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## Otter Creek Reservoir Co. v. New Escalante Irrigation Co., 203 P.3d 1015 (Utah 2009)

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appropriate and such appropriation would not deprive prior rights holders of that water. Thus, the Legislature did not create a “super status water use” for utilization of floodwaters.

The court concluded that summary judgment was proper as a matter of law because section 72-5-29 concerns flood waters and Waterfall was not asserting a right to flood waters, but to water from Culberson Spring. Furthermore, Waterfall was not entitled to appropriation under section 72-5-29 because this statute does not provide Waterfall a superseding natural right to water from a fully appropriated stream system. The only basis for Waterfall’s argument responding to the unavailability of unappropriated waters was from Mr. Murrill’s opinion, based on personal knowledge, that individual liquid waste disposal systems would return the water Waterfall sought to appropriate back to vested rights holders. The court dismissed Mr. Murrill’s testimony because it was opinion testimony unsupported by scientific fact and thus insufficient to defeat a motion for summary judgment. Consequently, the court affirmed the district court’s ruling.

*Karina Swenson Phipps*

## UTAH

**Otter Creek Reservoir Co. v. New Escalante Irrigation Co., 203 P.3d 1015 (Utah 2009)** (holding that a water user must complete seven years of adverse use by the 1939 effective date of an amendment to the water right statute to obtain a water right by adverse possession).

Otter Creek Reservoir Company (“Otter Creek”) and New Escalante Irrigation Company (“New Escalante”) claimed rights to snow melt near the divide between the Sevier River drainage and the Escalante River drainage. Without a diversion, the water would flow into the Sevier River, which forms part of Otter Creek’s water supply. New Escalante claimed that it adversely used the water since December 1, 1936 by way of a ditch that intercepted the water and carried it to the Escalante River drainage. The issue concerned the application of a 1939 amendment to Utah Code Ann. § 73-3-1 which prohibited the acquisition of water rights by adverse use. Prior to 1939, water users could obtain a right through seven years of “continuous, uninterrupted, hostile, notorious, adverse use.” Otter Creek filed an action with the Sixth District Court in Utah against New Escalante in 2001 seeking a declaratory judgment that New Escalante had no right to use the water. New Escalante filed a counterclaim, arguing that it had a diligence right, or, in the alternative, a superior right based on adverse use.

The district court granted summary judgment in favor of Otter Creek with respect to the diligence claim, holding that New Escalante forfeited its right by not participating in the 1936 adjudication of all water rights in the Sevier River drainage (“Cox Decree”). The district court denied summary judgment regarding the adverse use claim, holding that because New Escalante’s adverse use began prior to the effective date of the amended statute in 1936, the use could still ripen

into a water right. Following the district court's decision, Otter Creek filed a petition for interlocutory appeal with the Supreme Court of Utah (the "court"). On appeal, the court addressed whether a water user could acquire a right by adverse use if the seven-year period required to maintain an adverse use began before the 1939 amendment, but did not vest until after the amendment.

The court reviewed the district court's decision, but afforded no deference to the district court's legal conclusion in interpreting the statute. The court acknowledged that non-binding dicta in previous cases conflicted with and caused confusion about whether an adverse use claim could ripen into a water right after the effective date of the 1939 amendment. Therefore, the court looked to the plain language in the statute. Finding that the statute was clear on its face, the court relied solely on the statutory language in reaching its conclusion. The statute states that "no right to the use of water either appropriated or unappropriated can be acquired by adverse use or adverse possession." The court reasoned that because the statute did not allow for adverse use rights to be acquired after 1939, and because an adverse use right vests only after seven years of adverse use, a party must complete the seven years before 1939. The court focused on the legislature's use of the word "acquired" as opposed to "initiated" or "begun," which evidenced a legislative intent to prohibit the vesting of any water right by adverse use after 1939. Based upon this reasoning, the court found that New Escalante's adverse use claim failed because it did not complete seven years of adverse use by 1939. The court held that an adverse user must have completed seven years of adverse use before the effective date of the 1939 amendment in order to satisfy an adverse use claim.

Accordingly, the court reversed the district court's determination and remanded the matter for further proceedings consistent with its ruling.

*Mary Kate Finnigan*