

2006

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

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

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

Debra J. Moore; Joel Ferre; Mark L. Shurtleff; Utah Attorney General; Attorneys for Appellees.
Jack C. Helgesen; Keith M. Backman; Helgesen, Waterfall and Jones; Attorneys for Appellant.

Recommended Citation

Brief of Appellant, *Tuttle v. Olds*, No. 20060364 (Utah Court of Appeals, 2006).
https://digitalcommons.law.byu.edu/byu_ca2/6449

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

IN THE UTAH COURT OF APPEALS

WILLIAM J. TUTTLE, CHARLENE W.
TUTTLE, 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.

Case No. 20060364-CA

BRIEF OF APPELLANTS

THIS IS AN APPEAL FROM A JUDGMENT IN THE
THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH
THE HONORABLE JOHN PAUL KENNEDY

Jack C. Helgesen
Keith M. Backman
Helgesen, Waterfall & Jones, P.C.
4605 S. Harrison Boulevard, #300
Ogden, Utah 84403
Attorneys for Appellant

Debra J. Moore
Joel Ferre
Mark L. Shurtleff
Utah Attorney General
160 E. 300 South, 6th Floor
P.O. Box 140856
Salt Lake City, Utah 84114-0856
Attorneys for Appellees



FILED
UTAH APPELLATE COURT
JUL 06 2006

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF JURISDICTION	1
STATEMENT OF THE ISSUES	1
STATEMENT OF DETERMINATIVE LAWS	2
STATEMENT OF THE CASE	3
STATEMENT OF RELEVANT FACTS	5
SUMMARY OF THE ARGUMENT	9
ARGUMENT	11
I. THE TRIAL COURT ERRED IN CONVERTING THE MOTION TO DISMISS INTO A MOTION FOR JUDGMENT ON THE PLEADINGS AND DID NOT APPLY THE PROPER STANDARD IN DECIDING THE MOTION.	11
II. THE STATE ENGINEER HAD NO DUTY OR AUTHORITY TO CONDUCT THE GROUNDWATER SURVEY, IMPOSE A GROUNDWATER MANAGEMENT PLAN OR DETERMINE WATER RIGHTS IN THE PAHVANT VALLEY.	12
A. The State Engineer Had No Authority to Conduct a Groundwater Survey or Impose a Groundwater Management Plan.	13
B. The State Engineer must Determine Water Rights Through an Adjudication.	14
III. EVEN IF THE STATE ENGINEER HAD AUTHORITY TO PERFORM THE GROUNDWATER SURVEY IN THE PAHVANT VALLEY, HE WAS UNDER NO OBLIGATION TO DO SO AND HE HAD A DUTY TO PERFORM THE SURVEY WITH REASONABLE CARE.	15
IV. THE DEFENDANTS WERE ESTOPPED TO DENY THAT THE TUTTLES AND THE ELLSWORTHS HAD WATER RIGHTS SUFFICIENT TO IRRIGATE THE FARMS.	17
V. THE TUTTLES COMPLIED WITH THE NOTICE OF CLAIM PROVISIONS OF THE ACT.	19

VI. EVEN IF THE NOTICE OF CLAIM WAS UNTIMELY FILED, THE TUTTLES' ESTOPPEL AND TAKINGS CLAIMS SHOULD NOT HAVE BEEN DISMISSED.	22
CONCLUSION	23

TABLE OF AUTHORITIES

Statutes:

Utah Code Ann. §78-2-2 (1953 as amended)	1
Utah Code Ann. §63-30-11	3
Utah Code Ann. §63-30-12	2, 19
Utah Code Ann. §73-2-1 (2006)	13
Utah Code Ann. §73-4-1 (2006)	14

Cases:

<u>Bank One Utah v. West Jordan City</u> , 2002 UT App. 271, 54 P.3d 135	3, 20
<u>Bowles v. State ex. rel. Dept. of Transportation</u> , 652 P.2d 1345 (Utah 1982)	3
<u>Brinkerhoff v. Salt Lake City</u> , 13 Utah 2d 214, 371 P.2d 211 (Utah 1962)	2
<u>Colman v. State Land Board</u> , 795 P.2d 622 (Utah 1990)	3
<u>DCR, Inc. v. Peak Alarm Co.</u> , 663 P.2d 433 (Utah 1983)	16
<u>El Rancho Enters., Inc., v. Murray City Corp.</u> , 565 P.2d 778 (Utah 1977)	3
<u>Little Cottonwood Water Co. v. Kimball</u> , 76 Utah 243, 289 P. 116 (1930)	13
<u>Mendez v. Department of Social Services</u> , 813 P.2d 1234 (Utah App. 1991)	2, 17
<u>Miller v. Gastronomy, Inc.</u> , 2005 UT App. 80, 110 P.3d 144	1, 12
<u>Mounteer v. Utah Power & Light Co.</u> , 823 P.2d 1055 (Utah 1991)	12
<u>Nelson ex rel. Stuckman v. Salt Lake City</u> , 919 P.2d 568 (Utah 1996)	2, 16
<u>Russell v. Standard Corp.</u> , 898 P.2d 263 (Utah 1995).	12

<u>Thimmes v. Utah State Univ.</u> , 2001 UT App 93, 22 P.3d 257	12
<u>Valley Colour, Inc. v. Beuchert Builders, Inc.</u> , 944 P.2d 361 (Utah 1997)	20
<u>Whipple v. American Fork Irrigation Co.</u> , 910 P.2d 1218, 1220 (Utah 1996)	1

Rules:

Utah Rule of Civil Procedure 12(a)	11
Utah Rule of Civil Procedure 12(b)(6)	2, 11
Utah Rule of Civil Procedure 12(c)	2, 11

Other Authorities:

51 Am. Jur. 2d Limitation of Actions §151	20
Milton I Shadur, 2 Moore’s Federal Practice §12.12 (Matthew Bender 2006)	11
57A Am Jur. 2d Negligence §208 (1989)	16

STATEMENT OF JURISDICTION

This court has jurisdiction of this appeal pursuant to Utah Code Ann. §78-2a-3(2)(j) (1953 as amended).

