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Ability and Responsibility of State Engineer Regarding Reallocation of Water Rights

by

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I. INTRODUCTION

In the state of Utah, the right to use water is considered fully appropriated in all drainage basins wherein people reside in significant numbers. That is to say, new water rights may no longer be appropriated for new uses or to supplement existing uses; rather, water rights previously appropriated are being subjected to reallocations through the use of change or exchange applications. These reallocations are effectuated by changes in use and periods of use such as seasonal irrigation use to year-round domestic use and changes of point of diversion, wherein an existing use is moved from the area of historic use to an area where a demand for water exists. In certain areas of Utah, very large reallocations of water by change applications or exchange applications have occurred over the past thirty years. In some cases, these approved movements far exceed the water naturally produced by physical sources of the new area. Where approvals exceed available natural water supplies, the existing excess water rights have become known as "paper water" rights for the simple reason that the water exists only on paper. Significant problems result when an applicant attempts to divert paper water rights for beneficial use. Once the demand created by the use of such rights exceeds actual physical supply of the naturally occurring surface and ground water, existing rights are subjected to interference or impairment. Consequently, groundwater basins are taxed toward depletion, and natural stream environments are detrimentally affected because tributary surface and ground water sources are diverted and consumed. The purpose of this paper is to identify various tools available to the state engineer to resolve this ongoing significant problem.

II. REALLOCATION TOOLS OF THE STATE ENGINEER

The ultimate goal of nearly every water user is to place a water right to beneficial use, file a proof of appropriation or proof of change if the right is based

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on a change application,[1] and acquire a certificate of appropriation.[2] In certain situations, these rights have yet to be put to beneficial use, and proof of that use is not yet susceptible to the required showing. In such a situation, holders of water rights must reappear before the State Engineer at defined intervals in a process known as a "request for extension of time."[3] Previously awarded water rights also reappear before the State Engineer in the course of a general adjudication and what is commonly referred to as a "mini-adjudication."[4] Each of these tools will be discussed in more detail below.

A. Extensions of Time

If an applicant, after showing a diligent effort to develop and beneficially use his water right, is unable to file proof of application to beneficial use[5] under a change application within the time frame required by the State Engineer, the applicant may request an extension of time.[6] It is the author's impression that the State Engineer is fairly liberal when granting the first few extensions, but requires stricter showings of beneficial use as the application passes the fourteen-year mark.[7] The power and authority of the State Engineer to grant extensions is accorded notable discretion,[8] but is subject to judicial review where the State Engineer's decision may be tested.[9]

B. General Adjudications

The State Engineer may initiate a process known as a general determination or general adjudication:

> Upon a verified petition to the state engineer, signed by five or more or a majority of water users upon any stream or water source, requesting the investigation of the relative rights of the various claimants to the waters of such stream or water source, it shall be the duty of the state engineer, if upon such investigation he finds the facts and conditions are such as to justify a determination of said rights, to file in the district court an action to determine the various rights. In any suit involving

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[1] *See* UTAH CODE ANN. § 73-3-16 (Supp. 1999).
[2] *See id.* § 73-3-17 (1989).
[3] *See id.* § 73-3-12 (Supp. 1999).
[4] *See id.* § 73-4-24 (1999).
[5] *See id.* § 73-3-16.
[6] *See id.* § 73-3-12.
[7] *See id.* § 73-3-12(2)(e) (Supp. 1999).
[8] *See id.* § 73-3-12(2)(h)(i)(k).
[9] *See id.* § 73-3-14 (1989).

> water rights the court may order an investigation and survey by the state engineer of all the water rights on the source or system involved.[10]

This is a very time-consuming and factually-intensive proceeding that progresses under court supervision.[11] It requires a statement by the water user as to the beneficial use the user has made of the water right.[12] The State Engineer reviews and, if necessary, performs a field investigation of each statement and formulates a report and proposed determination that is sent to each claimant.[13] The claimant may agree with the State Engineer's assessment of the water right at issue, in which case the court recognizes the claimant's right by judicial decree,[14] or the claimant may contest the report before the court.[15] In any event, the investigative portion of this process involves the State Engineer reviewing the actual beneficial use of all water right applications, including those upon which a certificate has been issued, and determining the level of actual beneficial use that has occurred. This result contemplates the power of the State Engineer to reduce certificated water rights or uncertificated applications to the level of actual beneficial use.

