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Pre-Statutory Water Right Claims in Utah: Uncertainty in the Administration of Water Rights

PRE-STATUTORY WATER RIGHT CLAIMS IN UTAH: UNCERTAINTY IN THE ADMINISTRATION OF WATER RIGHTS

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INTRODUCTION

In the development of Utah water law, two dates stand out as pivotal points in the evolution of the method for recognizing ownership of a water right: March 12, 1903, and March 22, 1935. On the first date, the state legislature adopted Utah’s comprehensive appropriation statute.¹ On the second, the legislature amended the appropriation statute to reflect that the statute applied to all waters of the state, including underground waters.²

Recognizing that residents had diverted a substantial amount of water and placed it to beneficial use prior to the enactment of these statutes, the legislature provided mechanisms for water users to record their previously-established rights with the State Engineer. Specifically,

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1. See UTAH CODE ANN. § 73-3-1 (2010).

2. See *id.* § 73-1-1.

water users could file claims setting forth the elements of diversion and beneficial use in place prior to the statutory enactments. These “pre-statutory claims” fall into two categories: diligence claims and underground water claims.

A diligence claim under Utah water law is a claim to a surface water right that a user established by “diverting [water] from its natural channel and putting it to beneficial use” prior to March 12, 1903.³ An underground water claim (sometimes referred to as an “UGWC”) is a claim to underground water established by diversion and beneficial use of ground water prior to enactment of the 1935 statute.⁴

Since the enactment of the 1903 appropriation statute, water users have filed approximately 80,000 pre-statutory claims with the Utah Division of Water Rights; these claims comprise about 800,000 acre-feet (A.F.) of water.⁵ Of these claims, around 28,794 claims, comprising 290,000 A.F. of water, have not been subjected to public or judicial review and remain unevaluated.⁶ As water becomes an increasingly scarce commodity and water users compete for this limited public resource, the claimed date of the water’s first use becomes increasingly important. During drought or water shortages, those with senior rights are entitled to their full allotment of water before junior claims are satisfied.⁷ Pre-statutory rights generally have priority over rights established under the statutory application process.⁸

Because the requirements for filing pre-statutory claims were lenient compared to the requirements of the statutory application process, many claimants have filed claims with minimal or no evidence to support their claimed pre-statutory priority dates.⁹ Furthermore, as the state closed areas to new appropriations, the only way to obtain recognition of a new water right was by filing a pre-statutory claim.¹⁰ As a result, the State Engineer and the claimants face the challenge of evaluating, validating, and quantifying these pre-statutory rights whenever the claimants request distribution orders requiring delivery

3. *Eskelsen v. Town of Perry*, 819 P.2d 770, 771 n.1 (Utah 1991).

4. *See Salt Lake City v. Silver Fork Pipeline Corp.*, 5 P.3d 1206, 1216 (Utah 2000) (explaining that diligence rights to percolating and ground water are expressly limited to the amount of water actually beneficially used prior to 1935, the effective date of the statute, which first subjected percolating and groundwater to the application and appropriation process).

5. *See generally* UTAH DIVISION OF WATER RIGHTS DATABASE, <http://waterrights.utah.gov> (last visited April 21, 2011). This information was obtained by searching the Utah Division of Water Rights database with the assistance of the Utah Division of Natural Resources database specialist. All records are available to the public through the Division of Water Rights web site and can be accessed, downloaded and sorted based on the criteria selected herein.

6. *Id.*

7. UTAH CODE ANN. § 73-3-1 (2010).

8. *See* Wendy B. Crowther, Utah Water Law 101, Presentation Before the Utah State Bar 2008 Spring Convention (Mar. 14, 2008), at 3-4, *available at* http://www.utahbar.org/cle/springconvention/materials/water_law_101.pdf.

9. *Id.*

10. *See id.* at 4, 8.

of their water or file change applications. The process can be contentious. Sometimes the pre-statutory claimants exercise their rights adversely against statutory water right holders, or seek to convert early-priority surface water rights to ground water sources. A great deal of uncertainty also exists for those who have inherited or purchased unadjudicated pre-statutory rights. When the claim is judicially reviewed in the future, courts may find the claim invalid.