STATEMENT OF THE ISSUES

1. Did the trial court properly convert the motion to dismiss to a motion for judgment on the pleadings and apply the proper standard?
2. Did the defendants have a duty to conduct a groundwater survey and create a groundwater plan in the Pahvant Valley in 1992 to 1996 or did they exceed their authority?
3. Having determined to conduct a groundwater survey in the Pahvant Valley, did the defendants have an obligation to the Tuttle to conduct the survey in a non-negligent manner?
4. Were the defendants estopped from contradicting the 1996 groundwater survey?
5. Was the Tuttle's notice of claim timely?
6. Did the trial court err in dismissing the Tuttle's takings and estoppel claims?

All of these issues were decided by the trial court on a motion to dismiss, which the trial court treated as a motion for judgment on the pleadings. The standard of review for both issues is correctness. See Whipple v. American Fork Irrigation Co., 910 P.2d 1218, 1220 (Utah 1996) (standard of review for motion to dismiss is correctness); Miller v.

Gastronomy, Inc., 2005 UT App. 80, ¶6, 110 P.3d 144 (standard of review for motion for judgment on the pleadings is correctness).

STATEMENT OF DETERMINATIVE LAWS

1. Motion for Judgment on the Pleadings.
 - a. Utah Rule of Civil Procedure 12(b)(6);
 - b. Utah Rule of Civil Procedure 12(c).
2. Groundwater Survey and Groundwater Plan.
 - a. The Tuttle have been unable to locate any determinative law on this issue, which appears to be a matter of first impression.
3. Negligent Survey.
 - a. Nelson ex rel. Stuckman v. Salt Lake City, 919 P.2d 568 (Utah 1996);
 - b. Brinkerhoff v. Salt Lake City, 13 Utah 2d 214, 371 P.2d 211 (Utah 1962).
4. Estoppel.
 - a. Mendez v. Department of Social Services, 813 P.2d 1234, 1236 (Utah App. 1991).
5. Notice of Claim.
 - a. Utah Code Ann. §63-30-12¹;

¹The Legislature repealed the Utah Governmental Immunity Act during its 2004 general session and replaced it with the Governmental Immunity Act of Utah. See Laws

- b. Utah Code Ann. §63-30-11(1);
 - c. Bank One Utah v. West Jordan City, 2002 UT App. 271, ¶8, 54 P.3d 135.
6. Estoppel and Takings Claims.
- a. Bowles v. State ex. rel. Dept. of Transportation, 652 P.2d 1345, 1346 (Utah 1982);
 - b. El Rancho Enters., Inc., v. Murray City Corp., 565 P.2d 778, 779 (Utah 1977);
 - c. Colman v. State Land Board, 795 P.2d 622, 634 (Utah 1990).

STATEMENT OF THE CASE

This case arises out of water rights in the Pahvant Valley in Millard County, Utah. Appellants William J. Tuttle, Charlene W. Tuttle, Kenton Tuttle and Lori M. Tuttle (collectively “the Tuttles”) owned a number of tracts of land in the valley. The parcels came to approximately 1,700 acres, which the Tuttles farmed. Since the time that the Tuttles purchased these parcels, they used various water rights to irrigate the majority of the property.

2004, ch 267. The Legislature provided, however, that “(1) injuries alleged to be caused by a governmental entity that occurred before July 1, 2004, be governed by the provisions of Title 63, Chapter 30, Utah Governmental Immunity Act; and (2) injuries alleged to be caused by a governmental entity that occurred on or after July 1, 2004, be governed by the provisions of Title 63, Chapter 30d, Governmental Immunity Act of Utah.” Thus, this claim is governed by the former Act.

In 1992, the State Engineer announced that he was going to perform a groundwater survey of the Pahvant Valley and create a groundwater plan. A few years later, the State Engineer stated that the creation of the groundwater plan would proceed in three phases. In the first phase, the State Engineer would conduct a survey of the irrigated acreage and the water rights in the area to make sure that the areas which were being irrigated had sufficient water rights. If the State Engineer determined that a person was irrigating property without sufficient water rights, that person would receive a letter. If the person continued to irrigate without sufficient water rights, the State Engineer would take legal action.

Because the Tuttles wanted to be sure that their water rights were sufficient, they went to the State Engineer's regional office in Richfield. The employees there told them that if they had not received a letter, they were entitled to continue irrigating their property.

In March of 1996, the State Engineer sent a letter to property owners in the Pahvant Valley stating that the first phase of the survey had been completed. Those persons that the State Engineer had determined were irrigating illegally had received a letter and all of the irrigated property in the valley was now covered by valid water rights. The Tuttles had never received a letter, although they knew people who had received letters. The State Engineer had forced these people to stop irrigating.

In 1998, the Tuttles decided to sell their property. Based on the events of 1992 to 1996, they advertised the land as having sufficient water rights to irrigate the property as

the Tuttle had historically irrigated it. They were contacted by Grant and Fern Ellsworth, who were California residents. The Tuttle eventually sold the property to the Ellsworths.

After the Tuttle sold the property to the Ellsworths, Terry Monroe (“Monroe”), an employee of the State Engineer’s office contacted the Ellsworths and stated that he had concerns about the water rights. Although Monroe stated he would work with the Ellsworths to address his concerns, the Ellsworths did not work with Monroe. They started a legal action against the Tuttle in federal court.

Monroe later performed further analysis of the water rights and claimed that they were sufficient to irrigate only about 953 acres. Monroe testified to this effect at the trial between the Ellsworths and the Tuttle in federal court. The jury in the federal court returned a verdict for the Ellsworths on April 30, 2003 in the amount of \$1,113,840. This was later supplemented by \$260,184.83 in attorney’s fees and costs. Although the Tuttle appealed this verdict, it was upheld by the Federal Tenth Circuit Court of Appeals.

STATEMENT OF RELEVANT FACTS

Prior to 1998, the Tuttle were the owners of two farms in the Pahvant Valley in Millard County, Utah. Plaintiff William Tuttle owned approximately 1,100 acres (“William’s Farm”). Plaintiff Kenton Tuttle owned approximately 640 acres (“Kenton’s Farm”). R. at 2 - 8. During the time that the Tuttle owned the farms, they used various water rights to irrigate their farms. William’s Farm was irrigated using water rights 67-119, 67-137, 67-160, 67-286, 67-287, and 67-304. Kenton’s Farm was irrigated using

water rights 67-692, 67-694, 67-708, and 67-867. R. at 2 -8. The Tuttle believed that they had sufficient water rights to irrigate their entire farms and did irrigate the farms for the entire time they owned the farms without complaint or incident. R. at 2 - 8.

