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IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

CENTRAL UTAH WATER CONSERVANCY DISTRICT, a Utah Water Conservancy District, Plaintiff, vs. SOUTH UTAH VALLEY MUNICIPAL WATER ASSOCIATION, an interlocal cooperation entity, Defendant.	**AMENDED[1] MEMORANDUM IN SUPPORT OF JORDAN VALLEY WATER CONSERVANCY DISTRICT'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** (Hearing Requested)
PROVO RIVER WATER USERS ASSOCIATION, a Utah non-profit corporation, Intervenor.	Civil No. 120400610 Judge Lynn Davis

[1] This Amended Memorandum's sole change from the previously-filed Memorandum includes a Response to Defendant's Material Facts section, *infra* at page xi. Counsel for Jordan Valley Water Conservancy District spoke with counsel for Defendant South Utah Valley Municipal Water Association on June 8, 2015, and Defendant's counsel stipulated to the filing of this Amended Memorandum.

JORDAN VALLEY WATER CONSERVANCY DISTRICT, a Utah Water Conservancy District, Intervenor.	

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Intervenor Jordan Valley Water Conservancy District (the “District”), by and through its counsel of record, submits the following Memorandum in Support of its Motion for Summary Judgment and Opposition to Defendant’s Motion for Summary Judgment.

INTRODUCTION

This case involves water rights in South Utah County that have not been put to beneficial use for more than seventy years. From the beginning of the modern settlement of this area, pioneers and legislators recognized water as a precious commodity, and for over a century the government has regulated water usage. The overarching purpose of this regulation is to preserve the most water for the most people, due to its scarcity and our need.

The Defendant in this case, South Utah Valley Municipal Water Association (“Defendant” or “SUVMWA”), bought the water right, attempting to re-write history and utilize water not for the good of Utah’s citizens, but for the profit of a select few. SUVMWA entered into a contract with Clearwater Business Park (“Clearwater”) to purchase a large Water Right granted over ninety years ago to a sugar beet factory (“Factory Water Right”).

Clearwater bought approximately forty-four acres of land from Mr. and Mrs. Diamond in 2007[2] (the “Property”). At the turn of the twentieth century, a prosperous sugar beet factory stood on the Property. The State Engineer granted this factory two large water rights in 1923. The water was to be used for the production of sugar from beets. After initial success, drought and pests ravaged the sugar beet industry. The last sugar came out of the plant sometime before

[2] American Pension Services actually bought the Diamonds’ property, but immediately transferred the Property to Clearwater. As the transfer from Pension to Clearwater is not in dispute, and because the entities are nearly identical except in name, for purposes of clarity the District will refer to the purchaser of the Diamonds’ Property as “Clearwater.”

World War II;[3] the buildings crumbled and the land lay fallow, eventually passing into the ownership of a local bank. The Factory Water Right granted to this large industrial enterprise was all but forgotten. Per Utah statute (U.C.A. 73-3-1), those with junior water rights, including the Plaintiff and Intervenors, have now fully appropriated all water in the area.

A few decades ago, Mr. Diamond's father began renting the Property from Central Bank & Trust, tilling this land for hay and alfalfa. He also ran a few head of cattle. Mr. Diamond helped his father on the property, and eventually decided to buy this land for himself. Along with the Property, he purchased four shares of water from the Big Hollow Irrigation Company. These four shares provided him sufficient water to run his hay and cattle operation. Mr. Diamond had heard through the grapevine that a large water right used to be associated with his land, and he had discussed this with some knowledgeable individuals, but other than filing a Report of Water Right Conveyance in 2003, he did not attempt to use the water or exert ownership rights while he owned the Property.

Mr. Diamond sold the Property to Clearwater in 2007 for approximately $1.29 million. The transaction documents clearly state that only the land and the four shares of Big Hollow Irrigation water were included in the $1.29 million purchase price. The contract with Clearwater also includes two stipulations: one, that the Diamonds could rent back their home on the Property until their new home was complete; and two, that Clearwater had the option to purchase

[3] Jordan Valley does not dispute Provo River Water User's assertion that the beet plant ceased production more than a decade before World War II; rather, Jordan Valley uses the dates stipulated to by SUVMWA in its 30(b)(6) deposition, which are later than the probable reality but already agreed upon by Defendant.

the large Factory Water Right for $2 million at a later date. It was an option Clearwater never exercised.

After selling the Property, Mr. Diamond briefly attempted to process a change of use application for the Factory Water Right, but gave up this pursuit after people "up and down the country" opposed him. Unbeknownst to the Diamonds, however, Clearwater also asserted ownership of the Factory Water Right through appurtenance via its purchase of the land. Subsequently, the State Engineer had no option but to grant Clearwater's application for non-use, notwithstanding vehement protests.

Clearwater then sold its purported water rights to SUVMWA, duly noting in that transaction the tenuous nature of the rights. Plaintiff Central Utah Water Conservancy District filed this lawsuit, in which the District and Provo River Water Users Association intervened. As outlined below, SUVMWA's claim to the Factory Water Right is without merit due to the forfeiture and/or abandonment of the Factory Water Right, and also because exercising this long-defunct Factory Water Right would lead to an eradication of junior water rights by way of blatant water speculation, a practice inapposite to Utah's water laws and the overarching doctrine of beneficial use of water in our arid State.

