was rendered on April 30, 2003, and a judgment entered for approximately \$ 1.4 million. *Id.* at ¶ 92.⁶ The Tuttles filed a notice of claim against State Engineer Jerry D. Olds and the Department of Natural Resources on about April 28, 2004. R.113-20.

SUMMARY OF THE ARGUMENT

The trial court correctly dismissed the Tuttles’ negligence claims against the defendants because the Tuttles failed to file a notice of claim within a year of when the claims arose as required by the Utah Governmental

⁶The judgment was affirmed on appeal. *Ellsworth v. Tuttle*, 148 Fed. Appx. 653 (10th Cir. 2005).

Immunity Act. At the latest, the claims arose in November 2001, when the Ellsworths filed suit against the Tuttles in federal court. The Tuttles' notice of claim was not filed until April 2004.

The Tuttles have waived on appeal any error resulting from the trial courts' alleged reliance on materials outside the pleadings by failing to explain their argument in their opening brief with enough specificity to enable defendants to respond. The only outside matters to which the Tuttles refer is "the basis for the jury's decision in the federal action" and the "decisions made in the federal courts." But the Tuttles themselves relied on pleadings from the federal action in opposing the defendants' motion to dismiss. Moreover, public records from the federal case were central to the allegations and could have properly been considered under Rule 10(c) of the Utah Rules of Civil Procedure. In addition, although both parties offered outside materials and the trial court asked questions about the federal case, the court did not rely on and therefore implicitly excluded outside materials in making its decision.

Even if the Tuttles had timely filed notice of their negligence claims, those claims were also correctly dismissed because the state engineer owed the Tuttles no duty to use reasonable care in conducting a groundwater survey whose express purpose was to eliminate illegal irrigation, not to determine or alter water rights. In addition, the Tuttles' allegations fail to establish

several necessary elements of an estoppel claim against a governmental entity. The Tuttles could not, under any set of facts that could be proven in support of their claim, demonstrate that defendants made a specific written representation that the Tuttles had sufficient water rights to irrigate their entire farm acreage, that they reasonably relied on the statements that were made, that manifest injustice would result if estoppel were not applied and that the application of estoppel would not impair the exercise of the governmental function of administering water rights.

Finally, the district court correctly dismissed the Tuttles' taking claim because the Tuttles had no protectable property interest in water rights to irrigate their entire farmland. Nor did the Division ever "take" property that was never the Tuttles' to begin with. Therefore, this Court should affirm the judgment of dismissal in its entirety.

ARGUMENT

1. The Notice of Claim Was Untimely

The trial court correctly held that the Tuttles' notice of claim was untimely because it was filed more than one year after their claims accrued. The Utah Governmental Immunity Act (the "Act") provides that "a claim against the state, or against its employee for an act or omission occurring during the performance of the employee's duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed with the attorney general within one year after the claim arises" Utah Code Ann. § 63-30-12 (West 2004).⁷ The Act further provides that "[a] claim arises when the statute of limitations that would apply if the claim were against a private person begins to run." *Id.* at 63-30-11(1).⁸

Generally, "a statute of limitations is triggered upon the happening of the last event necessary to complete the cause of action." *Cedar Profl Plaza v. Cedar City Corp.*, 2006 UT App. 36, ¶ 11, 131 P.3d 275, 279 (citation and

⁷The Utah Governmental Immunity Act was repealed as of July 1, 2004 and replaced by the Governmental Immunity Act of Utah. The corresponding provision in the new act imposes the same time limitation as the previous provision, but alters the place of filing. See Utah Code Ann. § 63-30d-402 (West 2004) (effective July 1, 2004).

⁸The corresponding provision in the new act sets forth a new exception that codifies a discovery rule. See Section 63-30d-401(1)(a)-(c).

internal quotation marks omitted) (construing parallel notice requirement for claims against political subdivisions). However, a plaintiff is “not entitled to wait until it [knows] all of the facts supporting [the claim against the defendant]. It is enough that [the plaintiff is] ‘aware that the governmental entity’s action or inaction ha[s] resulted in some kind of harm to [the plaintiff’s] interests.’” *Id.* at ¶ 14 (quoting *Bank One Utah v. West Jordan City*, 2002 UT App 271, ¶ 12, 54 P.3d 135).

The Tuttles were certainly aware that the allegedly negligent survey had resulted in some harm to their interests by the time the Ellsworths filed their complaint against the Tuttles in federal court, in November 2001. In fact, the Tuttles had reason to doubt the survey long before then. As noted by the trial court, landowners are presumed to know the extent of their water rights. *Dugan v. Jones*, 615 P.2d 1239, 1246 (Utah 1980), *superseded by statute on procedural grounds as noted in Arnold v. Curtis*, 846 P.2d 1307 (Utah 1993). In addition, the Tuttles’ own allegations establish that they had doubts that prompted them to inquire at the Division’s regional office in Richfield. R.9 at ¶¶ 55-56. Although the Tuttles allege that unidentified employees at the regional office resolved those doubts, the Tuttles apparently ignored their actual water certificates.

Moreover, the 1998 letter from Terry Monroe questioning the existence of a water right for the Diesel Well should have revived the Tuttles’ concerns

before they sold their farms. The Tuttles had at least inquiry notice, if not outright personal knowledge, that the survey was inaccurate even before the sale of their farms. *See, e.g., Macris v. Sculptured Software, Inc.*, 2001 UT 43, ¶¶ 26-27, 24 P.3d 984, 991-92 (holding shareholder of closely held corporation was on inquiry notice of claim for conversion of shares when she was denied access to company information); *Walker Drug Co., Inc. v. La Sal Oil Co.*, 902 P.2d 1229, 1231 (Utah 1995) (holding plaintiff was on inquiry notice of property damage when they became aware of governmental investigation of potential environmental contamination of neighboring property). Accordingly, the trial court correctly concluded that the April 2004 notice of claim was untimely.⁹

The Tuttles' attempt to challenge that conclusion by relying on *Valley Colour, Inc. v. Beuchert Bldgs., Inc.*, 944 P.2d 361 (Utah 1997), is misplaced. That case involved claims for slander of title and tortious interference by the filing of a mechanic's lien against the plaintiff's property. The Supreme Court held that because special damages were a necessary element of those claims, the claims did not accrue and the limitations period did not begin to run until

⁹The Tuttles argued below that water rights are too complex for them to understand without expert assistance. But this did not relieve them of the obligation to exercise due diligence under the circumstances. *See, e.g., Walker Drug*, 902 P.2d at 1229 (holding property owners were on inquiry notice of possible environmental contamination of their property because they could have hired an expert to investigate the cause of gas fumes in and around their property).

the property was sold and the damages became ascertainable. *Id.*

But proof of special damages is not a required element of the Tuttles' negligence claim. Therefore, the special damages rule applied in *Valley Colour* is inapposite. Rather, the Tuttles sustained harm as soon as they became aware that the survey was inaccurate because that is when they allegedly sustained a diminution in the value of their farms. That alleged diminution occurred even regardless of whether they ever sold their property. Thus, there is nothing about the federal damage award that was essential to the Tuttles' claims in this case.

Again, the Tuttles were placed upon inquiry notice of the defendants' alleged negligence no later than when the Ellsworths filed their lawsuit in November 2001. But the Tuttles did not file their notice of claim for approximately two and a half more years, in April 2004. Therefore, the trial court correctly determined that the Tuttles failed to file their notice of the negligence claims within one year of when the claims arose. Accordingly, this Court should affirm the dismissal of the Tuttles' negligence claims.¹⁰

¹⁰The parties agree that no notice of claim was required for the Tuttles' equitable estoppel and takings claims, which are discussed at Points 4 and 5 below.

2. The Tuttles Have Waived Any Procedural Challenge to the Decision Below by Failing to Adequately Develop Their Argument in Their Opening Brief

The Tuttles have waived any procedural challenge to the decision below by failing to adequately develop their argument in their opening brief. Rule 24(a)(9) of the Utah Rules of Appellate Procedure provides that the argument “shall contain the contentions and reasons of the appellant with respect to the issues presented . . . with citations to the authorities, statutes, and parts of the record relied on.” U. R. App. P. 24(a)(9). In applying this rule, the Supreme Court has declined to review issues not presented with sufficient clarity, stating that “a reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a repository in which the appealing party may dump the burden of argument and research.” *See State v. Thomas*, 1999 UT 2, ¶ 11, 974 P.2d 269, 271.