C. Mini-Adjudication

A smaller and more manageable version of the general adjudication[16] is contained in the Utah Code:

> If, during the pendency of a general adjudication suit, there shall be a dispute involving the water rights of less than all of the parties to such suit, any interested party may petition the district court in which the general adjudication suit is pending to hear and determine said dispute. All persons who have a direct interest in said dispute shall be given such notice as is required by order of the district court and in addition thereto the district court shall require that notice of the initial hearing on said dispute be given by publication at least once each week for two successive weeks in newspapers reasonably calculated to give notice to all water users on the system. Thereafter the court may hear and determine the dispute and may enter an interlocutory decree to control

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[10] *Id.* § 73-4-1.
[11] *See id.* § 73-4-3.
[12] *See id.* § 73-4-5.
[13] *See id.* § 73-4-11.
[14] *See id.* § 73-4-12.
[15] *See id.* § 73-4-13.
[16] General adjudications frequently encompass the entire drainage basin of a river system or sub-basins thereof. For instance, a general adjudication of the Emigration Canyon section of the Jordan River has been pending for decades.

> the rights of the parties, unless modified or reversed on appeal, until the final decree in the general adjudication suit is entered. At that time the district court may after hearing make such modifications in the interlocutory decree as are necessary to fit it into the final decree without conflict.[17]

This approach also anticipates the State Engineer's inherent ability to reduce water rights to the level of actual beneficial use.

III. THE STATE ENGINEER'S AUTHORITY

The powers of the State Engineer are generally set forth in section 73-2-1 of the Utah Code.[18] In *Little Cottonwood Water Co. v. Kimball*,[19] the Utah Supreme Court noted that the State Engineer has no powers except those expressly conferred by statute. The Utah Supreme Court has further clarified the scope of the State Engineer's duties by ruling "[t]hat the office of the State Engineer was not created to adjudicate vested rights between parties, but only to administer and supervise the appropriation of the waters of the state."[20] Thus, under statutory law,

> [w]hether or not we call the engineer's decision administrative and the district court's decision judicial, no rights to the use of water accrue by the mere approving or rejecting of an application, the only thing thereby determined is whether the applicant may proceed in accordance with the statute to perfect the right applied for. [21]

Under the statutes currently in place, the ability of the State Engineer to revise or emplace additional conditions on a previously awarded water right is not constrained through the period up to the time a water right is certificated under section 73-3-17 of the Utah Code. His ability, however, may be somewhat constrained once a certificate is granted on a change application, except during the course of a general adjudication or mini-adjudication. Nevertheless, the general authority of the State Engineer under section 73-3-8 of the Utah Code, as well as the application of the public trust doctrine, may extend the State

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[17] UTAH CODE ANN. § 73-4-24 (1989).

[18] *See id.* § 73-2-1 (Supp. 1999).

[19] 289 P. 116 (Utah 1930).

[20] Whitmore v. Murray City, 154 P.2d 748, 750 (Utah 1944).

[21] United States v. District Court, 238 P.2d 1132, 1136 (Utah 1951) (citing Riordan v. Westwood, 203 P.2d 922 (Utah 1949)).

Engineer's ability to modify even certificated rights.[22] Arguably, the State Engineer is never constrained with respect to an approved exchange application.

