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Shares of Water Stock in Utah: Personal Property or Real Estate?

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SHARES OF WATER STOCK IN UTAH: PERSONAL PROPERTY OR REAL ESTATE?

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Abstract

Utah deserts supply the state with exquisite beauty and are a definitive part of Utah's identity. However, a consequence of this arid beauty is aridity itself. Because Utah is one of the driest states in the nation, water is an important resource. Accordingly, Utah legislators have enacted statutes that ensure that those who own water will use it beneficially and that ownership of water can be transferred easily from one owner to another. Water ownership is categorized as either ownership of a water right or a share of water stock. This Note focuses on the need for a resolution in Utah law regarding the transfer of shares of water stock. Under Utah statutes, shares of water stock transfer as securities according to the principles of Utah's Uniform Commercial Code. However, Utah courts have ignored these statutes and have applied judicially made rules in an ad hoc manner to determine whether the shares of stock in question should transfer as securities or as real property. This Note advocates that Utah courts should acquiesce to the Utah Legislature and hold that shares of water stock are transferred per the Utah Uniform Commercial Code.

I. INTRODUCTION

In Utah, the transfer of shares of stock in mutually-owned water companies is governed by competing laws. Under statutory law, shares of water stock are personal property and are transferred under the principles of the Utah Uniform Commercial Code. Under Utah common law, shares of water stock are akin to real property. They are generally transferred as appurtenances to land, except when the transfer conflicts with the water company's articles of incorporation. Therefore, it is unclear how shares of water stock are transferred. Utah courts should resolve this confusion by operating within the doctrine of separation of powers required by the Utah Constitution and acquiesce to the legislative mandate that shares of water stock are transferred as personal property in accordance with the Utah Uniform Commercial Code.

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II. BACKGROUND

This Note discusses the discrepancies between Utah statutory law and Utah common law regarding the transfer of water stock. Part II of this Note provides a background of the doctrine of prior appropriation and how this doctrine influences the transfer of both water rights and shares of water stock in the western United States. Next, this Note defines water rights and water stock and the differences between them. Part III demonstrates how Utah statutory law is impotent regarding how shares of water stock are transferred because of the Utah Supreme Courts' inconsistent application of a common law rebuttable presumption to the statutory mandate regarding these transfers. Part IV discusses the Utah legislature's clarification of how water stock is transferred in reaction to the Utah Supreme Court's degradation of Utah statutory law. Part V then demonstrates the Utah Supreme Court's continued ignorance of the Utah legislature's mandate that shares of water stock are transferred under the Utah Uniform Commercial Code. Part VI concludes by arguing that the best method to avoid confusion in these transfers and to remedy the departure from statutory law is for the Utah Supreme Court to follow the direction of the Utah legislature and hold that transfers of water stock are governed by Chapter 8 of the Utah Uniform Commercial Code.

A. Prior Appropriation

In the United States, individual states determine how water is allocated within their boundaries.[1] The states west of the 100th meridian allocate water under the doctrine of prior appropriation.[2] Under this doctrine, people obtain a right to use water by diverting it away from its natural flow and using the water for a beneficial purpose.[3] Thus, a person has the right to use their allotted amount of water, subject to when they obtained that right in relation to others who draw water from the same source. In other words, when two people own water rights from the same source of water, the person who first obtained their water right may draw the entirety of their water right (subject to the principle of beneficial use—essentially meaning that the water must be used to cultivate land[4]) before the subsequent person may access their allotted amount of water. Thus, in times of drought, subsequent water rights owners

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[1] Alan Matheson, Jr., *Let It Flow: Wading Through Utah's Instream Flow Statute*, 17 UTAH B.J. 18, 18 (2004).

[2] *Id*. The 100th meridian runs north-south roughly dividing down the middle of North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, and Texas. Kevin Krajick, *The 100th Meridian, Where the Great Plains Begin, May Be Shifting*, EARTH INST. COLUM. U. (Apr. 11, 2018), https://blogs.ei.columbia.edu/2018/04/11/the-100th-meridian-where-the-great-plains-used-to-begin-now-moving-east/ [https://perma.cc/93NM-R7RM].

[3] Matheson, *supra* note 1.

[4] ANTHONY TARLOCK & JASON ROBINSON, LAW OF WATER RIGHTS AND RESOURCES § 5:68 (July 2019).

may only access their allotted water right if doing so would not deny a prior owner from accessing their full water rights.

The doctrine of prior appropriation was first adopted in California in 1855, in *Irwin v. Phillips*.[5] In *Irwin*, a miner diverted the flow of a stream to lead into his mining encampment.[6] Subsequently, another miner dug a trench in the original miner's dam to re-divert the stream to suit the second miner's needs.[7] The first miner sued the second claiming that the second miner was infringing on the first miner's water right by diverting water away from the first miner's property.[8] The Supreme Court of California ruled in favor of the first miner. Thus, under *Irwin*, the law protects the water rights of those who "by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them . . . to supply the necessities of gold diggers."[9] By so holding, *Irwin* embraced the Lockean labor theory principle that the input of labor results in the output of ownership.[10] The *Irwin* court further held that conflicts regarding access to water "must be decided by the fact of priority upon the maxim of equity, *qui prior est in tempore potior est injure*" (meaning he who is earlier in time is stronger in law).[11] The *Irwin* court protected the rights of the first miner because he was first to divert the water into his encampment to aid his mining operation, in other words, he was the first to put the water to a beneficial use.[12] Under *Irwin*, a person who desires to divert water from natural sources "must take it as he finds it, subject to prior rights," so long as the preceding individual is using the water "for as high, and legitimate a purpose as the [subsequent water appropriator] seeks to accomplish."[13] Therefore, under the doctrine of prior appropriation, prior in time is prior in right, so long as the water is being used for a beneficial purpose.[14]

As discussed, a prior water appropriator's right to access their full water right is dependent on the owner continually using the water for a beneficial use.[15] Courts determine the amount of water required to fulfill a "beneficial use" by analyzing the "water duties" that are necessary to achieve this use.[16] A water duty is the amount of water "which, by careful management and use, without wastage, is reasonably

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[5] Irwin v. Phillips, 5 Cal. 140, 140 (Cal. 1855).

[6] *Id*. at 142.

[7] *Id.*

[8] *Id*.

[9] *Id.* at 146 (Murray, C.J., concurring).

[10] *See* Haslem v. Lockwood, 37 Conn. 500, 506 (Conn. 1871).

[11] *Irwin*, 5 Cal. at 147 (Murray, C.J., concurring).

[12] *Id*.

[13] *Id.*

[14] City of San Bernardino v. City of Riverside, 198 P. 784, 790 (Cal. 1921) ("[T]he respective priorities of each water right should be adjudged, so that, if in the future the supply falls below the quantity necessary for all, he who has the prior right may have his preferred right protected.").

[15] *Id.*

[16] TARLOCK & ROBINSON, *supra* note 4.

required to be applied to any given tract of land for such period of time as may be adequate to produce therefrom a maximum amount of such crops as ordinarily are grown thereon."[17] Water duties are restricted to agricultural uses, while the analogous principle of "system capacity" is used for municipal supplies that generally serve the public.[18]

Individuals who hold water rights may lose those rights, or at least have their allotted amount of water reduced if they stop using their full water duty for a beneficial use.[19] The beneficial use prong has three basic functions. First, it ensures that water usage is consistent and continual.[20] Second, it mandates that ownership of water is conditioned upon the owner using the water for productive purposes.[21] Third, it gives courts the authority to stop wasteful uses of water.[22]

Accordingly, a senior water rights owner, who has been continually putting her water rights to beneficial use, will likely not suffer during a drought because she has the right to access her water duty regardless of the needs of subsequent water rights owners.[23] In other words, the most senior water rights holder will only suffer during a drought if the natural water level drops below the senior owner's water duty. Conversely, successive owners of water rights must curtail their water usage in times of drought to avoid infringing on senior owners' rights to divert and beneficially use their entire water duty.[24] In sum, under the doctrine of prior appropriation, a senior water rights holder, who continually puts their full water duty to beneficial use, will always have full access to their water duty at the expense of junior owners of water rights.