This paper addresses the history of Utah water law relating to the recognition of pre-statutory claims and examines the number of claims that remain unadjudicated. Additionally, this paper addresses the limitations on the administrative and judicial powers to evaluate pre-statutory claims, as well as the types of evidence that can support a claim to pre-statutory water use.

I. UTAH WATER LAW - A HISTORICAL PERSPECTIVE

All waters in Utah are property of the public.¹¹ Although a “perfected right” to the use of water is a property right, its ownership gives only the right to use a given amount of the transitory waters of a stream or source for a specific time, at a specific place, and for a specific purpose.¹² The actual beneficial use of the water is the basis and measure of the right.¹³ For pre-statutory claims, the priority is the date of the water’s first use; for rights established under the appropriation statute, the priority is the filing date of the application to appropriate.¹⁴

The appropriation statute serves two important functions in the administration of water rights. First, it seeks to ensure there is an adequate supply of water in the water source before granting new rights. Second, it provides a system of priority for resolving the competing rights of one owner against the rights of another owner, thus creating a level of predictability.

The Utah legislature passed its first act addressing the method and mode of appropriating water in 1897. This act required that any person desiring to appropriate surface water must post written notices in two conspicuous places: at the post office nearest to the point of intended diversion and at the actual point of diversion.¹⁵ The statute also required that the notices be recorded, and described their content.¹⁶ By contrast, prior to 1897, Utah required only that water users record notices for accomplished appropriations in the county

11. UTAH CODE ANN. § 73-1-1(1) (2010) (“All waters in this state, whether above or under the ground, are hereby declared to be the property of the public, subject to all existing rights to the use thereof.”).

12. In re Uintah Basin, 133 P.3d 410, 423 (Utah 2006); see also *id.* § 73-3-2.

13. § 73-1-3.

14. See WELLS A. HUTCHINS & DALLIN W. JENSEN, THE UTAH LAW OF WATER RIGHTS 14-15 (1965).

15. Act of Mar. 11, 1897, ch. 52, § 8, 1897 Utah Laws 219, 221.

16. *Id.*

recorder's office.¹⁷

Utah did not enact further legislation with respect to the appropriation of water until 1903. Under the 1903 legislation, the "[r]ights to the use of any of the unappropriated water in the State may be acquired by appropriation, in the manner . . . provided, and not otherwise."¹⁸ Furthermore, the appropriation had to "be for some useful or beneficial purpose, and, as between appropriators, the one first in time shall be first in right."¹⁹ Before the applicant could develop and beneficially use the water, the new procedures required a prospective water user to file an application that the State Engineer would review for statutory compliance.²⁰ If approved by the State Engineer, the priority of the right was the filing date of the application.²¹ Other than through a court-ordered general adjudication, the 1903 statute did not include procedures for recognizing or recording claims for those who had already established a beneficial use of water prior to 1903.²² Furthermore, the 1903 statute did not apply to ground water or percolating waters that were not flowing in a defined stream channel.²³

By the early 1930s, underground water use was rapidly increasing due to advancements in drilling technology.²⁴ At the same time, private ownership of rights to underground and percolating waters diluted the predictability of the prior appropriation doctrine. In a 1921 case, however, Utah courts adopted the "correlative rights" or "reasonable use" doctrine to groundwater use, and applied the beneficial use requirement to resolve a dispute over percolating waters between adjacent property owners in an artesian basin.²⁵ From 1935 to 1939, the legislature eliminated conflicting means of obtaining or controlling water outside the appropriation process and declared that correlative rights, reasonable use, and adverse possession were no

17. Act of Feb. 20, 1880, ch. 20, §§ 1-4, 1880 Utah Laws 36, 36-37 (directing the appointment of county wide water commissioners who were to issue water certificates based on established water use and providing that such certificate shall be "prima facie evidence" of such claims).

18. Act of Mar. 12, 1903, ch. 100, § 34, 1903 Utah Laws 88, 97.

19. *Id.*

20. *Id.* § 39, 1903 Utah Laws at 99.

21. *Id.* § 46, 1903 Utah Laws at 101.

22. *See id.* §§ 10-14, 1903 Utah Laws at 91-93.

