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4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

JUL 20 2009

ATTORNEY GENERAL  
Natural Resources Division

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

MARILYN HAMBLIN, an individual,  
  
Plaintiff,  
  
vs.

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

Defendants.

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

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

CASE NO 060400639

DATE: 13 July 2009

Judge Claudia Laycock

Division 3

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

**PROCEDURAL HISTORY**

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

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

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

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

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

#### **UNDISPUTED FACTS<sup>1</sup>**

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

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

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

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

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

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

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

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

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

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

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

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

### **DISCUSSION**

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

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

### **I. Standard of Review**

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

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

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

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

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

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

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

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

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

## II. Forfeiture

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Furthermore, the court finds that the amendments were substantive because *Nephi City* leaves little question about what the outcome of this case would have been if Ms. Hamblin had submitted her change application before the 1996 amendments were enacted. The parties do not dispute that the Water Right has gone unused since at least 1980, and they apparently do not dispute that no one applied for an extension of time before the five-year period of nonuse for the Water Right expired in 1985.<sup>3</sup> Thus, if this court had analyzed this case under *Nephi City* anytime from 1986 to 1995, the State Engineer’s motion for summary judgment would have been

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

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

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

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

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

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

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

## **II. Impairment and Available Water**

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

### *A Beneficial Use and Relinquishment Under U C A 73-3-3*

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

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

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

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

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

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

The court finds that the State Engineer's motion for summary judgment cannot be granted on the basis of the arguments he asserts under U.C.A. 73-3-3(1)(a) or the arguments he asserts regarding impairment. First, although the State Engineer argues that U.C.A. 73-3-3(1)(a) requires the relinquishment of a current beneficial use, the court does not find that language anywhere in the statute. Rather, the statute requires the water user to "relinquish the original point of diversion, place of use, or purpose of use"

The State Engineer would have the court add the requirement that the relinquishment must be of a current proven beneficial use, but does not point the court to any authority in case law supporting this proposition. The court is unwilling to interpret the statute in this manner without more authority. Instead, the court finds that a plain reading of the statute requires Ms. Hamblin to “relinquish the *original* point of diversion, place of use, or purpose of use,” which she is apparently willing to do. (Emphasis added.) As stated elsewhere, the court finds that her Change Application should be denied on other grounds, but the court does not find that U.C.A. 73-3-3(1)(a) can independently support that finding.

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

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

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

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

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

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

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

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

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

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

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

In *Tanner v. Humphreys*, the Utah Supreme Court discussed a change application and found that the applicant demonstrated that there was unappropriated water at the proposed source by exchanging her old use for the new use, not by actually proving that the new source contained sufficient water. 48 P.2d 484, 488 (Utah 1935). The Court further found “that all that the plaintiff asked and all that she could get was an exchange of the waters which she had under her right.” *Id.* at 488. This court relies on its earlier forfeiture analysis and finds that because Ms. Hamblin no longer has a valid right to exchange, she cannot demonstrate that there is unappropriated water at the proposed source. Furthermore, because the parties agree that the basin is fully appropriated, she cannot otherwise demonstrate that unappropriated water exists in the proposed source absent an exchange from another existing water right. Thus, finding that Ms. Hamblin cannot satisfy one of the requirements of U.C.A. 73-3-8(1)(a), the court grants the State Engineer’s motion for summary judgment on this additional basis.

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

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

### **III. Entitlement to File**

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

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

#### **IV. Compliance with Statutory Requirements to File a Change Application**

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

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

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

### **CONCLUSIONS OF LAW**

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

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

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


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

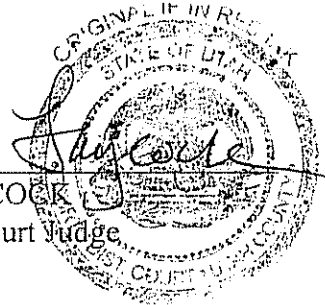
**ORDER**

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

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

Dated this 13<sup>th</sup> day of July, 2009

  
CLAUDIA LAYCOCK  
Fourth District Court Judge



Case No. 060400639

## MAILING CERTIFICATE

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

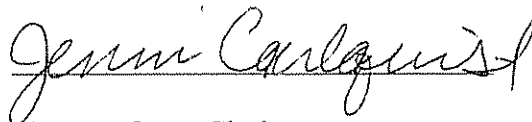
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