

WATER & THE LAW

The Walker Center | 175 South Main Street | Suite 300 | Salt Lake City, UT 84111 | 801.413.1600

Summer Issue 2011

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Association of Utah
Northern Conference
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Layton, UT**

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**American Water Works
Intermountain Section
Conference
Sep. 14-16, 2011
St. George, UT**

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Greetings!

Welcome to the 2011 Summer Edition of *Water and the Law*. We hope you will find this newsletter to be helpful and informative. As always, we welcome your feedback. If you have questions or comments, please reply to this e-mail or call us at 801-413-1600.

Craig Smith
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JENSEN v. JONES

By: Matthew E. Jensen and Jeffrey R. Gittins

The Utah Supreme Court recently issued an opinion in the Jensen v. Jones case, which was formerly known as the Hamblin v. Olds and Hamblin v. Clayton (Ms. Hamblin passed away, and Kent Jones is now the State Engineer). The central issue in this case was whether the State Engineer has authority to rely on nonuse in denying a change application. For roughly a century, Utah Code section 73-1-4 (the "Forfeiture Section") provided that a water right would cease upon nonuse for more than five years. Over the past fifteen years, the legislature has amended this section to provide that forfeiture of a water right may occur only by court decree and only after seven years of nonuse. Nevertheless, the State Engineer has occasionally denied change applications on the basis that the water right has not been used for an extended period.

Such was the case in Jensen v. Jones. Ms. Hamblin owned a water right from Spring Creek, a tributary to the Provo River. She filed a change application to move the water right to wells in Highland City. But the State Engineer rejected the change application because the water right had not been used for more than 20 years. On appeal to the district court, the court upheld



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the Order, concluding that the water right had been automatically lost to forfeiture long before the change application was filed. The court also concluded that recent changes to Utah's forfeiture statute did not apply retroactively.

Ms. Hamblin appealed to the Utah Supreme Court, arguing (1) that the State Engineer has not authority to assess forfeiture in a change application proceeding, and (2) that no forfeiture had occurred because recent changes to the Forfeiture Statute allowed forfeiture only by court decree. The court agreed with Hamblin's first arguments and therefore did not reach the second argument.

The Court concluded that the State Engineer's rights are limited by statute, and he has no authority to adjudicate water rights. Instead, the State Engineer may only rely on the factors contained in Utah Code section 73-3-8, which do not include forfeiture. Although the State Engineer argued that section 73-3-3 allows him to determine whether a person is "entitled to the use of water," the Court rejected this argument. Ultimately, the Court concluded, if the State Engineer is concerned about forfeiture by nonuse, they are authorized bring a separate court action to establish that forfeiture.

Although the Court's decision brings more certainty to the State Engineer's authority to look at nonuse when reviewing a change application, it does not determine whether a water right was forfeited without court decree upon five years of nonuse before 1996. Both these issues may be the subject of future legislative action.

([Click here](#) to read the full text of the district court's decision)
([Click here](#) to read the full text of the Supreme Court's Opinion)

SALT LAKE CITY v. BIG DITCH IRRIGATION CO.

By: Jeffrey R. Gittins

The Utah Supreme Court recently issued its opinion in the case of Salt Lake City v. Big Ditch Irrigation Company. The case centers on a 1905 water exchange agreement ("the Agreement") between Salt Lake City ("the City") and Big Ditch Irrigation Company ("Big Ditch"). The Agreement states that Big Ditch "grants, bargains and sells" its right to water from Big Cottonwood Creek, and in return, the City would "perpetually and continuously deliver" water suitable for irrigation to the head of Big Ditch's canal. Big Ditch and the City have operated under the Agreement for over 100 years. However, the amount

of water Big Ditch has received from the City has declined over the years, as residential and commercial development in Big Ditch's historic service area has reduced irrigated acreage.