23. *See id.* § 47, 1903 Utah Laws at 101. ("The water of all streams and other sources in this State, whether flowing above or underground, in known or defined channels, is hereby declared to be the property of the public, subject to all existing rights to the use thereof."). *See also* Riordan v. Westwood, 203 P.2d 922, 925 (Utah 1949) ("Until 1935, decisions of this court treated the waters of artesian basins as percolating waters, and as such the ownership went with the owner of the ground where such waters were located and were not considered to be subject to appropriation.").

24. *See* S.G. ROBSON & E.R. BANTA, U.S. GEOLOGICAL SURVEY, GROUND WATER ATLAS OF THE UNITED STATES (1995) available at http://pubs.usgs.gov/ha/ha730/ch_c/index.html.

25. *See* Horne v. Utah Oil Refining Co., 202 P. 815 (Utah 1921).

longer valid means for obtaining water rights.²⁶

In an attempt to incorporate existing underground water use into the State Engineer's records, Utah adopted a statute that required filing of underground water claims within a one-year period; the statute deemed failure to do so evidence of intent to abandon underground water rights.²⁷ An examination of the Utah Division of Water Rights' records reveals that water users filed over 17,470 pre-statutory claims between 1930 and 1940.²⁸ Most of these claims were underground water claims asserting established diversion and beneficial use prior to 1935, but also included claims to surface water for diversions and uses prior to 1903.²⁹ As one source accurately states:

The time for filing such claims was subsequently extended by various acts of the legislature . . . [and] in 1949 the legislature enacted [section] 100-5-13, Utah Laws 1949, Ch. 67, [section] 3, the predecessor statute of the present act which allowed the filing of claims until March 22, 1955. In 1955 the legislature . . . deleted any further reference to time within which claims must be filed and left the statute in its present form.³⁰

Utah Code section 73-5-13 still governs the method of filing pre-statutory claims to surface or underground water not otherwise represented (i.e., by certificates of appropriation or court decrees).³¹

The current pre-statutory claim statute (section 73-5-13, effective May 4, 1997) changed both the filing procedure and the significance of the filing action.³² It added an advertising requirement, and required opposing water users to file objections in district court.³³ In

26. See Act of Mar. 22, 1935, ch. 105, § 100-3-1, 1935 Utah Laws 195, 196; see also Act of Mar. 20, 1939, ch. 111, § 100-3-1, 1939 Utah Laws 146, 148. Prior to 1935, ground water was considered to be under private ownership and it was regulated for the first time in 1921, when the court applied the correlative rights and reasonable use doctrine to resolve a dispute between property owners. In 1935, ground water was declared to be owned by the public and correlative rights and reasonable use were replaced by the appropriation doctrine, as applied to underground water. See Act of Mar. 22, 1935, ch. 105, § 100-1-1, 1935 Utah Laws 195, 195 ("All waters in this state, whether above or under the ground are hereby declared to be the property of the public, subject to all existing rights to the use thereof.").

27. See Act of Mar. 22, 1935, ch. 105, § 100-5-12, 1935 Utah Laws 195, 200.

28. Between 1903 and 2010, 71,445 pre-statutory claims were filed with the Utah Division of Water Rights. Of these claims, 30,030 have no filing date associated with the claim. The estimate number of claims filed between 1930 and 1940—17,470—does not include any of the undated claims filed during this period. Therefore, the actual number of pre-statutory claims filed in the 1930s could be much higher. See generally UTAH DIVISION OF WATER RIGHTS DATABASE, *supra* note 5.

29. *Id.*

30. HUTCHINS & JENSEN, *supra* note 14, at 113 n. 78.

31. See UTAH CODE ANN. § 73-5-13(1)(a) (2010) ("All claimants to the right to the use of water, including both surface and underground, whose rights are not represented by certificates of appropriation issued by the state engineer, by applications filed with the state engineer, by court decrees, or by notice of claim filed pursuant to law, shall submit the claim to the state engineer.").