B. Utah Water Rights

Beginning in 1852, the territory of Utah granted Utahns water rights through "county courts" that allocated water rights to individuals based on case-by-case needs, regardless of priority.[25] Utah abandoned the county courts' water allocation system by statute in 1880.[26] The doctrine of prior appropriation was then adopted under the Utah Statutes of 1888, which established that the quantity of water needed to accomplish a beneficial use was appropriated under a "diligence right," modeled

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[17] *In re* Steffens, 756 P.2d 1002, 1005–06 (Colo. 1988) (quoting Farmers Highline Canal & Reservoir Co. v. City of Golden, 272 P.2d 629, 634 (Colo. 1954)).

[18] TARLOCK & ROBINSON, *supra* note 4.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] City of San Bernardino v. City of Riverside, 198 P. 784, 790 (Cal. 1921).

[24] Lawrence J. MacDonnell, *Prior Appropriation: A Reassessment*, 18 U. DENV. WATER L. REV. 228, 230 (2015).

[25] *Water Right Information*, UTAH DIV. WATER RTS. (July 19, 2011), https://www.waterrights.utah.gov/wrinfo/ [https://perma.cc/2S96-PCWV].

[26] *Id.*

after the above-discussed principle of water duties.[27] To date, the amount of water an owner may access is still determined by a diligence right, but since 1953, applicants seeking water rights must apply to appropriate water with the state engineer to create a new water right.[28]

Although people who divert and beneficially use water may own water rights, the actual water that flows through all natural Utah rivers and streambeds is public property.[29] This means that individuals with water rights do not own the water when it is in its natural riverbeds. Instead, owners of water rights in Utah own the right to divert (remove from its natural source) and beneficially use water.[30] Under Utah law, water rights are real property[31] and are typically appurtenant to the land on which the water is beneficially used.[32]

Because Utah water rights are typically appurtenant to land, they are transferred by deed in the same manner as real estate,[33] subject to three exceptions where water rights may be severed from land and transferred as independent property:

> A water right appurtenant to land shall pass to the grantee of the land unless the grantor: (i) specifically reserves the water right or any part of the water right in the land conveyance document; (ii) conveys a part of the water right in the land conveyance document; or (iii) conveys the water right in a separate conveyance document prior to or contemporaneously with the execution of the land conveyance document.[34]

These exceptions permit sellers to sever appurtenant water from land to increase flexibility in facilitating the transfer of water rights.[35]

When real property is transferred, courts presume that the water rights transferred with the land absent an explicit expression that the water has been severed from the land.[36] Utah Courts have held that water rights are "transferred by deed in substantially the same manner as real estate, and pass automatically to a grantee of the land unless expressly reserved."[37] When water rights are not

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[27] R.L. Knuth, *Conveyancing and Collateralizing Utah Water Rights*, 12 UTAH B.J. 12, 12 (1999).

[28] UTAH CODE ANN. § 73-3-1 (West 2019).

[29] *Id.*

[30] *Id.*

[31] UTAH CODE ANN. § 57-1-1 (West 2019).

[32] Janice Holben, Alan J. Jacobs, Jack K. Levin & Eric C. Surette, *Definition and Nature of Water Rights and Privileges—As Appurtenant or in Gross*, 78 AM. JUR. 2D Waters § 7 (2019).

[33] UTAH CODE ANN. § 73-1-10 (West 2019).

[34] UTAH CODE ANN. § 73-1-11(1)(a) (West 2019).

[35] Johanna Hamburger, *Improving Efficiency and Overcoming Obstacles to Water Transfers in Utah*, 15 U. DENV. WATER L. REV. 69, 74 (2011).

[36] *Id.*

[37] Salt Lake City v. Silver Fork Pipeline Corp., 5 P.3d 1206, 1220 (Utah 2000).

mentioned explicitly in a conveyance of land, the conveyance only includes the water rights that are appurtenant to the land being conveyed—not water rights that are in gross (meaning that the water right is not annexed or appended to anything else).[38] Whether water rights are appurtenant to land is a question of fact to be determined by a jury.[39]

C. Utah Shares of Water Stock

Mutually-owned water companies may also own the rights to access and beneficially use water.[40] Mutually-owned water companies are created when individual owners of water rights pool their resources together and create a mutually-owned company.[41] The company, in turn, distributes company stock that represents the shareholders' rights to access water in a quantity that is proportional to the amount of company stock owned.[42] These shares of stock are the personal property of shareholders,[43] representing the shareholders' right to divert a diligent right from the natural water and a corresponding interest in the ditch or canal by which the water right is transported.[44] Therefore, ownership of a share of stock in a mutually-owned water company is a representation of ownership of a specific water right.[45]

Shares of water stock in a mutually-owned water company serve a dual purpose. First, shares of water stock are personal property that represent "an ownership interest in the mutual irrigation company."[46] However, a stock certificate in a mutually-owned water company "is not like the stock certificate in a company operated for profit. Rather, it is a certificate showing undivided part ownership in a certain water supply."[47] Second, shares of water stock represent real property rights to water access and use because "each share of stock also represent[s] the right to water service and the delivery of a definite quantity of water."[48]

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[38] Holben et al., *supra* note 32.

[39] *Id.*

[40] UTAH CODE ANN. § 16-6a-611 (West 2019).

[41] UTAH CODE ANN. § 16-4-102 (West 2019).

[42] *See id.* ("'Water company' means a corporation in which a shareholder has the right, based on the shareholder's shares, to receive a proportionate share of water delivered by the corporation.").

[43] UTAH CODE ANN. § 73-1-10 (West 2019).

[44] Francis C. Amendola, Joseph Bassano, John J. Dvorske, Glenda K. Harnad, Janice Holben, Alan J. Jacobs, Stephen Lease, Anne E. Melley, Tom Muskus, Sally J.T. Necheles, Jeffrey J. Shampo, Eric C. Surette & Susan L. Thomas, *Corpus Juris Secundum,* 94 C.J.S. WATERS § 897 (2020).

[45] *Id.*

[46] Stephen N. Bretsen & Peter J. Hill, *Irrigation Institutions in the American West*, 25 UCLA J. ENVTL. L. & POL'Y 283, 306 (2006).

[47] Genola Town v. Santaquin City, 80 P.2d 930, 936 (Utah 1938).

[48] Bretsen & Hill, *supra* note 46, at 307.

Shares of stock in a mutually-owned water company most differ from water rights in how they transfer. Unlike water rights, which courts presume are appurtenant to land,[49] Utah statutory law mandates that shares of stock in a water corporation are not appurtenant to land. Under statutory law, "[t]he right to the use of water evidenced by shares of stock in a corporation is not a water right appurtenant to land."[50] Instead of transferring like real property, shares of water stock transfer like securities under the procedure set forth in chapter 8 of the Utah Uniform Commercial Code.[51] As a security, the transfer of a share of stock in a mutually-owned water company must transfer in accordance with the company's articles of incorporation and bylaws.[52]

In sum, under Utah statutory law, water rights are real property interests that transfer as appurtenances to land, unless the three statutory exceptions apply[53] or if the water right is in gross. Alternatively, shares of water stock in a water company are transferred as securities, regardless of any alleged appurtenant relationship between the water and the land. These statutory principles should govern how shares of water stock transfer because in Utah, "where a conflict arises between the common law and a statute or constitutional law, the common law must yield."[54] Utah courts, however, have disregarded the statutory principles regulating the transfer of water stocks.

III. THE DEGRADATION OF UTAH STATUTES MANDATING THAT SHARES OF WATER STOCK ARE NOT APPURTENANT TO LAND

This section discusses forty years of Utah case law addressing the common issue of whether shares of water stock were included in land transfers when the real estate contract made no mention of the shares of stock. Throughout this period, statutory law mandated that shares of water stock are not appurtenances to land and therefore are not included in land transfers unless the sales contracts explicitly include the shares of water stock. However, Utah courts ignored this mandate, eventually holding that shares of water stock are interests in real property that are automatically included in land transfers. This section discusses the five major court cases in which Utah common law eclipsed Utah statutory law.