STATEMENT OF MATERIAL FACTS

The District presents these facts as undisputed solely for the purposes of this Summary Judgment Motion. The District reserves the right to dispute any or all of these facts for purposes other than this Motion.

1. SUVMWA represents itself to be the valid the owner of record of Water Rights Nos. 51-1019 and 54-1131(collectively, the "Factory Water Right"). *See* Utah Division of Water Rights file, attached hereto as **Exhibit 1**.

2. The Factory Water Right purports to represent the right to divert approximately 4,000 acre feet of water from Big Hollow creek for miscellaneous use at a sugar plant. *Id.*

3. Water Right Number 51-1019 "is for year-round miscellaneous purposes at the Company's sugar refining plant at Springville." Order of the State Engineer On Application for Nonuse of Water Right Number 51-1019 (A9447), attached hereto as **Exhibit 2**.

4. Water Right Number 54-1131 "is for year-round miscellaneous purposes at the Company's sugar refining plant at Springville." Order of the State Engineer On Application for Nonuse of Water Right Number 54-1131 (A9447), attached hereto as **Exhibit 3**.

5. The sugar beet factory and its refining plant operated "only a few years" after 1918 "due to water shortages and a disease that infested the beets." *See* image and notes from J. Willard Marriott Library webpage produced by SUVMWA in its Responses to Plaintiff's Request for Documents, attached hereto as **Exhibit 4**.

6. The last year the factory operated was 1933. *Id.*

7. The factory was dismantled and removed from the property in 1940. *Id.*

8. SUVMWA admits that no water was used under the Factory Water Right in connection with sugar beet refining by the appropriator or its successors for at least 50 years after

about 1947.[4] *See* 30(b)(6) Deposition of SUVMWA witness Jared Parkinson (hereinafter "Parkinson Depo.") at 98:3-6; 69:16-19; 94:21-23, attached hereto as **Exhibit 5**.

9. No personal knowledge or research exists to show that the Factory Water Right was ever used for industrial purposes after the sugar plant closed. *Id*. at 24:14-20.

10. More than fifty years after the sugar beet plant ceased operations, Phillip C. Diamond and Shirlee H. Diamond ("Diamond") acquired the land upon which the sugar factory once stood (the "Property") in 1990. *See* Phillip Diamond Deposition at 9:24; 19:22-20:1, attached hereto as **Exhibit 6.**

11. When Mr. Diamond purchased the Property, no water rights were being used for sugar beet processing or any other industrial purpose. *Id*. at 94:14-25.

12. Mr. Diamond acquired four shares of water stock in the Big Hollow Irrigation Company with this purchase of the Property. *Id*. at 26:9-13.

13. Mr. Diamond ran cattle and farmed hay on this property. *Id*. at 21:21-23.

14. Mr. Diamond used his four shares in the Big Hollow Irrigation Company to irrigate his property. *Id*. at 38:21-39:3.

15. Mr. Diamond never used any water for industrial purposes. *Id*. at 95:22-24.

16. Clearwater understood that when the Diamonds conveyed the Property to Clearwater, the Factory Water Right was not being used on the property for industrial purposes. Parkinson Depo. at 24:7-20 (Ex. 5).

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[4] Exhibit 4 indicates a factory closure date of 1933 and a factory dismantlement date of 1940. At the very least SUVMWA admits, in its 30(b)(6) deposition, that the factory was not using water by 1947. Exhibit 5 at 98:3-6; 69:16-19; 94:21-23.

17. Mr. Diamond had not used any water from the Factory Water Right on his property. Diamond Depo. at 38:16-23 (Ex. 6).

18. Aside from the four shares in the Big Hollow Irrigation Company, Mr. Diamond never purchased any other water right or stock. *Id*. at 70:4-9.

19. The Agreement of Sale and Purchase of land between the Diamonds and Clearwater purported to sell the approximately forty-four acre Property "together with all improvements thereon and water rights 51-1017 [i.e., the Big Hollow rights] and appurtenances thereto." *See* Agreement of Sale and Purchase, Paragraph 1.0, attached hereto as **Exhibit 7**; see also Diamond Depo. at 50:6-10 (Ex. 6).

20. The Agreement of Sale and Purchase does not expressly transfer the Factory Water Right. Instead, the Agreement contained an option for Clearwater to purchase the Factory Water Right. Specifically, Section 13.1 of the Agreement of Sale and Purchase of land states, "Buyer to have the right to purchase water right 51-1019 [Factory Water Right] during the term of this contract for the amount of $2,000,000, but no sooner than January 16, 2006 without the permission of the seller." *Id*.

21. It was Mr. Diamond's intention to allow Clearwater to purchase the Factory Water Right 51-1019 from him for $2 million at a later date, but Clearwater did not make this purchase. Diamond Depo. 55:11-18; 89:7-19 (Ex. 6).

22. Mr. Diamond never intended to sell whatever interest he had in Factory Water Right 51-1019 to the buyer in the Agreement of Sale and Purchase of land. *Id*. at 55:19-56:3; 59:23-60:15.

23. Mr. Diamond testified that Clearwater "got the four shares of irrigation water and that—besides that, nothing…. They got the four shares of irrigation water, is what I conveyed to them and that was it. No other water rights." *Id.* at 91:10-12, 92:15-17.