In this vein, both the Supreme Court and this Court have frequently rejected arguments simply on the ground that they were insufficiently developed in the appellant’s opening brief. *See, e.g., Jensen v. Sawyers*, 2005 UT 81, ¶¶ 133-34, 130 P.3d 325, 349-50 (declining to review challenge to denial of attorney fees and costs, when appellant argued only that “If the court closely examines [the attorney’s submissions below], it will see the criteria for fees was met.”); *MiVida Enter. v. Steen-Adams*, 2005 UT App. 400, ¶ 15 n.4, 122 P.3d 144, 148 (declining to review contentions that various

transactions were final step necessary to complete cause of action when appellant “failed to detail the connection” between the transactions and the claims).

The Tuttlés’ vague assertions that the trial court “considered many matters which were outside the pleadings” and “did not construe the allegations in the light most favorable to the Tuttlés,” without further analysis, is insufficient to raise an issue for appeal. *See* Appellants’ Br. at 12. Nor are the Tuttlés’ contentions that “the trial court considered . . . the basis for the jury’s decision in the federal court action” and “relied in large part on the decisions made in the federal courts,” *id.*, specific enough to satisfy the Tuttlés’ burden of presenting the issue with sufficient clarity that the defendants and this Court would not have to guess exactly which decisions in the federal action the Tuttlés contend that the trial court erroneously relied upon. This is especially true where, in opposition to the motion to dismiss, the Tuttlés themselves alleged that the federal judgment was based on “fraud, breach of warranty, wrongful conversion, breach of contract, and . . . punitive damages based on the fraud,” R.134 at ¶21 & R.153-54, and that “the jury found in favor of the Ellsworths” after Terry Monroe testified that “the [Tuttlés’] water rights were sufficient to irrigate only 935.2 acres of the approximately 1,700 acres the Ellsworths had purchased from the Tuttlés.” R.12 at ¶89-90 & R.134 at ¶¶18-20.

Even if the Tuttles had not presented such allegations, records from the federal case could have properly been considered under Rule 10(c) of the Utah Rules of Civil Procedure, which provides that “an exhibit to a pleading is a part thereof for all purposes.” U. R. Civ. P. 10(c). Under Rule 10(c), a document that is central to the plaintiff’s claims may be considered on a motion to dismiss even if the plaintiff did not attach the document to the complaint. *See Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶¶ 10-15, 104 P.3d 1226, 1230-32 (citing federal cases and discussing rule). In addition, although at the hearing the trial court queried counsel about the federal case, it implicitly excluded any outside materials in making its decision. *See id.* at 1231-32 (citing with approval *Lybrook v. Farmington Mun. Sch. Bd. of Educ.*, 232 F.3d 1334, 1342 (10th Cir. 2000) (finding that trial court implicitly excluded outside materials unless it could be established that the trial court relied on those materials to reach its decision, and stating “[T]he submission of documents outside the pleadings by itself is not a basis for conversion to summary judgment.”)). Neither the written order dismissing the Tuttles’ claims, R.194-96 (copy attached as Addendum A to this brief), nor the trial court’s oral ruling at the conclusion of the hearing, R.208 at 60-65, referred to any determinations made in the federal case. Rather, the trial court simply held that the state engineer owed no duty to the Tuttles to conduct the groundwater survey with reasonable care.

Although the Tuttles cite case law on the standard of review for motions to dismiss and motions for judgment on the pleadings, they fail to supply any analysis or record citations to support their claim of procedural error. As shown above, in the context of this case, it is far from obvious that the trial court improperly relied on any outside material in reaching its decision, or if it did, how the trial court's ultimate decision was based on that material. The Tuttles may not wait until their reply brief to clarify their argument, leaving defendants no opportunity to respond. Accordingly, this Court should reject the Tuttles' claim of procedural error and affirm the decision below.¹¹

3. The State Engineer Owed No Duty to the Tuttles to Detect their Illegal Irrigation

The trial court also correctly dismissed the Tuttles' negligence claims on the alternative ground that the defendants owed no duty to the Tuttles to use reasonable care in conducting the groundwater survey so as to correctly determine their water rights. As the Tuttles correctly assert, under certain circumstances not present in this case, the state engineer may seek a judicial

¹¹The Tuttles also claim that the Court's conversion of the matter to a judgment on the pleadings under Rule 12(c) was error. Although defendants believe that conversion was not necessary, they are unable to discern how the conversion made any difference to the outcome. As the Tuttles note, the standards for deciding Rule 12(b)(6) and Rule 12(c) motions are the same.

determination of water rights. *See* Utah Code Ann. § 73-4-1(a) (West 2004). But, the state engineer has no statutory authority to adjudicate water rights. *See* Utah Code Ann. §§ 73-3-1 to -29 (West 2004); *Searle v. Milburn Irrig. Co.*, 2006 UT 16, ¶ 34, 133 P.3d 382, 391 (“It is well established that the state engineer has no authority to finally adjudicate water rights.”); *Whitmore v. Murray City*, 107 Utah 445, 154 P.2d 748, 750 (1944) (“The office of state engineer was not created to adjudicate vested water rights between parties, but to administer and supervise the appropriation of the waters of the state.”). Thus, only a court—not the state engineer—may finally determine water rights.

Absent a court order, recorded certificates of beneficial use issued by the state engineer at the conclusion of extensive administrative proceedings are prima facie evidence of water rights. *See* Utah Code Ann. §§ 73-3-17 (West 2004) (“The certificate so issued and filed shall be prima facie evidence of the owner’s right to the use of the water in the quantity, for the purpose, at the place, and during the time specified therein, subject to prior rights); *Lake Shore Duck Club v. Lake View Duck Club*, 50 Utah 76, 166 P. 309, 311 (1917) (“The certificate is [the water appropriator’s] deed; his evidence of title, good, at least against the state, for all it purports to be, and good as against every one else who cannot show a superior right.”). In the face of these formal procedures for the determination and recognition of water rights, the Tuttle’s

claim that the state engineer owed them a duty of reasonable care to determine their water rights in conducting a groundwater survey is untenable.

Finding no statutory duty, the Tuttles make the unsupported assertion that the state engineer nevertheless undertook to determine their water rights in conducting the groundwater survey, and therefore had a duty to use reasonable care in doing so. The fundamental flaw in this theory is the absence of any alleged facts demonstrating that the state engineer undertook such a determination. When imposing a duty to use reasonable care based upon an undertaking to render services, courts “must narrowly construe the scope of any assumed duty.” *See Weber v. Springville City*, 725 P.2d 1360, 1364-65 (Utah 1986) (declining to find that by maintaining creek’s streambed or shoreline to protect against flooding, city assumed a duty to prevent children or adults from drowning in the stream). As expressly stated in the proposed groundwater management plan, the state engineer undertook to eliminate illegal watering so as to reduce or eliminate the overdraft of water in the Pahvant Valley.

Furthermore, the engineer undertook the groundwater survey to protect the public interest, not that of the Tuttles. *See Utah Code Ann. § 73-1-1* (West 2004) (“All waters in this state, whether above or under the ground are hereby declared to the property of the public, subject to all existing rights to the use

thereof.”). Therefore, the allegation that the engineer missed the Tutttles’ illegal irrigation cannot be a basis for liability to the Tutttles absent the existence of a special relationship, which the Tutttles do not allege and could not demonstrate in this case. *See Webb v. University of Utah*, 2005 UT 80, ¶ 11 (recognizing and applying special duty rule, stating “[o]ur search for sound public policy has led us . . . to decide that governmental actors should be answerable in tort only when their negligent conduct causes injury to persons who stand so far apart from the general public that we can describe them as having a special relationship to the governmental actor.”)

Neither of the cases cited by the Tutttles is to the contrary. In *Nelson v. Salt Lake City*, 919 P.2d 568 (Utah 1996), there was no question that the government had undertaken to fence the park adjacent to the river that the child fell into. *Id.* at 570. Moreover, liability for voluntarily assumed duties is generally limited to damages for physical harm. *See* Restatement (Second) of Torts § 365 (1965); 57A Am. Jur. 2d *Negligence* § 105 (Westlaw updated May 2006). The case of *DCR Inc. v. Peak Alarm Co.*, 663 P.2d 433 (Utah 1983) is even further afield. There, liability was not based upon any undertaking by the defendant alarm company to warn its customers that the alarm system could be easily disabled by burglars. Rather, the Court held that a contractual relationship between the parties created a special relationship that created a duty of due care that extended beyond the obligations undertaken in the

contract. *Id.* at 434-37. Moreover, *DCR Inc.* involved the duty of one private entity to another, not the duty of a governmental entity to an individual. See *Webb*, 2005 UT 80, at ¶ 11.