32. See *id.* § 73-5-13.

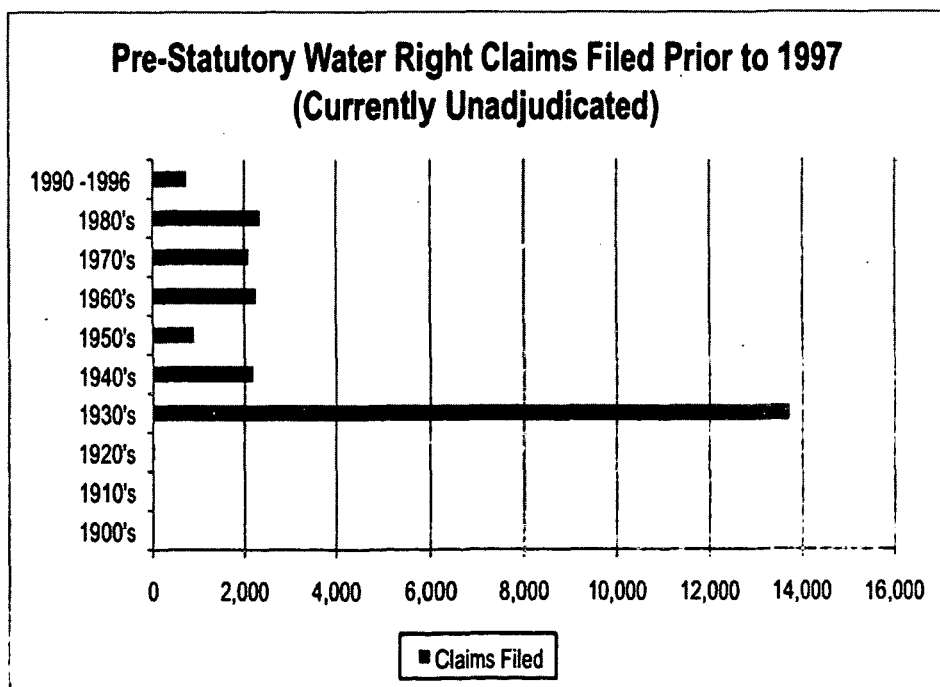
33. See *id.* § 73-5-13(6).

addition, it mandated a State Engineer field investigation and report.³⁴ The report prepared by the State Engineer can be considered as evidence for evaluating the validity of the claim or for determining the quantity of water diverted and the extent of beneficial use in both judicial and administrative proceedings.³⁵

The revised statute gave the State Engineer authority to establish standards for the determination of "acceptably complete claims" and removed the provision declaring a filed claim to constitute "prima facie evidence" of the validity of the claimed water right.³⁶ Instead, it required that the claimant prove the claim's legitimacy in any action to determine the validity of the claim.³⁷ If the claimant, or any other interested party, does not agree with the report's evaluation and conclusions regarding the claim, the claimant can petition for adjudication in district court.³⁸

Prior to the adoption of the 1997 standards, many pre-statutory claims were listed in a Proposed Determination of Water Rights (PD) produced by the State Engineer during a court-ordered adjudication and were subjected to both public and judicial review.³⁹ However, during the thirty to forty-year period from the time when most general adjudications were conducted (the 1950s and 1960s) until the adoption of the 1997 statute, a number of pre-statutory claims were filed.⁴⁰ These claims were not filtered through the general adjudication proceedings and were not subject to the filing and review requirements of the 1997 statute. Hence, these claims remain both unevaluated and unadjudicated.

An examination of the Utah Division of Water Rights' records reveals that 77,071 pre-statutory claims were filed prior to the 1997 statute, of which 28,794 claims have not been published in a proposed determination or subjected to a general adjudication.⁴¹



II. METHODS FOR OBTAINING A WATER RIGHT UNDER UTAH LAW

There were two ways through which a private party may have obtained a water right prior to the 1997 amendments to Title 73, Chapter 5: (1) by filing an appropriation application under Title 73, Chapter 3, or (2) by filing a claim for a pre-statutory use under Title 73, Chapter 5.⁴²

A. THE STATUTORY APPROPRIATION PROCESS

If a water user filed an appropriation application under Title 73, Chapter 3, the criteria set forth in section 73-3-1, previously and still currently requires the State Engineer to approve an application if:

- (a) there is unappropriated water in the proposed source; (b) the proposed use will not impair existing rights or interfere with the more beneficial use of the water; (c) the proposed plan is physically and economically feasible . . . and would not prove detrimental to the public welfare; (d) the applicant has the financial ability to complete the proposed works; and (e) the application was filed in good faith and not for purposes of speculation or monopoly.⁴³

The burden of persuasion is on the applicant throughout the application process to show that the proposed uses will not impair prior vested rights.⁴⁴