24. SUVMWA admits that the Factory Water Right was not part of what Clearwater was buying for $1,290,000, but gave Clearwater the option to acquire it for the additional amount of $2,000,000. *See* 30(b)(6) Deposition of SUVMWA witness Brad Olsen (hereinafter "Olsen Depo.") at 18:6-20, attached hereto as **Exhibit 8**.

25. Mr. Diamond made no further effort to establish a right to the Factory Water Right because the State Engineer "wouldn't allow it" because "[e]verybody protested it up and down the country." Diamond Depo. 103:17-104:1 (Ex. 6).

26. Despite failing to exercise the option to purchase the Factory Water Right from the Diamonds, and failing to pay the negotiated price of $2,000,000.00, Clearwater filed Reports of Water Rights Conveyance with the Division of Water Rights on December 7, 2007, and on March 21, 2008, claiming to own the Factory Water Right by way of appurtenancy to the purchased property. *See* Reports of Water Rights Conveyance (Ex. 19)..

27. Mr. Diamond first learned that Clearwater was claiming ownership of the Factory Water Right by appurtenance to the property at his deposition approximately nine years later on May 20, 2014. Diamond Depo. at 91:25-92:5 (Ex. 6).

28. After selling the Property and the Big Hollow Irrigation water shares to Clearwater, and believing he still owned the Factory Water Right, Diamond filed Change Application a33144 (51-1019) on Water Right 51-1019 to change the 4.54 cfs (or 3,287 acre feet) of water remaining under that water right on June 28, 2007. In the Change Application, Diamond claimed that 1,417

acre feet of Water Right 51-1019 was beneficially used for some or all of the period beginning with Diamond's acquisition of Water Right 51-1019 in 1990. *See* Change Applications, attached hereto as **Exhibit 9**.

29. However, of that 1,417 acre feet of use, only 80 acre feet was claimed to have been used on land owned by Diamond. The balance of 1,337 acre feet was claimed to have been used by shareholders of the Big Hollow Irrigation Company on various other lands owned by such shareholders. Diamond Depo. 33:9-16 (Ex. 6); see also Diamond Affidavit, attached hereto as **Exhibit 10.**

30. The other shareholders' purported use of the water was not because of any contract Mr. Diamond had with the others prior to 2004, nor was their purported use in addition to their Big Hollow Irrigation Company shares. Diamond Depo. at 78:12-21; 96:9-14 (Ex. 6).

31. The other shareholders' use of the water was not in addition to the Big Hollow irrigation rights. *Id*. at 96:9-14.

32. On May 1, 2008, Clearwater purported to convey the Factory Water Right by quit claim deed to SUVMWA, the Defendant in this action. Quitclaim deed, attached hereto as **Exhibit 11**. The deed was recorded May 2, 2008 in the Utah County Recorders Office as Entry No. 52376:2008, which was two days prior to the cut-off date by which water rights owned by public water suppliers were to be protected from forfeiture under H.B. 51, now codified as Utah Code Ann. § 73-1-4.

33. The conveyance documents' Recital C states, "Clearwater and SUVMWA understand the risk of forfeiture or loss of the water rights resulting from nonuse of said water rights." *Id*.

34. Clearwater understood that there had been a period of nonuse of the water by the appropriator of the sugar factory. Parkinson Depo. at 54:19-25 (Ex. 5).

35. Plaintiff and Intervenors in this case retained expert David E. Hansen, Ph.D., P.E., to opine on the historic non-use of the Factory Water Right. *See* Hansen Expert Report, attached hereto as **Exhibit 12**.

36. Dr. Hansen based his report upon two field investigations, information from the Water Rights Database, several depositions from this case, and his extensive research, experience and education. *Id.*; *see also* Hansen CV attached hereto as **Exhibit 13**.

37. Dr. Hansen's report opined that "upon abandonment of the sugar refinery, the use of said water for industrial purposes ceased." *Id.* at p 1.

38. Dr. Hansen's report further stated that "[d]ue to the fact that no water right change application was ever filed and approved, it is my opinion that the water represented by the Water Rights equaling 5.54 cfs has not been used on the property." *Id.* at p. 24.

39. Defendant engaged expert Robert H. Ramsey, P.G. *See* SUVMWA Expert Water Needs Assessment, attached hereto as **Exhibit 14**.

40. Mr. Ramsey opined that SUVMWA is a "public water supplier," and that SUVMWA may need the water within the next 40 years. *Id.* at p. 2.

41. Mr. Ramsey did not opine that the Factory Water Right had been used on the Property within the past fifty years or that the Factory Water Right was for any other purpose than Industrial Use related to the sugar beet factory. *Id.*, generally.

42. Clearwater purported to expressly convey its Factory Water Right to SUVMWA by quitclaim deed on 5/2/08. Reports of Water Right Conveyance, attached hereto as **Exhibit 15**.[5]

43. On May 26, 2010, SUVMWA filed two applications for non-use for the Factory Water Right ("Non-Use Applications"). *See* Non-Use Applications, attached hereto as **Exhibit 16**.

44. Multiple interested entities protested the granting of the Non-Use Applications, based on the lengthy history of non-use and the potential displacement of junior water rights. *See* Letters to State Engineer, Deposition Exhibits 19 and 22, attached hereto as **Exhibit 17**.

45. The Utah Legislature, during its 2008 general session, passed H.B. 51, amending Utah Code Ann. § 73-1-4 to protect "public water suppliers," as defined by statute, from application of the seven-year forfeiture rule so long as the water rights were being "conserved or held for the reasonable future water requirements of the public . . . ."