Several concepts must be applied to this analysis. The first is the beneficial use doctrine. Utah measures the scope of a water right as equal to the extent to which it is beneficially used.[23] Accordingly, appropriators may acquire property rights in the water of a natural stream only to the extent they apply such water to beneficial purposes.[24] Under Utah's beneficial use statute, any excess water in the stream (and presumably underground), or any increase over the appropriator's preferential right, is subject to appropriation or to the general rights of the public therein.[25] Even if the flow is within the amount to which an appropriator has a preferential right, during any time it is not being used beneficially and economically, it remains subject to all common rights of the public and to appropriation and use by another. The appropriator's right is merely a preferential right to the beneficial and economical use of the water up to his given quantity.[26] Thus, "a prior appropriator of water does not acquire title thereto but merely obtains the right to the use of a specific quantity of water from a certain stream[27] upon condition that the water shall be used for a beneficial purpose . . . ."[28]

Until an applicant possessing an approved change application has shown proof of beneficial use and has been issued a certificate by the State Engineer, "any right that he has to use the water is only inchoate."[29] Where an application lapses for failure to submit proof of appropriation by the due date, the consequent reduction in its priority is not a taking of property without due process of law.[30] Additionally, in the course of the general adjudication and the mini-adjudication, the State Engineer regularly cuts back water rights to the level of beneficial use. The State Engineer also routinely reduces a right that comes before him to the level to which that actual use has occurred.

The exchange application is treated a bit differently. As to ongoing State Engineer review, Utah Code section 73-3-20 provides the following:

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[22] *See* UTAH CODE ANN. § 73-3-8 (Supp. 1999).

[23] *See id.* § 73-1-3 (1989) ("Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state.").

[24] *See* Oldroyd v. McCrea, 235 P. 580, 584 (Utah 1925).

[25] *See* Lehi Irrigation Co. v. Jones, 202 P.2d 892 (Utah 1949).

[26] *See* Adams v. Portage Irrigation, Reservoir & Power Co., 72 P.2d 648, 653-54 (Utah 1937).

[27] Some of these cases predate the incorporation of ground water into the ambit of the State Engineer's authority. Since 1935, all waters of the State, whether surface or underground, have been administered by that office.

[28] United States v. Caldwell, 231 P. 434, 438 (Utah 1924).

[29] Mosby Irrigation Co. v. Criddle, 354 P.2d 848, 852 (Utah 1960). This is an important fact with respect to any "takings" claims should the State Engineer reduce the amount of water available under, or otherwise condition a water right through, the award of a certificate.

[30] *See id.*

> (2) The state engineer may require the owner of record of an approved exchange application to provide information concerning the diverting works constructed, the extent to which the development under the exchange has occurred, and other information the state engineer considers necessary to insure the exchange is taking place, to establish the owner of the exchange still has a legal interest in the underlying water right used as the basis for the exchange, or to arrive at the quantity of water being exchanged. This information shall be provided by the owner of record of an approved exchange within 60 days of notification by the state engineer.
> (3) The state engineer may lapse an application made pursuant to this section under the following conditions:
>
> (a) the applicant has lost a legal interest in the underlying right used to facilitate the exchange;
> (b) the exchange can no longer be carried out as stated in the application;
> (c) the applicant has not complied with the conditions established in approving the exchange; or
> (d) the applicant fails to provide the information as outlined in Subsection 73-3-20(2).[31]

While not as specific as the change application statute,[32] the State Engineer appears to have sufficient authority to reduce these rights if they are not being beneficially used.[33]

A. Utah Law Concerning Exchange Applications

Utah recognizes the rule that exchange applications are prohibited where such exchanges would deteriorate water quality. In *Little Cottonwood Water Co.*, the Utah Supreme Court rejected an exchange application on the ground that Utah law prohibits the exchange if water quality deteriorates as a result.[34] The court found that "the water proposed to be turned into Little Cottonwood creek [sic] by the applicant was inferior in quality to the [original water] . . . and that the commingling of such waters would render the entire stream below the point of commingling unfit for domestic and culinary uses."[35] The court ruled that it is an express statutory condition of exchange applications that returned waters not

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[31] UTAH CODE ANN. § 73-3-20 (1989).
[32] *See id.* § 73-3-3 (Supp. 1999).
[33] *See id.*
[34] *See Little Cottonwood Water Co.*, 289 P. at 119.
[35] *Id.*

deteriorate the quality of the original stream.[36] "The condition is a most important one. It concerns public as well as private interests."[37]

