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March 29, 2013

Mr. Kent L. Jones, State Engineer
UTAH DIVISION OF WATER RIGHTS
1594 West North Temple, Suite 220
Salt Lake City, Utah 84114-6300

Re: Water Right Nos. a28537 (57-10315), a28541 (57-10316), a28546 (57-10318) and a28547 (57-10319)

Dear Mr. Jones:

I'm writing as counsel for the owners of the referenced water rights, in response to your February 28, 2013 request for information regarding ownership of the segregated portions of water right 57-7800 and the historic depletion of that right. Your request is a little unusual procedurally in the sense that there has been no hearing or decision on the pending change applications filed by my clients and consequently these subjects might be viewed as premature as to those applications, but I recognize that the ownership and quantification questions raised in your letter relate directly to my clients' similar water rights so I appreciate the opportunity to respond in their behalf.

Ownership Allocation

We agree with your assessment that water right 57-7800 as presently segregated and shown in the State Engineer's records does not reflect an equal 1/6 interest as it should under the Water Right Deed dated October 29, 2003 and recorded in Salt Lake County on December 10, 2003 as Entry 8920853, on which the relevant Report of Conveyance is based. For that reason, we are grateful that reconsideration of the January 3, 2013 approval order on a28548 (the "Order") was granted so that this error can be corrected in the new approval order.

Parr Brown Gee & Loveless, A Professional Corporation
185 South State Street, Suite 800, Salt Lake City, UT 84111
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The certificated diversion limits and depletion amounts for the changed portion of water right 57-7800 prior to its segregation are as follows:

Use	Annual Diversion Limit	Depletion Percentage	Annual Depletion
3 families x 0.45 af/family	1.35 af	20%	0.270 af
0.73 acres x 5.0 af/acre	3.65 af	42.4%	1.548 af
15 ELUs x 0.028	0.42 af	100%	0.420 af
TOTAL	**5.42 af**		**2.238 af**

Each of the six grantees of 57-7800 owns an equal 1/6 of those amounts, as follows:

Water Right No.	Owner	Annual Diversion Limit	Annual Depletion
57-7800 (a28548)	Kevin Tolton	0.9033 af	0.373 af
57-10315 (a28537)	The Butler Management Group	0.9033 af	0.373 af
57-10316 (a28541)	Mark C. Haik	0.9033 af	0.373 af
57-10318(a28546)	Marvin A. Melville, Trustee	0.9033 af	0.373 af
57-10317 (a28545)	Judith Maack	0.9033 af	0.373 af
57-10319 (a28547)	William S. Hoge	0.9033 af	0.373 af
TOTAL		**5.42 af**	**2.238 af**

Accordingly, the current quantification of the six water rights associated with 57-7800 should be reflected as shown above in the records of the Division.

Diversion Limits

There is more than sufficient diversion and depletion under each of these six rights to facilitate the domestic use requested in the relevant change applications.

The right of each owner to divert 0.9033 af/yr easily meets the amount of 0.45 af/yr for the domestic needs of one family. The balance of 0.4533 af/yr will be used for storage and fire protection, as set forth in the change applications.

Your letter questions whether the uses and volumes specified in the Certificate of Permanent Change of Point of Diversion, Place, Purpose or Period of Use of Water number a702 issued May 24, 1971 (the "Certificate") should be ignored in favor of an explanatory statement in the underlying 1962 change application a4178 filed by Harold W. Bentley that says:

> "From the well the applicant proposes to divert 2,000 gallons per day between Oct. 1 and April 1 of the next year, and 4,000 gallons per day from the well between April 1 and Oct. 1 at a rate equal to 0.0625 s.f., which is 28.05 g.p.m."

Assuming, for purposes of discussion, that it is appropriate to look beyond the express terms of the 42-year-old Certificate, the proposal quoted above needs to be read in context with the sentences that immediately follow it, which are:

> "The water will be pumped from the well through a meter and into a pressure tank, from which it will be diverted as required. The rest of the water of the South Despain Ditch owned by the applicant will still be diverted from the points of diversion described in par. 9."

Obviously, the contemplated gallon per day figures only pertained to part of water right 57-7800. The very first sentence of the State Engineer's Memorandum Decision approving that change application plainly recognizes this fact, stating that the application is "to change the point of diversion and nature of use of a portion of a right contained in the Little Cottonwood Creek Decree." The decision then goes on to say that "[t]he remainder of his right is to be used as before."[1]

Currently, the State Engineer segregates a water right if only a portion of the right is changed. In 1962 when a4178 was filed, such was not the State Engineer's practice and one could change only a portion of a right without segregating that portion. That was the case with a4178 wherein Mr. Bentley moved a portion of his ¼ interest in the decreed South Despain Ditch water right to his well and continued to use the unchanged portion as in the past, as expressly acknowledged by the State Engineer in the first two paragraphs of his 1963 decision.

[1] The explanatory section also points out that springs in this area were considered as part of the creek flow in the 1910 Little Cottonwood Decree, that water developed from other wells in the area since the decree has also been considered as part of the decreed creek flow, and that the portion of water taken from the Bentley well is to be considered as part of the decreed creek flow. Moreover, the same explanatory section confirms that the application "is filed with the approval of Salt Lake City Corporation and the South Despain Ditch water users." And indeed, neither Salt Lake City Corporation nor any South Despain Ditch water user protested the application, which, given the fact that Mr. Bentley clearly indicated he had other South Despain water besides the flows to be taken from his new well, belies what appears to be Salt Lake City's present position (51 years later) that the Bentley right became limited in 1963 to those groundwater flow rates with no other residual water. The State Engineer expressly acknowledged in his 1963 approval decision that the change application applied only to a portion of Mr. Bentley's water right and that the remainder of his stream right would continue to be used as before.