46. H.B. 51 provided that "For a water right acquired by a public water supplier on or after May 5, 2008 [the effective date of H.B. 51] Subsection (2)(e)(vii) [the protection for public water suppliers holding water for the reasonable future needs of the public] applies [only] if; (i) the public water supplier submits a change application under Section 73-3-3; and (ii) the state engineer approves the change application."

47. On August 9, 2011, the State Engineer granted the Non-Use Applications despite the numerous protests and lengthy periods of non-use, noting that the Utah Supreme Court had in its recent decision in *Jensen v. Jones*, 2011 Utah 67, 270 P.3d 425, held that the State Engineer

[5] In the interest of brevity, Jordan Valley hereby adopts and incorporates by reference Provo River's Material Facts and Argument regarding the lengthy chain of title regarding the Factory Water Right and the subsequent quit claim deed executed by Clearwater on June 27, 2008.

had no authority to declare forfeiture of water rights. In his Order approving the Non-Use Applications, the State Engineer stated that "[t]he Court's argument that forfeiture is not one of the State Engineer's powers and is reserved for the Judiciary would also apply to a Nonuse Application." *See* State Engineer Order, Depo Exhibit 11, attached hereto as **Exhibit 18.** Therefore, the State Engineer had no option but to grant SUVMWA's Application for Non-Use.

48. Clearwater did not receive the Factory Water Right from Diamond by deed. *See* Purchase Agreement between Diamond and Clearwater (Ex. 7)**.**

49. Clearwater claims ownership of the Factory Water Right by virtue of appurtenance, through the purchase of the Property from Diamond. *See* Parkinson Depo. at 25:21-25; *see also* Reports of Conveyance filed with the Division of Water Rights on December 7, 2007 (Water Right 51-1019) and March 1, 2008 (Water Right 54-1131), attached hereto as **Exhibit 19**.[6]

50. At the time of the application for Non-Use, SUVMWA had not prepared a 40-year plan for its utilization of its water rights. Parkinson Depo. at 77:2-13.

RESPONSE TO DEFENDANT'S MATERIAL FACTS

For the purposes of this Motion only, Jordan Valley hereby adopts by reference the responses of Provo River Water Users Association and Central Utah Water Conservancy District to Defendant's Material Facts, ¶¶ 1-31, with the exception of paragraph 13, for which the District adds an additional response as follows:

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[6] In the interest of brevity, Jordan Valley hereby adopts and incorporates by reference Provo River's Material Facts and Argument regarding appurtenance in its Memorandum in Support of Summary Judgment.

SUVMWA'S MATERIAL FACT

13. SUVMWA acquired the Big Hollow Springs Water Rights from Clearwater Business Park, LLC by a Water Rights Quit Claim Deed executed by Clearwater Business Park, L.C. on May 1, 2008. The deed was recorded May 2, 2008. Tuckett Decl., ¶17.

JORDAN VALLEY RESPONSE: Disputed. SUVMWA could not have acquired the Big Hollow Springs Water Rights from Clearwater Business Park, LLC through a Quit Claim deed because Clearwater never owned the Water Right. Mr. Diamond, the seller of the property, intended to reserve the Factory Water Right, as evidenced by the inclusion of an option to purchase the Factory Water Right for $2,000,000 "during the term of this contract . . . but no sooner than January 16, 2006." *See* Agreement of Sale and Purchase, Paragraph 1.0 (Ex.7). Clearwater never executed on the option agreement. The option agreement was collateral to the land purchase agreement and therefore was not extinguished under the doctrine of merger. As such, the Factory Water right was not appurtenant to the land purchased by Clearwater. It was not until his deposition in this case that Mr. Diamond learned that Clearwater purported to own the Factory Water Right, in contradiction to the explicit language of the Purchase Agreement. Diamond Depo. at 91:25-92:5 (Ex. 6). *See infra* pp. 7-10.

STANDARD OF REVIEW

Rule 56 states that summary judgment shall be granted if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." U.R.C.P. 56(c). Summary judgment is appropriate "[w]hen it is clear from undisputed facts that the opposing party cannot prevail." *Lach v. Deseret Bank*, 746 P.2d 802, 804 (Utah Ct. App. 1987). Construing all facts in the light most favorable to the Defendant, there are no disputed material issues of fact or law before this court. The District is entitled to judgment as a matter of

law because "there is [no] dispute as to any issue of fact which would be determinative of rights of parties." *Transamerica Title Ins. Co. v. United Resources, Inc.*, 471 P.2d 165, 167 (Utah 1970).

Applying these principles to each cause of action, the Court should grant summary judgment in favor of the District because: 1) the water rights were forfeited long before the Defendant purportedly acquired them; 2) the water rights were abandoned long before the Defendant purportedly acquired them; 3) under the collateral exception to the doctrine of merger, the Defendant acquired no water rights with its land purchase; 4) there were no water rights appurtenant to the land purchased by the Defendant; and 5) allowing SUVMWA to now acquire the Factory Water Right would be a gross violation of public policy.