After an application is approved, the applicant has a specified period of time (set forth in the approval decision) in which to complete the proposed work and put the water to beneficial use.⁴⁵ After the diversion and delivery system and the beneficial use are in place, the applicant typically retains the services of a professional engineer or land surveyor who files "proof of appropriation" documentation providing a description of the diversion works and methods used in applying water to beneficial use, along with water diversion measurements, and professionally-created maps.⁴⁶ If the State Engineer finds the proof documentation sufficient, the State Engineer then issues a certificate of appropriation that sets forth and affirms the details contained in the proof.⁴⁷ An issued certificate is

42. UTAH CODE ANN. §§ 73-3-1, 73-5-13 (1996).

43. *Id.* § 73-3-8 (emphasis added).

44. *See* *Searle v. Milburn Irrigation Co.*, 133 P.3d 382, 396 (Utah 2006).

45. UTAH CODE ANN. § 73-3-10 (1996) ("The state engineer shall state in his endorsement of approval the time within which the construction work shall be completed and the time within which the water shall be applied to beneficial use.").

46. *Id.* § 73-3-16.

47. *Id.* § 73-3-17 ("Upon it being made to appear to the satisfaction of the state engineer that an appropriation or a permanent change of point of diversion, place or nature of use has been perfected in accordance with the application therefor, and that

prima facie evidence of the owner's right to the use of water in the quantity, for the purpose, at the place, and during the time specified therein, subject to prior rights.⁴⁸

B. PRE-STATUTORY CLAIMS

To obtain recognition of a water right acquired through diversion and beneficial use made prior to the adoption of the appropriation statutes (1903 for surface water and 1935 for ground water), section 73-5-13 (prior to the 1997 amendments) required the claimant to file a statement under oath declaring the quantity of water diverted and used, the nature of the use, and the date when beneficial use was first established.⁴⁹ The statute provided a standard form for such declarations.⁵⁰ This form contained a section for a sworn affidavit from a disinterested third party with personal knowledge who affirmed that the facts set forth in the claim were true and accurate accounts.⁵¹

Regardless of whether a water user established a water right under the stricter procedures of the appropriation application or under the more lenient pre-statutory claim statute, the effect was the same — both processes produced prima facie evidence of a valid water right.

III. JUDICIAL AND ADMINISTRATIVE PROCESSES – THE LIMITATIONS ON EVALUATING PRE-STATUTORY CLAIMS

A. ADMINISTRATIVE EVALUATION OF PRE-STATUTORY CLAIMS

Although the State Engineer has broad statutory discretion to “secure the equitable apportionment and distribution of the water according to the respective rights of appropriators,”⁵² the State Engineer lacks authority to adjudicate the validity of these rights.⁵³ The State Engineer may, however, rely on available evidence to deny an administrative action if this evidence shows the pre-statutory claim

the water appropriated or affected by the change has been put to a beneficial use, as required by §§ 73-3-16, he shall issue a certificate.”).

48. *Id.* § 73-3-17.

49. *See id.* § 73-5-13.

50. *See id.*

51. Utah Admin. Code R655-6-14 (G) allows the state engineer to refer to maps, aerial photographs and any other information necessary when making an administrative decision. Where information obtained shows a claim may be invalid or overstated, such an application could be denied both because there is no unappropriated water to be taken and because the new demand on the resource would unavoidably impair prior vested rights pursuant to the requirements under § 73-3-8 and § 73-3-1. In a fully-appropriated source, allowing a new water right to come into play pursuant to any administrative action would produce the effect of a new appropriation of water in that resource.

52. UTAH CODE ANN. § 73-2-1(3)(b) (2010).

53. Searle, *supra* note 44 at 391 (“[The] district court, when reviewing the State Engineer's decision to approve or reject an application for a change in use of a water right, 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.”).

might be invalid or overstated.⁵⁴ Therefore, when subjecting a claim to the administrative process; the owner of a pre-statutory water right should be prepared to provide evidence to substantiate the priority and extent of the claimed use.