The ultimate point of the Tuttles' contention that the state engineer had no authority to conduct a groundwater survey is unclear, but in any event, incorrect. The survey fell within the state engineer's responsibility "for the general administrative supervision of the waters of the state and the measurement, appropriation, apportionment, and distribution of those waters," Utah Code Ann. § 73-2-1(3)(a) (West 2004); his authority to "secure the equitable apportionment and distribution of the water according to the respective rights of appropriators, *id.* at § 73-2-1(3)(b)(ii); his authority to sue to "enjoin the unlawful appropriation, diversion, and use of surface and underground water"¹² and to "prevent waste, loss, or pollution of those waters," *id.* at § 73-2-1(3)(b)(iii)(A) & (B); and his authority to require repairs or construction to "prevent waste, loss, pollution or contamination of any waters." *Id.* at § 73-5-9. In addition, the authority to conduct groundwater surveys is presumed in authorizing the state engineer "for and on behalf of the state of Utah, with the approval of the executive director of natural resources

¹²See also *Rocky Ford Irrig. Co. v. Kents Lake Reservoir Co.*, 140 P.2d 638, 639 (Utah 1943) (citing predecessor statute and stating, "It thus appears that there are adequate procedures under which the state engineer can compel the appropriator to comply with the law governing the diversion and the use of water storage rights.").

and the governor, . . . to enter into agreements with any federal or state agency, subdivision or institution for cooperation in making snow surveys and investigations of both underground and surface water resources of the state.” *Id.* at § 73-2-15. *See also id.* at § 73-2-17 (“The state engineer, for and on behalf of the state of Utah, with the approval of the executive director and the governor, is authorized and directed to enter into an agreement with the United States geological survey or any other federal or state agency, for cooperation in making investigations of the groundwater resources of the state and reporting thereon.”).

Thus, the trial court correctly ruled that the state engineer owed no duty to the Tuttles to use reasonable care to conduct the groundwater survey of the Pahvant Valley so as to discover the Tuttles’ illegal watering. This Court therefore should affirm the dismissal of the Tuttles’ negligence claim.

4. The Tuttles’ Allegations Do Not Satisfy the Heightened Requirements for Estoppel Against the Government

The Tuttles’ attempt to invoke equitable estoppel against the defendants fails for several reasons: the Tuttles’ allegations fail to show, first, that the defendants made specific written representations that the Tuttles’ water rights “were sufficient to irrigate their farms”; second, that the Tuttles reasonably relied upon the representations; third, that manifest injustice

would result if estoppel were not applied; and fourth, that the exercise of governmental powers would not be impaired if estoppel were applied.

This Court has recognized that “as a general rule, estoppel may not be invoked against a governmental entity.” *View Condo. Owners Ass’n v. MSICO, L.L.C.*, 2004 UT App. 104, ¶ 34 n.2, 90 P.3d 1042, 1051 n.2 (alterations and quotation marks omitted), *rev’d on other grounds*, 2005 UT 91, 127 P.3d 697. But, “in Utah, there is a limited exception to this general principle for unusual circumstances where it is plain that the interests of justice so require.” *Id.* (quotation and citation omitted). For the unusual circumstances exception to apply, the plaintiff must show that “authorized government entities” have made “very specific written representations.” *Id.*

The Tutties allege that oral representations were made to them by unidentified employees of the Division’s regional office in Richfield that if the Tutties had not received a notice that they were in violation and their land did not appear on the color code maps, they had “no cause for concern.” R.9 at ¶ 59. These representations were nothing more than assurances that at that time the Division did not consider the Tutties to be illegally irrigating, not a specific representation that they had valid water rights sufficient to enable them to irrigate a certain acreage. But in any event, the representations were oral and therefore cannot form the basis of an estoppel claim against defendants. *See, e.g., Thimmes v. Utah State Univ.*, 2001 UT App. 93, ¶ 8, 22

P.3d 257, 259 (affirming dismissal of pedestrian's personal injury claim against university, holding university not estopped from asserting that pedestrian failed to comply with notice of claim requirement before filing personal injury claim where alleged representation that notice should be sent to Division of Risk Management was oral and plaintiff could not even identify who made the representation).

The Tuttles also base their estoppel claim on the 1996 letter from the state engineer to all water users in the Pahvant Valley, stating that "all irrigated lands are now covered by a valid water right." R.25; Appellants' Br., Addendum A. This statement is a general statement about irrigation in the Pahvant Valley and makes no representation specifically as to any particular user's water rights. Therefore, it is also too general to support an estoppel claim. *Compare Williams v. Public Serv. Comm'n*, 754 P.2d 41, 53 (Utah 1988) (holding public service commission not estopped from concluding that it had no jurisdiction over one-way paging services and therefore refusing to issue cease and desist order against unlicensed providers, even though it had previously granted license to plaintiff to provide one-way paging services), *with View Condo. Owners Ass'n*, 2004 UT App. 104, ¶ 34, 90 P.3d 1042, 1051 (remanding for further proceedings on estoppel claim to prevent construction of single family homes on lots 5 and 9, where town had made specific representations that "Lot 9" had been validly dedicated as "snow storage" for

condominiums); *Celebrity Club, Inc. v. Utah Liquor Control Comm’n*, 602 P.2d 689, 691 (Utah 1979) (holding state liquor commission was estopped to deny license on ground that applicant’s premises were within 600 feet of school when commission had given applicant letter stating that the commission has “reviewed the survey you submitted . . . [and] the location of the proposed liquor store in your proposed private club facility satisfies the 600 foot requirement); *Eldredge v. Utah State Ret. Bd.*, 795 P.2d 671, 673 (Utah 1987) (holding state retirement board estopped from reducing benefit of retired state employee based on years of service that included prior years of service with county service, or requiring employee to purchase service credit for the county years, when before employee had retired, board had given employee a letter stating, “This letter is in regard to your years of service with Salt Lake County You do not need to purchase your service with Salt Lake County from January 1, 1955 to February 15, 1961. This service has already been posted to your account A copy of your statement [which included credit for the county years] is enclosed for your convenience.”).

Second, even assuming that the Tuttles could show a specific written representation, their allegations fail to show that their reliance on the alleged representations was reasonable. Again, as the trial court noted, landowners are presumed to know the extent of their water rights. *Dugan v. Jones*, 615 P.2d at 1246. Moreover, in Utah, water rights are evidenced by certificates of

beneficial use issued by the Division of Water Rights after extensive administrative proceedings. *See* Utah Code Ann. § 73-3-17 (West 2004); *Lake Shore Duck Club*, 166 P. at 311 (noting that certificate of beneficial use provides “evidence of title, good, at least against the state, for all it purports to be, and good as against every one else who cannot show a superior right”). Those proceedings provide “the exclusive manner” in which water rights may be appropriated. *See Mosby Irrig. Co. v. Criddle*, 11 Utah 2d 41, 46, 354 P.2d 848, 852 (1960) (citing Title 73, Chapter 3 of the Utah Code). The Tuttles could not reasonably mistake the groundwater survey for such proceedings or rely on the groundwater survey as proof that they possessed water rights not evidenced by certificates of beneficial use. Furthermore, the Tuttles’ alleged reliance on the groundwater survey became all the more *unreasonable* after they received the 1998 Monroe letter advising them that the Division had no record of a water right for the Diesel Well. R.27.

Third, the Tuttles’ allegations could not support a determination that manifest injustice would result if estoppel were not applied—quite the contrary. The Tuttles sold their farms at an inflated price allegedly because they believed it was worth more than it actually was. They have been required by the federal judgment to disgorge the excess. Aside from whether the Tuttles dealt with the buyers in good faith, to allow them to now profit from the circumstances by recovering that excess from the defendants would itself

be manifestly unjust. The Tuttles have lost nothing that ever belonged to them to begin with. They have failed to allege any reason that they should be allowed to keep property rights that they quickly became aware, long before the federal judgment was entered, were not theirs.

Contrasting the facts here to those cases in which estoppel has been applied against the government is instructive. For example, in *Eldredge*, the court held that the state retirement board was estopped from removing from a former employee's retirement account credit for his years of service with the county. Before the employee had retired, the board had made specific written representations to him that those years would be included and in reliance on those representations, the employee had resigned a \$ 37,000 a year position that he could not regain and the employee was financially unable to either take a reduction in benefits or purchase the years of service. 795 P.2d at 676.

Finally, the Tuttles' allegations could not support a finding that the exercise of governmental powers would not be impaired by the application of estoppel. Water in Utah is the property of the public. *See* Utah Code Ann. § 73-1-1 (West 2004). The Legislature has declared that "beneficial use shall be the basis, the measure, and the limit of all rights to the use of water in this state." *Id.* at § 73-1-3. In conducting the groundwater survey, the state engineer was acting in a governmental, rather than proprietary, capacity. The groundwater survey was intended to address a serious problem of overuse of

water in the Pahvant Valley, including the illegal irrigation of an estimated 8,800 acres of land. R.20. To effectively address this problem, the engineer needed the cooperation of the landowners not only to eliminate irrigation without water rights, but also to implement water metering and enforcement of priority rights through a commissioner-based distribution system, if those steps were also necessary. R.21, 22 & 26. To impose liability on the state engineer for his assurances that the first phase of the groundwater management plan—the elimination of irrigation of acreage without water rights—had been completed would unduly hamper the engineer’s ability to address other similar serious problems.