ARGUMENT

Utah follows the doctrine of prior appropriation, and beneficial use of water has always been the basis of acquiring water rights. *Gunnison Irr. Co. v. Gunnison Highland Canal Co.*, 174 P. 852, 854 (Utah 1918). Beneficial use discourages and eliminates waste. *Big Cottonwood Tanner Ditch Co. v. Moyle*, 159 P.2d 596, 598 (Utah 1945)(opinion modified on rehearing, 174 P.2d 148). "One's right to use water is measured by the amount he puts to beneficial use." *Melville v. Salt Lake Cnty.*, 570 P.2d 687, 688 (Utah 1977).

SUVMWA claims ownership of the Factory Water Right, but the Factory Water Right was forfeited and/or abandoned over seventy years ago. The Factory Water Right was not sold with the Property. The District and other junior water rights holders beneficially use this water, and have done so for decades. Additionally, the District adopts and incorporates by reference as if set forth herein the Summary Judgment facts and arguments made in Plaintiff Central Utah Water Conservancy District's Memorandum in Support of Summary Judgment as well as Intervenor Provo Water Users Association's Memorandum in Support of Summary Judgment.

I. PRIOR WATER RIGHT OWNERS FORFEITED THE WATER RIGHT AT ISSUE IN THIS CASE.

Decades prior to Clearwater's purchase of the Property, former Property owners forfeited the Factory Water Right. Forfeiture "is designed to prevent the speculative holding of water rights by confining the right to the amount of water actually applied to beneficial use." Dan A. Tarlock, *Law of Water Rights and Resources*, § 5.86 (Thompson Reuters/West 2010). Utah law has long provided that a party can forfeit the right to use water by merely not using it; the right to use water depends upon its actual application to beneficial use. *Daniels Irr. Co. v. Daniel Summit*

Co., 571 P.2d 1323, 1324 (Utah 1977). Failure to place water to a beneficial use results in the reversion of the water right to the public, so that this precious resource will not go to waste: "When a vested right to appropriate stream water is forfeited by nonuse, there is a reversion to the public." *Whitmore v. Welch*, 201 P.2d 954, 960 (Utah 1949). *See also* Utah Code Ann. § 73-1-4(2)(c)(v)(B). The water formerly used under the Factory Water Right has been beneficially used during since the closure of the beet factory by those with junior priority rights, including the District.

There is no need to show an intent to forfeit a right to use water. "All that is required for forfeiture is proof that the water has not been used for the statutory period of seven years." David A. Thomas & James H. Backman, Utah Real Property Law § 9.04(b)(1) (2010 ed.). Specifically:

> When an appropriator or the appropriator's successor in interest abandons or ceases to use all or a portion of a water right for a period of seven years, the water right or the unused portion of that water right is subject to forfeiture in accordance with Subsection (2)(c), unless the appropriator or the appropriator's successor in interest files a nonuse application with the state engineer.

Utah Code Ann. § 73-1-4(2)(a).

The policy behind this law is to benefit the public by encouraging the beneficial and effective use of this precious resource. *Wash. Cnty. Conservancy Dist. v. Morgan*, 2003 UT 58, 82 P.3d 1125, 1129. The State is "vitally interested in seeing that none of the waters are allowed to run to waste or go without being applied to a beneficial use for any great number of years." *Bear River v. Town of Perry*, 819 P.2d 770, 775-76 (Utah 1991) (internal citations omitted). While courts have not specified a particular number, no party in this case can seriously argue that the (at least) seventy-year gap between the closure of the sugar beet factory and the present action is not a "great number of years."

Between the time when the sugar beet plant ceased operations in the 1940s, and prior to the adoption of H.B. 51, state law provided that water rights were automatically forfeited upon the running of the necessary statutory period. Prior to H.B. 51, Utah Code Ann. § 73-1-4 read: "When an appropriator or the appropriator's successor in interest abandons or ceases to use all or a portion of a water right for a period of five years, the water right or the unused portion of that water right ceases and the water reverts to the public . . . ." In the 50 years between the closure of the factory and 1990, when the Diamonds bought the Property, the applicable five or seven-year statutory forfeiture period expired many times, and the Factory Water Right was automatically forfeited the first time the forfeiture period ran, without the requirement of a judicial decree of forfeiture. Expert Dr. David Hansen opined that the Factory Water Right was forfeited when the sugar beet plant ceased operation, has not been used since, and could not have been used for anything other than industrial purposes.

SUVMWA does not dispute that its predecessor-in-interest ceased to use the Factory Water Right for substantially more than seven years. SUVMWA's expert Robert Ramsey did not opine that the Factory Water Right was not forfeited; instead, his testimony is limited to the opinion that SUVMWA could use this water at some point in the next 40 years. SUVMWA simply claims that this water right is protected from forfeiture or abandonment because of a nonuse application filed pursuant to Utah Code Ann. § 73-1-4(3)(b)(ii), which states: "Approval of a nonuse application protects a water right from forfeiture for nonuse from the applicant's filing date until the approved application's expiration date." Utah Code Ann. § 73-1-4(3)(b)(ii).

The purpose of the nonuse application is to inform the State Engineer of the owner's inability to beneficially use the water and permit the appropriator to show "reasonable cause" for

the nonuse. *See* Utah Code Ann. § 73-1-4(4)(a). While the statute specifically identifies several reasonable causes for nonuse,[7] each reasonable cause contemplates nonuse prospectively from filing for the pendency of the application. The nonuse application essentially acts as a tolling mechanism to extend the existing seven-year period forward. Utah Code Ann. § 73-1-4(3)(b)(ii). As the Court has already ruled, creating law of the case, Plaintiff's novel contention that this statute creates retroactive, absolute protection against the adverse effects of decades of nonuse would create a result that is "without reason and devoid of purpose." *See* March 11, 2013 Ruling on Defendant's Motion to Dismiss. Furthermore, it is undisputed that the Defendant has no plan in place for the non-use of this water.