The most common administrative action involving a pre-statutory claim occurs when the owner files a change application seeking either to modify the nature of the beneficial use (i.e., irrigation, municipal, power, stock watering), the point of diversion, and / or the place of use.⁵⁵ Sections 73-3-3 and 73-3-8 govern the procedures and criteria under which the State Engineer must approve a change application.⁵⁶ The State Engineer is required to undertake the same investigation for permanent change applications as for applications for water appropriations.⁵⁷ For example, the State Engineer must find that the proposed use will not impair existing rights or interfere with the more beneficial use of the water, and that the change is feasible and would not prove detrimental to the public welfare.⁵⁸

Because a claim filed prior to 1997 is prima facie evidence of a valid right, the State Engineer must, when evaluating a change application based on such a pre-statutory claim, take administrative notice of the facts set forth in the claim. These facts include the amount of water used, the nature of use, and the priority of the claim.

The Division of Water Rights has adopted administrative rules that allow the State Engineer to refer to maps or aerial photographs, to compel the production of any necessary evidence, and to consult experts before approving or denying a change application.⁵⁹ All adjudicative proceedings of the Division (including change applications) are informal proceedings.⁶⁰ At its discretion, the Division may determine matters within its authority by holding hearings on adjudicative proceedings.⁶¹ Although the rules prohibit the type of discovery typical of litigation, the rules establish permissible types of evidence and confer the power to compel production of necessary evidence.⁶² At a hearing, “[t]he Presiding Officer may take official notice of the following matters which shall be considered as facts presented at the hearing: [r]ules, regulations, official and unofficial reports, surveys, maps, investigations, all Division files, decisions and orders of the State Engineer and any other regulatory agency, state or federal.”⁶³

The State Engineer may have access to historic hydrographic

54. See UTAH CODE ANN. § 73-3-5(2), (4) (2010).

55. See generally UTAH DIVISION OF WATER RIGHTS DATABASE, *supra* note 5.

56. See *id.* § 73-3-3.

57. *Id.* § 73-3-3(5)(a).

58. *Id.* § 73-3-8(1)(a).

59. UTAH ADMIN. CODE r. 655-6-14(G) (2011).

60. *Id.* at r. 655-6-2.

61. *Id.* at r. 655-6-7(D).

62. *Id.* at r. 655-6-14(A).

63. *Id.* at r. 655-6-14(G).

survey maps showing the purported place of beneficial use. If the record shows the claimed use is invalid or overstated, the State Engineer may reject the application on the grounds that approving a change to an invalid or overstated right would have the effects of a new appropriation of water or constitute an enlargement of the underlying right.⁶⁴ Although these findings could support a conclusion that a certain water right claim is invalid, as long as the State Engineer is not asserting a determination of forfeiture or abandonment of the underlying right, he is neither adjudicating the right nor exceeding his administrative powers.⁶⁵

A party may obtain judicial review in district court of any order from the State Engineer.⁶⁶ Although a party may ask the State Engineer to reconsider his action, that party does not have to exhaust administrative remedies before appealing.⁶⁷

Where a party appeals, the trial court is required to determine the same questions that were before the State Engineer in the administrative process in a *de novo* review.⁶⁸ When appealing the rejection of a change application, the extent or priority of rights that the applicant asserts have been acquired under a pre-statutory claim cannot be adjudicated because “no cause of action for the adjudication . . . accrue[s]” from the administrative action on a change application.”⁶⁹ Therefore, the court’s reviewing of the denial of a change application is “based only on a finding of reason to believe that such facts do or may exist if the application is approved rather than a finding of such facts.”⁷⁰

Even where the State Engineer’s records show that the claimed use or priority may be invalid, the records of the State Engineer extend no further than the sanctity of his decisions.⁷¹ The courts are not bound by evidence or data adduced at hearings before the State Engineer.⁷² Regardless of what evidence the court considers on appeal, the extent and validity of a pre-statutory claim cannot be judicially determined until the validity of that right is itself the subject of a judicial or adjudicative action. Therefore, an invalid or overstated pre-statutory claim could continue to underlie the right to water use under the original claim for decades after the State Engineer denied a change application. Furthermore, the right may change ownership several

64. See UTAH CODE ANN. §§ 73-3-8(1) (2010).

65. See *id.* § 73-2-1 (setting out the powers and duties of the State Engineer).

66. UTAH ADMIN. CODE r. 655-6-18(A) (2011).

67. *Id.*

68. *E. Bench Irrigation Co. v. State*, 300 P.2d 603, 606 (Utah 1956).