Thus, as a general rule, the State Engineer may approve exchange applications where a subsequent appropriator diverts water from the same stream or another stream so long as it is equal in quantity and quality and is returned into the stream or into the ditch of the prior appropriator. Water must be returned at a point and in such a quality that the prior appropriator can make full use of the water without injury or damage.[38]

Exchange applications may lapse if not timely completed and are subject to abandonment and forfeiture as are other certificated or approved change applications. Indeed, the Utah Code provides authority for the State Engineer to demand:

> information concerning the diverting works constructed, the extent to which the development under the exchange has occurred, and other information the state engineer considers necessary to insure the exchange is taking place, to establish the owner of the exchange still has a legal interest in the underlying water right used as the basis for the exchange, or to arrive at the quantity of water being exchanged. This information shall be provided by the owner of record of an approved exchange within 60 days of notification by the State Engineer.[39]

Section 73-3-20(3) of the Utah Code gives the State Engineer the ongoing authority to declare an exchange application lapsed pursuant to section 73-3-18 if:

> a) the applicant has lost a legal interest in the underlying right used to facilitate the exchange,
> b) the exchange can no longer be carried out as stated in the application,
> c) the applicant has not complied with the conditions established in approving the exchange, or
> d) the applicant fails to provide the information as outlined in Subsection 73-3-20(2).[40]

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[36] *See id.*

[37] *Id.*

[38] *See* UTAH CODE ANN. § 73-3-20(1) (1989). *See also* Moyle v. Salt Lake City, 176 P.2d 882, 888 (Utah 1947); *Caldwell*, 231 P. at 437.

[39] UTAH CODE ANN. § 73-3-20(2) (1989).

[40] *Id.* § 73-3-20(3).

The State Engineer has not only the authority, but likely the responsibility, to continually monitor the progress of exchange applications regarding beneficial use.

B. Utah Law Concerning Change Applications

Utah case law supports the fundamental rule that it is "the state engineer's obligation, before approving a change application, to determine that no vested water right will be impaired by the proposed change."[41] Moreover, a prior appropriator's right to change the place of diversion is not an absolute or vested right, but is only a conditional right since no such change can be made if the public, or any other appropriator, prior or subsequent, is adversely affected.[42] Neither can a prior appropriator prevent a subsequent appropriator from using any of the unappropriated waters of the state to the fullest extent possible merely because the prior appropriator in the future may desire to change his place of diversion.[43] Further, a lower user of water from a stream acquires a vested right as against all upper users that they shall not increase the amount of water consumed by a change of place of diversion or place or manner of use and thereby deprive the lower user of such water to which he is accustomed.[44] Thus, the State Engineer has both the power and duty to constantly supervise the progress of change applications toward beneficial use.

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[41] Crafts v. Hansen, 667 P.2d 1068, 1070 (Utah 1983). *See also* Salt Lake City v. Boundary Springs Water User's Ass'n, 270 P.2d 453 (Utah 1954).

[42] *See Caldwell*, 231 P. at 436–38.

[43] *See id. See also Moyle*, 176 P.2d at 892–94 (Wolfe, J., concurring).

[44] *See* East Bench Irrigation Co. v. Deseret Irrigation Co., 271 P.2d 449, 453–55 (Utah 1954). *See also* Piute Reservoir & Irrigation Co. v. West Panguitch Irrigation & Reservoir Co., 367 P.2d 855, 856 (Utah 1962); Lehmitz v. Utah Copper Co., 118 F.2d 518 (10th Cir. 1941) (holding that prior appropriator could make changes in place of diversion and in use of water that neither enlarged nor diminished any existing right but merely made use of existing right at another place, without detriment or impairment of any vested right of junior appropriator); *Boundary Springs*, 270 P.2d at 453 (ruling that owner of water right has vested right to quality as well as quantity that he has beneficially used); United States v. District Court, 242 P.2d 774 (Utah 1952) (concluding that if there is reason to believe that only part of the waters covered by the application may be diverted at proposed new diversion place without interfering with rights of others, State Engineer should approve application to change diversion place of only such amount of water as may be changed without impairing rights of others, regardless of amount specified in application); Eardley v. Terry, 94 Utah 367, 77 P.2d 362 (1938) (holding that any application to appropriate water is subject to all rights accrued prior to filing, and filing application does not give applicant right or license to proceed to injury of prior rights); Tanner v. Humphreys, 48 P.2d 484 (1935) (ruling that in action to change point of diversion of water from river to tributaries upon which power company's dam was located, if exchange of waters could be made without affecting vested right of power company, or if decree could be entered with conditions that would safeguard rights of power company, plaintiff should succeed).