In 1992, the State Engineer announced that he intended to create a new water management plan for the Pahvant Valley. R. at 8. A few years later, the State Engineer announced that the creation of the new groundwater management plan for the Pahvant Valley would proceed in three phases. R. at 8. In the first phase, the State Engineer would conduct a survey of the irrigated acreage in the valley to determine whether the property was being irrigated with proper and sufficient water rights. R. at 8. If it was determined that property was being irrigated without a valid or sufficient water rights, the owner would receive a letter. If the owner continued to irrigate the property without valid water rights or with insufficient water rights, the State Engineer would commence legal action to stop the illegal irrigation. R. at 8.

In an effort to verify the validity and sufficiency of their water rights to irrigate their entire farms, the Tuttle went into the State Engineer's regional office in Richfield to confirm that their irrigation was under valid and sufficient water rights. R. at 9 - 10. The Tuttle were told that if they had not received a letter, their water rights were valid and sufficient, and they were entitled to continue to irrigate the land as they had historically done. R. at 9 - 10.

In March of 1996, the plaintiff received a letter from the State Engineer's office indicating that the first phase of the groundwater management plan had been completed

and all irrigated land in the Pahvant Valley was now covered by a valid water right. R. at 10. A copy of this letter is included as Exhibit “A” in the Addendum. The Tuttles never received a letter or any other information from the State Engineer informing them that they did not have a valid water right sufficient to irrigate William’s or Kenton’s entire Farms. R. at 10.

In 1998, the Tuttles decided to sell the farms. R. at 10. Based on the communications they had received from the State Engineer’s office, the Tuttles advertised the land as having water rights and informed prospective buyers that there were valid and sufficient water rights to irrigate the entire farms. R. at 10 -11. The Tuttles transferred the farms to Grant Ellsworth and Fern Ellsworth (“the Ellsworths”) in December 1998 via a §1031 exchange. The full transaction was closed on July 1, 1999. They also transferred all of the water rights associated with the farms to the Ellsworths. R. at 11.

On or about December 6, 2000, defendant Terry Monroe (“Monroe”) sent a letter to the Ellsworths informing the Ellsworths that Monroe had concerns about the water rights for the farms. R. at 11. Although Monroe informed the Ellsworths that he was willing to work with the Ellsworths to review Monroe’s concerns, the Ellsworths did not work with Monroe to address the problems. Instead, the Ellsworths commenced a lawsuit against the Tuttles in the Federal District Court for the District of Utah (“the Federal Lawsuit”). R. at 11 - 12. Monroe later performed a further evaluation of the water rights which the Tuttles had transferred to the Ellsworths and determined that the water rights

were sufficient to irrigate only 484 acres of William's Farm and 451.2 acres of Kenton's Farm. R. at 135.

At the trial of the Federal Lawsuit, Monroe testified on behalf of the Ellsworths. Monroe testified that the water rights were insufficient to irrigate the entire farms the Tuttles sold to the Ellsworths. R. at 12. Monroe testified that the water rights were sufficient to irrigate only 935.2 acres of the approximately 1,700 acres the Ellsworths had purchased from the Tuttles. R. at 134.

The jury in the federal lawsuit found in favor of the Ellsworths. The jury reached its verdict on April 30, 2003. See Exhibit "A" attached to the Defendants' Memorandum in Opposition to the Motion to Dismiss. R. at 134 -35. The Federal District Court entered judgment against the Tuttles in the amount of \$1,113,840 on July 7, 2003. The original judgment was for fraud, breach of warranty, wrongful conversion, breach of contract and for punitive damages based on the fraud. R. at 134 -135. The Federal District Court entered a supplemental judgment against the Tuttles in the amount of \$260,184.83 on October 7, 2003. This judgment was for attorney's fees and costs. See Exhibit "B" attached to the Defendants' Memorandum in Opposition to the Motion to Dismiss. R. at 135.

The Tuttles appealed to the Tenth Circuit Court, which upheld the jury's verdict and affirmed the judgment. R. at 135.

The Tuttles filed their notice of claim on April 29, 2004. R. at 140.

SUMMARY OF THE ARGUMENT

Although the defendants filed a motion to dismiss, the trial court decided to treat the motion as a motion for judgment on the pleadings. In making its decision, however, the trial court did not limit itself to the allegations in the pleadings and did not accept the allegations of the complaint as true. The trial court therefore committed error which warrants reversal.

The trial court granted the motion on two major bases. First, the trial court ruled that the State Engineer had no duty to provide an error-free survey of the groundwater resources in the Pahvant Valley. Instead, the court held that owners of water rights are presumed to know the amount of water which they own and can only alter water rights through statutory procedures. This conclusion of the trial court is error because the trial court failed to acknowledge that the State Engineer had no duty or authority to determine water rights in the Pahvant Valley on his own initiative. The State Engineer can only determine water rights through a court action after receiving a petition.

Having decided to determine water rights through the groundwater survey when he had no duty or authority to do so, the State Engineer had a duty to perform the survey with reasonable care. The trial court's conclusion that the Tuttle were not entitled to an error-free determination of the groundwater resources is incorrect. By acting where he had no duty and outside his scope of authority, the State Engineer assumed a duty to conduct the survey with reasonable care.

Furthermore, having made at least two representations to the Tutties that their water rights were sufficient, the State Engineer was estopped from later changing its position and claiming that the Tutties (and later the Ellsworths) did not have sufficient water rights to irrigate the water as they had previously done.

The second basis of the trial court's decision to grant the motion for judgment on the pleadings was its belief that the Tutties' notice of claim was untimely. The trial court correctly determined that the notice of claim was due within one year of the time that the claims arose. Although the trial court did not determine when the claims arose, it did determine that the claims arose before the jury returned its verdict in the federal court case and the notice of claim was therefore untimely. In fact, the claims against these defendants arose when the jury in the federal action delivered its verdict on April 30, 2003, and the notice of claim was filed timely on April 29, 2004.