It is also undisputed that Defendant's predecessors in interest did not beneficially use the water at issue for more than seventy years. It is further uncontroverted that Defendant's predecessor in interest did not file a nonuse application during that time. Rather, it was not until 2010 when Defendant filed its nonuse application that any entity attempted to revive the corpse of this long-forfeited Factory Water Right. In granting that nonuse application, the State Engineer invited opponents to take legal action. This Court may determine what the State Engineer, under *Jensen v. Jones, supra*, could not: that a water right "depends on beneficial use

[7] Reasonable causes for nonuse are: (i) a demonstrable financial hardship or economic depression; (ii) the initiation of water conservation or efficiency practices, or the operation of a groundwater recharge recovery program approved by the state engineer; (iii) operation of legal proceedings; (iv) the holding of a water right or stock in a mutual water company without use by any water supply entity to meet the reasonable future requirements of the public; (v) situations where, in the opinion of the state engineer, the nonuse would assist in implementing an existing, approved water management plan; or (vi) the loss of capacity caused by deterioration of the water supply or delivery equipment if the applicant submits, with the application, a specific plan to resume full use of the water right by replacing, restoring, or improving the equipment.

for its continued validity" (*In re Bear River*, 819 P.2d at 775), and that this Factory Water Right should be laid to rest.

Defendant's predecessor in interest engaged in water speculation, seeking to revive rights which were forfeited by non-use decades ago under the statutes in place at that time. Plaintiff has proffered no evidence that the Factory Water Right has been utilized for its enumerated use at any time since the first half of the twentieth century. Accordingly, Plaintiff cannot argue that Utah Code Ann. § 73-1-4(3)(b)(ii) bars the forfeiture cause of action, and summary judgment against Defendant is proper.

II. PRIOR OWNERS ABANDONED THE WATER RIGHTS LONG BEFORE DEFENDANTS PURCHASED THE LAND.

The sugar beet factory using this particular Factory Water Right abandoned the industry and the right decades ago. Water rights are based upon prior appropriation, but the appropriator may lose the rights through abandonment. Utah Code Ann. 73-1-4(2)(a). Water usage is governed by rights of use, not by ownership, and these rights are subject to and conditioned upon the continuing obligation to use the water—you use it or you lose it in favor of someone else who, in turn, is obligated to beneficially use the water. Utah Code Ann. 73-1-4(2)(c)(v). "The controlling element [of abandonment] is some manifestation of an intent to forsake or desert the right to use water." David A. Thomas & James H. Backman, Utah Real Property Law § 9.04 (2010 ed.). Abandonment may occur at any time when the water user manifests an intention to abandon the right. *In re Drainage Area of Bear River*, 361 P.2d 407, 409 (Utah 1961).

"Abandonment, as applied to the doctrine of appropriation of water to a beneficial use, may be defined to be an intentional relinquishment of a known right." *Hammond v. Johnson*, 66

P.2d 894, 899 (Utah 1937) (overruled on unrelated issues of adverse possession by *Otter Creek Reservoir Co. v. New Escalante Irrigation Co.*, 2009 UT 16, ¶ 23, 203 P.3d 1015), quoting *Oviatt v. Big Four Min. Co.*, 65 P. 811, 812 (Or. 1901). "Abandonment of a water right requires concurrence of intention to abandon and actual failure in its use for the statutory period." *Tanner v. Provo Reservoir Co.*, 98 P.2d 695, 700 (Utah 1940).

The determinative facts here show that 1) the beet factory closed in the first half of the twentieth century; 2) no Property owner since has engaged in industrial use of the Property; and 3) more than the seven statutorily-required years have passed since the beet factory abandoned both the production of sugar beets and its use of the associated Factory Water Right.

The burden is upon the party attempting to show an abandonment, who must show an actual and intentional abandonment. *Dalton v. Wadley*, 355 P.2d 69, 72 (Utah 1960). The facts of this case clearly show that the owners of the Factory Water Right, forsook and deserted the Property and the Factory Water Right when the plant was intentionally closed and dismantled. However reluctant the previous owners of the factory were to admit the end of the sugar beet era, their reaction to the drought and infestation caused the factory's owners to abandon the entire venture, only to be preserved in the annals of Utah State history. It is undisputed that in addition to abandoning the sugar beet enterprise, there was an "actual failure" (*Tanner v. Provo Reservoir Co., supra*) to use the Factory Water Right for either its intended purpose or for any other related purpose. Indeed, the plant was dismantled and could not thereafter use water to process sugar beets.

The last legitimate owners of the Factory Water Right utilized the Factory Water Right in a manner explicitly outlined in the documents granting them such use. When the plant ceased

operations, the owners abandoned the facility and its productive capabilities. No more than four shares of water have been utilized on the Property for over fifty years, and those four shares came from the separate and distinct Big Hollow Irrigation water right for irrigation, not industry. These facts are not disputed, and it is difficult to find a more clear-cut example of abandonment than this particular case.