In 1954, the Utah Supreme Court heard *Brimm v. Cache Valley Banking Co.*,[55] in which a buyer contracted to purchase two tracts of land and alleged that their purchase included 112 shares of water stock.[56] The contract stated that the land was

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[49] *Supra* Section II.B.

[50] UTAH CODE ANN. § 73-1-11(4)(a) (West 2019).

[51] UTAH CODE ANN. § 73-1-11(4)(b) (West 2019) (referencing UTAH CODE ANN. § 73-1-10(2) (West 2019)).

[52] UTAH CODE ANN. § 16-6a-606 (West 2019).

[53] UTAH CODE ANN. § 73-1-11(1)(a) (West 2019).

[54] Hansen v. Utah State Ret. Bd., 652 P.2d 1332, 1337 (Utah 1982).

[55] Brimm v. Cache Valley Banking Co., 269 P.2d 859 (Utah 1954).

[56] *Id.* at 860.

to be purchased "together with water right [sic] appurtenant thereto," but the contract made no specific mention of any appurtenant water rights.[57] Thirty-six years before the *Brimm* lawsuit, Anderson, the then-owner of the two tracts of land and appurtenant water rights, organized the Mendon Central Irrigation Company ("MCIC").[58] By creating this company, Anderson "sold, assigned, transferred, conveyed and confirmed unto the [MCIC] all [his] right, title and interest in and to the springs and the waters arising therefrom" in exchange for certificates of stock in MCIC.[59] The issue in *Brimm* was whether the current buyer's purchase of the land included the shares of MCIC water stock that the buyer assumed to be appurtenant to the land, despite the absence of the shares of MCIC stock in the purchase contract.

At the time the court heard *Brimm*, 73 Utah Code Ann. § 1-10 read: "[w]ater rights shall be transferred by deed in substantially the same manner as real estate, except when they are represented by shares of stock in a corporation, in which case water *shall not be deemed to be appurtenant to the land.*"[60] Despite this language, the *Brimm* court held that the shares of water stock were appurtenant to the land that the buyer purchased. The *Brimm* court reasoned that 73 Utah Code Ann. § 1-10 only:

> [E]stablish[es] a rebuttable presumption that a water right represented by shares of stock in a corporation [does] not pass to the grantee as an appurtenance to the land upon which the water right was used, but that the grantee could overcome such presumption if he could show by clear and convincing evidence that said water right was in fact appurtenant and that the grantor intended to transfer the water right with the land, even though no express mention of any water right was made in the deed.[61]

As suggested by the *Brimm* court's slippery language—consistently using the term "water right" when the water at issue was represented by shares of MCIC stock—this holding conflates the separate entities. Under the *Brimm* analysis, the independent legal status of water, whether a right or share of stock, is largely irrelevant because the water's legal status is secondary to whether the grantor intended the water to transfer with the land as an appurtenance. In other words, *Brimm* reduced 73 Utah Code Ann. § 1-10 to a presumption that shares of water stock are not included in a land conveyance, which may be rebutted by clear and convincing evidence showing that the grantor intended that the sale includes water, regardless of the water's legal status as shares of water stock.

The *Brimm* court justified its conclusion that the shares of MCIC water stock were appurtenant to the sold land by using two points of reasoning to determine whether the grantor intended for the sales contract to include the water, despite the

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[57] *Id.* at 861.
[58] *Id.* at 860–61.
[59] *Id.*
[60] *Id.* at 863 (emphasis added).
[61] *Id.* at 864.

contract itself lacking specific mention of the MCIC stock. The *Brimm* court held that the grantor did intend to transfer the MCIC stock with the land conveyance because: (1) "the water had been used to irrigate the land [for sixty-four years]," and (2) "[t]he land had little value without the water."[62] The *Brimm* court developed these factors from precedent pre-dating 73 Utah Code Ann. § 1-10 in the case of *In re Johnson's Estate*,[63] which held, *inter alia*, that the length of time the shares of water stock has been used on land and how that use benefits "this arid country" are the most significant factors in resolving ownership disputes of shares of water stock.[64] Ultimately, the *Brimm* court reasoned that the grantor intended to transfer the shares of water stock not included in the real estate purchase contract because the shares of water had been used on the land for an extended period of time and the value of the land was increased proportionally to the amount of water stock allegedly included in the purchase.

As commented by Justice Henriod in his dissent, the *Brimm* holding weakened the effect of 73 Utah Code Ann. § 1-10, which, in turn, obfuscates whether a transfer of land includes water stock not expressly included in a purchase contract to "a matter of presumption and proof."[65] Unlike the statutory mandate that shares of water stock "shall not be deemed to be appurtenant to the land,"[66] *Brimm* gave courts the flexibility to determine whether shares of water stock are included in a land conveyance transfer on an *ad hoc* basis. The *Brimm* decision began a trend of Utah courts determining whether shares of water stock are appurtenant to land by inconsistently applying the two primary *Brimm* factors,[67] rather than adhering to the statutory mandate that shares of water stock are not appurtenant to land.[68] This ultimately led to Utah courts completely disregarding Utah statutes regulating the transfer of shares of water stock and the fulfillment of Justice Henriod's prophetic dissent that ownership of water stock "may depend on presumption or the lack of it."[69]

Four years after *Brimm*, the Utah Supreme Court revisited the issue of whether shares of water stock are included in a land conveyance that does not explicitly enumerate the shares of water stock allegedly included in the sale in *Hatch v. Adams*.[70] Unlike *Brimm*, the *Hatch* court held that the shares of water stock did not transfer with the real estate because the grantor did not clearly and convincingly intend to convey the shares of water stock with the land. In *Hatch*, the defendant-

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[62] *Id.*

[63] *In re* Johnson's Estate, 228 P. 748 (Utah 1924).

[64] *Id.* at 752.

[65] *Brimm*, 269 P.2d at 864.

[66] *Id.* at 863.

[67] Utah courts never expressly identify these points as factors, rather they are points of reasoning that are consistently used to support holdings. The author uses the term "factor" for convenience and clarity.

[68] *Brimm*, 269 P.2d at 863.

[69] *Id.* at 865.

[70] Hatch v. Adams, 318 P.2d 633, 633 (Utah 1957).

seller sold real estate to the plaintiff-buyer. The sales contract sold the farm land "[t]ogether with all buildings and improvements thereon and all water rights [sic][71] appurtenant thereto" followed by a list of shares of water stock included in the sale.[72] Following the sale, the plaintiff-buyer argued that he owned an additional seven and one-half shares of stock not included in the contract because the seven and one-half shares of water were allegedly appurtenant to the sold land.[73] The Supreme Court of Utah affirmed the trial court's finding that the seven and one-half shares were not appurtenant to the land and thus not included in the sale.[74]

Despite the seemingly obvious decision that shares of water stock not included in the sales contract were not sold, the *Hatch* decision is significant because the Utah Supreme Court affirmed the trial court's decision by applying only the first of the two *Brimm* factors. Again, the *Brimm* court held that 73 Utah Code Ann. § 1-10 "establish[es] a rebuttable presumption that a water right represented by shares of stock in a corporation [does] not pass to the grantee as an appurtenance to the land upon which the water right was used."[75] The *Brimm* court held that the buyer had rebutted this presumption by providing evidence that: (1) "the water had been used to irrigate the land [for sixty-four years]," and (2) "[t]he land had little value without the water."[76] Conversely, the *Hatch* court held the buyer failed to rebut the presumption that seven and one-half shares of water stock in question were not appurtenant to the land, and thus not included in the land conveyance.[77] Instead of engaging both *Brimm* factors, the *Hatch* court reasoned that "proof that water represented by water stock was used on certain land by the owner of the land during the entire period of his ownership of the land is not alone sufficient to rebut the presumption that such water is not to be deemed appurtenant [to the sold land]."[78] While this holding concedes that the first *Brimm* factor is not satisfied, it simultaneously reduces the weight of that factor by concluding that evidence of use of the shares of water stock on the land alone is insufficient to rebut the presumption that shares of water stock are not appurtenant to land when the land is transferred.