Finally, even if the trial court was correct that the notice of claim was untimely, that would not affect the Tutties' estoppel claims or its takings claims. These claims were not addressed in the court's decision. Because these claims were not addressed, they are still viable and the court's decision to dismiss the complaint was improper.

ARGUMENT

I. THE TRIAL COURT ERRED IN CONVERTING THE MOTION TO DISMISS INTO A MOTION FOR JUDGMENT ON THE PLEADINGS AND DID NOT APPLY THE PROPER STANDARD IN DECIDING THE MOTION.

At the hearing on this matter, the trial court announced that, although the defendants had filed a motion to dismiss, it was granting a motion for judgment on the pleadings. This was error. A motion to dismiss under Rule 12(b)(6) may be filed immediately after the complaint is filed in lieu of an answer. See Rule 12(a); Milton I Shadur, 2 Moore's Federal Practice §12.12 (Matthew Bender 2006) ("Although a defendant . . . may present every defense in a responsive pleading, Rule 12 permits the party to raise certain defenses and objections by motion filed before serving the answer").

A motion for judgment on the pleadings, on the other hand, must be filed "After the pleadings are closed but within such time as not to delay the trial." Rule 12(c).

In this matter, the pleadings had not been closed—the defendants had not filed an answer. The only pleading which had been made was the complaint.

The trial court apparently converted the motion to a motion for judgment on the pleadings in the belief that this would allow it to consider matters outside the pleadings. This is, however, incorrect. "The grant of a motion for judgment on the pleadings is reviewed under the same standard as the grant of a motion to dismiss, i.e., we affirm the grant of such a motion only if, as a matter of law, the plaintiff could not recover under the

facts alleged.” Miller v. Gastronomy, Inc., 2005 UT App. 80, ¶6, 110 P.3d 144 (quoting Thimmes v. Utah State Univ., 2001 UT App 93, ¶4, 22 P.3d 257).

In addition, in considering a motion to dismiss, the trial court must construe the complaint in the light most favorable to the plaintiff and indulge all reasonable inferences in his favor. Mounteer v. Utah Power & Light Co., 823 P.2d 1055 (Utah 1991); Russell v. Standard Corp., 898 P.2d 263 (Utah 1995).

At the hearing of this matter, the trial court considered many matters which were outside the pleadings, particularly the basis for the jury’s decision in the federal court action. The trial court also did not construe the allegations in the light most favorable to the Tuttle, but relied in large part on the decisions made in the federal courts. This was error and requires the reversal of the trial court’s decision in this matter.

II. THE STATE ENGINEER HAD NO DUTY OR AUTHORITY TO CONDUCT THE GROUNDWATER SURVEY, IMPOSE A GROUNDWATER MANAGEMENT PLAN OR DETERMINE WATER RIGHTS IN THE PAHVANT VALLEY.

In 1992, the State Engineer announced that he intended to conduct a groundwater survey of the Pahvant Valley. A few years later, the State Engineer announced that the groundwater survey would proceed in three stages. The first was that the State Engineer would review the water rights in the valley and determine whether all of the property which was being irrigated was covered by valid water rights. If the State Engineer determined that any property was being irrigated without a valid water right, the State Engineer would first send a notice to the person irrigating the property. If the person

continued to irrigate without a valid water right, the State Engineer would commence legal action to stop the illegal irrigation.

This scheme was illegal for two reasons. First, the State Engineer had no right to conduct the groundwater survey. Second, the procedure proposed by the State Engineer allowed him, in effect, to determine water rights outside of a district court action in violation of Utah law. Thus, the State Engineer exceeded his authority in conducting the groundwater survey in the Pahvant Valley.

A. The State Engineer Had No Authority to Conduct a Groundwater Survey or Impose a Groundwater Management Plan.

The State Engineer exceeded his authority in creating the groundwater management plan in the first place. It is axiomatic that the State Engineer only has the power that is delegated to him in the statute. Little Cottonwood Water Co. v. Kimball, 76 Utah 243, 289 P. 116 (1930). The State Engineer's authority and duties are described in Utah Code Ann. §73-2-1 (2006). In this statute, the State Engineer is given wide authority to take such actions as: 1) providing administrative supervision of waters and water rights, 2) making rules to govern water issues, 3) bringing suit to enjoin or prevent violations of water law, 4) upon request of an irrigation district, survey land proposed for annexation into the district to determine the amount of water which can be beneficially used on the land, and 5) establishing water distribution systems and their boundaries.

Nowhere in this statute, however, is the State Engineer authorized or required to perform a survey of the water rights in a particular area and to impose a groundwater

management plan on the area. In this regard, it is important to note that in the 2006 General Session of the Utah Legislature, a bill was proposed which would have authorized the State Engineer to create groundwater management plans. See draft legislation, attached as Exhibit “B” in the Addendum. Although this bill was not passed, the fact that it was considered necessary indicates that the State Engineer was not required to perform this survey of the Pahvant Valley and had no authority to impose the groundwater plan in the Pahvant Valley.

B. The State Engineer must Determine Water Rights Through an Adjudication.

Utah Code Ann. §73-4-1(a) (2006), prescribes the procedure the State Engineer must follow in determining water rights. That section states:

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.

The first relevant feature of the system for determining water rights is that the State Engineer may not commence a determination of water rights himself. He cannot act until he has received a verified petition signed by five or more water users or a majority of the water users in an area. In the case of the Pahvant Valley, however, it appears that the

State Engineer violated this limitation and commenced the determination of water rights on his own initiative.²

A second important feature of the procedure for determining water rights is that, if the State Engineer receives a proper petition, he must commence an action in the district court to determine the water rights. In this matter, the State Engineer determined the water rights in the Pahvant Valley without any involvement from the courts.³

Clearly, the State Engineer had no right or authority to conduct the determination of water rights as he did in the Pahvant Valley.

III. EVEN IF THE STATE ENGINEER HAD AUTHORITY TO PERFORM THE GROUNDWATER SURVEY IN THE PAHVANT VALLEY, HE WAS UNDER NO OBLIGATION TO DO SO AND HE HAD A DUTY TO PERFORM THE SURVEY WITH REASONABLE CARE.