III. DEFENDANT ACQUIRED NO WATER RIGHTS WITH ITS LAND PURCHASE BECAUSE OF AN EXCEPTION TO THE DOCTRINE OF MERGER; THE OPTION TO LATER PURCHASE THE FACTORY WATER RIGHT WAS COLLATERAL TO THE AGREEMENT AND DID NOT MERGE WITH THE DEED.

As the Purchase Agreement specifically outlines an additional, separate price for the purchase of the Factory Water Right, Clearwater cannot have acquired the Factory Water Right through the Property transaction. The doctrine of merger states that delivery and acceptance of a deed extinguishes or supersedes the underlying contract for the conveyance. *Secor v. Knight*, 716 P.2d 790, 792 (Utah 1986). The merger doctrine, as a general rule, declares "that on delivery and acceptance of a deed the provisions of the underlying contract for the conveyance are deemed extinguished or superseded by the deed." *Dansie v. Hi-Country Estates Homeowners Ass'n*, 1999 UT 62, ¶ 19, 987 P.2d 30. However, there are four exceptions to the doctrine of merger: "(1) mutual mistake in the drafting of the final documents; (2) ambiguity in the final documents; (3) existence of rights collateral to the contract of sale; and (4) fraud in the transaction." *Robinson v. Tripco Inv., Inc.*, 2000 UT App 200, ¶ 11, 21 P.3d 219. Mutual mistake and ambiguity of the final documents are unlikely to apply to the sale and purchase agreement between the Diamonds and Clearwater, but as rights collateral to the contract of the sale existed,

the Factory Water Right, if in existence, did not merge with the contract for the sale of land.[8] *See Hatch v. Adams*, 318 P.2d 633 (Utah 1957); *see also Spears v. Warr*, 2002 UT 24, ¶ 34, 44 P.3d 742[9] (overruled on other grounds by *Tangren Family Trust*, 2008 UT 20, 182 P.3d 326).

In *Spears v. Warr*, the Utah Supreme Court held that irrigation water rights were collateral to the agreement to convey title and that the collateral rights exception was satisfied. The Warrs owned land and irrigation rights on about 110 acres of land which they subdivided and sold to the individuals who became the plaintiffs. The Warrs did not include the irrigation water rights in the deed of sale. *Id.* at ¶ 5. After the sale, the Warrs demanded additional money for the water rights. The plaintiffs refused because they believed they already paid for the water rights. *Id.* at ¶ 6.

The court determined that the collateral rights exception applied. *Id.* at ¶ 16. The court stated that "[u]nder the collateral rights exception, if the original contract calls for performance of some act that is collateral to the conveyance of title, the contractual obligations are not extinguished, but instead survive the deed." *Id.* at ¶ 14. Further, "irrigation water rights are not necessarily appurtenant to the lots but are separate rights, distinct from the subject matter of the deed, that the parties planned to have transferred by a subsequent deed at a later date. As a result, the collateral rights exception applies, meaning the merger doctrine does not extinguish the irrigation water agreement." *Id.*

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[8] The District does not assert that the fraud exception applies, as there are no damages (as necessary for alleging fraud) because the Factory Water Right was dead long before Mr. Diamond acquired the Property.

[9] *Tangren Family Trust v. Tangren*, 2008 UT 20, ¶ 12 fn. 20, disapproved of *Spears* to the extent that it "suggest[ed] that extrinsic evidence of a separate oral agreement *is* admissible where the contract contains a clear integration clause, we disavow them." *Tangren* did not disagree with the collateral rights exception of *Spears*.

Similar to the *Warr* factual scenario, Mr. Diamond intended to reserve the Factory Water Right, as evidenced by the inclusion of an option to purchase the Factory Water Right for $2,000,000 "during the term of this contract . . . but no sooner than January 16, 2006." It was not Mr. Diamond's intent to allow the Factory Water Right to pass along with the Property in the sale. It was not until his deposition in this case that Mr. Diamond learned that Clearwater purported to own the Factory Water Right, in contradiction to the explicit language of the Purchase Agreement.

Therefore, since a court must look to the parties' intent when determining if a term is collateral (*Secor v. Knight*, 716 P.2d at 793), looking to the Purchase Agreement clearly shows that the option to buy the Factory Water Right indicated that the Factory Water Right was collateral to the real estate purchase agreement. Thus, the Factory Water Right, assuming it existed on the land when Mr. Diamond owned it, remains with Mr. Diamond. Because the collateral rights exception to the doctrine of merger applies in this case, even if the Diamonds had any water rights beyond the Big Hollow shares, they did not sell them to anyone, and this case must be summarily decided in favor of the Plaintiff and Intervenors.

IV. THE PROPERTY HAS NO ADDITIONAL APPURTENANT WATER RIGHTS.

Clearwater believes it acquired the Factory Water Right through appurtenance, but this is impossible, as "a vested water right is considered appurtenant to the land conveyed only to the extent that it is used to the land's benefit at the time of the conveyance." *Little v. Greene & Weed Inv., 83*9 P.2d 791, 796 (Utah 1992). At the time of the conveyance to Clearwater, the Factory Water Right had been extinct for decades.