In sum, the district court correctly dismissed the Tuttles’ estoppel claim. The Tuttles’ allegations could not support a determination that defendants made specific written representations that the Tuttles’ water rights were sufficient to irrigate their farms, that the Tuttles reasonably relied upon the representations, that manifest injustice would result if estoppel were not applied, or that the exercise of governmental powers would not be impaired if estoppel were applied. Accordingly, the judgment below should be affirmed.

5. The Tuttles’ Allegations Do Not Support a Takings Claim

The district court also correctly dismissed the Tuttles takings claim, which like their other claims, relies on the fiction that the groundwater survey

constituted a determination of their water rights. Again, the Tutttles err.¹³

Article I, section 22 of the Utah Constitution provides that “[p]rivate property shall not be taken or damaged for public use without just compensation.” A takings claim under article I, section 22 has two elements: “First, the claimant must demonstrate some protectable interest in property. If the claimant possesses a protectable property interest, the claimant must then show that the interest has been taken or damaged by government action.” *View Condo. Owners Ass’n v. MSICO, L.L.C.*, 2005 UT 91, ¶ 30, 127 P.3d 697, 704-05 (alterations and quotation omitted). A “taking” is “any substantial interference with private property which destroys or materially lessens its value, or by which the owner’s right to its use and enjoyment is in any substantial degree abridged or destroyed.” *Id.*¹⁴

Although water rights constitute protectable property interests, *see Sigurd City v. State*, 105 Utah 278, 142 P.2d 154, 157 (1943), the Tutttles fail to allege

¹³Contrary to the Tutttles’ assumption, the district court did not state that it was dismissing the takings claim because of their failure timely to file a notice of claim. Rather, the district court did not explain its reasons for dismissing the takings claim. R.194-96; Addendum A.

¹⁴In the proceedings below, the Tutttles also cited the takings clause contained in the Fifth Amendment to the United States Constitution. However, they did not contend that the Fifth Amendment provides more protection than article I, section 22. Therefore, defendants do not separately analyze the Fifth Amendment claim. *See View Condo. Owners Ass’n*, 2005 UT 91, at ¶ 29 n.5, 127 P.3d at 704 n.5 (analyzing takings claim solely under article I, section 22 when parties did not delineate whether Utah Constitution provides more protection against a taking than United States Constitution).

sufficient facts from which a court could conclude that the defendants ever made a legal determination that the Tutttles either had, or did not have, sufficient water rights to irrigate all of their land. As discussed at Point 3 above, the state engineer never made any “determination” of the Tutttles’ water rights. His stated opinions based on the groundwater survey that all irrigated land in the Pahvant Valley was covered by a valid water right had no effect on the Tutttles’, or anyone else’s, certificates of beneficial use, which were the prima facie evidence of their water rights. It was simply a statement of his opinion at that time.

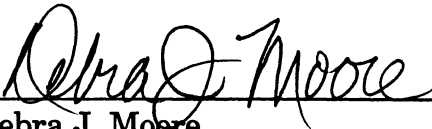
Similarly, Terry Monroe’s letter to the Ellsworths analyzing the water rights they purchased from the Tutttles, had no impact on the extent of water rights that the Tutttles transferred to the Ellsworths. Again, the water rights appurtenant to the farms were evidenced by the certificates and other official documents (such as change applications) themselves. Nothing the defendants did either before or after the Tutttles’ sale of their farms to the Ellsworths altered the Tutttles’ certificated water rights.

The Tutttles never owned water rights sufficient to irrigate all of their farm acreage and neither the state engineer’s letter nor Monroe’s letter had any effect on the Tutttles’ water rights, whatever they were. Therefore, the Tutttles did not sustain a taking and the trial court properly dismissed that claim.

CONCLUSION

The Tuttles' entire complaint is built on a legal fiction: that the state engineer's stated opinion in March 1996 that all irrigated land in the Pahvant Valley was covered by valid water rights constituted a legal determination of the Tuttles' water rights. The trial court correctly rejected that fiction in dismissing the Tuttles' negligence, estoppel, and taking claims. The defendants owed the Tuttles no duty to use reasonable care in conducting the groundwater survey on which the engineer based his opinion. The Tuttles' allegations fail to establish that defendants ever made a specific written statement to them that their water rights were sufficient to irrigate their entire farm acreage, that the Tuttles reasonably relied on the statements that were made, that failure to apply estoppel against defendants would result in manifest injustice, or that the application of estoppel would not interfere with the exercise of a governmental function. The district court also correctly dismissed the Tuttles' taking claim because the Tuttles had no protectable property interest in water rights sufficient to irrigate their entire farms. Accordingly, the judgment below should be affirmed in its entirety.

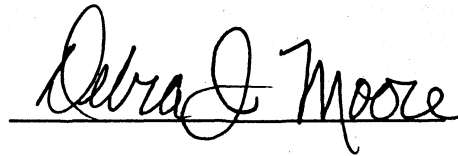
RESPECTFULLY submitted this 14th day of August, 2006.


Debra J. Moore
Assistant Attorney General
Attorney for Appellees

CERTIFICATE OF SERVICE

I certify that two true and correct copies of the foregoing Brief of Appellees were delivered by U.S. mail, first-class postage prepaid, this 14th day of August, 2006, to the following:

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Addendum A

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FILED DISTRICT COURT
 Third Judicial District

MAR 21 2006

SALT LAKE COUNTY

By Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
 SALT LAKE COUNTY, STATE OF UTAH

WILLIAM J. TUTTLE, CHARLENE W.	:	
TUTTLE J. KENTON TUTTLE and LORI	:	ORDER GRANTING DEFENDANTS'
M. TUTTLE,	:	MOTION FOR JUDGMENT ON THE
	:	PLEADINGS
Plaintiffs,	:	
	:	
vs.	:	Case No.050913117
	:	
JERRY D. OLDS, Utah State Engineer,	:	Judge John Paul Kennedy
UTAH DEPARTMENT OF NATURAL	:	
RESOURCES, and TERRY MONROE	:	
	:	
Defendants.	:	

Defendants' Motion for Judgment on the Pleadings came before the Court on February 27, 2006, the Honorable John Paul Kennedy presiding, for decision. Having reviewed the pleadings, Motion, memoranda and materials submitted by the parties, and for good cause appearing the Court makes the following ruling.

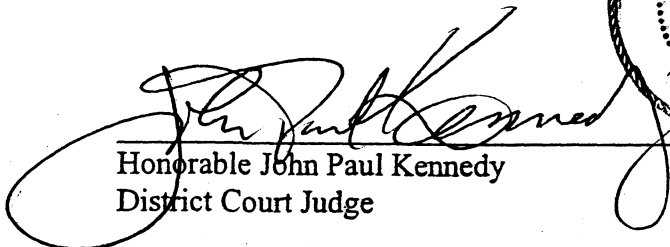
The Court finds that Defendants had no duty to conduct an error-free survey of

groundwater resources in the Pahvant Valley which included property Plaintiffs owned when a survey was conducted in the early 1990's. Property owners are presumed to know the amount of water available to their land, *Dugan v. Jones*, 615 P.2d 1239, 1246 (Utah 1980), and may only alter certificated water rights through statutory procedures, Utah Code Ann. §§ 73-3-1 et seq. The Court also finds that Plaintiffs failed to file a notice of claim as required by the Utah Governmental Immunity Act within one year of when their claims arose. See Utah Code Ann. § 63-30d-401.

IT IS HEREBY ORDERED that Defendants' Motion for Judgment on the Pleadings is GRANTED and Plaintiffs' complaint is DISMISSED with prejudice.

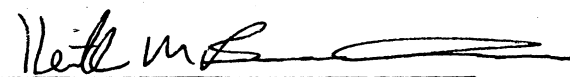
DATED this 20 day of March, 2006.