In 2006, Big Ditch and some of its shareholders filed change applications to modify their use of the exchange water received from the City. The City protested, asserting that Big Ditch and its shareholders did not own the water rights, and were therefore not entitled to file change applications. The City then filed suit against Big Ditch and the shareholders, asserting that (1) under the Agreement, the City holds title to the Big Cottonwood Creek water rights and the exchanged water; (2) that Big Ditch and its shareholders do not have a right to file a change application on the exchanged water; (3) that the City is not in breach of its delivery obligations under the Agreement; and (4) that Big Ditch and its shareholders have the contractual right to receive only the amount of water necessary to satisfy the irrigation needs of Big Ditch shareholders whose lands are served by the Big Ditch system. Big Ditch and the shareholders filed counterclaims against the City, asserting among other things that the City was in violation of the Utah Antitrust Act.

In a series of decisions, the district court ruled in favor of the City. Specifically, the district court (1) denied the individual shareholders' motion to dismiss the City's claims against them; (2) held that the City holds title to all of the water under the Agreement; (3) held that Big Ditch did not have the right to file change applications on the exchanged water; (4) held that Big Ditch was barred from demanding the full amount of water to which it was entitled under the Agreement; and (5) dismissed the antitrust counterclaim against the City.

The district court's rulings were appealed to the Utah Supreme Court ("the Court"). The Court reviewed each of the five issues outlined above, ultimately concluding that the district court was correct on some issues, but erred on other issues. The Court's conclusions on each of the five issues are discussed below.

First, the Court held that the district court erred when it denied the individual shareholders' motion to dismiss the City's claims against them. The Court noted that the district court had used the wrong legal standard when reviewing the motion to dismiss. Additionally, the Court noted that the shareholders' rights were derivative of the corporation (Big Ditch), and that the corporation-and not the individual shareholders-were parties to the Agreement. Accordingly, the Court held the individual shareholder had no privity of contract with or duty to the City. Thus, the Court ruled that the individual shareholders were not properly named as defendants and that the district court should

have dismissed all of the City's claims against the individual shareholders.

Second, the Court affirmed the district court's ruling that the City holds title to the water under the Agreement. The Court noted that under the Agreement, Big Ditch "grants, bargains and sells" its right to Big Cottonwood Creek water to the City. The Court noted that this was conveyance language that passed title of the water rights from Big Ditch to the City. On the other hand, the City agreed to "perpetually and continuously deliver" water to Big Ditch. The Court noted that this was not conveyance language, and therefore did not transfer title to the exchanged water from the City to Big Ditch. In sum, Big Ditch conveyed its water right to the City in exchange for a contractual commitment by the City to deliver water to Big Ditch. Thus, the Agreement vested in the City title to all of the water rights at issue.

Third, the Court held that the district court erred in its conclusion that because Big Ditch had failed to take the full amount of water to which it was entitled under the Agreement in prior years, Big Ditch was estopped from now demanding the full amount of water. The Court concluded that the legal doctrine of equitable estoppel did not apply because there was no inconsistency in Big Ditch's conduct of taking less than its entitled amount of water in prior years and then later demanding the full amount of water to which it was contractually entitled. Thus, the Court held that the Agreement as originally drafted remains in force, meaning that Big Ditch may take the full amount of water to which it is entitled and that its use of the water is not limited to irrigation use or to use in Big Ditch's historic service area.

Fourth, the Court held that the district court erred in its conclusion that because Big Ditch was not the appropriator or owner of the exchanged water, Big Ditch was not entitled to file a change application on the water. The Court distinguished prior cases that focused on ownership of the water right, and noted that "one with an entitlement to use water may file a change application," as long as their right to use the water is not "subsumed to other competing interests." The Court concluded that because Big Ditch is contractually entitled to receive the exchanged water from the City in perpetuity, Big Ditch is a "person entitled to the use of water" under Utah Code section 73-3-3, and therefore entitled to file change applications on the exchanged water.

Finally, the Court held that the district court properly dismissed the counterclaim against the City for violation of the Utah

Antitrust Act. The Court noted that the Act exempts "the activities of a municipality to the extent authorized or directed by state law." Because municipalities are expressly permitted to acquire water rights and operate water systems, the Court concluded that the City was exempt from the Antitrust Act.

