

MEMORANDUM

To: Bill Hyde
 From: Craig Anderson and Rick Wathen
 Re: Salt Lake City Change Applications
 Date: July 27, 1993

HEARING SUBMITTAL TO
 DIVISION OF WATER RIGHTS

Right No.: a28548 + a28545

Date: 7/13/2011

Submitter: Applicant

Kevin Tolton

I. Background

A. Change Applications

~~Salt Lake City has filed a number of change applications with the Utah State Engineer, Robert J. Murdock, a professional engineer, sent a letter dated May 28, 1993, addressed to Robert L. Morgan, the State Engineer, protesting the change applications filed by Salt Lake City. A copy of the letter was sent to Commissioner Bradley and was received in his office on June 1, 1993. The letter was forwarded to the County Attorney's Office by Commissioner Bradley on June 1st, after the thirty day deadline (May 29, 1993) for filing a protest.~~

B. Basis for the City's Change Applications

~~Each of the change applications are based on prior contracts with Salt Lake City to provide water. It appears that many of these prior contracts were negotiated by Salt Lake City in the past without formal approval. Furthermore, all of the applications deal with a change in the "nature of use" of the water. This involves changing what the City claims to be "municipal" use to other uses such as recreation. The fundamental problem is that the "municipal" use was never approved by the State Engineer.~~

~~For example #16837 request to divert water to be used by the Millcreek Inn. Obviously, the Millcreek Inn has been in operation and using water for some time. Also, #16843 requests a diversion of water to Salt Lake County service area #3 (Snowbird) pursuant to an agreement with Salt Lake County. The contract between the city and county was signed in 1980. Simply stated, the City is trying to change a municipal use that has never been approved.~~

~~It appears that Salt Lake City may now be trying to comply with the states water diversion requirements. Utah Code § 73-3-3. Non-compliance is a class B misdemeanor for each day of the unlawful change, constituting a separate offense, separately punishable. Id. at (9)(b).~~

C. Description of the change applications.

LITTLE COTTONWOOD CANYON

16839- USDA for recreational purposes
 16841- Alta Peruvian Lodge for incidental uses of 13 homes
 16842- Charlotte Sturdy for domestic requirements
 16843- Salt Lake County to provide service to SL County service area #3 (Snowbird) resort use including snow making

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16844- Alta City resort use including snow making
 16845- John D. Cahill for domestic use
 16846- ~~Canyonlands, Inc. domestic requirements up to 35 homes~~

BIG COTTONWOOD CANYON

16811- Brighton Lodge for fire protection
 16812- Board of Advisors of LDS camp for domestic purposes
 16813- Cardiff Fork Assoc. for domestic use of up to 40 homes
 16814- Evergreen Summer Homes domestic for up to 15 homes
 16815- Giles Flat Water Users Association domestic up to 17 homes
 16816- 12 named individuals for domestic use
 16817- Lady of the Lake subdivision for domestic use up to 9 homes
 16818- Wasatch National Forest within Mill "D" homes association (homeowners have special use permit through WNF) for domestic use up to 23 homes
 16819- Mule Hollow Water Co., Inc. for domestic use up to 26 homes and 1 lodge
 16820- Walter J. Plumb III for domestic use up to 10 homes
 16821- Robert Scott for domestic use up to 5 homes
 16822- James Moyle for domestic use up to 31 homes
 * protest by relative who claims ownership to rights
 16823- Timberline Water Co. for domestic use up to 4 homes
 16824- John A. Ward for domestic use up to 40 homes
 * Ward is protesting claiming original right to water
 16825- Big Cottonwood Pine Tree Water Co. for domestic up to 66 homes
 16826- Joy F. Dunyon for domestic use up to 122 homes
 16827- Mount Haven Owners Assoc. for domestic use up to 92 homes
 16828- Bravo Ski Corp. (Solitude Resort) domestic use for up to 320 rental units and fire protection
 16829- Silver Park Pipeline Corp. for domestic use up to 330 homes
 16840- US Department of Agriculture for recreational and incidental use

PARLEY'S CANYON

16786- Forest Home Co. for domestic use of up to 125 homes
 16787- 10 named individuals for domestic use
 16788- For Salt Lake City's Mountain Dell storage reservoir to service Lamb's Canyon users
 16789- Lost Acres Water Users Assoc. for domestic use up to 22 homes

MILLCREEK CANYON

16836- Porter Fork Summer Home Assoc. for up to 31 summer homes
 16837- Allan Frandsen for use of Millcreek Inn
 16838- US Department of Agriculture for recreational and incidental use

D. Protests of Applications

The protests range from challenges to the ownership of certain water rights, to the beneficial use of the water and public welfare.

1. Murdock - Mr. Robert Murdock's protest of the proposed change application is based on his belief that the applications will interfere with the "beneficial use" of the water and will otherwise be detrimental to the general public welfare. Mr. Murdock's position is based on the characterization of the water as "surplus." His public welfare concerns are essentially as follows:

- a. Surplus water provided to non-residents for culinary and sanitary purposes may be discontinued by the City at any time;
- b. The surplus water sold by the City is high quality culinary water and is being used for irrigation, dust control, snow making, and other uses for which lower quality water is more suitable.
- c. Surplus water used for irrigation, dust control and snow making, should be given a lower priority in preference to residential culinary and sanitary uses. Mr. Murdock also notes that several of the applications are deficient because they are either untimely or in error.