Further, the *Hatch* court failed to determine whether the seven and one-half shares of water stock would increase the value of the land if they were appurtenant to the land. By failing to consider how the value of the land would change if the shares of water stock in question where appurtenant to the land, the *Hatch* court failed to guide future courts in weighing the *Brimm* factors. While the *Hatch* court did consider that "other water was used on the land in question" besides the seven

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[71] The contract incorrectly used the term "water rights" instead of "shares of water stock."

[72] *Hatch*, 318 P.2d at 633.

[73] *Id*. at 634.

[74] *Id.* at 635.

[75] *Brimm*, 269 P.2d at 864.

[76] *Id.*

[77] *Hatch*, 318 P.2d at 634.

[78] *Id*.

and one-half of shares of water stock at issue,[79] the court did not engage in a discussion of whether the diligent right of the shares of water stock enumerated in the contract satisfied the land's needs, (i.e., its beneficial use), or if the other seven and one-half shares of water stock would increase the land's productivity, and therefore its value. While the *Hatch* court's holding is consistent with Utah statutory law, which states that shares of water stock are not appurtenant to the land,[80] it fails to clarify why the *Brimm* presumption was not rebutted, which led to confusion in future litigation.

Twenty-six years after *Hatch*, the Utah Supreme Court heard *Abbott v. Christensen*,[81] where the court awarded shares of water stock to Christensen—the buyer.[82] The *Abbott* court held that Christensen owned the shares of water stock in question because Abbott (the seller) intended to sell the land with the shares of water stock, over Abbott's later objection. The *Abbott* court, relying on *Brimm*, held that Christensen successfully rebutted the presumption that unmentioned shares of water stock are not included in a land conveyance.[83] However, the *Abbott* court's reliance on *Brimm* was in error because, as the *Abbott* court itself stated, the sales contract at issue did include the shares of water stock, albeit vaguely.

Abbott and Christensen were engaged in a joint venture in which Christensen lived on Abbott's ranch and cared for Abbott's cattle, with the parties splitting the profits from sold calves fifty-fifty.[84] Upon the termination of this joint venture, Christensen received part of Abbott's real property, as governed by a contract prepared by Abbott.[85] The contract, however, made no specific mention of the shares of water stock that had historically been used to irrigate the conveyed real estate.[86] After Abbott sold the land to Christensen, Abbott alleged that the sales contract did not include "424 shares of stock in the Farnsworth Canal Irrigation Company" that were historically used to irrigate the sold land.[87] Abbott argued that the sale could not have included the shares of Farnsworth water stock because under 73 Utah Code Ann. § 1-10 shares of water stock are not appurtenant to land, and only the land was spoken of in the contract.[88] The trial court awarded Christensen the real estate and the 424 shares of stock in the Farnsworth Canal Irrigation Company.[89]

Abbott appealed the trial court's application of the law. He argued that the plain language of 73 Utah Code Ann. § 1-10 proscribed automatic inclusion of shares of water stock in a real estate conveyance when the stock in question is not expressly

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[79] *Id.*
[80] UTAH CODE ANN. §§ 73-1-10, 11 (West 2019).
[81] Abbott v. Christensen, 660 P.2d 254 (Utah 1983).
[82] *Id.* at 258.
[83] *Id.* at 257.
[84] *Id.* at 255.
[85] *Id.* at 256.
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*

mentioned in the contract. Abbott argued that whether the shares of water stock in question are appurtenant to the conveyed land is irrelevant when determining whether shares of water stock are included in a land conveyance because under Utah statutory law shares of water stock "shall not be deemed to be appurtenant to the land . . . ."[90] Abbott also cited both *Brimm* and *Hatch* to support his argument that conveyances of land do not include water when the water is represented by shares of water stock in a water company, and those shares are not expressly included in the contract.[91] Abbott further claimed the trial court's consideration of the amount of time the shares of Farnsworth stock were historically used on Christensen's real estate was irrelevant because, under *Hatch,* proof of water use "by the owner of the land during the entire period of his ownership of the land is not alone sufficient to rebut the presumption that such water is not to be deemed appurtenant."[92]

The Utah Supreme Court rejected Abbott's arguments. The court reasoned that the shares of water stock were appurtenant to the land in part because "the water at issue had been used on the land for over forty years, a period much longer than the current ownership" and that "[a]s in *Brimm*, this land would have comparatively little value without the water."[93] The court continued, reasoning that the 424 shares of stock in the Farnsworth Canal Irrigation Company were appurtenant to the land because Abbott did not contest their appurtenant status until two years after the land conveyance contract was signed as "a counter in the larger and evolving controversy between the parties."[94]

Although the ultimate decision in *Abbott* was correct, considering, *inter alia*, this lawsuit was a fraudulent counter to developments in a greater suit; the *Abbott* court inappropriately applied the *Brimm* rebuttable presumption to 73 Utah Code Ann. § 1-10. In *Brimm*, the issue that prompted the need to rebut 73 Utah Code Ann. § 1-10 was the fact that the court could not determine what water the contract referenced.[95] In *Abbott*, the contract between Abbott and Christensen did mention the shares of water stock, just not by name. The real estate conveyance contract included a provision that stated, "if the said Buyers shall . . . fail to pay the taxes or *water assessments* on the said property when the same shall become due, then [after notice Sellers may declare the agreement void and Buyers forfeit all rights]."[96] In analyzing this provision, the *Abbott* court reasoned that "there was no water to which

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[90] *Id*. at 258 n.1.

[91] *Id*. at 257.

[92] *Id.*

[93] *Id*.

[94] *Id*.

[95] *See* Brimm v. Cache Valley Banking Co., 269 P.2d 859, 864 (Utah 1954) (granting the land to the grantee notwithstanding that "no express mention of any water right [sic] was made in the deed.").

[96] *Abbott*, 660 P.2d at 257 (emphasis and punctuation in original).

the above provision could have referred except the 434 [sic][97] shares of Farnsworth stock involved in this controversy."[98] The land conveyance between Abbott and Christensen, therefore, did not merit analysis of the *Brimm* rebuttable presumption to 73 Utah Code Ann. § 1-10 because this rebuttable presumption is triggered when "no express mention of *any water right* [sic][99] is made in the deed."[100]

In *Abbott*, whether the shares of the stock were appurtenant to the land was irrelevant because the contract discussed the shares of Farnsworth stock in the sale. Rather than relying on the *Brimm* rebuttable presumption that shares of water stock not included in real estate conveyance contracts are not transferred as appurtenances to conveyed real estate, the *Abbott* court should have determined that the shares of stock were severed from the land yet included in the land conveyance to Christensen through the contract. Under this analysis, the *Abbott* court would still have reached the fair result of Christensen (the buyer) retaining the real estate and the shares of water stock. Instead, the *Abbott* court further weakened the statutory mandate that shares of water stock are not appurtenant to real estate by applying the *Brimm* rebuttable presumption to 73 Utah Code Ann. § 1-10 and holding that "Christensen rebutted the statutory presumption by clear and convincing evidence, and acquired ownership of the irrigation company stock under the real estate contract."[101]

The *Abbott* holding is particularly problematic because there was conflicting evidence regarding whether the land's value increased if the shares of Farnsworth stock were appurtenant to the land at the trial court level.[102] Under the second prong of *Brimm*, a piece of land's comparative value with or without the shares of water influences whether the shares of water stock are appurtenant to the land.[103] When the evidence shows that the shares of water stock in question were used on the land and this use increases the land's value, courts favor a finding that the shares of water stock are appurtenant to land. At trial, Abbott argued that the Farnsworth stock was not appurtenant to the land because the value of the land was the same with or without the water.[104] Abbott testified that the value of the land in 1974 without the Farnsworth stock was the same price that Christensen paid when he purchased the land on December 21, 1974.[105] Conversely, Christensen testified that the first 1974 value did not represent the value of the land without the water, "but simply the amount Abbott originally paid for the property, plus interest" because the parties

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[97] It is unclear whether the dispute was over 424 or 434 shares of Farnsworth stock because the opinion uses both amounts. However, the difference of ten shares one way or another makes no substantive difference to the legal analysis of the case.

[98] *Abbott*, 660 P.2d at 257.

[99] The dispute in Brimm involved shares of MCIC shares of water stock, not water rights.