C. The Bonham Factors

In *Bonham v. Morgan*,[45] the Utah Supreme Court ruled that the State Engineer must undertake the same statutorily-mandated investigation when evaluating permanent change applications that he does for original applications for water appropriations.[46] The criteria for approving water appropriation applications are set out in Utah Code section 73-3-8, and the *Bonham* court found that "both statutory purposes and a reasonable textual interpretation of water allocation statutes support the application of appropriation criteria to permanent change applications."[47] The court held further that *temporary* change applications were to be approved only if they did not impair existing valid rights. Applications for *permanent* changes, however, were subject to the criteria under the appropriation statute requiring approval of such applications only if, *inter alia*, "they did not interfere with more beneficial use, public recreation, the natural stream environment, or the public welfare."[48] In drawing its conclusion, the Court reasoned that

> [t]he only reasonable meaning to read into section 73-3-3 is that the state engineer must investigate and reject the application for either appropriation or permanent change of use or place of use if approval would interfere with more beneficial use, public recreation, the natural stream environment, or the public welfare. It is unreasonable to assume that the legislature would require the state engineer to investigate matters of public concern in water appropriations and yet restrict him from undertaking those duties in permanent change applications. Carried to its logical conclusion, such an interpretation would eviscerate the duties of the state engineer under section 73-3-8 and allow an applicant to accomplish in a two-step process what the statute proscribes in a one-step process. For all that an applicant would need to do to achieve a disapproved purpose under section 73-3-8 would be to appropriate for an approved purpose and then to file a change application under section 73-3-3.[49]

In sum, the court ruled that the State Engineer must investigate and reject an application for either appropriations or permanent changes if such approvals

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[45] 788 P.2d 497 (Utah 1989).
[46] *See id.* at 501.
[47] *Id.* at 500.
[48] *Id.* at 501. *See also* UTAH CODE ANN. § 73-3-8(1); *Moyle*, 176 P.2d at 895.
[49] *Bonham*, 788 P.2d at 502.

would interfere with a more beneficial use, public recreation, the natural stream environment, or the public welfare.[50]

Because exchange applications are similar in nature to change applications,[51] the *Bonham* factors of section 73-3-8 logically apply to exchange applications as well. This notion is supported by the same rationale asserted by the *Bonham* court. To wit: an exchange application should be subject to Utah Code section 73-3-8 because otherwise an applicant could effectuate an illegal use of water by simply exchanging appropriated water rights—which were approved pursuant to section 73-3-8—for water rights that conflict with section 73-3-8. Logically, exchange applications must be dealt with under the same approach, and the same analysis would apply to water rights granted under Utah Code section 73-3-20. Prior approvals of change and exchange applications that contradict the *Bonham* factors listed in section73-3-8 are illegal.