As a final note, although the Court held that Big Ditch may file change applications based on the exchanged water, the Court specifically stated that it was offering no opinion on whether or not the change applications should be approved by the State Engineer. Each change application will still have to go through the administrative process and be reviewed under the applicable standards. It will be interesting to see how these change applications proceed through the process and if they will ultimately be approved.

([Click here](#) to read the full text of the Supreme Court's Opinion)

HAIK v. SANDY CITY

By: Jeffrey R. Gittins

The Utah Supreme Court recently issued its opinion in the case of Haik v. Sandy City. The case centered on a title dispute to a water right. As the court noted in the first line of the opinion, the case illustrates the importance of promptly recording a deed for a water right.

In 1977, Saunders-Sweeney Inc. and Sandy City entered into an "Agreement of Sale," under which Saunders-Sweeney agreed to sell a water right to the City. The City recorded the Agreement of Sale with the Salt Lake County Recorder. Shortly thereafter, the City received a quitclaim deed for the water right from Saunders-Sweeney, but the City did not record the deed.

In 1978, Saunders-Sweeney conveyed the property to which the water right was [appurtenant](#) to Judith Saunders. Several years later, the property was conveyed to Lynn Biddulph. In 1999, Saunders-Sweeney also quitclaimed the water right to Ms. Biddulph. Shortly thereafter, Ms. Biddulph filed a [change application](#) on the water right. The City protested the change application, but did not claim ownership of the water right. In 2003, Ms. Biddulph conveyed the water right to LWC LLC. Later that same year, LWC LLC conveyed the water right to Kevin Tolton, who then conveyed the water right to the Haik parties. All of the deeds in this chain of title were properly recorded with the Salt Lake County Recorder.

In 2004, the Haik parties filed a change application. In preparing a protest of the change application, the City conducted research and discovered the unrecorded deed from 1977. The deed was finally recorded in April 2004. The City then sought to update title with the Division of Water Rights, but the City's request was denied.

The Haik parties filed an action to quiet title to the water right. The district court ruled that the Haik parties were the legal owners of the water right. The City filed an appeal with the Utah Supreme Court.

The Supreme Court began its analysis by noting that Utah is a race-notice jurisdiction, meaning that a subsequent purchaser for value prevails over a previous purchaser if the subsequent purchaser (1) takes title in good faith and (2) records before the previous purchaser. There was no question that the Haik parties recorded their deed before the City, so Court's analysis focused on whether the Haik parties took title in good faith, i.e., whether the Haik parties had actual or constructive notice of the City's prior, unrecorded interest.

The City contended that the 1977 Agreement of Sale imparted constructive record notice of a conveyance of the water right to the City. The Haik parties, on the other hand, argued that the Agreement of Sale did not provide record notice because it was impossible to know whether the sale was actually finalized and whether a deed was delivered to the City.

In the end, the Court sided with the Haik parties. The Court concluded that the Agreement of Sale did not subvert the Haik parties' claim of having purchased the water right in good faith because (1) the Haik parties reasonably believed they had a clear chain of title to the water right; (2) the City failed to record its deed for nearly 27 years after receiving the deed; (3) the Haik parties' predecessors-in-interest had maintained the water right and filed a change application on the water right in 1999; and (4) the City failed to contest ownership when it protested the 1999 change application. Thus, the Supreme Court upheld the district court's judgment that the Haik parties are the legal owners of the water right.

[\(Click here](#) to read the full text of the Supreme Court's Opinion)

MONTANA v. WYOMING

By: Matthew E. Jensen

It is somewhat rare that the U.S. Supreme Court delves into the world of western water law, but it recently did so in a case between the states of Montana and Wyoming. This case is not an appeal of any decision by a lower court, because when one state sues another, the case goes directly to the U.S. Supreme Court for determination. The central issue in the case is whether Wyoming violated the Yellowstone River Compact because Wyoming water users had converted from flood irrigation to sprinkle irrigation, which increased the consumption of water in Wyoming beyond historic (pre-1950) levels.