Water rights are generally transferred by deed, in essentially the same manner as transfers of real estate. Utah Code Ann. § 73-1-10. Even where a water right is not specifically conveyed in a deed, a water right may pass to a purchaser through appurtenance, as water rights usually run with the land unless specifically reserved. *Sanpete Am., L.L.C. v. Willardsen*, 2011 UT 48, ¶ 55, 269 P.3d 118. Utah law provides that "[a] water right appurtenant to land shall pass to the grantee of the land . . . ." Utah Code Ann. § 73-1-11, *supra.*

However, once water rights are associated with a tract of land, they do not run with the land forever. "The amount of water which is appurtenant to any particular tract of land is the amount which was beneficially used upon the land immediately prior to the conveyance." Thomas and Backman, Utah Real Property Law 2010, § 9.01(b)(3)(i) (emphasis added). In order for water rights to be transferred by appurtenance, the rights must be "appurtenant to" the land at the time of conveyance. No water rights existed to be transferred to Clearwater, because "only the amount of water which was used on that particular tract during the time immediately preceding the execution of the conveyance will be deemed appurtenant to the land and pass to the grantee." Utah Real Property, *supra*, at 266. *See also Stephens v. Burton*, 546 P.2d 240, 241 (Utah 1976): "where the water right has been exercised in irrigating different parcels of land at different times, such right passes only the water which was exercised next preceding the time of the execution of any conveyance," and Utah Code Ann. § 73-1-11(2)(a).

In addition to the fact that the Purchase Agreement specifically excludes the Factory Water Right for potential sale in an option contract, the Factory Water Right did not pass to Clearwater with the Property as the water was not being beneficially used immediately prior to conveyance as required for appurtenance to attach by Utah statute and case law. The Factory

Water Right existed from when it was granted in 1923 for industrial purposes at the "sugar refining plant." There is no evidence that the Factory Water Right could have been exercised by anyone for this purpose after the sugar beet plant ceased operations and was dismantled. Rather, the only evidence of water usage on the Property comes from limited irrigation from four shares of Big Hollow Irrigation stock. As such, no appurtenant water rights beyond the Big Hollow rights existed for Mr. Diamond to sell with his property, or for Clearwater to obtain. Therefore, Clearwater could not convey title of the Factory Water Right to SUVMWA and SUVMWA, having no ownership interest in the Factory Water Right, had no right to file the Non-Use Applications. Thus, SUVMWA has no claim to the Factory Water Right and summary judgment in favor of the Plaintiff and the Intervenors is proper.

V. SUVMWA'S CLAIM TO THE WATER RIGHT IS VOID AS AGAINST PUBLIC POLICY.

The water purportedly allocated under the Factory Water Right is already in use by junior appropriators, serving thousands of Utahns, as it has for decades. Disturbing the delicate balance of appropriated rights in this arid state due to the machinations of water speculators is detrimental to our limited water supply, inapposite to legislative intent, and contrary to established public policy. As noted in the Court's March 11, 2013 Ruling on the Motion to Dismiss, "Defendant's reading of [Utah Code Ann. §73-1-4(3)(b)(ii)] would only serve to extend already long periods of time of nonuse which is counter to the State's vital interest in seeing that the water it holds in trust for the public is put to beneficial use." Court's March 11, 2013 Ruling at p. 11. Defendant's stance of ownership of the Factory Water Right is thus contrary to the long-held public policy of putting this scarce resource to beneficial use rather than benefitting one

single entity at the expense of a growing population. Allowing Defendant to reap the benefit of long-dead water rights, approved specifically for the industrial use of a long-gone sugar beet factory, would encourage even more water speculation. Furthermore, as per the Court's ruling "only the Plaintiff's reading of the statute will coincide with Utah's history of water law." *Id.*

Courts use public policy guidelines in decision on water rights issues. *See, e.g.*, *E. Jordan Irrigation Co. v. Morgan*, 860 P.2d 310, 312 (Utah 1993): "We base this decision on the statutory scheme governing the appropriation of public waters … and the dictates of sound public policy." Here, sound public policy requires the Court to prevent the abuse of the legal system by manipulating alleged loopholes in untested legislation.

After decades of non-use of the Factory Water Right, the water that otherwise would have been used under the Factory Water Right is now being used or otherwise relied upon by the holders of junior water rights in the Utah Lake Basin, including the District. The threatened revival of use of the approximately 4,000 acre feet of water in the over-appropriated Utah Lake drainage basin will deprive the District and other junior water right holders of water they have relied upon in meeting their own legitimate water needs. Depriving the District and others of the ability to continue their on-going beneficial use of or reliance upon the water originally represented by the Factory Water Right will cause a distinct and palpable injury to the District and others in the Utah Lake/Jordan River drainage basin.

CONCLUSION

The undisputed facts and a century of case law show that SUVMWA has no claim to the Factory Water Right. The District respectfully requests that the Court grant its Motion for Summary Judgment and enter a Declaration that the water rights 51-1019 and 54-1131 have been

forfeited through non-use and/or abandonment, that water rights 51-1019 and 54-1131 are not appurtenant to any Property, that these water rights have reverted to the public, and for a permanent injunction enjoining the diversion and use of water under water rights 51-1019 and 54-1131.

DATED this 10th day of June, 2015.

CHRISTENSEN & JENSEN, P.C.

/s/ David C. Richards
David C. Richards
Attorneys for Intervenor Jordan Valley Water Conservancy District

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of June, 2015, a copy of the foregoing **AMENDED MEMORANDUM IN SUPPORT OF JORDAN VALLEY WATER CONSERVANCY DISTRICT'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** was electronically filed and transmitted to the following:

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