[100] *Brimm*, 269 P.2d at 864 (emphasis added).

[101] *Abbott*, 660 P.2d at 257.

[102] *Id.* at 258 n.4.

[103] *Brimm*, 269 P.2d at 864.

[104] *Abbott*, 660 P.2d at 258 n.4.

[105] *Id.*

agreed that Abbott would not profit from the sale of the land.[106] Although it was not an error for the Utah Supreme Court to accept the district court's favorable weight of Christensen's testimony, the *Abbott* court's holding provides no analysis to guide future courts in their application of the second *Brimm* factor.

The ultimate result in *Abbott* is correct, but the court used the wrong legal tools to reach a sound conclusion. The *Abbott* court's unnecessary application of the *Brimm* rebuttable presumption to 73 Utah Code Ann. § 1-10 is problematic because it leads to further confusion for future courts when applying the *Brimm* rebuttable presumption in light of the mandatory language of 73 Utah Code Ann. § 1-10.[107]

A mere four months after *Abbott*, the Utah Supreme Court fell prey to its precedential confusion regarding the application of the *Brimm* factors while deciding *Roundy v. Coombs.*[108] In *Roundy*, a father conveyed all of his land and two shares of stock in the Boulder Irrigation Company to his son.[109] Later, the father conveyed a homesite parcel of the same land to his daughter.[110] To effectuate this sale, the son relinquished the homesite parcel by executing a quitclaim deed to the land in favor of his father, who then executed a warranty deed to the property in favor of the daughter.[111] None of the deeds or corresponding sales documents made any mention of the transfer of the two shares of stock in the Boulder Irrigation Company to the daughter.[112] Further, the daughter did not pay any of the stock assessments for the two shares of Boulder Irrigation Company stock; rather, the son paid these obligations.[113] Years later, the Boulder Irrigation Company abandoned its ditch system in favor of a water pipeline that bypassed the sister's homesite, thereby preventing the sister from using the two shares of water to irrigate her land.[114] The parties disputed whether the plaintiff-sister could continue to use the water, represented by two shares of stock in the Boulder Irrigation Company that the defendant-brother claimed to own.[115] The trial court awarded the two shares of water to the sister. On appeal, the Utah Supreme Court reversed in favor of the brother.[116]

On appeal, the plaintiff-sister argued that the trial court's award of the two shares of stock was correct under the precedent in *Brimm* because the water had been

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[106] *Id.*

[107] *Cf.* Hansen v. Utah State Ret. Bd., 652 P.2d 1332, 1337 (Utah 1982) (stating that "where a conflict arises between the common law and a statute or constitutional law, the common law must yield.").

[108] Roundy v. Coombs, 668 P.2d 550 (Utah 1983).

[109] *Id.* at 551.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.* at 552.

[115] *Id.* at 551 ("On appeal, defendants challenge only the award of the water stock, the issue presented being whether the evidence at trial was sufficient to warrant reformation of the deed to include a conveyance of water.").

[116] *Id.*

used on the homesite for many years and "that there was an understanding of all parties that there was some water to be used upon the property."[117] The sister argued that although her father's deed to her did not expressly mention the shares of stock, they were implicitly included in the deed because she consistently used the water to irrigate her land when her brother was not using the same shares of water to irrigate his fields. This practice pre-dated her ownership of the homesite by thirty-nine years.[118]

The *Roundy* court was not sympathetic to the sister's arguments, holding that the two shares of Boulder Irrigation Company water were not appurtenant to the sister's homesite.[119] The *Roundy* court supported its holding by applying both of the *Brimm* factors. First, the court followed the precedent set in *Hatch*[120] that the use of the shares of water alone is not sufficient to rebut the presumption that shares of water stock are not appurtenant to land.[121] Second, the *Roundy* court employed the second *Brimm* factor (that shares of water are more likely appurtenant to land when the value of the land is increased if the diligent right of the water stock is used on the land) holding in favor of the brother. The *Roundy* court reasoned that the two shares of water stock were not appurtenant to the homesite estate because "the value of the homesite was not dependent upon the use of the water."[122] The *Roundy* court reached this conclusion because the plaintiff-sister occasionally used water other than the Boulder Irrigation Company water to irrigate her homesite, again, mirroring the reasoning of the *Hatch* court.[123] With neither *Brimm* factor satisfied, the *Roundy* court reversed and held that the sister-plaintiff failed to carry her burden to rebut the presumption that her conveyance of the homesite included the two shares of Boulder Irrigation Company stock.[124]

The *Roundy* decision is strong evidence that the Utah Supreme Court employs the *Brimm* factors loosely to reach subjectively fair conclusions, rather than strictly

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[117] *Id.* at 552 (internal quotations omitted).

[118] *Id.* at 552–53 (The court held that the shares of water at issue had been used on the land since 1941 and this suit was filed in 1980).

[119] *See id.* at 551 (stating that "defendants challenge only the award of the water stock, the issue presented being whether the evidence at trial was sufficient to warrant reformation of the deed to include a conveyance of water. We conclude that it was not and reverse").

[120] Hatch v. Adams, 318 P.2d 633, 634 (Utah 1957) (stating that "[w]e are of the opinion that proof that water represented by water stock was used on certain land by the owner of the land during the entire period of his ownership of the land is not alone sufficient to rebut the presumption that such water is not to be deemed appurtenant.").

[121] *Roundy*, 668 P.2d at 553.

[122] *Id.* at 552.

[123] *See id.* at 552 (stating that "other water supplied by the town of Boulder was available and was used by plaintiff."); *see also Hatch*, 318 P.2d at 634 (holding that "[t]he evidence establishes that other water was used on the land in question. We are of the opinion that proof that water represented by water stock was used on certain land by the owner of the land during the entire period of his ownership of the land is not alone sufficient to rebut the presumption that such water is not to be deemed appurtenant.").

[124] *Roundy*, 668 P.2d at 553.

adhering to the *Brimm* factors as dispositive tools to determine whether shares of water stock are actually appurtenant to land. In *Brimm*, the court held that the shares of water stock were appurtenant to the land because: (1) the water had been used on the property for sixty-four years, and (2) the land had little worth without the water.[125] On the other hand, in *Roundy*, the court held that the shares of water stock were not appurtenant to the land despite the fact that: (1) the water in question was used on the sister's land for thirty-nine years,[126] and, (2) the homesite was located in the particularly arid location of Richfield, Utah.[127]

The *Roundy* court, following precedent, reduced the first *Brimm* factor to an irrelevancy. In *Roundy*, the court concluded that the two shares of Boulder Irrigation Company water were not appurtenant to the homesite even though this water was used on the homesite property for at least thirty-nine years.[128] The *Roundy* court, quoting *Hatch*, reasoned that "proof that water represented by water stock was used on certain land . . . is not alone sufficient to rebut the presumption that such water is not to be deemed appurtenant."[129]

However, this same argument influenced the court to take the opposite position in *Abbott*. The *Abbott* court held that the shares of water stock were appurtenant to the land in part because "the water at issue had been used on the land for over forty years."[130] Again, the *Roundy* court held that the first *Brimm* factor was not satisfied despite the consistent use of the two shares of Boulder Irrigation stock on the homesite for at least thirty-nine years.[131] Thus, the Utah Supreme Court used a difference of approximately one year to justify contradictory results in *Abbott* and *Roundy*. This suggests that Utah courts' subjective palatability of the ultimate result influences whether the first factor of *Brimm* is satisfied rather than the factor determining whether shares of water stock transfer as appurtenances to land.

The *Roundy* court's superficial application of the second *Brimm* factor further suggests that the Utah Supreme Court manipulated the *Brimm* rebuttable presumption to justify its desired ultimate result rather than as an objective formula to determine the appurtenant status of shares of water stock to real estate. The homesite in *Roundy* was in Richfield, Utah. Richfield receives approximately 8.48 to 8. 54 inches of rainfall per year.[132] The amount of rainfall is significant because the Utah Supreme Court held in the *In re Johnson's Estate* case that "in this arid

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[125] Brimm v. Cache Valley Banking Co., 269 P.2d 859, 864 (Utah 1954).