Wyoming, Montana, and North Dakota entered into the Yellowstone River Compact in 1951, and Congress then ratified the Compact. The Compact provided that beneficial users of water on the Yellowstone River system with priority dates before January 1, 1950 "shall continue to be enjoyed in accordance with . . . the doctrine of appropriation." Montana claimed, among other claims, that more efficient irrigation practices were consuming more water on the Wyoming (upstream) side, which left less water for the pre-1950 Montana water rights. Montana based its claims first on general principles of the prior appropriation doctrine, and second on the Compact's definition of "beneficial use."

The Court concluded that, although "the law of return flows is an unclear area of the appropriation doctrine," the general rule allows a water user to increase his irrigation efficiency even if that harms downstream users. First, the injury that a change in water use cannot injure other water users does not apply to changes in crop type or irrigation method, but applies to changes in points of diversion, or place or purpose of use. Second, most western states allow an appropriator to recapture and reuse water on the same acreage as long as it remains on the property and within the water user's control. Thus, the general rule already allows increased consumption through recapture.

The Court also rejected Montana's second claim that the compact itself strictly limited Wyoming to a maximum amount of depletion. The Court indicated that other compacts like the Colorado River Compact expressly limit depletion amounts, but the Yellowstone River Compact does not. Therefore, the Court concluded that the Compact's definition of beneficial use simply acknowledged a preference for consumptive uses rather than nonconsumptive uses.

Ultimately, this case is not binding on any state court, including Utah courts. The Supreme Court specifically acknowledged that state courts control the doctrine of prior appropriation.

Nevertheless, the discussion found in the case is instructive of general principles of western water law.

[\(Click here](#) to read the full text of the Supreme Court's Opinion)

LOWRY v. G & L ENTERPRISES

By: Jeffrey R. Gittins

The Utah Court of Appeals recently issued its opinion in Carol L. Lowry Irrevocable Trust v. G&L Enterprises, LLC. The case was between the Carol L. Lowry Irrevocable Trust and Fred Lowry (collectively, "Lowry") and G&L Enterprises LLC, Guy Palmer, and Lynda Palmer (collectively, "G&L").

Lowry and G&L own adjacent parcels of property near Manti. A spring known as Crystal Springs is located on State property east of G&L's property. The water from Crystal Springs forms a natural stream that flows west across G&L's property to Lowry's property. Lowry has a right to use six-sevenths of the flow from the Springs, and G&L has the right to use the other one-seventh. A dispute arose when G&L disagreed with Lowry's plan to replace the stream from Crystal Springs across G&L's property with a pipeline. Lowry filed suit, seeking to establish a prescriptive easement for a road across G&L's property.

Although Lowry only asked for a prescriptive easement for the road, which the district court granted, the district court also determined that Lowry was entitled to a prescriptive easement in the stream bed across G&L's property. The district court relied on Utah Code Section 57-13a-102, which provides that a prescriptive easement for water conveyance may be established by continuous, open, and adverse use for twenty years. G&L appealed the district court's decision to the Utah Court of Appeals.

The central issue identified by the Court of Appeals is whether Section 57-13a-102 applies to a natural stream. The Court of Appeals looked to Section 57-13a-101's definition of a "water conveyance," which is "a canal, ditch, pipeline, or other means of conveying water." Based on this definition, the Court of Appeals determined that Section 57-13a-102 applies only to artificially created watercourses, and not natural streams like Crystal Springs stream. In an important footnote, however, the Court of Appeals stated that it expressed no opinion on the question of whether Utah's common law provides a basis to establish a prescriptive easement in a natural stream. Ultimately, the Court of Appeals concluded that the district court had erred in granting Lowry a prescriptive easement in

Crystal Springs stream across G&L's property under Section 57-13a-102.

[\(Click here\)](#) to read full text of the Court of Appeals' Opinion)

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