That being the case, if one ignores the express terms of the 42-year-old Certificate and instead calculates the usable volume based on flow rates, Mr. Bentley's water right would allow not just the volumes listed in footnote 7 of your letter, but also the following additional amount during the summer:

1/4 x 0.25 cfs x 1.98 af/day/cfs x 182 days = 22.5 af/yr

less 2.24 af/yr (from footnote 7) = 20.3 af/yr

Thus, the summer portion of the unchanged part of Mr. Bentley's water right *alone* would be almost four times the volume of water reflected by the uses listed in the Certificate (bearing in mind that the Certificate is not a full definition of Mr. Bentley's water right and only applies to the amount of 57-7800 that was changed.) Indeed, this additional quantification would be consistent with the methodology Salt Lake City commonly uses to quantify its canyon stream water rights. Furthermore, if one were to ignore the Certificate and look only to the original decree, the Little Cottonwood Decree imposes no limits on the nature or duration of use that can be made of the water, so Mr. Bentley's use could be 100% depletive. Therefore, in answer to your question about whether there is sufficient water in the Bentley right to cover the uses shown in the Certificate, we believe that with a full understanding of the facts the answer is a resounding "yes."

For purposes of their change applications, my clients are willing to recognize the limits set forth in the Certificate (diversion of 0.9033 af/yr for each application), rather than looking beyond the Certificate for a larger volume of water, provided that their pending change applications are approved for the uses requested therein.

Depletion

As you well know, there is a water right principle that under a change application the hereafter diversion and depletion amounts cannot exceed the heretofore diversion and depletion amounts. At times, depending on the specific fact situation, the hereafter diversion needs to be limited to the heretofore depletion in order to protect existing water rights. The rescinded Order assumed that was the case with the change application filed by Mr. Tolton (a28548, the "Tolton Application"). However, we believe that principle was erroneously applied in the Order relative to the hereafter domestic portion of the Tolton Application. In the Tolton Application (and in the other five change applications) the heretofore and the hereafter points of return for the domestic uses are identical and, therefore, limiting the hereafter diversion to the heretofore depletion is inappropriate and limits the right beyond that required to protect existing water rights.

In your letter it is noted in footnote 5 that:

> "The domestic uses associated with the underling water right [are] for three homes that are assumed to be located in an area served by a public sewer system where nearly all the water is returned to the hydrologic system via the Jordan River minus those amounts lost in the treatment process (evaporation, etc.). The Central Valley Water Reclamation Facility has a reuse program; however, it does not appear that this water right has ever been included in a wastewater reuse application or project consistent with the underlying right. As a result 20% consumption for the heretofore domestic use is assumed."

We do not disagree with that assessment. However, in the Order it is also stated that because septic and drain field disposal of waste is not allowed in the canyon, domestic use is considered totally consumed. We respectfully disagree with that assessment. Wastewater from contained septic tanks in the Alta area is pumped and disposed of by waste haulers into the Salt Lake County Service Area No. 3 sewer line (the "County Sewer Line") via a dump station at Alta. That wastewater is then collected by the Cottonwood Improvement District and transported to the Central Valley Water Reclamation Facility, where it is discharged after treatment to the Jordan River.[2]

Virtually all of the wastewater from Little Cottonwood Canyon (upper and lower), whether residential (as with the Albion Basin Subdivision) or commercial (as with the ski resorts), is collected and disposed of in the same way at the same place, along with wastewater from the other 125,000 people served by the Cottonwood Improvement District. Therefore, depletion from domestic uses should be considered the same whether at the mouth of Little Cottonwood Canyon or in Albion Basin. There is no change in depletion to the hydrologic system of the domestic portion of the right from the heretofore to the hereafter uses under the Tolton Application.

This fact is amply demonstrated by the prior history of moving water rights from the mouths of the Wasatch Front canyons to locations further up the canyons under similar change applications -- including many filed by one of the protestants of the Tolton Application -- which applications have all been approved by the State Engineer. For example, in 1992 Salt Lake City

[2] This operational fact is mandated by law. All homeowners in the Albion Basin (including Mr. Tolton) are required to connect to the County Sewer Line if the sewer line is within 300 feet of the homeowner's property. (Alta Town Code § 8-3-4D) Otherwise, the homeowner must install a private wastewater disposal system until such time as the public sewer line becomes available to the property. (*Id.* §§ 8-3-6A and 6E) Until the time when connection is made to the County Sewer Line, "[a]ll private wastewater shall be disposed of at the sewer dump station within the town." (*Id.* § 8-3-6F)

filed two temporary change applications (the "SLC Temporary Applications")[3] and five permanent change applications (the "SLC Permanent Applications")[4] based on exchange agreements with various irrigation companies on Little Cottonwood Creek, to move water from the mouth of Little Cottonwood Canyon to the Alta/Snowbird area in order to meet contractual obligations to provide water to upper canyon users including Snowbird and Alta. The SLC Temporary Applications were filed to move a massive 2,500 af/yr of Little Cottonwood Creek water up to the Snowbird and Alta resorts, converting it from irrigation and domestic use to culinary and snowmaking use at the resorts, with diversion from springs, mine tunnels and Little Cottonwood Creek near the resorts.

At the hearing on the SLC Temporary Applications, Joe Novak, counsel for the applicant (Salt Lake City), argued that despite the huge volume of water to be taken from surface sources in the Albion Basin for the culinary needs of two large ski resorts and the Town of Alta, "there will be no impairment of any of the rights of any of these [Little Cottonwood Creek irrigation] companies nor any owners of rights, other rights, on Little Cottonwood Creek." (See Exhibit A, June 22, 1992 hearing transcript, page 8)

Ed Higbee, the court-appointed Little Cottonwood Creek water commissioner, testified that approval of the SLC Temporary Change Applications would have no impact to any of the Little Cottonwood Creek decreed water rights or any other water users on Little Cottonwood Creek. He described in detail how the waters of Little Cottonwood Creek, including Salt Lake City's interest, are measured and distributed. In distributing the waters of the creek, the water commissioner determines the total flow of Little Cottonwood Creek to be distributed by adding the diversion of the creek through the Murray Power Plant, the flow of Little Cottonwood Creek at the mouth of the canyon near Wasatch Boulevard, the flow of wastewater from the canyon through the County Sewer Line, and the discharge of two of Sandy City's wells at the mouth of the canyon. (Exhibit A, pages 12-13) Under Salt Lake City's exchange agreements with the four canal companies and the water sale agreements between Salt Lake City and users in the upper canyon, the water in the sewer system comes out of Salt Lake City's allocation. Therefore, if wastewater is measured and counted as part of the total flow of Little Cottonwood Creek for distribution purposes, there is no loss to the system and, therefore, no impairment to Salt Lake City or any other Little Cottonwood water user and no consumption in the canyon.