Utah courts have consistently found that when a person (including a governmental agency) undertakes an action which the person has no duty to perform, and another relies on that action, the person must perform the act with ordinary or reasonable care.

For instance, in Nelson ex. rel. Stuckman v. Salt Lake City, 919 P.2d 568 (Utah 1996), a mother took her child to a park in Salt Lake City. The park was adjacent to the

²In fact, it appears that the State Engineer violated this provision twice in this matter. The first time was in 1992 when the State Engineer decided to commence the initial survey and groundwater plan. The second time was in 2000 when the State Engineer, through Terry Monroe, contacted the Ellsworths and told them that they did not have the water claimed.

³The State Engineer also violated this provision in 2000 when Terry Monroe informed the Ellsworths that they did not have the water rights which they believed they had received in the transaction with the Tuttle. The State Engineer made this determination without the involvement of a court.

Jordan River and the child went through a hole in the fence, fell into the river and suffered permanent injuries. The mother sued and the city defended on the basis that it was immune. The trial court granted the city's motion for summary judgment and the mother appealed.

On appeal, the city once again asserted that it was immune. The Utah Supreme Court disagreed. Although the court did not determine whether the City had a duty to erect a fence between the park and the river, the court stated that "once an entity undertakes to provide that protection, it is obligated to use reasonable care in providing it." Id. at 573. See also DCR, Inc. v. Peak Alarm Co., 663 P.2d 433 (Utah 1983) ("the defendant's tort liability is not based upon breach of contract, but rather upon violation of the legal duty independently imposed as a result of what the defendant undertook to do with relation to the plaintiff's interests"); 57A Am Jur. 2d Negligence §208 (1989) ("Where one undertakes an act which he has no duty to perform and another reasonably relies upon that undertaking, the act must generally be performed with ordinary or reasonable care").

In this matter, the State Engineer had no duty or authority to conduct the survey of water rights or create a groundwater management plan in the Pahvant Valley. Having decided to do so, however, he was required to use ordinary or reasonable care in his actions. The trial court was obligated to accept the allegations of the complaint that the State Engineer failed to exercise reasonable care in making this survey and creating the

groundwater management plan. The court should therefore not have granted the State's motion to dismiss.

IV. THE DEFENDANTS WERE ESTOPPED TO DENY THAT THE TUTTLES AND THE ELLSWORTHS HAD WATER RIGHTS SUFFICIENT TO IRRIGATE THE FARMS.

The defendants made at least two representations to the Tuttles that their water rights were sufficient to irrigate their farms. The Tuttles relied on those representations and the defendants were estopped from denying those water rights after the sale to the Ellsworths. In order to establish equitable estoppel, a plaintiff must establish three elements:

(1) a party's statement, admission, act, or failure to act that is inconsistent with a later-asserted claim; (2) reasonable action or inaction by a second party, taken on the basis of the first party's statement, admission, act, or failure to act; (3) injury to the second party resulting from allowing the first party to repudiate its statement, admission, act, or failure to act.

Mendez v. Department of Social Services, 813 P.2d 1234, 1236 (Utah App. 1991).

In order to establish equitable estoppel against a governmental agency, the plaintiff must establish two additional elements:

(1) [the estoppel is] necessary to prevent manifest injustice; and (2) the exercise of governmental powers will not be impaired as a result of the application of estoppel.

Id.

The Tuttles' equitable estoppel claim meets all of the requirements established by the courts. The defendants represented to the Tuttles that they had sufficient water rights to irrigate their farms. The defendants made this representation in at least two ways.

First, when the Tuttle visited the State Engineer's Richfield regional office the defendants' employees informed the Tuttle that if they had not received a letter, their water rights were sufficient. Second, the defendants sent the Tuttle a letter which informed the Tuttle that the first phase of the review of the Pahvant Valley had been completed and everyone who had been found to be using water in violation had been notified. The Tuttle had not received a notice that they were in violation.

The Tuttle relied on the defendants' representations when they sold their property to the Ellsworths. Based on what they had been told by the defendants, the Tuttle informed the Ellsworths that there were sufficient water rights to irrigate both of the farms.

In 2000, however, the defendants unilaterally and without notice changed their position on the water rights. At that time, they informed the Ellsworths that the water rights were insufficient to irrigate the entire farms. As a result of this change in position, the Ellsworths sued the Tuttle and obtained a judgment against the Tuttle of over \$1,400,000.

In addition, application of estoppel is necessary in this matter to prevent a manifest injustice. The Tuttle sold the farms in good faith in the belief that they had sufficient water rights to irrigate all of the farms. Two years later, after the Tuttle had sold the property, the defendants changed their minds about the water rights and helped the Ellsworths obtain a judgment of over \$1,400,000 against the Tuttle. It would be manifestly unjust to allow the defendants to treat the Tuttle in this manner.

Finally, the exercise of governmental powers would not be impaired by the application of estoppel in this matter. The Tuttle are not asking for an order prohibiting the defendants from making determinations of water rights in proper circumstances. They are asking, however, that when the defendants act without statutory authorization to make a determination of water rights, come to a conclusion regarding a party's water rights and then change that determination without giving the affected party notice or an opportunity to be heard, the defendants should bear the costs of their actions instead of passing those costs on to the holders of the water rights.

Because all of these matters must be deemed to be admitted in a motion to dismiss or a motion for judgment on the pleadings, the trial court erred in dismissing the Tuttle's estoppel claims.

V. THE TUTTLES COMPLIED WITH THE NOTICE OF CLAIM PROVISIONS OF THE ACT.

The trial court's next basis for granting the defendants' motion to dismiss was the court's finding that Tuttle failed to file a notice of claim within one year of the time their claims arose.

At the time this matter arose, the Act provided that a notice of claim must be filed within one year of the time a cause of action arises. See Utah Code Ann. §63-30-12. The Act also provided that "A claim arises when the statute of limitations that would apply if the claim were against a private person begins to run." Utah Code Ann. §63-30-11(1).

The question is therefore when would the statute of limitations have begun to run against a private person for these same claims?