69. *Id.* at 607.

70. *Id.*

71. See *Am. Fork Irrigation Co. v. Linke*, 239 P.2d 188, 190-91 (Utah 1951) (stating that courts are the “sole ultimate arbiter[s] of law and fact in water cases, bound neither by the nature, extent or content of [the State Engineer’s] decision, nor as to the character, quantum or quality of proof, evidence or data adduced at hearings before him or accumulated independently by his office.”).

72. *Id.* at 190-91.

times, possibly creating unfounded expectations of a valid water right.

B. JUDICIAL ADJUDICATION – EVALUATING PRE-STATUTORY CLAIMS

There are only two ways to accomplish a forfeiture of a water right: either pursuant to a court-ordered adjudication, or in a civil action where a plaintiff shows, through evidence, that a user has either abandoned or forfeited the right.⁷³ A general adjudication is a statutorily-created process intended to evaluate the extent and priority of all water rights in an entire drainage or sub-drainage basin; it is governed by sections 73-4-1 through 73-1-24.⁷⁴

An adjudication may commence when five or more users of a water source file a petition requesting an investigation into their relative rights.⁷⁵ If, after investigation, the facts justify a determination, the State Engineer has a duty to file an action in district court.⁷⁶ All adjudications commenced since 1903 have begun either by petition or *sua sponte* (i.e., a court hearing a private cause of action regarding water rights converted the proceeding into a statutory adjudication).⁷⁷

After an action is filed in district court, the State Engineer is required to provide notice to all water rights owners in the affected drainage basin.⁷⁸ The State Engineer then performs extensive surveys to determine the location and extent of all diversions and beneficial uses of water within the designated area.⁷⁹ Subsequently, the State Engineer publishes a record of all uses in the form of a PD and delivers a copy to each party in the action.⁸⁰ The water users must file a Water User's Claim ninety days after notice of the adjudication.⁸¹ Opposing users must file objections to the PD no more than ninety days after delivery of the PD to the claimants.⁸² If a party fails to assert any claim to water covered under the adjudication, that party may be barred from asserting the claim in the future.⁸³

Most adjudications have turned out to be a lengthy process, with some proceedings lasting over forty years.⁸⁴ An examination into past

73. UTAH CODE ANN. § 73-1-4 (2010).

74. *Id.* §§ 73-4-1 through 73-1-24.

75. *Id.* § 73-4-1(1).

76. *Id.* § 73-4-1(2)(b)-(c).

77. *See id.* § 73-4-18; *see also* *Watson v. Dist. Ct. ex rel. Cache Cnty.*, 163 P.2d 322, 323 (Utah 1945) (district court converted a private suit into a general adjudication).

78. *Id.* § 73-4-3(2)(a).

79. *Id.* § 73-4-3(3).

80. *Id.* § 73-4-11(2).

81. *Id.* § 73-4-5.

82. *Id.* § 73-4-11(2)(b).

83. *Id.* § 73-4-9. *See also* *In re Gen. Determination Of Rights To Use All Water, Both Surface and Underground Within Drainage Area of Utah Lake and Jordan River in Utah, Salt Lake, Davis, Summit, Wasatch, San Pete and Juab Counties in Utah*, 982 P.2d 65, 70-71 (Utah 1999).

84. *See General Adjudications in Utah*, UTAH DIVISION OF WATER RIGHTS, <http://waterrights.utah.gov/adjstatus/default.asp> (last visited Mar. 13, 2011) (for example, Area 52 Little Bear River).

adjudication proceedings reveals that in one case, a PD was published over twenty-four years ago, protests are on record with the court and, while a final hearing has yet to be scheduled, many of the described water rights have transferred ownership several times.⁸⁵ Additionally, the status of objections filed by persons who have deceased since publication of the PD remains unresolved.⁸⁶ These conditions exemplify the lack of order and certainty and the limitations for evaluating both statutory and pre-statutory water rights through a general adjudication.

A water right owner desiring some degree of certainty as to extent and priority of a pre-statutory claim may request a declaratory action in judicial court. However, the Utah Supreme Court has addressed the problems imposed by private remedies and declared that no decree can be entered for a private water right until a general determination of water rights is completed.⁸⁷ Thus, even a private action for a declaratory judgment or to quiet title leaves a degree of uncertainty as to the ultimate rights under a pre-statutory claim.