Commissioner Higbee culminated his testimony on the key issue of impairment with the following exchange:

[3] t92-57-19 and t92-57-20.

[4] a16839, a16841, a16842, a16843, a16844, a16845 and a16846.

Mr. Novak: Mr. Higbee, you're familiar with these two temporary change applications, are you not?

Mr. Higbee: Yes I am.

Mr. Novak: Based on your experience and measurements of water that is distributed, can you tell the State Engineer whether these two, either or both of these temporary change applications, would in any way impair the rights of the four companies that protested?

Mr. Higbee: I can think of no way in the world that it can impair those or any other users.

Mr. Novak: As far as the four companies and other users, it is your view that the temporary changes can be effectuated without impairing any of their rights?

Mr. Higbee: That is correct. (Exhibit A, page 16)

The State Engineer then proceeded to approve both of the SLC Temporary Change Applications, despite several protests that the changes would impair existing canyon rights. In the approval decisions, no limit whatsoever was placed on depletion of the 2,500 af/yr. Rather, the State Engineer found that movement of the water from the mouth of the canyon to the Alta/Snowbird area, diverting it from surface sources there, and using it for culinary and snowmaking purposes at the resorts and in the town "will not impair vested rights." Surely, then, neither will the relatively infinitesimal amount of water to be diverted for domestic use by the Tolton Application.

The same water that was changed by the SLC Temporary Change Applications was later permanently changed by applications a16843 and a16844, filed in 1992 and approved in 1994. The same non-impairment arguments were made by Salt Lake City, including the earlier testimony by Commissioner Higbee. Once again, in the decisions permanently approving the same changes, the State Engineer made no reference to depletion and imposed no depletion limits on the permanent use of 2,500 af/yr of water by the ski resorts and the town of Alta. These permanent approvals were given despite vigorous protests of resulting impairment.

Similarly, the five SLC Permanent Applications moved Little Cottonwood Creek water from the mouth of the canyon upstream to commercial facilities and homes in the Albion Basin area, with diversion from local springs and mine tunnels in the area. Salt Lake City again provided conclusive evidence that doing so would not impair any water users because the

wastewater return flows would end up in the County Sewer Line. Tim Doxey, a 41-year veteran of Salt Lake City's Public Utilities Department, testified as follows:

> Mr. Novak: Mr. Doxey, based on your experience and review of the water rights on Little Cottonwood Creek, the exchange agreements and the sales contracts and the change applications that are before the State Engineer, do you have an opinion as to whether the approval of the five change applications or any of those would interfere with or impair existing rights in Little Cottonwood Creek?
>
> Mr. Doxey: It is my personal opinion after review of those that there shouldn't be any impairment.
>
> . . .
>
> Mr. Novak: There is a sewer line, is there not, down Little Cottonwood Creek?
>
> Mr. Doxey: Yes, there is, in Little Cottonwood Canyon.
>
> Mr. Novak: . . . Can you tell us, Mr. Doxey, probably get it from the commissioner, how the water going into the sewer line from the cabins or buildings that are -- that have these sales contracts with the City, how those waters are accounted for as far as other rights on Little Cottonwood Creek, including the exchange users?
>
> Mr. Doxey: The contracts we have with Alta City and with the service district No. 3 up there require that that water be metered, and then that water that goes into the sewer or through those is added to the water in the stream, and then the court commissioner is supposed to apportion it properly.
>
> Mr. Novak: So the quantity of water going through the sewer is added to the physical quantity of Little Cottonwood Creek and the percentage interest under the decree or applied to the sum of the existing plus water going through the sewer line; is that correct?
>
> Mr. Doxey: That's my understanding, yes.

(See Exhibit B, August 28, 1996 hearing transcript, pages 39-41)

Commissioner Higbee was then called upon to confirm the fact that no impairment would result from the five SLC Permanent Change Applications:

Mr. Novak: Do you have an opinion, Mr. Higbee, as to whether the approval of these five change applications would interfere with or impair other water rights on Little Cottonwood Creek?

Mr. Higbee: There should be no impairment to any of the decreed water users. It may impair a little bit the quantity that Salt Lake City is able to receive through the treatment plant and through the, put into the culinary system through Metropolitan.

Mr. Novak: The waters that, to the extent under these sales contracts and change applications, to the extent that those waters go into the sewer coming down Little Cottonwood Canyon, are they accounted for in determining the total quantity of Little Cottonwood Creek?

Mr. Higbee: That's correct. In coming up with the total bill at the mouth of the canyon I take the stream flow that's going through the power plant at Murray City, that Murray City has used, I take the amount of 15-foot Parshall from the water, then I include the sewer flow, the amount that's coming down the sewer system, and I also include the wells that Sandy City has in the mouth of the canyon and charge that as part of the total flow, because that affects the seepage flow into the creek.

Mr. Novak: And I take it to the extent that the water that's used in the upper canyon under these sales contracts, to the extent that those waters find their way into the sewer, the net effect is that that comes out of Salt Lake City's share of the waters of Little Cottonwood Creek?

Mr. Higbee: That's correct. (Exhibit B, pages 42-43)

The approved SLC Permanent Change Applications are particularly significant because:

- While they impose hereafter depletion limits of 50% of the diversion amount (based on the fact that the underlying Little Cottonwood Creek rights are irrigation rights), they were all approved without any scrutiny of what the hereafter depletion would be or how return flows would be characterized.

- One of them (a16842) approves domestic use for two families (a duplex) from a surface spring, based on a diversion of only 0.442 af/yr. This application, successfully prosecuted by Salt Lake City, establishes that a diversion right of

0.442 af/yr with a depletion limit of 50% is enough for the year-round domestic use of two families, so obviously the hereafter domestic depletion was assumed to be less than 50%.

- One of them (a16845) approves domestic use for one family from a surface spring, based on a diversion of only 0.221 af/yr. This application, successfully prosecuted by Salt Lake City, establishes that a diversion right of 0.221 af/yr with a depletion limit of 50% is enough for the year-round domestic use of one family, so obviously the hereafter domestic depletion was assumed to be less than 50%.