BY THE COURT


Honorable John Paul Kennedy
District Court Judge



Approved as to Form


Jack C. Helgesen
Keith M. Backman
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 2006, I caused to be served by U.S. mail, postage pre-paid, a true and correct copy of the foregoing Order Granting Defendants' Motion for Judgment on the Pleadings, to the following:

Jack C. Helgesen
Keith M. Backman
HELGESEN, WATERFALL & JONES, P.C.
Centennial Bank Building
4605 Harrison Blvd, Third Floor
Ogden Ut 84403

Jessica Atherton

Addendum B

Utah Rules of Civil Procedure, Rule 10

C

West's Utah Court Rules Annotated Currentness

State Court Rules

Utah Rules of Civil Procedure (Refs & Annos)

Part III. Pleadings, Motions, and Orders

→RULE 10. FORM OF PLEADINGS AND OTHER PAPERS

(a) **Caption; names of parties; other necessary information.** All pleadings and other papers filed with the court shall contain a caption setting forth the name of the court, the title of the action, the file number, the name of the pleading or other paper, and the name, if known, of the judge (and commissioner if applicable) to whom the case is assigned. In the complaint, the title of the action shall include the names of all the parties, but other pleadings and papers need only state the name of the first party on each side with an indication that there are other parties. A party whose name is not known shall be designated by any name and the words "whose true name is unknown." In an action in rem, unknown parties shall be designated as "all unknown persons who claim any interest in the subject matter of the action." Every pleading and other paper filed with the court shall also state the name, address, telephone number and bar number of any attorney representing the party filing the paper, which information shall appear in the top left-hand corner of the first page. Every pleading shall state the name and address of the party for whom it is filed; this information shall appear in the lower left-hand corner of the last page of the pleading. The plaintiff shall file together with the complaint a completed cover sheet substantially similar in form and content to the cover sheet approved by the Judicial Council.

(b) **Paragraphs; separate statements.** All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) **Adoption by reference; exhibits.** Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading, or in any motion. An exhibit to a pleading is a part thereof for all purposes.

(d) **Paper quality, size, style and printing.** All pleadings and other papers filed with the court, except printed documents or other exhibits, shall be typewritten, printed or photocopied in black type on good, white, unglazed paper of letter size (8 1/2" x 11"), with a top margin of not less than 2 inches above any typed material, a left-hand margin of not less than 1 inch, a right-hand margin of not less than one-half inch, and a bottom margin of not less than one-half inch. All typing or printing shall be clearly legible, shall be double-spaced, except for

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Utah Rules of Civil Procedure, Rule 10

matters customarily single-spaced or indented, and shall not be smaller than 12-point size. Typing or printing shall appear on one side of the page only.

(e) **Signature line.** Names shall be typed or printed under all signature lines, and all signatures shall be made in permanent black or blue ink.

(f) **Enforcement by clerk; waiver for pro se parties.** The clerk of the court shall examine all pleadings and other papers filed with the court. If they are not prepared in conformity with this rule, the clerk shall accept the filing but may require counsel to substitute properly prepared papers for nonconforming papers. The clerk or the court may waive the requirements of this rule for parties appearing pro se. For good cause shown, the court may relieve any party of any requirement of this rule.

(g) **Replacing lost pleadings or papers.** If an original pleading or paper filed in any action or proceeding is lost, the court may, upon motion, with or without notice, authorize a copy thereof to be filed and used in lieu of the original.

[Amended effective January 1, 1983; April 1, 1990; April 1, 1998; November 1, 2000; November 1, 2002.]

ADVISORY COMMITTEE NOTE

As a general matter, Rule 10 deals with the form of papers filed with the court--both "pleadings" as defined in Rule 7(a) and "other papers filed with the court," including motions, memoranda, discovery responses, and orders. The changes in the present rule were promulgated to clarify ambiguities in the prior rule and to address specific problems encountered by the courts. Paragraphs (b), (c) and (e) of the rule were not changed, except that paragraph (e) was redesignated as (g) and new paragraphs (e) and (f) were added.

Paragraph (a). This paragraph specifies requirements for captions in every paper filed with the court. In addition to the other requirements, the caption must contain the name of the judge to whom the case is assigned, if the judge's name is known at the time the paper is filed. In the top left-hand corner of the first page, each paper must state identifying information concerning the attorney representing the party filing the paper. Finally, every pleading must state the name and current address of the party for whom it is filed; this information should appear on the lower left-hand corner of the last page. This information need not be set forth in papers other than pleadings.

Paragraph (d). The changes in this paragraph make it clear that papers filed with the court must be "typewritten, printed or photocopied in black type." The Advisory Committee considered suggestions from different groups that so-called "dot matrix" printing be specifically allowed or specifically prohibited. The Advisory Committee, however, settled on the requirements that "typing or printing shall be clearly legible ... and shall not be smaller than pica size." If typing or printing on papers filed with the court complies with these standards, the papers should not be deemed to violate the rule merely because they were prepared in a dot matrix printer. As currently written, this paragraph also removes any confusion concerning the top margin and left margin requirements (now 2 inches and

Utah Rules of Civil Procedure, Rule 10

1 inch respectively), and this paragraph imposes new requirements for right and bottom margins (both one-half inch).

Paragraph (e). This paragraph, which is an addition to the rule, requires typed signature lines and signatures in permanent black or blue ink.

Paragraph (f). The changes in this paragraph make it clear that the clerk must accept all papers for filing, even though they may violate the rule, but the clerk may require counsel to substitute conforming for nonconforming papers. The clerk is given discretion to waive requirements of the rule for parties who are not represented by counsel; for good cause shown, the court may relieve parties of the obligation to comply with the rule or any part of it.

Utah Rules of Civil Procedure, Rule 12

C

West's Utah Court Rules Annotated Currentness

State Court Rules

Utah Rules of Civil Procedure (Refs & Annos)

■ Part III. Pleadings, Motions, and Orders

→RULE 12. DEFENSES AND OBJECTIONS

(a) **When presented.** Unless otherwise provided by statute or order of the court, a defendant shall serve an answer within twenty days after the service of the summons and complaint is complete within the state and within thirty days after service of the summons and complaint is complete outside the state. A party served with a pleading stating a cross-claim shall serve an answer thereto within twenty days after the service. The plaintiff shall serve a reply to a counterclaim in the answer within twenty days after service of the answer or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court, but a motion directed to fewer than all of the claims in a pleading does not affect the time for responding to the remaining claims:

(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(2) If the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

(b) **How presented.** Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be

Utah Rules of Civil Procedure, Rule 12

treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearings and determination thereof be deferred until the trial.

(e) Motion for more definite statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty days after the service of the pleading, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of defenses. A party who makes a motion under this rule may join with it the other motions herein provided for and then available. If a party makes a motion under this rule and does not include therein all defenses and objections then available which this rule permits to be raised by motion, the party shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) Waiver of defenses. A party waives all defenses and objections not presented either by motion or by answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

Utah Rules of Civil Procedure, Rule 12

(i) Pleading after denial of a motion. The filing of a responsive pleading after the denial of any motion made pursuant to these rules shall not be deemed a waiver of such motion.

(j) Security for costs of a nonresident plaintiff. When the plaintiff in an action resides out of this state, or is a foreign corporation, the defendant may file a motion to require the plaintiff to furnish security for costs and charges which may be awarded against such plaintiff. Upon hearing and determination by the court of the reasonable necessity therefor, the court shall order the plaintiff to file a \$300.00 undertaking with sufficient sureties as security for payment of such costs and charges as may be awarded against such plaintiff. No security shall be required of any officer, instrumentality, or agency of the United States.

(k) Effect of failure to file undertaking. If the plaintiff fails to file the undertaking as ordered within 30 days of the service of the order, the court shall, upon motion of the defendant, enter an order dismissing the action.

[Amended effective September 4, 1985; April 1, 1990; November 1, 2000.]

Rules App.Proc., Rule 24



This document has been updated. Use KEYCITE.

West's Utah Court Rules Annotated Currentness

State Court Rules

Utah Rules of Appellate Procedure (Refs & Annos)

■ Title V. General Provisions

→RULE 24. BRIEFS

(a) Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order indicated:

(a)(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(a)(2) A table of contents, including the contents of the addendum, with page references.

(a)(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(a)(4) A brief statement showing the jurisdiction of the appellate court.

(a)(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(a)(5)(A) citation to the record showing that the issue was preserved in the trial court; or

(a)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(a)(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

(a)(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall

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follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

(a)(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(a)(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

(a)(10) A short conclusion stating the precise relief sought.

(a)(11) An addendum to the brief or a statement that no addendum is necessary under this paragraph. The addendum shall be bound as part of the brief unless doing so makes the brief unreasonably thick. If the addendum is bound separately, the addendum shall contain a table of contents. The addendum shall contain a copy of:

(a)(11)(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief;

(a)(11)(B) in cases being reviewed on certiorari, a copy of the Court of Appeals opinion; in all cases any court opinion of central importance to the appeal but not available to the court as part of a regularly published reporter service; and

(a)(11)(C) those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction.