“Limitation periods begin to run when a cause of action has accrued, which occurs upon the happening of the last event necessary to complete the cause of action.” Bank One Utah v. West Jordan City, 2002 UT App. 271, ¶8, 54 P.3d 135 (internal quotations omitted). In this case, the happening of the last event necessary to complete the Tuttle's cause of action against the defendants was the entry of the jury verdict against the Tuttle in the Federal lawsuit. Up to that time, although the Tuttle believed that the defendants had acted improperly, they had suffered no damages as a result of the defendants' misconduct and could not maintain a cause of action against the defendants. It is black-letter law that no cause of action exists until some damages have resulted from the defendants' actions. See Valley Colour, Inc. v. Beuchert Builders, Inc., 944 P.2d 361, 364 (Utah 1997) (“Because Valley Colour did not sustain, and therefore could not have demonstrated, special damages until after the sale by Central Bank, it could not have maintained its suit to conclusion until that time”); 51 Am. Jur. 2d Limitation of Actions §151 (“A cause of action does not accrue for the purpose of a statute of limitations until all the elements are present, including damages.”)

The defendants claimed, and the trial court apparently believed, that the Tuttle should have filed their notice of claim in 1998 or 1999 based on representations they made in the Federal Court case. They claim that the statute of limitations began to run from this time. In making this argument, however, the defendants confused the

Ellsworths' claims against the Tutties with the Tutties' separate and distinct claims against the defendants. That the statute of limitations began to run on the Ellsworths' claims against the Tutties does not mean that the statute of limitations began to run on the Tutties' claims against the defendants. Until there was a verdict in the federal lawsuit, the Tutties had suffered no damages from the defendants' actions and the Tutties had no cause of action against the defendants.

The defendants also claimed that the statute of limitations would have begun to run from Monroe's August 21, 1998 letter expressing his concerns about the Diesel Well. This letter did not and could not have alerted the Tutties to any problem with the well. It stated only that the State could not see the well in its database and asked for help in identifying the associated water right. It did not state or even imply that the Diesel Well was not a valid water right or that the water rights was insufficient to irrigate the property the Tutties were irrigating. This letter cannot constitute the happening of the last event necessary to complete any potential cause of action because, at that time, the Tutties had not suffered any damages. Only when the jury verdict was entered against the Tutties did the Tutties suffer damages as a result of the defendants' misconduct.

The Tutties suffered no harm in this matter until the Federal Court jury rendered its verdict on April 30, 2003 at the earliest. The Tutties sent their notice of claim on April, 29, 2004, which was within the one-year time period established in the Act. The notice was timely and the trial court should not have granted the motion to dismiss on this basis.

VI. EVEN IF THE NOTICE OF CLAIM WAS UNTIMELY FILED, THE TUTTLES' ESTOPPEL AND TAKINGS CLAIMS SHOULD NOT HAVE BEEN DISMISSED.

Finally, the trial court erred in dismissing all of the Tuttles' claims on the bases described in the court's order. That order states that the State Engineer did not have a duty to perform an error-free survey of the water rights. Even if that were true, this would only dispose of the Tuttles' negligence claims.

The trial court's other basis for dismissing the action was that the failed to file a notice of claim within the time required by the Act. This would only affect claims which are subject to the Act. The Tuttles asserted an equitable estoppel claim, which is not subject to the Act. See Bowles v. State ex. rel. Dept. of Transportation, 652 P.2d 1345, 1346 (Utah 1982) ("governmental immunity is not a defense to equitable claims"); El Rancho Enters., Inc., v. Murray City Corp., 565 P.2d 778, 779 (Utah 1977) ("The common law exception to governmental immunity pertaining to equitable claims has long been recognized in this jurisdiction.")

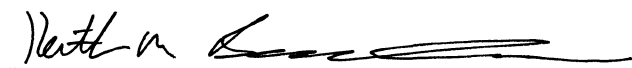
The Tuttles also raised a takings claim under Article 1, section 22 of the Utah Constitution, which is also not subject to the Act. See Colman v. State Land Board, 795 P.2d 622, 634 (Utah 1990) ("In sum, article I, section 22 needs no legislation to activate it; it is mandatory and obligatory as it is").

It was therefore error for the trial court to dismiss all of the Tuttles' claims on the bases described in the court's order.

CONCLUSION

The trial court erred in converting the defendants' motion to dismiss into a motion for judgment on the pleadings, addressing matters outside the pleadings and failing to accept the allegations of the complaint as true. State Engineer had no duty or authority to conduct a survey of the groundwater rights in the Pahvant Valley and impose and groundwater management plan unless property owners filed a petition. Because the State Engineer acted where he had no duty, he had an obligation to conduct the survey with reasonable care. The trial court erred in holding that the State Engineer did not have a duty to the Tuttles in conducting the survey and creating the groundwater management plan. In addition, all of the elements of estoppel are present in this case, and the trial court erred in dismissing the estoppel claim. The trial court also erred in holding that the notice of claim was untimely. The notice of claim was filed within one year of the time the jury in the federal court imposed damages, which was the final step necessary for a claim against these defendants. Finally, it was error for the trial court to dismiss the Tuttles' estoppel and takings claims on the bases described in the trial court's order. For all of these reasons, this court should reverse the decision of the trial court and remand for further proceedings.

DATED this 4 day of July, 2006.



Keith M. Backman
Attorney for Appellant

Certificate of Mailing

I hereby certify that on this 6 day of July, 2006, I mailed a true and correct copy of the foregoing brief to Joel Ferre and Debra J. Moore, attorneys for defendants-appellees, at 160 E. 300 South, P.O. Box 140856, Salt Lake City, Utah 84414-0856.

Kath M. Rundle

Addendum

Exhibit

“A”

801375526.



State of Utah
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF WATER RIGHTS

Michael G. Leavitt
Governor
Ted Stewart
Executive Director
Robert L. Morgan
State Engineer

1030 West North Temple, Suite 220
Salt Lake City, UT 84116-3156
801-536-7200
801-536-7467 (Fax)

PLPS EXHIBIT 3
FOR ID 7-2902-2
AMANDA RICHARDS NP, CGR
WITNESS W. TUTTLE

March 28, 1996

Dear Water User.

The purpose of this letter is to keep you apprised of the progress we are making on the implementation of the ground-water management plan for Pahvant Valley.