- One of them (a16846) approves domestic use for 15 families in the Albion Basin Subdivision from a surface spring and mine tunnel, based on a diversion of 0.45 af/yr for each family. This application, successfully prosecuted by Salt Lake City, establishes that a diversion right of 0.45 af/yr with a depletion limit of 50% is enough for the year-round domestic use of one family, so obviously the hereafter domestic depletion was assumed to be less than 50%.

Another more recent change application (a26764) was filed by Salt Lake City to move 11.05 af/yr of Little Cottonwood Creek water to Alta for culinary and domestic water at the Watson Shelter and Alpenglow Shelter, with diversions from surface sources in the area. That application was approved in 2009 with a calculated hereafter depletion limit, but no analysis of the hereafter return flow was made, no one (including the State Engineer) questioned that return flows would be to the Little Cottonwood Creek system even though the resort facilities dispose of their wastewater through the County Sewer Line just as the Tolton Application will do, and (as with all of the foregoing applications) there was no imposition of a requirement that only a deep bedrock groundwater well could be used as the hereafter source.

It is, to put it politely, ironic that Salt Lake City, having successfully received approval of all of its numerous Little Cottonwood change applications, now opposes the substantively identical 57-7800 change applications on the basis that they will impair existing rights in Little Cottonwood Creek.

All six of the 57-7800-based change applications will collectively consume far less than an acre-foot of water. The Little Cottonwood Creek water commissioner actually testified, in support of Salt Lake City's change applications, that the entire operations of two commercial ski resorts (Alta and Snowbird) and a municipality (the town of Alta) consume no discernible water at all from their upper canyon diversions because the amount consumed is too small to effectively measure and because all of the water (and more) is returned to the system through the County Sewer Line. Commissioner Higbee indicated there is no consumption from these uses because the sewer flow is included as part of the total flow of Little Cottonwood Creek and there is typically more water measured in the County Sewer Line than is diverted for use up the

canyon. (Exhibit A, pages 19-20) His position has carried the day on at least 10 prior approvals to move Little Cottonwood water from the mouth of the canyon to the Albion Basin vicinity.

The State Engineer's rescinded Order, on the other hand, reached the polar opposite conclusion, assuming that 100% of the water diverted under the Tolton Application will be consumed and no water will be returned. With all due respect, that is a clearly erroneous assumption, and certainly one that is directly contrary to the views of the water commissioner, to the views of Salt Lake City in connection with its prior successful efforts to move water up the canyon, and to the prior precedent established by the State Engineer in approving the various applications of Salt Lake City and others in Little Cottonwood and other canyons.

Under the Tolton Application there will be no depletion to Little Cottonwood Canyon because the wastewater flows are accounted for as part of the total flow of the creek and distributed as such by the court-appointed water commissioner. At a maximum, the domestic use proposed by Mr. Tolton and the other applicants will consume 20% of the diverted water, as was the case with their domestic use previously, because return flows will be disposed of via the County Sewer Line the same way as Alta, Snowbird and all others in the canyon dispose of their wastewater, and the water commissioner will treat that effluent as return flow the same way he has done for decades. Under those conditions, the depletion by each of the six pieces of water right 57-7800 will be

$$0.45 \text{ af/yr} \times 20\% = 0.09 \text{ af/yr}$$

which is well below the heretofore depletion of 0.373 af/yr for each right. The subject applications will actually result in far less water being depleted from the system than was depleted heretofore, which is obviously not an enlargement of the right. In fact, the applicants could consume up to 83% of the diverted water for domestic purposes before they would surpass the prior depletion amount (0.373/0.45 = 82.9%).

Lastly, because of concerns regarding possible local impairment, the rescinded Order limited hereafter diversions to an underground water well only and required that the well be completed in the deeper bedrock aquifer to prevent local impairment to sources in the shallow alluvial aquifer. While that requirement has not been imposed on Salt Lake City or others who have successfully moved water up-canyon, that requirement alone protects the local water users from impairment. Mr. Tolton and my clients should be allowed to divert their water from all of the springs, tunnels and other sources listed in their change applications (including the mine tunnel located on their property), just as Salt Lake City has been allowed to do under the 10 approval decisions discussed above through the upper canyon surface sources approved therein. But if Mr. Tolton and my clients are not allowed to do so, the requirement that the well be completed in bedrock by itself precludes any possibility of local impairment and should thus provide an independent reason for approving their applications.

Thank you again for the opportunity to respond to the issues you raised. Please note that I am not sending this directly to any of the parties who protested the subject change applications, and am instead counting on your office to send a copy of this to whoever you believe should receive it.

Respectfully yours,

PARR BROWN GEE & LOVELESS

By _____
Daniel A. Jensen
Attorneys for Mark Haik, Bill Hoge, Marvin Melville and The Butler Management Group

Enclosures

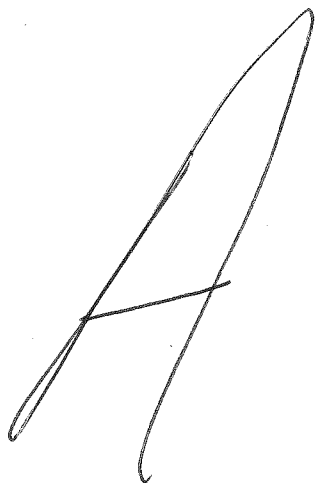

Exhibit A

TRANSCRIPT OF HEARING CONDUCTED RELATIVE TO
TEMPORARY CHANGE APP. NOS. t92-57-19 AND t92-57-20
FILED BY SALT LAKE CITY CORPORATION

R. L. MORGAN: We're on record. This is hearing before the State Engineer concerning two temporary change applications. They are numbered and are both in the 57 area, applications 92-57-19 and 92-57-20. The first one is, both of them have been filed by Salt Lake Department of Public Utilities. The first application - Heretofore, 114.375 cubic feet per second or, I'm giving the reference to paragraph 4, it looks like 2,000 acre feet.

L. KAPALOSKI: The transfer is 2,000, that's correct. That amount is the full amount with the rights that are being transferred.