(b) Brief of the appellee. The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that the appellee need not include:

(b)(1) a statement of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant; or

(b)(2) an addendum, except to provide material not included in the addendum of the appellant. The appellee may refer to the addendum of the appellant.

(c) Reply brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the

Rules App.Proc., Rule 24

requirements of paragraph (a) (2), (3), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

(d) References in briefs to parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

(e) References in briefs to the record. References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.

(f) Length of briefs. Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (a) of this rule. In cases involving cross-appeals, paragraph (g) of this rule sets forth the length of briefs.

(g) Briefs in cases involving cross-appeals. If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant for the purposes of this rule and Rule 26, unless the parties otherwise agree or the court otherwise orders. The brief of the appellant shall not exceed 50 pages in length. The brief of the appellee/cross-appellant shall contain the issues and arguments involved in the cross-appeal as well as the answer to the brief of the appellant and shall not exceed 50 pages in length. The appellant shall then file a brief which contains an answer to the original issues raised by the appellee/cross-appellant and a reply to the appellee's response to the issues raised in the appellant's opening brief. The appellant's second brief shall not exceed 25 pages in length. The appellee/cross-appellant may then file a second brief, not to exceed 25 pages in length, which contains only a reply to the appellant's answers to the original issues raised by the appellee/cross-appellant's first brief. The lengths specified by this paragraph are exclusive of table of contents, table of authorities, and addenda.

(h) Permission for over length brief. While such motions are disfavored, the court for good cause shown may upon motion permit a party to file a brief that exceeds the limitations of this rule. The motion shall state with specificity the issues to be briefed, the number of additional pages requested, and the good cause for granting the motion. A motion filed at least seven days before the date the brief is due or seeking five or fewer additional pages need not be accompanied by

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a copy of the brief. A motion filed less than seven days before the date the brief is due and seeking more than 5 additional pages shall be accompanied by a copy of the draft brief for in camera inspection. If the motion is granted, any responding party is entitled to an equal number of additional pages without further order of the court. Whether the motion is granted or denied, the draft brief will be destroyed by the court.

(i) Briefs in cases involving multiple appellants or appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) Citation of supplemental authorities. When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made within 7 days of filing and shall be similarly limited.

(k) Requirements and sanctions. All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

[Amended effective October 1, 1992; July 1, 1994; April 1, 1995; April 1, 1998; November 1, 1999; April 1, 2003; November 1, 2004; April 1, 2006.]

U.C.A. 1953 § 73-2-1

WEST'S UTAH CODE ANNOTATED

TITLE 73. WATER AND IRRIGATION

CHAPTER 2. STATE ENGINEER--DIVISION OF WATER RIGHTS

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

- (1) There shall be a state engineer.
- (2) The state engineer shall:
 - (a) be appointed by the governor with the consent of the Senate;
 - (b) hold office for the term of four years and until a successor is appointed; and
 - (c) have five years experience as a practical engineer or the theoretical knowledge, practical experience, and skill necessary for the position.
- (3)(a) The state engineer shall be responsible for the general administrative supervision of the waters of the state and the measurement, appropriation, apportionment, and distribution of those waters.
- (b) The state engineer shall have the power to:
 - (i) make and publish rules necessary to carry out the duties of his office;
 - (ii) secure the equitable apportionment and distribution of the water according to the respective rights of appropriators; and
 - (iii) bring suit in courts of competent jurisdiction to:
 - (A) enjoin the unlawful appropriation, diversion, and use of surface and underground water;
 - (B) prevent waste, loss, or pollution of those waters; and
 - (C) enable him to carry out the duties of his office.
- (c) The state engineer shall:
 - (i) upon request from the board of trustees of an irrigation district under Title 17A, Chapter 2, Part 7, Irrigation Districts, or a local district under Title 17B, Chapter 2, Local Districts, that operates an irrigation water system, cause a water survey to be made of all lands proposed to be annexed to the district in order to determine and allot the maximum amount of water that could be beneficially used on the land, with a separate survey and allotment being made for each 40-acre or smaller tract in separate ownership; and

U.C.A. 1953 § 73-2-1

(ii) upon completion of the survey and allotment under Subsection (3)(c)(i), file with the district board a return of the survey and report of the allotment.

(4)(a) The state engineer may establish water districts and define their boundaries.

(b) The water districts shall be formed in a manner that:

(i) secures the best protection to the water claimants; and

(ii) is the most economical for the state to supervise.

Laws 1919, c. 67, § 7; Laws 1921, c. 69, § 1; Laws 1941, c. 96, § 1; Laws 1991, c. 3, § 1; Laws 2001, c. 90, § 61, eff. April 30, 2001.

Codifications R.S. 1933, § 100-2-1; C. 1943, § 100-2-1.

CROSS REFERENCES

Natural Resources Act, see § 63-34-1 et seq.

Rulemaking, Administrative Rulemaking Act, see § 63-46a-1 et seq.

Water resource board, see § 72-10-1.

LAW REVIEW AND JOURNAL COMMENTARIES

Davis, The Only Way to Manage a Desert: Utah's Liability Immunity for Flood Control, 8 J. Energy L. & Pol'y 95 (1987).

Engel, Water Quality Control: The Reality of Priority in Utah Groundwater Management, 1992 Utah L. Rev. 491 (1992).

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

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C.J.S. Waters §§ 333 to 337, 357, 359 to 360, 362 to 364, 367, 391, 435.

UNITED STATES SUPREME COURT

Water rights,

Extent of water rights, see State of Arizona v. State of California, 1936, 56 S.Ct. 848, 298 U.S. 558, 80 L.Ed. 1331, rehearing denied 57 S.Ct. 4, 299 U.S. 618, 81 L.Ed. 456.

Vested rights of first to appropriate, see State of Ariz. v. State of Cal., U.S.Ariz.1963, 83 S.Ct. 1468, 373 U.S. 546, 10 L.Ed.2d 542, entered 84 S.Ct.

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U.C.A. 1953 § 73-2-1

755, 376 U.S. 340, 11 L.Ed.2d 757, amended 86 S.Ct. 924, 383 U.S. 268, 15
L.Ed.2d 743, amended 104 S.Ct. 1900, 466 U.S. 144, 80 L.Ed.2d 194.

U.C.A. 1953 § 73-2-15

WEST'S UTAH CODE ANNOTATED

TITLE 73. WATER AND IRRIGATION

CHAPTER 2. STATE ENGINEER--DIVISION OF WATER RIGHTS

§ 73-2-15. Agreements with federal and state agencies--Investigations, surveys or adjudications

The state engineer, for and on behalf of the state of Utah, with the approval of the executive director of natural resources and the governor, is authorized to enter into agreements with any federal or state agency, subdivision or institution for cooperation in making snow surveys and investigations of both underground and surface water resources of the state. The state engineer is further authorized to cooperate with such agencies, subdivisions and institutions, with the approval of the executive director and the governor, for the investigation of flood and erosion control and for the adjudication of water rights. The expenses of such investigations, surveys and adjudications shall be divided between the cooperating parties upon an equitable basis.

Laws 1937, c. 130, § 2; Laws 1941, 1st Sp. Sess., c. 40, § 1; Laws 1967, c. 176, § 12; Laws 1969, c. 198, § 7.

Codifications R.S. 1933, § 100-2-15; C. 1943, § 100-2-15.

CROSS REFERENCES

Federal assistance management program, purposes, see § 63-40-1.

U.C.A. 1953 § 73-2-15, UT ST § 73-2-15

Current through the end of the 2004 4th Spec. Sess.

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U.C.A. 1953 § 73-3-17

WEST'S UTAH CODE ANNOTATED

TITLE 73. WATER AND IRRIGATION

CHAPTER 3. APPROPRIATION

§ 73-3-17. Certificate of appropriation--Evidence

Upon it being made to appear to the satisfaction of the state engineer that an appropriation or a permanent change of point of diversion, place or nature of use has been perfected in accordance with the application therefor, and that the water appropriated or affected by the change has been put to a beneficial use, as required by Section 73-3-16, he shall issue a certificate, in duplicate, setting forth the name and post-office address of the person by whom the water is used, the quantity of water in acre-feet or the flow in second-feet appropriated, the purpose for which the water is used, the time during which the water is to be used each year, the name of the stream or source of supply from which the water is diverted, the date of the appropriation or change, and such other matter as will fully and completely define the extent and conditions of actual application of the water to a beneficial use; provided that certificates issued on applications for projects constructed pursuant to Title 73, Chapter 10, Utah Code Annotated 1953, and for the federal projects constructed by the United States Bureau of Reclamation, referred to in Section 73-3-16 of said Code, need show no more than the facts shown in the proof. The certificate shall not extend the rights described in the application. Failure to file proof of appropriation or proof of change of the water on or before the date set therefor shall cause the application to lapse. One copy of such certificate shall be filed in the office of the state engineer and the other shall be delivered to the appropriator or to the person making the change who shall, within thirty days, cause the same to be recorded in the office of the county recorder of the county in which the water is diverted from the natural stream or source. The certificate so issued and filed shall be prima facie evidence of the owner's right to the use of the water in the quantity, for the purpose, at the place, and during the time specified therein, subject to prior rights.