At the last public meeting I held with you on February 24, 1994, an eight point "Proposed Ground-water Management Plan for Pahvant Valley" (Plan) was distributed and a comment period was set. At that meeting, I stated that the Plan would be phased in over a period of three to four years and that the ongoing acreage survey would be completed.

Based on the comments received, the first part of the Plan was implemented with the promulgation of a new "Appropriation Policy for Pahvant Valley" on March 2, 1994. The new policy went into effect on April 1, 1994.

Comments were also received dealing with the proposal to realign some of the ground-water districts. The comments on this proposal were overwhelmingly negative. As a result, the boundaries of the ground-water districts were not changed. Implicit in this decision is that no water right shall be moved out of the district in which it is presently located.

During 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.

Beginning in the summer of 1994 and continuing into the summer of 1995, a cataloging of wells was conducted by the Distribution section of the Division. As part of the cataloging, a survey was also made to determine the number of uncontrolled flowing wells that were wasting water. The result of this effort was an updated

State of Utah
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF WATER RIGHTS

1030 West North Temple, Suite 220
Salt Lake City, Utah 84116-3156

3-1

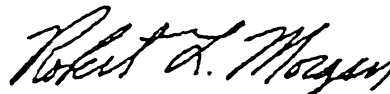
accounting of all significant irrigation wells and flowing wells in the valley. In reviewing the uncontrolled flowing wells, it was determined that the amount of water discharged by these wells was not significant.

The Distribution section also held meetings with water users to assess the need to establish a commissioner-operated, water user-funded distribution system and begin the metering of wells. The result of these meetings was that the implementation of a distribution system and the metering of wells would be delayed to see if the changes resulting from the acreage compilation would resolve the problem of declining ground-water levels.

I still remain committed to the goal of reducing ground-water withdrawals to an annual average of about 60,000 acre-feet per year, which is considered to be the safe yield of the valley's aquifer system. If this can not be achieved through acreage compliance, then additional action may be necessary. Over the past three years, ground-water levels (as represented by the U.S. Geological Survey continuous monitoring well near Flowell) show continued declines. We will continue to monitor ground-water levels and withdrawals, but I cannot rule out the future distribution of water based on priority date, the establishment of a distribution system with a commissioner, or the metering of wells. If forced to distribute water by priority date, I would establish the distribution system and order the metering of wells first, then phase in the pumpage reductions over several years to allow water users a reasonable amount of time to make operational and financial adjustments.

Again, I would like to thank you for your past cooperation in the development and implementation of this Plan, and I look forward to working with you in the future.

Sincerely,



Robert L. Morgan, P.E.
State Engineer

RLM:wes

Exhibit

“B”

GROUNDWATER MANAGEMENT PLAN

2006 GENERAL SESSION

STATE OF UTAH

LONG TITLE**General Description:**

This bill authorizes the state engineer to create a groundwater management plan.

Highlighted Provisions:

This bill:

- ▶ authorizes the state engineer to create a groundwater management plan for any groundwater basin or aquifer;
- ▶ allows conjunctive management of hydrologically connected ground and surface water;
- ▶ describes the purpose and effect of a groundwater management plan;
- ▶ outlines the requirements for creating a groundwater management plan;
- ▶ eliminates a provision addressing administration of groundwater rights; and
- ▶ makes technical changes.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:**AMENDS:**

73-5-1, as last amended by Chapter 41, Laws of Utah 2000

ENACTS:

73-5-15, Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section 73-5-1 is amended to read:

73-5-1. Appointment of water commissioners -- Procedure -- Hearing to determine adequacy of underground water supply.

(1) (a) If, in the judgment of the state engineer or the district court, it is necessary to

33 appoint a water commissioner for the distribution of water from any river system or water
34 source, the commissioner shall be appointed for a four-year term by the state engineer.

35 (b) The state engineer shall determine whether all or a part of a river system or other
36 water source shall be served by a commissioner, and if only a part is to be served, the state
37 engineer shall determine the boundaries of that part.

38 (c) The state engineer may appoint:

39 (i) more than one commissioner to distribute water from all or a part of a water source;

40 or

41 (ii) a single commissioner to distribute water from several separate and distinct water
42 sources.

43 (2) (a) The state engineer shall consult with the water users before appointing a
44 commissioner. The form of consultation and notice to be given shall be determined by the state
45 engineer so as to best suit local conditions, while providing for full expression of majority
46 opinion.

47 (b) If a majority of the water users agree upon a qualified person to be appointed as
48 water commissioner, the duties the person shall perform, and the compensation the person shall
49 receive, and they make recommendations to the state engineer on the appointment, duties, and
50 compensation, the state engineer shall act in accordance with their recommendations.

51 (c) If a majority of water users do not agree on the appointment, duties, or
52 compensation, the state engineer shall make a determination for them.

53 (3) (a) (i) The salary and expenses of the commissioner and all other expenses of
54 distribution, including printing, postage, equipment, water users' expenses, and any other
55 expenses considered necessary by the state engineer, shall be borne pro rata by the users of
56 water from the river system or water source in accordance with a schedule to be fixed by the
57 state engineer.

58 (ii) The schedule shall be based on the established rights of each water user, and the
59 pro rata share shall be paid by each water user to the state engineer on or before May 1 of each
60 year.

61 (b) The payments shall be deposited in the Water Commissioner Fund created in
62 Section 73-5-1.5.

63 (c) If a water user fails to pay the assessment as provided by Subsection (3)(a), the state

64 engineer may do any or all of the following:

65 (i) create a lien upon the water right affected by filing a notice of lien in the office of
66 the county recorder in the county where the water is diverted and bring an action to enforce the
67 lien;

68 (ii) forbid the use of water by the delinquent water user or the delinquent water user's
69 successors or assignees, while the default continues; or

70 (iii) bring an action in the district court for the unpaid expense and salary.

71 (d) In any action brought to collect any unpaid assessment or to enforce any lien under
72 this section, the delinquent water user shall be liable for the amount of the assessment, interest,
73 any penalty, and for all costs of collection, including all court costs and a reasonable attorney
74 fee.

75 (4) (a) A commissioner may be removed by the state engineer for cause.

76 (b) The users of water from any river system or water source may petition the district
77 court for the removal of a commissioner and after notice and hearing, the court may order the
78 removal of the commissioner and direct the state engineer to appoint a successor.