R. L. MORGAN: And the source of water, heretofore, has been Little Cottonwood Creek in Salt Lake County. It is now proposed, well it has been used within Salt Lake City and its service areas in Salt Lake County, and place of use is also within the city and within the service area in Salt Lake County. The following changes are proposed: 500 acre feet from Little Cottonwood Creek -

L. KAPALOSKI: One's 500 and one's 2,000.

R. L. MORGAN: Okay, this one's 2,000. Let the record stand that 92-57-19 is for 2,000 acre feet. Will be diverted the same as heretofore from the tunnel in Little Cottonwood Creek and it will all be consumed. It will generally be used for irrigation 4/1 through 10/15, domestic and municipal purposes year round and other uses year round -- mainly confined in Little Cottonwood Canyon through the Snowbird area. Sufficiently confused everyone on that one. Second application is for 114.375 cfs, that is the total demand with, and that has been used within Salt Lake City and its service area. They were seeking to change of that total flow, 500 acre feet from Little Cottonwood Creek be diverted from tunnel springs in Little Cottonwood Creek and be used at Alta. The application was advertised?

K. JONES: Yes.

R. L. MORGAN: It was advertised and protested by Cahoon and Maxfield Irrigation Company, Richards Irrigation, Little Cottonwood Tanner Ditch Company, Walker Ditch Company and Mr. Skeen, you represent all four of those irrigation companies?

E. SKEEN: That's right.

R. L. MORGAN: We have here today Salt Lake City represented by Mr. Hooton and counsel, Mr. Novak?

J. NOVAK: That's correct.

R. L. MORGAN: We would first turn to -- any questions on the applications first of all? We first turn to Salt Lake City to explain the merits of the temporary change applications and then we would turn to the applicant for their statement, or if they have any questions of the applicant first and then we'll have a statement from the protestors.

E. SKEEN: Very well.

J. NOVAK: Thank you, Mr. Morgan. It is Salt Lake City's position that the water rights sought to be changed under the two temporary change applications are evidenced by four exchange agreements, one with each of the protesting companies, and copies of those exchange agreements are a matter of record on file in the State Engineer's Office and a part of four exchange applications, E2919, 20, 21, 22 in the 57 area that were filed in the State Engineer's Office on March 30, 1992. It's the basic position of Salt Lake City that Salt Lake City has absolute ownership and title to the water rights awarded to the Cahoon & Maxfield Irrigation Company, Little Cottonwood Tanner Ditch Company, Richards Irrigation Company and Walker Ditch or Irrigation Company under the Morse Decree, and Salt Lake City's ownership is vested in Salt Lake City by virtue of the four exchange agreements. There are basically three Utah Supreme Court cases that I want to call the Engineer's attention to, and I have made copies of those cases and have highlighted the portions of the cases that I want to refer to. Let the record show that I'm handing Mr. Skeen a copy of the three cases and one for the State Engineer and one for the Attorney General's Office.

The first case is a 1905 case and it's State ex rel. Ellerbeck v. Salt Lake City. There, the Supreme Court was concerned with the ownership that would be conferred on Salt Lake City under some options that had been acquired and were about to be exercised by Salt Lake City to determine whether that ownership interest by virtue of those proposed exchange applications was sufficient to meet the constitutional requirements of ownership for the City to incur debt in addition to that fixed by the constitution, and to exchange water rights under Article 6, Section 11 of the Constitution of Utah. I would like to read, if I may, into the record and call the Engineer's attention to page 274 of the blue-lined or highlighted portion. It reads as follows: Again, we were talking about, or the Supreme Court was looking at practically identical exchange applications as are the exchange applications that are the subject matter of this hearing. The Supreme Court said:

> The compliance or noncompliance with the conditions of the sale and transfer of the water in question will be exclusively within the control of the City, and so long as the City does that which it will be its legal duty to do, and which the farmers in case of default could, by judicial proceedings, compel it to do if there were no forfeiture clause in the contract of exchange, there can be no forfeiture of the water thus acquired by the City and its title to the same will be as clear and indefeasible as though the exchange were absolute and unconditional. We are of the opinion that when sales and exchanges of the rights of the respective parties are made in and to the use of the waters, the forfeiture clause being a condition subsequent is not obnoxious to the vesting of title and ownership in the City to the mountain water which it has received in exchange for lake water, and it is settled by the great weight of authority that when real estate is sold upon a condition subsequent as the farmers propose to do in this case, the

> fee is transferred to and remains in the grantee until a breach of the condition and a re-entry by the grantor. That is, such a sale carries with it all the attributes and incidents of absolute ownership until the condition is broken.

And down at the bottom:

> Applying the foregoing principles of law to the admitted facts in this case, we have no hesitancy in saying that the right and title of the City to the water it will receive from the farmers by the exchange when made as contemplated will constitute ownership and will come clearly within the foregoing provisions of the State Constitution.

The next case I would call the Engineer's attention to and would like to read just a short excerpt into the record is Salt Lake City v. McFarland, and that was decided in 1954. That case involved almost identical exchange contracts as are involved here, except that there the exchange application provided for a reservation by the stockholders of that company of 900 gallons per day during the summer and 500 gallons per day during the winter months. We have a similar provision in the Richards Irrigation Company exchange agreement that is a part of the subject matter of this hearing. Turning over to page 69, in the highlighted --

E. SKEEN: Excuse me, Mr. Novak, where is that similar agreement for the Richards?

J. NOVAK: Well, the Richards Irrigation agreement provides for the delivery by Salt Lake City of culinary water to the stockholders of the Richards Irrigation Company, and it is similar to the exchange agreements that is the subject matter of this case.

E. SKEEN: That's not entirely true, can I, is it all right if I--

R. L. MORGAN: I think you'll have the opportunity after Mr. Novak gets through.

E. SKEEN: I'm sorry.

J. NOVAK: Did you want to correct me, or--

E. HIGBEE: All I was going to say is the difference is, the Richards Ditch contract does not give them free water, but they get it at City rates.

J. NOVAK: Okay.

E. HIGBEE: That's the only--that's the difference, I think, in the contract, this court case and the one that I have with Richards Ditch. That's just--

J. NOVAK: Thanks. That hopefully clarifies it in my mind. But over on page 629 of Salt Lake City v. McFarland, the Court said:

> When the creek water to which the appellants' stock ownership entitle them was turned into the City's mains, title to such water vested in the City. The City was thereafter free to sell its water to whomever it pleased, including the stockholders from whom they had purchased it.