[126] *Roundy*, 668 P.2d at 553.

[127] *Id.* at 551.

[128] *Id.* at 552–53.

[129] *Id.* at 553 (citing Hatch v. Adams, 318 P.2d 633, 633, aff'd on rehearing, 329 P.2d 285 (Utah 1958)).

[130] *Abbott*, 660 P.2d at 257.

[131] *Roundy*, 668 P.2d at 552–53.

[132] *Climate Richfield—Utah,* U.S. CLIMATE DATA, https://www.usclimatedata.com/climate/richfield/utah/united-states/usut0213 [https://perma.cc/82YK-WFZQ] (last visited May 19, 2020).

country, in most cases, 'farm lands'[133] are valueless without water."[134] This is especially significant because, as discussed earlier, the *Brimm* court relied on the precedent set in *In re Johnson's Estate* while developing its two rebuttable presumption factors.[135]

While the statutory laws governing the transfer of shares of water stock at the time of *In re Johnson's Estate* were more lenient in permitting shares of water stock to be appurtenant to land than 73 Utah Code Ann. § 1-10,[136] the *In re Johnson's Estate* court was persuaded that the shares of water stock were appurtenant to the devised land, because of the land's aridity.[137] The court in *In re Johnson's Estate* reasoned that "[i]t is inconceivable that the testator in this case intended to devise . . . farm land and not include the water rights, [sic][138] upon the use of which depends the enjoyment and value of the property."[139] *In re Johnson's Estate,* therefore, suggests that whether a piece of land is worth more when coupled with shares of water stock is the most significant factor in determining whether a grantor intended that unmentioned shares of water stock be included in the sale of land as appurtenances to the sold land. This is especially significant because the land in question in *In re Johnson's Estate* was located in Salt Lake County, which has an average rainfall of 18.57 to 18. 58 inches per year.[140]

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[133] *In re Johnson's Estate* does not define what types of land constitute "farm lands." The *Roundy* court may have been persuaded that the plaintiff-daughter's estate, which was a homesite, did have the same need for water as land that is specifically used as "farm lands" for growing crops. However, this argument is somewhat contrary to the doctrine of beneficial use. A homesite surely requires water use and the *Roundy* court specifically mentions that the plaintiff-daughter used the two shares of water stock to irrigate her "garden, pasture and orchard area around the homesite." *Roundy*, 668 P.2d at 551. This type of water use would almost certainly be considered a beneficial use. Therefore, the distinction between the *Johnson's Estate* court's use of "farm-land" and the *Roundy* use of "homesite" is of minimal importance.

[134] *In re* Johnson's Estate, 228 P. 748, 752 (Utah 1924).

[135] Brimm v. Cache Valley Banking Co., 269 P.2d 859, 862 (Utah 1954).

[136] The statute governing the transfer of water stock when *In re Johnson's Estate* was heard is: By Laws Utah 1919, c. 67, section 16. This statute reads: "Water rights shall be transferred by deeds, in substantially the same manner as real estate, except when they are represented by shares of stock in a corporation, and such deeds shall be recorded in books kept for that purpose." The court interpreted this statute to mean: "[I]f the water right is represented by shares of stock in a corporation, the plain implication is that it may be transferred by a transfer of the certificate of stock, in the ordinary manner, as personal property. But that does not necessarily mean that water rights thus represented may not be an appurtenant to the land upon which the water is used, and pass as such with a conveyance of the land." *In re Johnson's Estate*, 228 P. at 750–51.

[137] *Id*. at 752.

[138] The court erroneously uses the words "water rights" to represent 44 shares of the capital stock of the Union & Jordan Irrigation Company. *Id*.

[139] *Id.*

[140] *Climate Salt Lake City—Utah*, U.S. CLIMATE DATA, https://www.usclimatedata.

The fact that Richfield County receives approximately ten fewer inches of rainfall than Salt Lake County suggests that the *Roundy* court was more concerned with not granting the plaintiff-sister an unpurchased windfall than actually determining whether the shares of water stock were appurtenant to the homesite. If the *Roundy* court's primary concern were whether the shares of water stock were appurtenant to the land, the court likely would have held that the shares of water stock were appurtenant to the plaintiff-daughter's land after an objective application of the two *Brimm* factors. First, the water in *Roundy* was used on the land for at least thirty-nine years,[141] approximately one year less than the acceptable amount of time under *Abbott*,[142] and second, the land was in an especially arid part of Utah.[143]

The Utah Supreme Court's refusal to objectively apply *Brimm's* rebuttable presumption that shares of water stock are not appurtenant to land reached its apex in *Salt Lake City Corp. v. Cahoon & Maxfield Irr. Co*.[144] In *Cahoon*, Salt Lake and Sandy cities transferred shares of water stock in violation of an irrigation company's articles of incorporation.[145] Without making any reference to *Brimm* or its progeny of cases outlined above, the *Cahoon* court ruled that the irrigation company's articles of incorporation governed any transactions involving the company's shares of water stock because "stock in a mutual irrigation corporation represents an interest in real property and is therefore not a certificated security under [title 70A—the Utah Uniform Commercial Code]."[146] In essence, *Cahoon* eliminated the rebuttable presumption that shares of water are not appurtenant to land and abrogated 73 Utah Code Ann. § 1-10 by reasoning that shares of water stock are interests in real property. Further, the Utah Supreme Court implied that shares of water stock, as real property interests, are appurtenant to land because the court held that "ownership of the shares of stock is merely incidental to the ownership of the [real property] water rights [owned] by the shareholders."[147]

Beginning with *Brimm* in 1954 to the 1994 decision in *Cahoon*, 73 Utah Code Ann. § 1-10 was eroded by various Utah Common law court decisions. Water stocks changed from being clearly defined as personal property that "shall not be deemed

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com/climate/salt-lake-city/utah/united-states/usut0225 [https://perma.cc/N5FA-RX2W] (last visited May 19, 2020).

[141] Roundy v. Coombs, 668 P.2d 550, 553 (Utah 1983).

[142] *See* Abbott v. Christensen, 660 P.2d 254, 257 (Utah 1983) (holding that Christensen rebutted the statutory presumption that shares of water are not appurtenant to land because "the water at issue had been used on the land for over forty years.").

[143] *Roundy*, 668 P.2d at 553.

[144] Salt Lake City Corp. v. Cahoon & Maxfield Irr. Co., 879 P.2d 248 (Utah 1994).

[145] *Id*. at 250; *see also* UTAH CODE ANN. § 16-6a-606 (West 2019) (stating that ownership of shares in a water company are transferrable unless the transfer is otherwise prohibited by the water company's articles of incorporation).

[146] *Cahoon*, 879 P.2d at 252.

[147] *Id.* at 253 n.8 (citing Jacobucci v. Dist. Court In & For Jefferson Cty., 541 P.2d 667, 672 (Colo. 1975)).

to be appurtenant to the land"[148] to an entity that is inherently appurtenant to land as an "interest in real property."[149] Thus, Utah common law obfuscated the once clear distinction between water rights and shares of water stock, fulfilling Justice Henriod's prophetic dissent in which he stated that the *Brimm* decision would invoke lawsuits where one's ownership of water "may depend on presumption or the lack of it."[150]

IV. THE UTAH LEGISLATURE'S CLARIFICATION REGARDING HOW SHARES OF WATER STOCK ARE TRANSFERRED

In direct response to *Cahoon*, the Utah Senate passed House Bill 61 in 1996.[151] After explicitly disagreeing with the result of *Cahoon* by name, Utah Representative David Ure explained that under House Bill 61 "the water certificate itself . . . will be classified as personal property and will be . . . governed under the same rules as the Uniform Commercial Code" to ensure that financial institutions will know how to protect their collateral.[152] Specifically, House Bill 61 amended 73 Utah Code Ann. § 1-10 by adding subsection 2, which reads: "[t]he right to the use of water evidenced by shares of stock in a corporation shall be transferred in accordance with the procedures applicable to securities set forth in Title 70A, Chapter 8, Uniform Commercial Code . . . ."[153]

The Utah legislature later emphasized how shares of water stock are transferred under House Bill 61 by adding paragraph (b) to subsection (4) of 73 Utah Code Ann. § 1-11 which reads: "[o]n or after May 14, 2013, . . . the right to the use of water evidenced by shares of stock in a corporation shall transfer only as provided in Subsection 73-1-10(2)."[154] When combined, the two amended statutes read: "[o]n or after May 14, 2013, . . . the right to the use of water evidenced by shares of stock in a corporation shall transfer only"[155] "in accordance with the procedures applicable to securities set forth in Title 70A, Chapter 8, Uniform Commercial Code--Investment Securities."[156] In other words, under House Bill 61 and the 2013 amendment to 73 Utah Code Ann. § 1-10, the Utah legislature mandated that shares

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[148] Brimm v. Cache Valley Banking Co., 269 P.2d 859, 863 (Utah 1954).