While exchange applications are similar to change applications, there are also distinct differences. First, the proof of appropriation and certification processes would not seem applicable by their own specific terms.[52] Second, an exchange application is governed in part by the criteria set forth in Utah Code section 73-3-20. Rather than a certification process, section 73-3-20(2) requires an ongoing review process by the State Engineer to determine that the applicant is meeting the terms and conditions of the original appropriation.[53] Similarly, section 73-3-20(3) provides the authority by which an exchange application may be lapsed:

> The state engineer may lapse an application made pursuant to this section under the following conditions:
> (a) the applicant has lost a legal interest in the underlying right used to facilitate the exchange;
> (b) the exchange can no longer be carried out as stated in the application;
> (c) the applicant has not complied with the conditions established in approving the exchange; or
> (d) the applicant fails to provide the information as outlined in Subsection 73-3-20(2).[54]

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[50] *See id.*

[51] Each process requires replacement of water at one point of diversion to allow a like quantity of water at another point. The necessity of similar treatment regarding the *Bonham* factors is supported by the use by the State Engineer of the standard administrative practice when approving or rejecting exchanges. *See, e.g.*, UTAH CODE ANN. §§ 73-3-5, -7, -10, -14 (Supp. 1999).

[52] *See id.* §§ 73-3-16, -17.

[53] *See id.* § 73-3-20(2).

[54] *Id.* § 73-2-20(3).

It is important to note that in addition to the requirement to follow the *Bonham* factors, the State Engineer may only approve an exchange application if "the original water in the stream, body of water or reservoir [is] not deteriorated in quality or diminished in quantity for the purposed use."[55] These requirements would follow every approved exchange whether specifically incorporated in the decisional document or not.

D. The Public Trust Doctrine

In addition to this statutory authority to condition and revisit changes and exchanges, the public trust doctrine provides further authority and may, in fact, mandate certain future revisions to existing approvals. In the influential "Mono Lake Case," the California Supreme Court ruled that "the core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters."[56] Accordingly:

> parties acquiring rights in trust property generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust. . . .[57] Thus, the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust."[58]

Section 73-1-1 declares all waters in Utah, whether above or under the ground, "to be the property of the public, subject to all existing rights to the use thereof."[59] Because the State Engineer manages this public property, he is entrusted to do so in such way as to best protect the public's property interest.[60]

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[55] Lasson v. Seely, 238 P.2d 418, 421 (Utah 1951).

[56] National Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 712 (Cal. 1983).

[57] *Id.* at 721.

[58] *Id.* at 724.

[59] UTAH CODE ANN. § 73-1-1 (1999). *See also* J.J.N.P. Co. v. State ex rel. Division of Wildlife Resources, 655 P.2d 1133, 1136 (Utah 1982).

[60] *See* Tanner v. Bacon, 136 P.2d 957, 962 (Utah 1943) (holding that statutes requiring State Engineer to reject applications under specified conditions in interest of public welfare, even though all waters of stream covered by application have not been appropriated, clearly enjoin upon state duty to control appropriation of public waters in manner that will be for best interests of public).

Utah recognizes the public trust doctrine. In *Colman v. Utah State Land Board*,[61] the Utah Supreme Court reviewed the State's decision to breach a causeway in the Great Salt Lake as a means to control flooding.[62] The breach, however, caused damage to an underwater brine canal running parallel to and just north of the causeway that was authorized by a lease and easement to Colman by the state.[63] The Court, in reversing the lower court's denial of Colman's motion for a preliminary injunction and claim for damages, held that the public trust doctrine controlled[64] and that the state must grant Colman compensation if his lease was originally granted in compliance with the public trust doctrine.[65]

Citing the seminal United States Supreme Court case *Illinois Central Railroad Co. v. Illinois*,[66] the *Colman* court noted that states may "grant certain rights in navigable waters if those rights can be disposed of without affecting the public interest in what remains."[67] The Utah Supreme Court then found that "there is nothing to show that Colman's canal impaired the public interest in any way at the time the state granted him the right to conduct his operation."[68] Thus, under the public trust doctrine, the state could breach the causeway but was required to compensate Colman for damage *caused* to his canal.[69] Inexplicably, the *Colman* court ignored that changed circumstances, especially regarding natural fluctuations in the level of the Great Salt Lake, could nonetheless have bearing on how the state manages its public trust responsibility. Presumably, for the *Colman* court, the state should have issued Colman his lease conditioned on the state's right to exercise its public trust responsibilities. But, because the state issued the grant without such a reserved right, Colman was entitled to compensation when the state exercised its public trust obligations.