The third case is a 1964 case, Green Ditch Water Company v. Salt Lake City, and it was sort of a follow-up to the McFarland case, whereas the McFarland involved just a stockholder of the company, this involved the whole company, and one of the issues raised was whether that exchange agreement was enforceable. I call the Engineer's attention to the highlighted portion on page 588, where our Supreme Court said:

> Since there was a specific charge for any excess used by the signers, and since the contract did not provide a credit for unused water incident to any given month, it seems inescapable to conclude that the outright unconditional grant to the City of all of the signer's right, title and interest should vest in the City absolute ownership and title to the unused water.

> That seems to have been the conclusion in the McFarland case that we just referred to, either express or by necessary implication, when it was said that when the creek water to which puddle stock ownership entitled them was turned into the City's mains, title to such water vested in the City and that the City was thereafter free to sell its water to whomever it pleased, including the stockholders from whom they had purchased it.

Then that next quote:

> Under the pleadings and affidavits and the specific provisions of the exchange agreement, we believe and hold that the agreement was not only valid, but that title to any unused water to which the signatories otherwise would have been entitled by virtue of their shareholders interests vested in the City.

The three cases that we've cited and the language taken from those three cases, establishes without question as apply to almost identical exchange agreements where either the company or the stockholders sold and granted to the City the right to the use of the creek water in exchange for irrigation water, and in some case, domestic water, vested title and absolute ownership in Salt Lake City, subject only to a condition subsequent that if the City failed to comply with the terms and covenants of the exchange agreements, then there would be a defeasance of the title of the City. It should be noted that in the four exchange agreements there is no limitation on where or for what purposes Salt Lake City can use the water which it acquired under the exchange.

I suggest that it's immaterial here whether Salt Lake City has technical legal title, which is what is raised by the protestant. What is material here is that Salt Lake City is entitled to the use of the Little Cottonwood Creek waters to satisfy the requirements of 73-3-3 and you will recall that subparagraph (2) of that title provides that any person entitled to the use of water may make (i)

permanent or temporary changes in place of diversion, (ii) permanent or temporary changes in place of use, and (iii) permanent or temporary changes in the purpose of use for which the water was originally appropriated. We are not here talking about stock ownership in an irrigation company. We are here talking about a grant under the specific provisions of the exchange agreements.

We should call the Engineer's attention to the Cahoon & Maxfield exchange agreement under paragraph 1. It provides that subject to the reservations, the restrictions and strict performance by the City, the company gives and grants to the City the right to have, take and use perpetually all of the waters that were awarded to the Cahoon & Maxfield Irrigation Company with some qualifications as to the Little Cottonwood Water Company, and some reservations as to prior conveyances. The other three exchange agreements, again, subject to the reservations, restrictions and strict performance by the City, those companies, in each of the exchange agreements, gives and grants to the City the right to have, take and use water and water rights under those awards in the Morse Decree.

In addition, paragraph 4 of the Cahoon & Maxfield exchange agreement specifically provides that the City may -- it is permissive -- the City may file change applications, etc. to accomplish, if needed to accomplish the objectives of the exchanges by using the name of the company on any such changes. And likewise, under the other three, in paragraph 2 it provides that the City may, if it so desires, use the name of the company to file the change applications, etc. Here the City, with its absolute ownership as we see it, and title, selected to file those temporary change applications in the City's own name.

The next point I want to make is that we think it's ironic that one of the bases of the lawsuit that has filed against Salt Lake City by these four companies, which I'm sure the Engineer is aware of, complains under paragraph 10 that Salt Lake City sold water to Alta and Snowbird without filing change applications as required by law. No prior notice of default or notice to cure had been filed

by any of these companies with the City. What I'm saying is that those exchange agreements provide that if the company claims any default or failure to comply with the covenants of those exchange agreements, then under the Cahoon & Maxfield exchange agreement, Salt Lake City has six months within which to cure the defect before there can be a forfeiture, and under the three other exchange agreements, Salt Lake City has one month, or one year, excuse me, after notice to cure any of the claimed defaults before there can be a forfeiture. So here, Salt Lake City files the temporary change applications and these four companies who claim some sort of default by selling the water and having it diverted without having filed change applications, now come in and filed protests against the granting of those temporary change applications, and we think it's ironic that they would do that.

The four companies urged that since the ownership of the water rights is the subject matter of the pending litigation, the State Engineer should withhold action until those rights are adjudicated. We suggest that that basis is simply a delaying tactic to further frustrate the process and in some way prevent Salt Lake City from curing the claimed defect within the time provided.

And again, as I indicated before, it makes no difference here where the technical legal title to these water rights vests. We, by virtue of the four exchange agreements and in the pleadings that have been released, the memos that have been filed, the companies have urged or stated that they are not seeking to terminate those four exchange agreements and we think it's clear that under those agreements, Salt Lake City is entitled to the use of water to meet the requirements of 73-3-3.
The other issue that I want to just mention is the impairment issue. And we will have Mr. Higbee, the Little Cottonwood Creek Water Commissioner, and Mr. Hooton, the Director of Public Utilities of Salt Lake City, testify as to some matters relating to that. But, I simply want to point out that there will be no impairment of any of the rights of any of these companies nor any owners of rights, other rights, on Little Cottonwood Creek.

The fact is, that for the last at least 19 years, Mr. Higbee as the Little Cottonwood Creek Water Commissioner, has made available to each of these companies, at their diversion points, all of the water that they wanted and could beneficially use, either from Little Cottonwood Creek or from Utah Lake through the East Jordan Canal and its extension, and the Jordan and Salt Lake City Canal. Mr. Higbee does not, and has not, regulated those headgates. The companies have regulated those headgates and turned whatever water they thought they needed into their systems, and if they have ever had a problem, and Mr. Higbee will tell us about it, they have contacted him. He has made additional water available, which can be done by releases through the Little Cottonwood Water Treatment Plant into the farmers' headgate.

