MABEY WRIGHT & JAMES PLLC
ATTORNEYS AT LAW

175 SOUTH MAIN, SUITE 1330
SALT LAKE CITY, UTAH 84111

John H. Mabey, Jr. jmabey@mwjlaw.com
TELEPHONE: (801) 359-3663 www.mwjlaw.com FACSIMILE: (801) 359-3673

January 23, 2013

RECEIVED
JAN 23 2013 SC
WATER RIGHTS
SALT LAKE

Mr. Kent L. Jones
Utah State Engineer
1594 West North Temple Suite 220
P.O. Box 146300
Salt Lake City, Utah 84114-6300

Re: Sandy Irrigation Company Request for Reconsideration; Change Application Number 57-7800 (a28548)

Dear Mr. Jones:

Sandy Irrigation Company respectfully requests that the state engineer reconsider the state engineer order which approved Change Application a28548 with conditions ("Order"). In addition to not properly addressing all the statutory criteria for change applications and denying the application on those grounds, the Order improperly authorizes new diversions of water during the non-irrigation season above Sandy Irrigation Company's point of diversion, which will directly impair Sandy Irrigation Company's non-irrigation season water rights. Clarification is needed with regards to the right of the change applicant to divert water during the non-irrigation season. It appears the state engineer overlooked the state engineer's water right records for Water Right No. 57-9001 wherein the water rights of Salt Lake City for the non-irrigation season are already expressly recognized. Because it is more likely than not that the proposed change application will impair the water rights of Sandy Irrigation Company on Little Cottonwood Creek, the change application must be rejected.

Approved Change Application No. a28548. The Order approves the change application subject to condition 1:

> This application is limited to a maximum annual diversion of 0.53 acre-foot of water to be used for the indoor domestic use of one family and fire protection solely from the well source, subject to the prior contractual obligation during the winter or non-irrigation season that is associated with this right.

As approved, water may be diverted from a well, but the amount of water diverted during the non-irrigation season is especially restricted. During the non-irrigation season the condition restricts the quantity of water diverted as

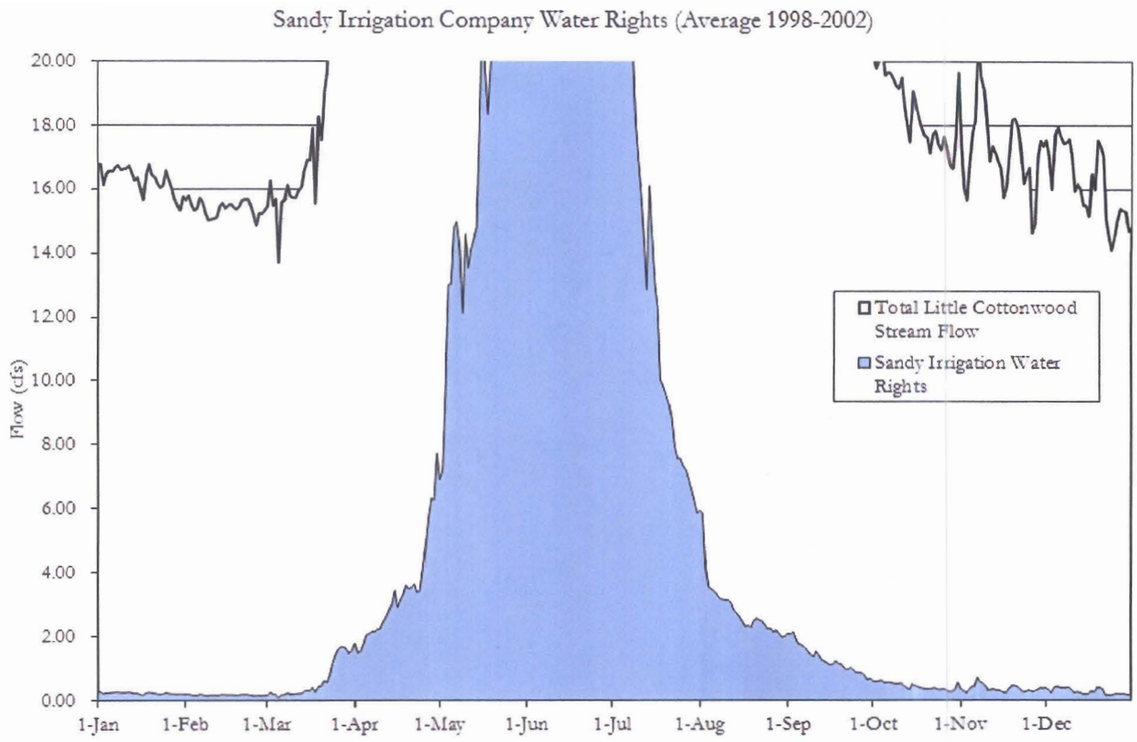
limited by the 1934 contract with Salt Lake City. The Order on Page 6 describes this restriction as "any diversions made must be limited to historical diversion amounts of the underlying right which, based on existing contracts, restricts the amount of water that can be diverted during the 'winter or non-irrigation season.'"