V. EVIDENCE – HOW TO SUBSTANTIATE A PRE-STATUTORY CLAIM.

Historically, courts have placed strict requirements on evidence submitted to substantiate claims for pre-statutory water rights and held that “vague and indefinite evidence might be insufficient to establish pre-1903 beneficial water use.”⁸⁸ In a departure from traditional evidentiary standards, in 1991, the Utah Supreme Court awarded a pre-statutory diligence claim and allowed as evidence hearsay testimony from a witness who had merely heard of such uses. The court reasoned that “it would be overly burdensome and unrealistic for us to require a water user to produce unquestionable, overwhelmingly clear evidence of water use” prior to 1903.⁸⁹

85. See *Virgin River Adjudication - Book 2 Details*, UTAH DIVISION OF WATER RIGHTS, <http://waterrights.utah.gov/adjstatus/default.asp> (follow “Area 81 - East Fork Virgin River Division Book 2” hyperlink) (last visited Mar. 13, 2011).

86. *Id.*

87. See *Watson*, *supra* note 77, at 323 (“If a court were allowed to enter final judgments of individual rights in a suit for general adjudication before the state engineer has made his survey, report, determinations and recommendations as provided for in the statute, the very purpose of the statute, which we have shown is to avoid piecemeal litigation, would be circumvented. [N]o final judgment should be entered until all the rights of all the claimants can be adjudicated.”). In a case of quiet title to land, the courts have recommended using the adjudication statute and procedures that require completion of a hydrologic survey to determine the rights to which parties are entitled. See *Hardy v. Beaver Cnty. Irrigation Co.*, 234 P. 524, 530-31 (Utah 1924) (holding that the trial court did not determine the rights to a definite degree, the court recommended filing a petition to adjudicate the basin in question suggesting that “[a] disinterested hydrographic survey of respondents’ lands and irrigation systems by such state official will inevitably eliminate many of the uncertainties which are inherent in the record now before us.”).

88. *Eskelsen*, *supra* note 3, at 774 (citing *Mt. Olivet Cemetery Ass’n v. Salt Lake City*, 235 P. 876, 878-79 (Utah 1925)). See also *Richfield Cottonwood Irrigation Co. v. City of Richfield*, 34 P.2d 945, 949 (Utah 1934).

89. *Eskelsen*, *supra* note 3, at 774.

Because “[i]t is elementary that an appropriation of water is limited by time as well as by amount. . . an appropriator’s right is limited by not only the quantity of water which he has beneficially used and the seasonal period [in which it was used].”⁹⁰ Historical deeds, maps, witnesses, journals and any evidence that tends to support the claimed uses can be adduced to establish these essential facts.⁹¹

Courts have rejected some types of evidence as creating a vested pre-statutory claim including, water certificates created pursuant to the 1880 Laws of Utah,⁹² and federal land patents granted under the Homestead and Mining Acts.⁹³ An owner of a pre-statutory claim or potential purchaser of such a claim should investigate the original claim statement and be prepared to present evidence anytime the water right is the subject of judicial or administrative action.

CONCLUSION

The prior appropriation doctrine strives to create predictability and accuracy in securing the equitable apportionment of Utah’s waters. Over 27,000 pre-statutory claims remain unevaluated and adjudicated, creating a high level of uncertainty not only to the persons who own or acquire these claims, but also to those who have established their rights under the appropriation process and may have competing priority.⁹⁴ An owner of an adjudicated pre-statutory water right should be prepared with evidence to substantiate the claimed priority date and extent of claimed beneficial uses. Because private remedial actions outside statutory adjudications serve only to produce interlocutory decrees, there is a strong public policy interest in authorizing the State Engineer to exercise reasonable regulatory power to ascertain and regulate pre-statutory claims through administrative actions.

90. Hardy, *supra* note 87, at 529.

91. See UTAH CODE ANN. § 73-3-16 (2010).

92. See *Holman v. Christensen*, 274 P. 457, 461 (Utah 1929).

93. See 43 U.S.C. § 661 (2011) (“Whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same.... All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section.”).

94. See generally UTAH DIVISION OF WATER RIGHTS DATABASE, *supra* note 5.