Another thing that's important, and the record will show, that the irrigated acreages of each of these four companies have substantially reduced and the demand for irrigation water by these companies has substantially reduced. In the exchange application, it's documented that based on a study by Hansen, Allen & Luce in 1992, using 1938 aerial photographs in 1991, in 1938, Cahoon & Maxfield Irrigation Company was irrigating 3284 acres. In 1991, they were irrigating 476 acres, or a reduction of about 86%. Walker, in 1938 was irrigating 568 acres, in 1991 250 acres, or about a 66% reduction. Richards, the records reflect that in 1979, or excuse me, or 1950, John A. Ward had made a compilation that they were irrigating 538 acres; and in '79 were irrigating 483 acres; and in 1991, irrigating 453 acres, or from a 16% to a 6% reduction. Little Cottonwood Tanner Ditch Company in 1938 were irrigating 1278 acres; in 1991, 308 acres, or a 76% reduction. And I should point out that the reductions of irrigated acreages are from the sole volition of the shareholders of each of these companies that has resulted from urbanization where those shareholder/landowners have sold their irrigated lands for residential and commercial development which of course commands substantially higher prices for those lands. It has been nothing that Salt Lake City has done that has resulted in any of those reductions. It's solely the voluntary reductions by those stockholder/landowners of those companies.

I would like, with your permission, to have Mr. Higbee, the Little Cottonwood Creek Water Commissioner, to explain briefly the distribution of water from Little Cottonwood Creek and get into the impairment or non-impairment issues of these temporary changes. And then would ask LeRoy Hooton, the Director of Public Utilities to provide some information relating to the usage, total usage, by these companies during the past ten years and the pattern of usage at Alta and Snowbird. As to the latter, the records will show that the majority of the use by Alta and Snowbird is during the winter months, during the non-irrigation season, and during the irrigation season, their combined use is approximately a quarter of a second foot, which is very difficult to even measure when that water's in the stream. So with your permission, I would like to call Mr. Higbee.

R. L. MORGAN: Mr. Higbee.

E. HIGBEE: Give me a second to pin this up on the board here.

Okay, maybe you can see what we've got.

Looks like we've got to spread it out more later. Here at the top.

J. NOVAK: First, Mr. Higbee, for the record, state your name and what your position is relative to distribution of waters in Little Cottonwood Creek.

E. HIGBEE: Well, I've been appointed as the Court Commissioner on Little Cottonwood Creek in regards to the irrigation court decree, Union and East Jordan Irrigation Company v. Richards Ditch Irrigation Company, et al., case no. 4802. It was dated 1910.

J. NOVAK: How long have you served as Commissioner on Little Cottonwood Creek?

E. HIGBEE: I was made Commissioner on the 26th day of June, 1979.

J. NOVAK: And I take it that you administer and distribute the waters of Little Cottonwood Creek under the

supervision of the court in accordance with the 1910 Morse Decree?

E. HIGBEE: That's correct. That's the way the decree reads under the supervision of the court.

J. NOVAK: Who pays your salary? Your wages?

E. HIGBEE: The court decree orders that the users pay for it. At present, Salt Lake City, because of the exchange agreements, the ditch companies reverted back the responsibility to Salt Lake City. These four ditch companies, Salt Lake City now pays the court fees for these four ditch companies. The others, I collect from other entities, Sandy City's the same kind of situation with Union and Jordan, and the others are smaller ditch users, and so on. But those, between Sandy City and Salt Lake City, all of the secondary primary ditches are tied up under contract.

J. NOVAK: And so you administer those contracts or those Exchange Agreements along with the provisions -- is that correct?

E. HIGBEE: That is correct. I've tried to follow the decree's instructions and any subsequent contracts and agreements that have gone into effect since the decree was in effect.

J. NOVAK: Is there any provision in the decree that directs you to provide the whatever distribution it is required consistent with the decree to provide for greater efficiency or beneficial use of water?

E. HIGBEE: There is a paragraph in the decree that does indicate that very specifically. I think it is the 39th paragraph in the court decree under conclusions of law. And I will read it in full, it is only a short one.

> The Commissioner provided for herein may divide and distribute the water by hours or days or by constant streams or in any other manner as in his judgments seems best so as to secure the greatest efficiency for the water. All of the above, however, is subject to the supervision and control of this court.

That is the entire paragraph 39.

J. NOVAK: Okay Mr. Higbee, you will just move that chair off to the side so that -- would you explain the dealings just very briefly and very generally how the waters of Little Cottonwood Creek are distributed pursuant to the decree of the Exchange Agreements.

E. HIGBEE: In operating the decree at present, to try and come up with spot readings later on I give full and better efficient manner of measuring -- I have to come up with the total for the creek. If I were doing it the way the decree originally said, it would be measured at each ditch, all of the ditches would be totalled up and that would be the stream. But since there is cutoff savings rights of the Little Cottonwood Water Company to take into effect here, that saves some water. The City savings and rights in here.

J. NOVAK: Because of the Murray Power Plan?

E. HIGBEE: Because of the penstock. Because of those I have to take into account a little differently. So now, the way I figure the total for the creek: I take a flow, an estimated flow for the sewer and each month we get that, an exact correct amount of how much they were using through the sewer line.

J. NOVAK: The sewer goes where?

It goes right on up the canyon and feeds clear from Alta City on down and picks up water from Alta, Snowbird and other users of water. I count that as part of total stream flow. Nobody gets to use it. The sewer plant. And I wouldn't let anybody use it if I could help it. Okay. Murray City takes out water here. I measure the waters that comes to the power plants. So here is two parts of the total to come up with the total flow. I have the sewer flow and the power plant flow. Then I pick up the 15 foot parshall, which is right here on Wasatch Blvd. -- right close to Wasatch Blvd. -- and I've got three ditches up above here that use water. So I have to add them. I have to add the South Despain, the South Despain extension and the North Despain. So to get my total flow of the creek, I take these

ditches, the sewer plant, the power plant flow and the stream flow at Wasatch Blvd. The users of them now -- Alta, Snowbird, through their contracts are using water. The only way I can account for the water they use, in my figures, is by what sewer outflow is. This is water that would, if, all of this in Little Cottonwood were gone, all of the businesses, all of the users, we closed it, no skiing, no nothing, that water would come down the stream. So I figure it is part of the stream flow. Okay I add these into it. I also add in two wells. Sandy City has two wells drilled right near where the south Despain extension are. They are above Wasatch Blvd. They are above and the water that they take is counted as part of the water of the canyon. So I add that in. So here is the waters that I use to come up with the total flow of the creek.