Mr. Murdock's goal is to move away from reliance on surplus water, by forming an independent public entity (special service district) or private entity (mutual water company) to acquire and hold water rights for the benefit of residents of the unincorporated County. Most of the points raised by Mr. Murdock are the same as the issues in the White City case: (1) termination of service without notice; (2) "double taxation" - in the form of paying taxes to the Salt Lake County Conservancy District and paying higher rates to the City for surplus water; and (3) the threat of annexation.

Mr. Murdock is of the opinion that the County Commission could form a special service district to perform this function for the residents of the east side of the County. A special service district may be more desirable than a mutual water company given the number of people involved. Residents of the west side of the County receive water from the Salt Lake County Water Conservancy District.

2. Forest Service - Applications are improper because Salt Lake City lacks the authority to change water flow on U.S. Forest Service property. (This may involve the federal reserved water rights issue under the Winters Doctrine).

3. The following dispute ownership of many of the water rights:

Cahoon and Maxfield Irrigation Company
 Evergreen Summer Home Association
 Big Cottonwood Pine Tree Water Company
 Kurt Zilm, David Vanier and Kelly Ragsdale
 Silverlake Subdivision
 Ward Investment Company
 Silver Fork Pipeline Corp.

4. H. Stauffer disputes many of the applications on the basis that the changes will disrupt head water flow.

II. Administrative Procedures

A. Informal Hearing

Water rights disputes are governed by administrative procedures. Utah Admin. R. 655-6 (1993). Disputes before the Division of Water Rights are conducted as informal proceedings. Id. at 655-6-2. To become a party to an informal proceeding regarding a water change application a protest must be filed with the Division of Water Rights within 30 days after notice of the pending change application is published. Utah Code §73-3-7(1). The deadline for protesting the Salt Lake City applications was May 29, 1993. (phone conversation on 6/22/93 with Judy at the Division of Water Rights).

Protests filed after the expiration of the protest period will be placed on file and will become part of the administrative record. Utah Admin. R. 655-6-5(B)(5)(d). The late protestant will receive notice of the proceedings. Id. A late protestant may participate in the hearing as a witness, and with the consent of the Presiding Officer, may also participate in the Division's investigation. Id. at R.655-6-11(B). However, the protestant does not become a party to the action, Id. at 655-6-5(B)(5)(d), and may not seek judicial review. Id. at R.655-6-11(B). (Perhaps in contradiction, Utah Code §73-3-14(1)(a) states that "any person aggrieved" by an order of the State Engineer may seek judicial review of that order).

B. Standard of Administrative Review

It is the duty of the State Engineer to withhold approval of appropriation applications if the use would interfere with a more beneficial use, or if it will unreasonably affect public recreation or the natural stream environment, or if it will prove detrimental to the public welfare. Utah Code §73-3-8(1) (1992). The State Engineer has the same duty regarding permanent change applications. Bonham v. Morgan, 788 P.2d 497,502 (Utah 1989). Generally, an

aggrieved party must exhaust all administrative remedies before resorting to judicial review. Utah Code §63-46b-14 (1992).

C. Appeal

The district court has jurisdiction to review de novo the final decisions of these informal proceedings. Id. at §63-46b-15(1)(a). The district court proceedings are governed by the Utah Rules of Civil Procedure. Id. at (2)(a). On appeal, a party who was not a party to the administrative hearing may seek permissive joinder under Rule 20 or intervene under Rule 24.

An administrative hearing is scheduled for August 4, 1993, to hear all protests regarding Salt Lake City's change applications.

III. County's Interest In Change Applications

The County's interest in the change applications parallel the public welfare concerns raised by Mr. Murdock, as noted above. In addition, the surplus water issues are essentially the same as those raised in the White City case, and are summarized as follows:

A. "Surplus" Water and Public Welfare Issues

1. Residential service to dwellings in Salt Lake County.
 - a. Potential disenfranchisement of non-residents;
 - b. Likelihood that differential rates will be established for residents and non-residents;
 - c. A surplus is temporary by definition; and
 - d. Service can be terminated without notice
2. Surplus high quality culinary water should be prioritized for residential use. Lower quality water should be used for irrigation, dust suppression and snow making.
3. Fire protection - adequate volume and pressure for fire suppression.

B. Beneficial Use

The concept of surplus water is inconsistent with the requirement that water be put to a beneficial use.

IV. Options

At this point in the pending administrative proceedings, Salt Lake County has two possible options. First, the County can attend the August 4, 1993, hearing and participate as a non-party to the extent allowed. At this hearing the County may request the State Engineer to withhold approval of the change applications pending further investigation of a special service district by the County

Commission. The County may also submit a written statement of position rather than attending and participating in the hearing. This approach would allow the Commission to evaluate the impact of the change applications on the residents of the County prior to becoming involved in any litigation.

Second, the County can wait for the State Engineer's decision on the change applications. If the State Engineer's determination is adverse to one or more of the protestants, and his decision is appealed to the district court, the County may intervene in the proceedings as a party. Because an appeal will involve de novo review, the County can address all of the relevant issues. The only limitation is that a party to the administrative proceeding must file an appeal.

Please review this matter with the Commissioners and advise me regarding how they wish to proceed in this matter. A decision must be made before the August 4, 1993, hearing date.

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