Laws 1919, c. 67, § 56; Laws 1937, c. 130, § 1; Laws 1953, c. 130, § 1; Laws 1955, c. 160, § 1.

Codifications R.S. 1933, § 100-3-17; C. 1943, § 100-3-17.

U.C.A. 1953 § 73-5-9

WEST'S UTAH CODE ANNOTATED

TITLE 73. WATER AND IRRIGATION

CHAPTER 5. ADMINISTRATION AND DISTRIBUTION

§ 73-5-9. Powers of state engineer as to waste, pollution or contamination of waters

To prevent waste, loss, pollution or contamination of any waters whether above or below the ground, the state engineer may require the repair or construction of head gates or other devices on ditches or canals, and the repair or installation of caps, valves or casings on any well or tunnel or the plugging or filling thereof to accomplish the purposes of this section.

Any requirement made by the state engineer in accordance with this section shall be executed by and at the cost and expense of the owner, lessee or person having control of such diverting works affected. If within ten days after notice of such requirement as provided in this section, the owner, lessee or person having control of the water affected, has not commenced to carry out such requirement, or if he has commenced to comply therewith but shall not thereafter proceed diligently to complete the work, the state engineer may forbid the use of water from such source until the user thereof shall comply with such requirement. Failure to comply with any requirement made by the state engineer in accordance with the provisions of this section shall constitute a misdemeanor. Each day that such violation is permitted to continue shall constitute a separate offense.

Laws 1935, c. 105, § 2.

Codifications R.S. 1933, § 100-5-11; C. 1943, § 100-5-11.

U.C.A. 1953 § 73-4-1

WEST'S UTAH CODE ANNOTATED

TITLE 73. WATER AND IRRIGATION

CHAPTER 4. DETERMINATION OF WATER RIGHTS

§ 73-4-1. By engineer on petition of users--Upon request of Department of Environmental Quality

(1) Upon a verified petition to the state engineer, signed by five or more or a majority of water users upon any stream or water source, requesting the investigation of the relative rights of the various claimants to the waters of such stream or water source, it shall be the duty of the state engineer, if upon such investigation he finds the facts and conditions are such as to justify a determination of said rights, to file in the district court an action to determine the various rights. In any suit involving water rights the court may order an investigation and survey by the state engineer of all the water rights on the source or system involved.

(2)(a) As used in this section, "executive director" means the executive director of the Department of Environmental Quality.

(b) The executive director, with the concurrence of the governor, may request that the state engineer file in the district court an action to determine the various water rights in the stream, water source, or basin for an area within the exterior boundaries of the state for which any person or organization or the federal government is actively pursuing or processing a license application for a storage facility or transfer facility for high-level nuclear waste or greater than class C radioactive waste.

(c) Upon receipt of a request made under Subsection (2)(b), the state engineer shall file the action in the district court.

(d) If a general adjudication has been filed in the state district court regarding the area requested pursuant to Subsection (2)(b), the state engineer and the state attorney general shall join the United States as a party to the action.

Laws 1919, c. 67, § 20; Laws 2001, c. 107, § 16, eff. March 15, 2001.

Codifications R.S. 1933, § 100-4-1; C. 1943, § 100-4-1.

Addendum C

APR 30 2003

MARKUS B. ZIMMER, CLERK
BY

DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

GRANT ELLSWORTH and FERN
ELLSWORTH,

Plaintiffs,

vs.

WILLIAM J. TUTTLE, CHARLENE W.
TUTTLE, J. KENTON TUTTLE, and
LORIE M. TUTTLE,

Defendants.

SPECIAL VERDICT FORM
(J. KENTON AND LORI M. TUTTLE)

Case No. 2:01CV907K

MEMBERS OF THE JURY:

Please answer the following questions according to the burdens of proof as I have instructed. For those questions which require a clear and convincing burden of proof, if you find the evidence in favor of the question presented is clear and convincing, answer it "yes." If you find the evidence in favor of the question is not clear and convincing, answer it "no."

For those questions which require only a preponderance of the evidence, if you find the evidence preponderates in favor of the question presented, answer it "yes." If you find that the evidence preponderates against the question presented, answer it "no." If on any question you find that the evidence is so equally balanced that you cannot determine an answer, then answer the question "no."

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We, the Jury, answer the question submitted as follows:

QUESTIONS REGARDING FRAUD

Question No. 1

Do you find that Kenton Tuttle was acting as an agent for Lori Tuttle for purposes of selling their farm?

Yes ✓

No _____

Proceed to Question No. 2.

Question No. 2

(a) Have the Ellsworths proven by clear and convincing evidence that Defendant Kenton Tuttle committed fraud?

Yes ✓

No _____

If your answer to Question No. 2(a) is "yes," then go on to Question Nos. 2(b) and 2(c). If your answer to Question No. 2(a) is "no," then skip Question Nos. 2(b) and 2(c), and proceed to Question No. 3.

(b) State the amount of compensatory damages that the Ellsworths incurred as a result of this fraud.

Damages: \$ 71,680.00

(c) State the amount of punitive damages, if any, that the Ellsworths should be awarded as a result of this fraud by checking the box next to A and filling in the amount. If you find that punitive damages are not appropriate, check the box next to B.

(A) 10,000.00 punitive damages should be awarded in the following amount:

\$ 10,000.

(B) _____ punitive damages should not be awarded.

Question No. 3

If your answer to Question No. 1 is "yes," then skip Question No. 3 and proceed to Question No. 4. If your answer to Question No. 1 is "no," then answer Question No. 3.

(a) Have the Ellsworths proven by clear and convincing evidence that Defendant Lori Tuttle committed fraud?

Yes _____

No _____

If your answer to Question No. 3(a) is "yes," then go on to Question Nos. 3(b) and 3(c). If your answer to Question No. 3(a) is "no," then skip Question Nos. 3(b) and 3(c), and proceed to Question No. 4.

(b) State the amount of compensatory damages that the Ellsworths incurred as a result of this fraud.

Damages: \$ _____

(c) State the amount of punitive damages, if any, that the Ellsworths should be awarded as a result of this fraud by checking the box next to A and filling in the amount. If you find that punitive damages are not appropriate, check the box next to B.

(A) _____ punitive damages should be awarded in the following amount:

\$ _____.

(B) _____ punitive damages should not be awarded.

QUESTIONS REGARDING MISTAKE

If you find liability for fraud and awarded damages for the involved property, then skip Question No. 4. If you did not find liability and award damages for the involved property, then answer Question No. 4.

Question No. 4

Have the Ellsworths proven by clear and convincing evidence their claim for:

- (a) mutual mistake? Yes _____ No _____; or
- (b) unilateral mistake? Yes _____ No _____; or
- (c) material misrepresentation? Yes _____ No _____.

Stop here. Have the jury foreperson sign and date this Special Verdict Form on the last page and return it to the Court.

DATED this 30th day of APRIL, 2003.



FOREPERSON

APR 30 2003

MARKUS B. ZIMMER, CLERK
BY _____ DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

GRANT ELLSWORTH and FERN
ELLSWORTH,

Plaintiffs,

vs.

WILLIAM J. TUTTLE, CHARLENE W.
TUTTLE, J. KENTON TUTTLE, and
LORI M. TUTTLE,

Defendants.

SPECIAL VERDICT FORM
(WILLIAM J. AND CHARLENE W.
TUTTLE)

Case No. 2:01CV907K

MEMBERS OF THE JURY:

Please answer the following questions according to the burdens of proof as I have instructed. For those questions which require a clear and convincing burden of proof, if you find the evidence in favor of the question presented is clear and convincing, answer it "yes." If you find the evidence in favor of the question is not clear and convincing, answer it "no."

For those questions which require only a preponderance of the evidence, if you find the evidence preponderates in favor of the question presented, answer it "yes." If you find that the evidence preponderates against the question presented, answer it "no." If on any question you find that the evidence is so equally balanced that you cannot determine an answer, then answer the question "no."

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We, the Jury, answer the question submitted as follows:

QUESTIONS REGARDING FRAUD

Question No. 1

Do you find that Bill Tuttle was acting as an agent for Charlene Tuttle for purposes of selling their farm?

Yes



No

Proceed to Question No. 2.

Question No. 2

(a) Have the Ellsworths proven by clear and convincing evidence that Defendant Bill Tuttle committed fraud?