In order for Sandy Irrigation Company's rights to be meaningfully protected from impairment, the state engineer must clarify what that exact restriction amount is. Water should not be diverted from the well during the non-irrigation season until the restriction is defined. Such restriction could be as little as zero, depending on the limitations of the contract. If after reconsideration the state engineer should still decide to approve the application, the state engineer should clarify in an amended order that under the approved change the diversion of water is limited to a specific number of gallons per day during the non-irrigation season. Such amount must be limited to "historical diversion amounts of the underlying right" as demonstrated by the applicant and restricted by the 1934 contract.

Impairment of Sandy Irrigation Company's Non-Irrigation Season Water Rights. If the amount of water diverted under the approved change application during the non-irrigation season exceeds the historical diversion amount, the non-irrigation season water rights of Sandy Irrigation Company will be impaired. The Company owns water rights which divert below the mouth of Little Cottonwood Canyon, including water during the non-irrigation season. Water Right No. 57-8756 in the name of Sandy Irrigation Company is certificated to divert 2.0 cfs or 1,448 acre-feet of water year round for municipal purposes. Sandy Irrigation Company is obligated by contract to deliver this water to Sandy City.

The Order approves one domestic use with an unknown limitation amount during the non-irrigation season. It is likely that limitation amount will be less than what is necessary to meet the requirements for domestic water. Because it will be impractical if not impossible for the one domestic use to have sufficient water, the state engineer should order that the domestic use period of use should be restricted to the irrigation season. Otherwise, diversion of water to meet the demands of the domestic use will exceed the non-irrigation season limitation and thereby impair the water rights of Sandy Irrigation Company.

Any water diverted above the Sandy Irrigation Company point of diversion in excess of historic diversions will impair the company's water rights. The following figure shows the five-year average between 1998 and 2002 of the total flows of Little Cottonwood Creek and the water available to Sandy Irrigation Company under its water rights (blue portion of graph). The top of the graph is truncated to focus on the non-irrigation season.



During the non-irrigation season, the Company continues to receive water under its water rights. This water goes to satisfy the Company's contract with Sandy City for up to 2.0 cfs. During those times of the year, particularly the non-irrigation season, when there is insufficient water in the creek to provide the 2.0 cfs to Sandy City under the Company's water rights, *any* increased diversions and depletions over and above historic water rights will impair the water rights of Sandy Irrigation Company. There is no such theory as a *de minimus* impairment under Utah law. *Piute Reservoir & Irr. Co. v. West Panguitch Irr. & Res. Co.*, 367 P.2d 855, 858 (Utah 1962).

Accordingly, until the applicant can meet its burden of demonstrating that there is reason to believe the change application can be approved without impairing the water rights of Sandy Irrigation Company, the change application must be rejected as an unlawful enlargement.

Sincerely,
MABEY WRIGHT & JAMES, PLLC
Attorneys for Sandy Irrigation Co.

John H. Mabey, Jr.

JHM/ma