The influence of *Colman* on the State Engineer's ability to condition previously-approved water rights changes and exchanges is unfavorable to the extent that, if the public trust doctrine were used as authority to condition vested water rights, damages may be owed by the state to such licensees. Because the State Engineer has already certificated some change applications, not unlike the issuance of Colman's lease to operate a canal in the Great Salt Lake, compensation may be owed to those approved change application holders by the state—that is, so long as the issuance of the changes were done in the public

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[61] 795 P.2d 622 (Utah 1990).
[62] *See id.* at 623.
[63] *See id.* at 635–36.
[64] *See id.* at 636.
[65] *See id.* at 635–36.
[66] 146 U.S. 387, 453 (1892).
[67] *Colman*, 795 P.2d at 635.
[68] *Id.* at 636.
[69] *See id.* at 635–36.

interest at the time the changes were approved. If the changes were initially approved *contrary* to the public trust, then such changes and exchanges violate both the public trust doctrine and the public welfare protections of section 73-3-8 of the Utah Code and are void *ab initio*.[70] Since exchanges are not required to be certificated and the State Engineer possesses ongoing authority, such a right must always be inchoate and subject to modification without compensation.

Utah's other important public trust doctrine case is *National Parks and Conservation Ass'n v. Board of State Lands*.[71] In *National Parks*, the Utah Supreme Court noted that the public trust doctrine "protects the ecological integrity of public lands and their public recreational uses for the benefit of the public at large."[72] The court, however, distinguished "sovereign lands" from specific trusts.[73] Sovereign lands are those lands generally held in trust by the state for the public. Specific trusts, on the other hand, are lands, such as school trust lands, that serve a specific purpose for particular beneficiaries. "Thus, the beneficiaries and the purposes of the public trust and the school land trust are different,"[74] and the public trust doctrine does not govern the state's management of its school trust lands.

The *National Parks* court's ratification of the limitation on the public trust doctrine within Utah Code section 65A-1-1(4) runs counter to the notion asserted by the Arizona Supreme Court in the recent *San Carlos Apache Tribe v. Superior Court*,[75] which holds that if a natural resource is protected by the public trust, such constitutional obligations supercede *any* legislation or judicial precedent.[76] The Arizona Supreme Court ruled that "[t]he public trust doctrine is a constitutional limitation on legislative power to give away resources held by the state in trust for its people .... The Legislature cannot by legislation destroy the constitutional limits on its authority."[77]

Because Utah law declares all waters of the state to be public property, water rights must be distributed in the public interest. Therefore, it stands to reason that, when the state issues water rights to individuals to use the waters of

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[70] *See id.* at 636.

[71] 869 P.2d 909 (Utah 1994).

[72] *Id.* at 919.

[73] *See id.* at 919–20.

[74] *Id.* at 919.

[75] 972 P.2d 179 (Ariz. 1999) (holding that legislature is barred from enacting statutes ordering courts to make public trust doctrine inapplicable in water rights adjudications because such legislation controverts separation of powers and violates constitutional limits on legislative power to give away resources held in trust by state). "That determination depends on the facts before a judge, not on a statute. It is for the courts to decide whether the public trust doctrine is applicable to the facts." *Id.* at 199. Thus, if a natural resource is held to be protected by the public trust, such a determination supercedes any established legislation or judicial precedent.

[76] *See id.* at 199.

[77] *Id. See also* Arizona Ctr. for Law in the Public Interest v. Hassell, 837 P.2d 158, 168-71 (Ariz. Ct. App. 1991).

the state, it must do so subject to the public trust. Accordingly, the state is bound by its public trust obligation when issuing and conditioning water rights, whether they are original appropriations, general adjudications, mini-adjudications, change applications, or exchange applications.

