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## Searle v. Milburn Irrigation Co., No. 20040406, 2005 Utah LEXIS 98 (Utah Sept. 2, 2005)

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representatives, claiming that the conversion of these districts disqualified them as organized divisions of the Red Bluff District and prevented them from electing representatives to the board. Both sides sought declaratory relief and, following a bench trial, the 143rd District Court of Ward County entered judgment in favor of Red Bluff District. Ward District 1 and Ward District 3 appealed to the Court of Appeals of Texas, Eighth District.

In interpreting the statute *de novo*, the court observed that the legislature initially approved control and improvement districts for inclusions in power control districts such as Red Bluff, but later amended the statute to omit them. Red Bluff maintained, as did the trial court, that this change in the statute indicated an intention by the legislature to restrict membership in power control districts to improvement districts. However, the court held that, rather than evidencing an intent to forever restrict membership to improvement districts, the legislature intended only to exclude the more powerful control and improvement districts from inclusion in power control districts. Furthermore, the trial court's restrictive approach to the statute was inconsistent with a general legislative intent to permit conversion of one type of water district to another. As such, Ward Districts 1 and 3 could remain functional members of the Red Bluff District.

Red Bluff also claimed that Chapter 58 irrigation districts could not elect representatives to its board because the election procedures provided for these districts would lead to voter disenfranchisement. Under Chapter 58, eligibility to vote in irrigation district elections is based on ownership of irrigable land, excluding non-landowners. The court, however, pointed to United States Supreme Court precedent concluding that such elections do not violate equal protection because of the special limited purpose of water districts. The court concluded that the issue was irrelevant here because Chapter 58 only applies to elections of the irrigation district's own board of directors and does not apply to the election of representatives to the Board. Thus, the court reversed the trial court in favor of the irrigation and water improvement districts.

*Noah Klug*

## UTAH

**Searle v. Milburn Irrigation Co., No. 20040406, 2005 Utah LEXIS 98 (Utah Sept. 2, 2005)** (holding: (1) an applicant seeking a change in water use need only show reason to believe approval of an application will not result in impairment of a vested water right; (2) applicant bears the burden of persuasion throughout the application process; and (3) protestant may successfully oppose an application approval by

producing direct or circumstantial evidence that undermines an applicant's showing).

Lawrence and Ann Searle ("Searles") purchased a water right in Sanpete County, Utah. To comply with requirements necessary to obtain a building permit, the Searles filed a change application with the State Engineer to change the point of diversion, place of use, and nature of use of the water right. Milburn Irrigation Company ("Milburn") opposed this application, claiming it would impair its prior existing rights. After an informal adjudicative hearing in which both parties presented argument and testimony, the State Engineer rejected the Searles' application, as well as the Searles' subsequent request for reconsideration.

The Searles filed suit in the District Court for the Sixth District seeking judicial review of the State Engineer's decision. At trial, the Searles offered testimony from an expert witness supporting their contention that their requested change application would not impair Milburn's water rights. Milburn, in turn, offered testimony from two expert witnesses supporting its contention that the change would impair its rights. The district court reached the same conclusion as the State Engineer and denied the Searles' application.

On appeal to the Supreme Court of Utah, the Searles and the State Engineer took exception to the approach adopted by the district court in which the burden of persuasion "shifted from the applicant to the protestant" and that the "standard of proof was by a preponderance of the evidence." The State Engineer argued that the burden of persuasion remained on the Searles, whereas the Searles argued that the standard of proof placed on Milburn should have been more akin to clear and convincing evidence, rather than proof by a preponderance of the evidence.

The court addressed three areas of concern with the approach that the district court adopted. It analyzed whether the district court: (1) properly invoked the preponderance of the evidence standard of proof; (2) appropriately allocated the burden of proof; and (3) correctly concluded that a change applicant's prima facie showing that no impairment will result from application approval could be undermined by circumstantial evidence demonstrating the probability of impairment.

The court first provided a brief overview of the change application process itself, as well as the procedural course followed by the district court in the present case. The court noted that the lower court relied on its decisions in *Crafts v. Hansen* and *Salt Lake City v. Boundary Springs Water Users Ass'n* to justify applying a "burden shifting scheme" as well as utilizing a preponderance of the evidence standard of proof. However, the court distinguished the applicability of the language in those cases to the case at hand, reasoning that the proper procedure to fol-

low when considering the merits of a change application is to analyze those cases in conjunction with the Utah Code.

In establishing the appropriate procedure for determining the merits of a change application, the court balanced the two policy goals of putting water to the most beneficial use possible while simultaneously guarding vested rights. The court distinguished the standard of proof applicable to the application process from the standard applicable to a final adjudication of rights. A review of case law established that an applicant need only show a reason to believe that a proposed change would not impair any vested right. The court analogized the application stage where a reason to believe is appropriate, to the preliminary phase of a criminal trial where probable cause is sufficient to allow the case to proceed. It reasoned that allowing for a less onerous burden at the application stage allows for the development of water uses to the maximum extent possible.

The procedures already in place would also guard against harming existing rights. The burden remains on the applicant to invest the resources necessary to develop the proposed change. After the change is implemented, the applicant still bears the burden of showing that the implemented changes do not impair other rights. If an impairment of vested rights occurs, the burden is on the applicant to sustain the loss for the development. This system ensures that the applicant will take all the necessary precautions to ensure that his proposed change will not adversely affect the rights of others.

The court reasoned that the burden of persuasion remains on the applicant for the duration of the application process because it is the applicant who is disturbing the existing order. It also reasoned that circumstantial evidence can undermine an applicant's proposed change because determinations of impairment often hinge on probabilities and not on direct observation, measurement and calculation. The court noted there could be situations in which circumstantial evidence could successfully undermine an applicant's evidence to such an extent that it would be unreasonable to believe that the proposed change could be accomplished without impairing vested rights.

The court concluded that the district court applied the wrong standard of proof. The court also held that the parties improperly allocated the burdens of proof. The court remanded the case to the district court for reconsideration under the standard outlined.

*Roger J. Lucas*