[149] *Cahoon*, 879 P.2d at 252.

[150] *Brimm*, 269 P.2d at 865 (Henriod, J., dissenting).

[151] *See In re* Anderson, No. ADV 12-2348, 2014 WL 172222, at *8 (Bankr. D. Utah Jan. 15, 2014) ("In 1996, the Utah Legislature passed House Bill 61 ("H.B.61"), which amended § 73–1–10 and § 73–1–11 of the Utah Code Annotated, and enacted § 70A–8–409.").

[152] *Floor Debate*, General 51st Leg., Gen. Sess. (Utah Jan. 30, 1996) (Committee recording tape no.2) (statement of Rep. David Ure), *available at* https://le.utah.gov/av/floorArchive.jsp?markerID=27246 [https://perma.cc/4U92-AZVE].

[153] UTAH CODE ANN. § 73-1-10 (West 2019).

[154] H.B. 326, 60th Leg., Gen. Sess, 2013 Utah Law ch. 363 (Utah 2013).

[155] *Id*.

[156] UTAH CODE ANN. § 73-1-10(2) (West 2019).

of water stock shall transfer as personal property[157] security interests under chapter eight of the Utah Uniform Commercial Code to ensure that courts produce predictable outcomes that allow for companies to protect the collateral that they hold in the form of shares of water stock.[158] These amendments unequivocally mandate that shares of water stock are personal property that is explicitly governed by titles 70A and 73 of the Utah Code.

V. THE UTAH SUPREME COURT'S CONTINUED REFUSAL TO FOLLOW STATUTORY LAW REGARDING THE TRANSFER OF SHARES OF WATER STOCK

Just one year after the Utah Legislature amended 73 Utah Code Ann. § 1-11, the Utah Supreme Court rejected the argument that a share of water stock is governed under Title 70A of the Utah code in *Southam v. S. Despain Ditch Co*.[159] The facts in *Southam* are similar to *Cahoon*. In *Southam*, a buyer bought shares of water stock "in contravention of [the company's] restrictions on transferability" within the company's articles of incorporation.[160] The purchaser argued that under *Cahoon,* shares of water stock are "interests in real property."[161] Accordingly, the purchaser argued that the South Despain Ditch Company's articles of incorporation restricting transferability were void under the common law principle that restraints on the alienability of real property are void.[162]

The *Southam* court ruled that the purchaser's arguments failed on two grounds. First, the court held that the transferability of the stock is "foreclosed or preempted by the clear, comprehensive terms of . . . the Revised Nonprofit Corporation Act."[163] Second, the court ruled that the plaintiff's argument that the corporation's restrictions on water stock transferability were a restraint on alienation of real property was incorrect because "the transaction at issue is not the transfer of real property interests in water; it is the transfer of shares of a nonprofit corporation."[164] While these holdings appear sound when viewed individually when compared against each other, the court's logic justifying its first holding violates the logic needed to justify the second.

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[157] *See id.* § 70A-1a-201(2)(ii) (defining a "[s]ecurity interest" as an interest in personal property rather than real property).

[158] *See* H.B. 326, *supra* note 154.

[159] Southam v. S. Despain Ditch Co., 337 P.3d 236 (Utah 2014).

[160] *Id.* at 237.

[161] *Id.* at 239.

[162] *Id.* at 238 (noting that the "[buyer] also sought to challenge the South Despain transfer restrictions as an unlawful restraint on alienation."); *see also* Page v. Page, 394 P.2d 612, 613 (Utah 1964) (holding that "any provision of an instrument of conveyance or of any later instrument which purports to prohibit or restrain the conveyee or owner in fee from alienating the property or to withhold from him the right or power to alienate, whether for the entire period of his life or for some lesser time, is void").

[163] *Southam*, 337 P.3d at 240.

[164] *Id.* at 241.

In deciding that the stock could not be transferred because the transfer would violate section 606 of the Revised Nonprofit Corporation Act, the court explained that it was bound to adhere to the statutory restriction on the transferability of stock under section 606 because "a *legislative* presumption of the *general* nontransferability of nonprofit shares, . . . leaves little room for a *judicial* determination that *more limited restrictions* are void as contrary to public policy" and that "the expression of one [interpretation of law] should be interpreted as the exclusion of another."[165]

Therefore, under *Southam*, *Brimm* and its progeny of cases should be abrogated because all these cases rely heavily on a judicial determination of law at the expense of a legislative mandate. Namely, the *Brimm* decision that the statutory language "shall not be deemed to be appurtenant to the land," is only a presumption that may be rebutted.[166] However, rather than abrogating *Brimm* and the cases that follow in its wake, *Southam* implicitly endorses the common law principle that shares of water stock are more akin to real estate than personal property, thereby upholding the *Brimm* rebuttable presumption. This is because *Southam* confirms the holding in *Cahoon* that shares of water stock are "interest[s] . . . involving real property."[167]

Moreover, the *Southam* holding that legislative presumptions trump contrary judicial determinations abrogates *Southam* itself. As discussed above, the *Southam* court endorsed the judicial determination in *Cahoon* that shares of water stock are not securities. This endorsement of a judicial determination is contrary to a legislative *mandate*, not just a *presumption*. *Southam*, repeating the holding in *Cahoon*, stated, "we have rejected the argument that an interest in a mutual irrigation company is a 'security' governed by our Investment Securities Act, Utah Code section 70A–8–102(1), and in so doing have characterized the interest as one involving real property."[168] The *Southam* court's echo of *Cahoon* is blatantly contrary to the legislation made in direct response to *Cahoon*; namely, that "the right to the use of water evidenced by shares of stock in a corporation *shall transfer only*"[169] ". . . in accordance with the procedures applicable to securities set forth in Title 70A, Chapter 8, Uniform Commercial Code--Investment Securities."[170] By upholding section 606 of the Revised Nonprofit Corporation Act and *Cahoon*, the *Southam* court simultaneously embraced and condoned the idea that judicial determinations may contradict legislative mandates.

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[165] *Id.* (emphasis in original) (citations omitted).

[166] *See* Brimm v. Cache Val. Banking Co., 269 P.2d 859, 864 (Utah 1954) (holding that the phrase, "in which case water shall not be deemed to be appurtenant to the land" establishes "a rebuttable presumption that a water right represented by shares of stock in a corporation did not pass to the grantee as an appurtenance to the land" (citing UTAH CODE ANN. § 100-1-10 (1943) (recodified as UTAH CODE ANN. § 73-1-10 (2019)))).

[167] *Southam*, 337 P.3d at 241 n.7.

[168] *Id.*

[169] UTAH CODE ANN. § 73-1-11(4)(b) (West 2019).

[170] *Id.* § 73-1-10(2) (West 2019) (emphasis added).

