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

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UTAH

Searle v. Milburn Irrigation Co., 133 P.3d 382 (Utah 2006) (holding that when evaluating an application for change in use of a water right: (1) district courts enjoy significant, but not broad, discretion, when determining whether evidence of impairment is sufficient for application denial; (2) the applicant seeking change need only show reason to believe that approval of the proposal will not impair vested water rights; (3) the applicant bears the burden of persuasion throughout the application process; and (4) a party protesting the application may defeat the change application by relying exclusively on circumstantial evidence that demonstrates the probability of impairment).

Lawrence and Ann Searle purchased undeveloped property in Sampete County, Utah. The building permit application process required the Searles to establish the presence of an on-site water source sufficient to meet the needs of a prospective cabin. The Searles purchased a water right with a priority date of 1956, but with a diversion point that was a significant distance from the cabin and therefore did not satisfy the on-site requirement. The Searles subsequently sought to change the water right's point of diversion and nature of use to a closer existing well, known as the Jacobsen well. The Searles appropriately filed a change application with the Utah State Engineer ("State Engineer") and advertised the application.

Milburn Irrigation Company ("Milburn") opposed the Searles' change application. Milburn distributed water to its twenty-six shareholders by means of gravity-pressured sprinkler irrigation systems. Milburn owned a water right with a priority date of 1876, entitling it to divert 8.875 cubic feet of water per second from the South San Pitch River; however, Milburn typically was not able to satisfy the entire amount of its water right. It opposed Searle's application out of concern that the Jacobsen well was in the drainage area that contributed to the South San Pitch and that the use of the well could lead to additional water shortfalls.

The State Engineer heard testimony from both parties concerning the possibility of an impairment to Milburn's water right based on a possible connection between the Jacobsen well and Milburn's water source. The State Engineer consequently rejected the change application, and the Searles appealed to the Sixth District Court for the State of Utah. The district court heard testimony from expert witnesses from both parties and held that, under a preponderance of the evidence standard, approving the application would impair Milburn's rights. The Searles then appealed to the Supreme Court of Utah.

On appeal, the Searles, Milburn, and the State Engineer each argued that the court should modify the approach taken by the district court, raising three issues: (1) whether the district court properly in-

voked the preponderance of evidence standard of proof; (2) whether the district court correctly allocated the burden of persuasion; and (3) whether a change application may be undermined by circumstantial evidence demonstrating the probability of impairment. The court addressed each issue separately.

As a threshold issue, the court determined that district courts enjoy significant, but not broad, discretion when determining whether evidence of impairment is sufficiently compelling to deny an application approval. However, because of the strong public policy interest in promoting consistent and predictable results when adjudicating water rights, the court found it appropriate to constrain district court discretion in this area.

The parties presented two arguments regarding the appropriate standard of proof. The State Engineer and Milburn argued that the decision-maker should deny an application when a preponderance of the evidence establishes that vested rights will be impaired, while the Searles argued that the decision-maker should deny an application only if direct, noncircumstantial evidence clearly demonstrates that impairment would result from the approved application. The court held that the proper standard lies between the two positions advanced by the parties: the change application process requires an applicant only to show reason to believe that no impairment will result from application approval. The court reasoned that this standard of proof provided a balance between twin policy goals: putting water to the most beneficial use possible, and simultaneously guarding vested water rights.

Next, the court addressed the proper burden of persuasion. The district court shifted the burden of persuasion from the Searles to Milburn, based on a common misunderstanding of previous court opinions. Here the court emphasized that the burden of persuasion should remain on change applicants throughout the application process. This burden, the court reasoned, is analogous to the burden usually imposed upon the moving party in a lawsuit. Moreover, the applicant must persuade the decision-maker that there is no reason to believe that vested rights will be impaired if the application is approved. This burden exists even when there is no opposition to the application, and as a result unopposed applications can still fail.

Last, the court held that circumstantial evidence may be included in the decision-making process. The court acknowledged that a protesting party faces a difficult task in producing evidence sufficient to block approval, and that in many cases impairment only can be illustrated by relying on conjecture or probability.

The court remanded the case because the district court invoked the wrong standard of proof and improperly allocated the burden of persuasion in its review of the State Engineer's decision.

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