79 ~~[(5) (a) In addition to the power granted to the state engineer to appoint water~~
80 ~~commissioners for the distribution of water, the state engineer may, at any time, hold a hearing,~~
81 ~~or upon a petition signed by not less than one-third of the users of underground waters in any~~
82 ~~area as defined by the state engineer, shall hold a hearing, to determine whether the~~
83 ~~underground water supply within such area is adequate for the existing claims.]~~

84 ~~[(b) (i) Notice of the hearing shall be given in a form and manner which, in the~~
85 ~~judgment of the state engineer, best suits local conditions.]~~

86 ~~[(ii) The state engineer may make a full investigation and provide findings for the~~
87 ~~hearing.]~~

88 ~~[(c) If the findings show that the water supply is inadequate for existing claims, the~~
89 ~~state engineer shall divide, or request that the water commissioner divide, the water supply~~
90 ~~among the claimants entitled to the water in accordance with their respective rights:]~~

91 Section 2. Section 73-5-15 is enacted to read:

92 **73-5-15. Groundwater management plan.**

93 **(1) As used in this section:**

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

95 withdrawals consistently exceed the safe yield.

96 (b) "Safe yield" means the amount of groundwater that can be withdrawn from a
97 groundwater basin over a period of time without exceeding the long term recharge of the basin
98 or unreasonably affecting the basin's physical and chemical integrity.

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

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

104 (i) limit groundwater withdrawals to safe yield;

105 (ii) protect the physical integrity of the aquifer; and

106 (iii) protect water quality.

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

108 (i) the hydrology of the groundwater basin;

109 (ii) the physical characteristics of the groundwater basin;

110 (iii) the relationship between surface water and groundwater, including whether the
111 groundwater should be managed in conjunction with physically connected surface waters;

112 (iv) the geographic spacing and location of groundwater withdrawals;

113 (v) water quality;

114 (vi) local well interference; and

115 (vii) other relevant factors.

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

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

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

123 (d) The state engineer shall adopt a groundwater management plan for a groundwater
124 basin if more than one-third of the water right owners in the groundwater basin request that the
125 state engineer adopt a groundwater management plan.

- 126 (4) (a) (i) Except as provided in Subsection (4)(c), the withdrawal of water from a
127 groundwater basin shall be limited to the basin's safe yield.
- 128 (ii) Before limiting withdrawals in a groundwater basin to safe yield, the state engineer
129 shall:
- 130 (A) determine the groundwater basin's safe yield; and
131 (B) adopt a groundwater management plan for the groundwater basin.
- 132 (iii) If the state engineer determines that groundwater withdrawals in a groundwater
133 basin exceed the safe yield, the state engineer shall regulate groundwater rights in that
134 groundwater basin based on the priority date of the water rights under the groundwater
135 management plan, unless a voluntary arrangement exists under Subsection (4)(c) that requires a
136 different distribution.
- 137 (b) When adopting a groundwater management plan for a critical management area, the
138 state engineer may, based on economic and other impacts on the local community caused by
139 the implementation of safe yield limits on withdrawals, allow gradual implementation of the
140 groundwater management plan.
- 141 (c) (i) Water users in a groundwater basin may agree to participate in a voluntary
142 arrangement for managing withdrawals at any time, either before or after a determination that
143 groundwater withdrawals exceed the groundwater basin's safe yield.
- 144 (ii) An arrangement under Subsection (4)(c)(i) may be created by the participating
145 water users under the state engineer's supervision.
- 146 (iii) A voluntary arrangement under Subsection (4)(c)(i) shall be consistent with other
147 law.
- 148 (iv) The adoption of a voluntary arrangement under this Subsection (4)(c) by less than
149 all of the water users in a groundwater basin does not affect the rights of water users who do
150 not agree to the voluntary arrangement.
- 151 (5) To adopt a groundwater management plan, the state engineer shall:
- 152 (a) hold one or more public meetings in the geographic area where the groundwater is
153 located, after providing 30 days' notice of the meeting, to:
- 154 (i) address the need for a groundwater management plan, including the reasons why the
155 groundwater management plan should be adopted;
- 156 (ii) provide and gather information and present any data, studies, or reports concerning

- 157 the groundwater resources involved in the groundwater management plan;
158 (iii) address safe yield and any other subject that may be included in a potential
159 groundwater management plan; and
160 (iv) outline the estimated administrative costs to groundwater users;
161 (b) provide notice of the proposed plan and request comments in accordance with
162 Subsection (6);
163 (c) receive and consider written comments concerning the proposed groundwater
164 management plan from any person for a period determined by the state engineer of not less
165 than 60 days after the day on which the notice required by Subsection (5)(a) is given; and
166 (d) provide notice of the adoption of the groundwater management plan.
167 (6) A notice required by this section shall be provided by:
168 (a) publishing the notice once a week for a period of two successive weeks in a
169 newspaper of general circulation in the county where the groundwater aquifer is located; and
170 (b) publishing the notice conspicuously on the state engineer's Internet website.
171 (7) A groundwater management plan may be amended in the same manner as a
172 groundwater management plan may be adopted under this section.
173 (8) The existence of a groundwater management plan does not preclude any otherwise
174 eligible person from filing any application or challenging any decision made by the state
175 engineer within the affected groundwater basin.
176 (9) (a) A person affected by a groundwater management plan may challenge any aspect
177 of the groundwater management plan by filing a complaint in the district court for any county
178 in which the groundwater basin is found.
179 (b) Notwithstanding Subsection (8), a person may only challenge a state engineer's
180 conclusions concerning the safe yield of a groundwater basin in the manner provided by
181 Subsection (9)(a).
182 (10) A groundwater management plan adopted or amended in accordance with this
183 section is exempt from the requirements in Title 63, Chapter 46a, Utah Administrative
184 Rulemaking Act.
185 (11) Recharge and recovery projects permitted under Chapter 3b are exempted from
186 this section.
187 (12) (a) A groundwater management plan adopted by the state engineer before May 1,

188 2006 remains in force and has the same legal effect as it had on the day on which it was
189 adopted by the state engineer.

190 (b) An amendment to a groundwater management plan that existed before May 1,
191 2006, that is adopted on or after May 1, 2006, is subject to this section's provisions.