IV. REALLOCATION OPTIONS OF THE STATE ENGINEER

The State Engineer faces a challenge integrating not only the more traditional statutory charges, such as Utah Code section 73-3-8, but also the *Bonham* factors and the public trust doctrine into his water allocation and reallocation decisions. As explained above, *Bonham* and the public trust doctrine require the State Engineer to consider the impact of water allocations on the natural stream environment, public recreation, and public welfare, among other things. Such consideration necessarily involves an examination of the impact of allocations on water *quality*, a responsibility historically exercised by the Utah Division of Water Quality.[78] The State Engineer's entry into this arena has lain dormant in most places of the state where the movement of water by change or exchange application has failed to attract many water quality concerns. However, where unique hydrogeologic conditions and increased development and movement of water by previous approval of change or exchange applications have combined to cause severe water quantity and quality problems, the State Engineer is now squarely faced with the task of incorporating water quality concerns into his decisions.

To complicate matters further, certain waterways are considered impaired waterways under section 303(d) of the Clean Water Act.[79] This designation imposes a requirement that water quality be maintained at a level sufficient to support specifically identified "beneficial uses." In addition, the Utah Water Quality Act contains an "antidegradation policy," which requires, at a minimum, that water quality and designated beneficial uses be maintained at current levels.[80] This law is also called the "anti-backsliding" rule because it prohibits *any* activity that results in degradation of water quality.

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[78] The Utah Division of Water Rights and Division of Water Quality have stated that responsibility for monitoring water quantity and quality are separate functions lying within the separate agencies.

[79] 33 U.S.C. § 1313(d) (1994). This section requires the states to list waters that do not meet state-established water quality standards or support state-designated beneficial uses. In addition, states are required to list those waters that do not meet water quality standards and/or support beneficial uses and establish Total Maximum Daily Loads (TMDLs) for such waters. TMDLs place limits on all sources of pollution to the impaired waterbody sufficient to ensure that the waterbody will meet water quality standards and support beneficial uses. *See id.*

[80] *See* UTAH CODE ANN. § 19-5-104 (1998). *See also* UTAH ADMIN. CODE R317-2-3 (1999).

In light of these water quality provisions, the additional challenge of the State Engineer, together with the Division of Water Quality, is to ensure that water allocations and reallocations, whether they be guised as change or exchange applications, result in no additional degradation of water quality. Approvals of change or exchange applications which result in sustained lower flows in streams and may otherwise operate to impair water quality and prevent the waters from supporting designated beneficial uses are not legally sound.

The reappearance of approved change and exchange applications within the context of the various statutory vehicles discussed herein provides the State Engineer with a unique opportunity to exercise his powers. When change or exchange applications appear before him on requests for extensions of time, new or substitute change or exchange applications, or in the course of a general adjudication or mini-adjudication, these rights should be reviewed not only with respect to what a given drainage or subdrainage basin may actually provide to physically fill such water rights, but also with respect to the effect the use of the rights may have on impaired waters and beneficial uses required to be supported thereby. If approval of such change or exchange applications will lead to violations of state or federal water quality laws, the State Engineer has the sufficient authority and duty under *Bonham* and the public trust doctrine to reject the applications. Operating proactively with the Division of Water Quality, the strength of this position is enhanced.

V. CONCLUSION

For much of the past three decades the State Engineer has approved change and exchange applications with limited regard to maintaining historic hydrologic balances, impacts on impaired waters, impacts on the factors set forth in section 73-3-8 of the Utah Code, and the public trust doctrine. The State Engineer has the authority, ability and duty to reduce these rights to more manageable levels as they reappear before him in various proceedings. The State Engineer also has the authority through his administrative functions to review an area on a wholesale basis and determine what water rights have been used and what water rights have not been used. Additionally, in any of these situations if the original water right appears to have been approved contrary to law, then it should be reconsidered and reduced or eliminated so legal compliance occurs. The mere fact that the State Engineer may have made an initial mistake because attention was not focused on certain legal parameters at the time of initial approval does not force him to compound that mistake by ignoring its ramifications at a later date. Rather, the State Engineer should use the authorities discussed herein to prevent the depletion and degradation of the natural stream

environment and to achieve not only a hydrologic balance in a given area, but to generally preserve water quality.