The *Southam* court's preservation of the holding in *Cahoon* also contradicts its own statements of law. *Southam* undercuts *Cahoon* by stating in a footnote that "the *Cahoon* case can hardly be understood to establish the general applicability of real property law in regulating interests in mutual irrigation companies,"[171] despite the *Cahoon* court expressly stating: "we hold that stock in a mutual irrigation corporation represents a real property interest."[172] The *Southam* holding affirms that shares of water stock are interests in real property, but suggests that real property law principles are inapplicable to determine how these shares of water stock are transferred because the *Southam* court held that "the transaction at issue is not the transfer of real property interests in water; it is the transfer of shares of a nonprofit corporation."[173]

The *Southam* court, therefore, upholds two contradictory legal principles. First, *Southam* forwards the position that Utah courts should "advance the public policies enshrined in Utah statutes, and not to advance others that [the court] might find controlling if [it] had a policymaking role,"[174] while in the same breath abrogating 73 Utah Code Ann. § 1-10 by affirming the *Cahoon* court's holding that shares of water stock are not certified securities under 70A Utah Code Ann. § 8-102.[175] Second, in a footnote *Southam* rejects the notion that real property common law governs how shares of water stock are transferred because *Southam* declares that "the *Cahoon* case can hardly be understood to establish the general applicability of real property law in regulating interests in mutual irrigation companies,"[176] even though the *Southam* court itself "characterized [shares of water stock] as one involving real property," in the same footnote.[177]

Southam thus securely places shares of water stock in a state of complete legal confusion. *Southam* abrogates *Brimm* and its progeny by holding that legislative decisions silence judicial opposition on the same subject. However, it upholds *Brimm's* underlying message that shares of water stock are more akin to real property than personal property. Further, *Southam* defends the integrity of Utah statutes from judicial intervention by adhering to the Revised Nonprofit Corporation Act. However, it completely defiles the statutory mandate that title 70A governs the transfer of shares of water stock by reinforcing the holding from *Cahoon,* which states precisely the opposite.

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[171] *Southam*, 337 P.3d at 241 n.7.

[172] Salt Lake City Corp. v. Cahoon & Maxfield Irr. Co., 879 P.2d 248, 253 (Utah 1994).

[173] *Southam*, 337 P.3d at 240241.

[174] *Id.* at 241 (quoting McArthur v. State Farm Mut. Auto. Ins. Co., 274 P.3d 981, 984 (Utah 2012)) (internal quotation marks omitted).

[175] *Id.* at 241 n.7.

[176] *Id.*

[177] *Id.*

VI. CONCLUSION

To date, it is not only unclear how shares of water stock in Utah should be transferred, but also how priority to these shares of water stock is perfected. When an instrument (such as a deed or a stock certificate) is perfected, it is executed and filed with a public registry.[178] Thus, the perfection of a water right, or share of water stock, determines the priority under which water appropriators may draw their diligent right in relation to other appropriators.[179] Under *Brimm*, contested shares of water stock are perfected like real estate, namely, by a judicial decree rebutting the presumption that the shares of water stock are not appurtenant to land. Under the principles of *Cahoon* and *Southam*, shares of water stock apparently are perfected under real property laws subject to a "mutual irrigation corporation's articles of incorporation, if valid."[180] Under Title 70A of the Utah Code, a share of water stock, as a security, is perfected by control.[181] This occurs when the "security is delivered to the purchaser," like personal property.[182] Therefore, Utah law allows an owner of a share of water stock to establish their priority right to use water as the first in time by: (1) buying the land which the water is appurtenant to, subject to the *Brimm* factors; (2) creating a water company that includes articles of incorporation that bestow the stock to the shareholder-owner, as determined by the *Southam* court; and (3) possessing the stock certificate under Utah statutory law.

Furthermore, nonprofit mutually-owned water companies are difficult for courts to regulate. Courts have reasoned that mutually-owned companies are beyond the scope of anti-trust monopoly regulations because "the conflict of interest between consumer and vendor are eliminated because the owners are both the buyers and sellers of their own services."[183] Mutually-owned companies are not at risk to monopolistic conflicts of interest, because if rates are low, consumers must accept the diminished quality of services, or increase their payments to improve the services.[184] If rates become too high, the surplus is collected and returned to the consumer-owners pro-rata.[185] If consumer-owners are ever dissatisfied with the services they receive, they "have it in their power to elect other directors and demand certain changes."[186] Because mutual ownership of a company includes inherent

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[178] *See Perfect*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also Instrument*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[179] *See supra* Section II.B.

[180] Salt Lake City Corp. v. Cahoon & Maxfield Irr. Co., 879 P.2d 248, 252 (Utah 1994).

[181] *See* Editors' Notes, *Uniform Commerical Code Comment*, UTAH CODE ANN. TIT. 70A, CH. 8, REFERENCES & ANNOTS Westlaw (current with laws effective through May 11, 2020) ("The basic rule is that a security interest may be perfected by 'control.'").

[182] UTAH CODE ANN. § 70A-8-105(1) (West 2019).

[183] Bear Hollow Restoration, LLC v. Pub. Serv. Comm'n of Utah, 274 P.3d 956, 962 (Utah 2012).

[184] Garkane Power Co., Inc. v. Pub. Serv. Comm'n, 100 P.2d 571, 573 (Utah 1940).

[185] *Id*.

[186] *Id.*

checks and balances that discourage monopolistic behavior, courts have found that "mutual ownership eliminates the policy justifications for regulation and such government interference becomes unwarranted."[187]

Courts are also hesitant to regulate mutually-owned nonprofit water companies that are not classified as public utilities. Nonprofit mutually-owned water companies are either public utilities or private companies.[188] The Supreme Court of Utah reasoned that "[t]he essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefiniteness or unrestricted quality that gives it its public character."[189] Conversely, a private mutually-owned nonprofit water company only provides services to its members.[190] Courts have declared that private mutually-owned nonprofit water companies are not converted into public utilities even when the company's shareholders permit the general public to use the water that the shareholders' own.[191] This means that as Utah's population rapidly grows,[192] the governing bodies that write the articles of incorporation and bylaws of private nonprofit water companies will have a vast amount of power to determine how their water is used, and these governing bodies will likely be outside the scope of judicial oversight.

To solve these issues, the Utah Supreme Court should follow its directive and "advance the public policies enshrined in Utah statutes."[193] As expressed by former Rep. David Ure, to ensure that financial institutions will know how to protect their collateral,[194] when disputes arise regarding the transfer of shares of water stock, the Utah Supreme Court should hold that shares of water stock "shall be transferred in accordance with the procedures applicable to securities set forth in title 70A."[195] Further, the court should use areas of law outside of water law to render justice when required. If the Utah Supreme Court follows its own mandate "that common law must yield" when "a conflict arises between the common law and a statute or

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[187] *Bear Hollow*, 274 P.3d at 963.

[188] *See id.* at 962–63 (discussing the court's test to determine if a utility is public and thus subject to the jurisdiction of the Public Service Commission).

[189] *Garkane Power*, 100 P.2d at 573 (quoting Thayer v. Cal. Dev. Bd., 128 P. 21, 25 (Cal. 1912)).

[190] *See Bear Hollow*, 274 P.3d at 963 (stating that "exclusive service to owner-members is incompatible with the concept of public service . . . ").

[191] *Id.* ("The fact that those shareholders may permit the public to use the water to which the shareholders are legally entitled does not convert SWDC into a public utility. If such were the case, a shareholder who allows a guest to wash her hands or drink a glass of water could independently defeat the purposes of the entire cooperative and convert it into a public utility.").

[192] Lee Davidson, *Study: Utah to Nearly Double Population by 2050*, SALT LAKE TRIB. (Apr. 18, 2014, 12:35 PM), https://archive.sltrib.com/article.php?id=57833427&itype=CMS ID [https://perma.cc/Z5WL-JQEK] (predicting that Utah is expected to add "2.5 million people to its current 2.9 million" by 2050).

[193] Southam v. S. Despain Ditch Co., 337 P.3d 236, 241 (Utah 2014).

[194] *See Floor Debate*, *supra* note 152 (statement of Rep. David Ure).

[195] UTAH CODE ANN. § 73-1-10(2) (2019).

constitutional law,"[196] individuals and corporations will know how to convey and protect their water rights (which are real property), their shares of water stock (which are personal property), and future litigants seeking to access water owned by private nonprofit mutually-owned water companies will know what legal theories (real property principles or principles governed by the Utah Uniform Commercial Code) to use to persuade courts to provide favorable results that will ensure that Utahns across the state will have the ability to beneficially use one of the state's most valuable resources.

[196] Hansen v. Utah State Ret. Bd., 652 P.2d 1332, 1337 (Utah 1982).