Yes



No

If your answer to Question No. 2(a) is "yes," then go on to Question Nos. 2(b) and 2(c). If your answer to Question No. 2(a) is "no," then skip Question Nos. 2(b) and 2(c), and proceed to Question No. 3.

(b) State the amount of compensatory damages that the Ellsworths incurred as a result of this fraud.

Damages: \$ 805,340

(c) State the amount of punitive damages, if any, that the Ellsworths should be awarded as a result of this fraud by checking the box next to A and filling in the amount. If you find that punitive damages are not appropriate, check the box next to B.

(A) ☒

punitive damages should be awarded in the following amount:

\$ 150,000.

(B) ☐

punitive damages should not be awarded.

Question No. 3

If your answer to Question No. 1 is "yes," then skip Question No. 3 and proceed to Question No. 4. If your answer to Question No. 1 is "no," then answer Question No. 3.

(a) Have the Ellsworths proven by clear and convincing evidence that Defendant Charlene Tuttle committed fraud?

Yes _____

No _____

If your answer to Question No. 3(a) is "yes," then go on to Question Nos. 3(b) and 3(c). If your answer to Question No. 3(a) is "no," then skip Question Nos. 3(b) and 3(c), and proceed to Question No. 4.

(b) State the amount of compensatory damages that the Ellsworths incurred as a result of this fraud.

Damages: \$ _____

(c) State the amount of punitive damages, if any, that the Ellsworths should be awarded as a result of this fraud by checking the box next to A and filling in the amount. If you find that punitive damages are not appropriate, check the box next to B.

(A) _____ punitive damages should be awarded in the following amount:

\$ _____.

(B) _____ punitive damages should not be awarded.

QUESTIONS REGARDING MISTAKE

If you find liability for fraud and awarded damages for the involved property, then skip Question No. 4. If you did not find liability and award damages for the involved property, then answer Question No. 4.

Question No. 4

Have the Ellsworths proven by clear and convincing evidence of their claim for:

- (a) mutual mistake? Yes _____ No ; or
- (b) unilateral mistake? Yes _____ No _____; or
- (c) material misrepresentation? Yes _____ No _____.

Proceed to Question No. 5.

QUESTIONS REGARDING BREACH OF WARRANTY

Question No. 5

(a) Have the Ellsworths proven by a preponderance of the evidence a breach of warranty under the Bill/Charlene Tuttle Real Estate Purchase Contract with respect to whether the Diesel Well was properly permitted and fit for its intended purpose?

Yes ✓ No _____

If you answer "yes" to Question No. 5(a), proceed to Question No. 5(b). If you answer "no" to Question No. 5(a), skip Question No. 5(b) and proceed to Question No. 6.

(b) State the amount of damages, including both compensatory and consequential damages, that the Ellsworths incurred as a result of breach of warranty.

Damages: \$ 125,000

Proceed to Question No. 6.

QUESTIONS REGARDING THE JUNE 29, 1999 WRITING

Question No. 6

Do you find that the June 29, 1999 writing is an entirely new agreement, rather than a modification of the Bill/Charlene Real Estate Purchase Contract?

Yes ✓ No _____

Proceed to Question No. 7.

Question No. 7

Have the Ellsworths proven by a preponderance of the evidence that the June 29, 1999 writing, whether a new agreement or a modification, is not a valid contract because it lacks consideration?

Yes ✓ No

If you answered "yes" to Question No. 7, skip Question Nos. 8 and 9, and proceed to Question No. 10. If you answered "no" to Question No. 7, proceed to Question No. 8.

Question No. 8

Have the Ellsworths proven that the June 29, 1999 writing, whether a new agreement or a modification, is not a valid contract because the parties did not have a meeting of the minds regarding one of its integral terms?

Yes No

If you answered "yes" to Question No. 8, skip Question No. 9, and proceed to Question No. 10. If you answered "no" to Question No. 8, proceed to Question No. 9.

Question No. 9

Do you find that the parties intended for the term "proceeds" to mean that the additional 7% interest would only become due if the 1999 hay crop generated a net profit (income exceeded expenses)?

Yes No

If you answered "yes" to Question No. 9, proceed to Question No. 10. If you answered "no" to Question No. 9, proceed to Question No. 13.

Question No. 10

(a) Have the Ellsworths proven by a preponderance of the evidence that Bill or Charlene Tuttle, acting as an agent for the other, wrongfully converted funds from the 1999 farm operating account?

Yes ☒

No ☐

If you answered "yes" to Question No. 10(a), then proceed to Question Nos. 10(b) and (c). If you answered "no" to Question No. 10(a), then skip Question Nos. 10(b) and (c), and proceed to Question Nos. 11 and 12.

(b) State the amount of damages, including both compensatory and consequential damages, that the Ellsworths incurred as a result of this wrongful conversion.

Damages: \$ ~~11,000~~ 11,000

(c) State the amount of punitive damages that the Ellsworths should be awarded as a result of this wrongful conversion by checking the box next to A and filling in the amount. If you find that punitive damages are not appropriate, check the box next to B.

(A) ☐ punitive damages should be awarded in the following amount:

\$ _____.

(B) ☒ punitive damages should not be awarded.

Question No. 11

(a) Have the Ellsworths proven by a preponderance of the evidence that Bill Tuttle wrongfully converted funds from the 1999 farm operating account?

Yes ☐

No ☐

If you answered "yes" to Question No. 11(a), then proceed to Question Nos. 11(b) and (c). If you answered "no" to Question No. 11(a), then skip Question Nos. 11(b) and (c), and proceed to Question No. 12.

(b) State the amount of damages, including both compensatory and consequential damages, that the Ellsworths incurred as a result of this wrongful conversion.

Damages: \$ _____

(c) State the amount of punitive damages, if any, that the Ellsworths should be awarded as a result of this wrongful conversion by checking the box next to A and filling in the amount. If you find that punitive damages are not appropriate, check the box next to B.

(A) _____ punitive damages should be awarded in the following amount:

\$ _____.

(B) _____ punitive damages should not be awarded.

Question No. 12

(a) Have the Ellsworths proven by a preponderance of the evidence that Charlene Tuttle wrongfully converted funds from the 1999 farm operating account?

Yes _____

No _____

If you answered "yes" to Question No. 12(a), then proceed to Question Nos. 12(b) and (c). If you answered "no" to Question No. 12(a), then skip Question Nos. 12(b) and (c), and proceed to Question No. 13.

(b) State the amount of damages, including both compensatory and consequential damages, that the Ellsworths incurred as a result of this wrongful conversion.

Damages: \$ _____

(c) State the amount of punitive damages, if any, that the Ellsworths should be awarded as a result of this wrongful conversion by checking the box next to A and filling in the amount. If you find that punitive damages are not appropriate, check the box next to B.

(A) _____ punitive damages should be awarded in the following amount:

\$ _____.

(B) _____ punitive damages should not be awarded.

Question No. 13

(a) Have the Ellsworths proven by a preponderance of the evidence that the Bill/Charlene Tuttle Real Estate Purchase Contract was breached by the removal of funds from the 1999 farm operating account for payment of the additional 7% interest?

Yes ✓ No _____

If you answered "yes" to Question No. 13(a), then proceed to Question No. 13(b). If you answered "no" to Question No. 13(a), then skip Question No. 13(b), and proceed to Question No. 14.

(b) State the amount of damages, including both compensatory and consequential damages, that the Ellsworths incurred as a result of breach of the real estate purchase contracts by removal of funds from the 1999 farm operating account for payment of the additional 7% interest.

Damages: \$ 14,500

Proceed to Question No. 14.

QUESTIONS REGARDING BREACH OF CONTRACT FOR REMOVAL OF FUNDS FOR PAYMENT OF INTEREST ON LOANS THAT PREDATED 1999

Question No. 14

(a) Have the Ellsworths proven by a preponderance of the evidence that the Bill/Charlene Tuttle Real Estate Purchase Contract was breached by the removal of funds from the 1999 farm operating account for payment of interest on loans that were incurred prior to 1999?

Yes ✓ No _____

If you answered "yes" to Question No. 14(a), then proceed to Question No. 14(b). If you answered "no" to Question No. 14(a), stop here. Have the jury foreperson sign and date this Special Verdict Form on the last page and return it to the Court.

(b) State the amount of damages, including both compensatory and consequential damages, that the Ellsworths incurred as a result of this breach of contract by removing funds from the 1999 farm operating account for payment of interest on loans that were incurred by the Defendant(s) prior to 1999.

Damages: \$ 7,500

Stop here. Have the jury foreperson sign and date this Special Verdict Form on the last page and return it to the Court.

DATED this 30th day of April, 2003.



FOREPERSON