I use that total to come up with the amount that the ditches are entitled to. Now in the case of the four ditch companies that were involved here, the Cahoon & Maxfield and their schedule to Salt Lake City have set amounts. And that's all. I don't have to figure their percentage of the stream, because they have a set amount that they are entitled to if they can use it.

The Richard's ditch, the Tanner ditch and the Walker ditch are all based on the stream flow. Now for the first three months of the year, or first three months of the water season, April, May and June, they are entitled to the creek share of water, with no addeds or anything. If you get into the July, August and September and a half month of October, those three ditches are entitled to the amount that the creek decree gives them plus one second foot for the Walkers, Richards, two second feet for the Tanner -- if Salt Lake City is taking that amount of water through the treatment plant. If they are taking all of the water these ditch companies are entitled to, then they would have to give that additional one second foot and two second feet to these ditches. But coming up with these figures, I know exactly what each of the ditches are entitled to.

J. NOVAK: Okay Mr. Higbee, you show the East Jordan canal and extension, and Jordan and Salt Lake City canal in red near the bottom --

E. HIGBEE: Can you see this down here or is it too low?

Okay, the East Jordan canal comes in on 9th East, just south of Fort Union. I think that was Fort Union Blvd, but it comes in there, crosses over and heads over towards 13th East. It crosses 13th East right about in this area here. That is where 13th East is. But as water comes down here, we can deliver water. There is a section of the Tanner ditch here that they cannot get canal water with gravity flow. That section of water we deliver, I always keep enough water in there. Right at present there is no way to provide water, canal water to the Richards' ditch, so they get their entire amount from the creek. That means I don't have to have to add that extra second foot to their amount. Because there is no exchange taking place. They are getting the water right out of the creek through this cutoff savings and through their pipeline system.
The Tanner ditch has a short section here that has users, they have to have water from the creek. After it gets beyond East Jordan Canal they have two delivery points come into the Tanner ditch system that feeds their water. Okay. The Union and Jordan, that is the one that is owned by Sandy City. They bought out that ditch entirely. They have to have small amount for their ditch, until it crosses the East Jordan Canal. Now they cross it below 9th East so they are not on East Jordan extension. This is not the scale as anybody can guess. But the Cahoon & Maxfield has a section through here that they use to have one or two users on. They now have no users between the creek and the East Jordan canal that are actively consuming any water in the Cahoon & Maxfield ditch. Then it goes down and crosses the Jordan and Salt Lake City canal. The City has diversions for both of those stations --the Cahoon & Maxfield and East Jordan canal extension, Jordan and Salt Lake City. The Walker ditch has a diversion from the creek and they are almost underneath office buildings and everything else around. And it is all piped through here. They have a connection off the canal. And they have the choice of taking it into either source when there is water in the creek. Most of the year they take

it off the canal. They deliver the water through the Walker ditch that way. That is the way that I deliver water to these ditch companies.

J. NOVAK: Okay, Mr. Higbee, since you have been Commissioner, would you tell the Engineer whether you have made available at the diversion points of all four companies of all of the water that they requested and could use.

E. HIGBEE: As far as I have been able to yes, I've done it pretty well. I don't think there have been times, if they have let me know that they have problems, I have gone and found out what is wrong and tried to get things going. If I can't get it from sources like the canals -- which is the Utah Lake water -- I can't get it from there, I take it away from the treatment plant and send it downstream.

J. NOVAK: Which does, I take it, or could, include water coming in through the Salt Lake Aqueduct.

E. HIGBEE: Yes, there has been one or two times I think that they have used water from the aqueduct into the stream to take care of these few users up in here. And one time we used water out of the Little Cottonwood Well to take care of these users down here. So we have had different sources -- we have had ways of getting water to them.

J. NOVAK: Do you regulate the head gage for these four companies?

E. HIGBEE: I do not. If I get the message that they want water, I ask them how much will you be able to use, and I try to get that much to their diversion. And then as the season gets on and gets moving, I watch to see how much water is going on downstream, that would end up in Utah Lake or in the Great Salt Lake or the Jordan River. I try and get that water consumed somewhere in the system.

J. NOVAK: Do the companies, representatives of the companies . . .

E. HIGBEE: Yes, I would not dare unless I was told by the presidents of the companies or the water masters, I would not dare open one of their head gates for any purpose. I don't want to be responsible for

water going through their systems. If they should have some contractor in a middle of a project underneath the ditch and I didn't know about it, and I turned the water in, I would be responsible. And I won't. I refuse to. It is the responsibility of the ditch companies to decide when they can handle it, when they can use it, and how much they can use. It depends on the capacity of their system.

J. NOVAK: Mr. Higbee, you're familiar with these two temporary change applications are you not?

E. HIGBEE: Yes I am.

Based on your experience and measurements of water that is distributed, can you tell the State Engineer whether these two, either or both of these temporary change applications, would in any way impair the rights of the four companies that protested.

E. HIGBEE: I can think of no way in the world that it can impair those. Or any other users.

J. NOVAK: As far as the four companies and other users, it is your view that the temporary changes can be effectuated without impairing any of their rights?

E. HIGBEE: That is correct.

J. NOVAK: Those are all of the questions I have, Mr. Higbee. It might be that Mr. Skeen wanted to ask some questions, it might be a good time to do it.

E. SKEEN: I have a few questions, Mr. Higbee. Is it part of your duty as water commissioner to measure water in the creek available in the creek and also to measure the water from Jordan River or Utah Lake into the systems of these various companies?

E. HIGBEE: Some of the time I do that, but there are water masters, there are some men that work for Salt Lake City who are on the constant call to measure those, through measuring devices.

E. SKEEN: Do you have any records of those measurements?

E. HIGBEE: Yes sir.

E. SKEEN: And where are they?

E. HIGBEE: They are in the files of Salt Lake City. We have -

E. SKEEN: Will you tell me what they consist of?

E. HIGBEE: Okay, we take field notes and recorder sheets. From those we develop our data of how much water is actually being consumed, how much has been used, how much is going through each ditch. We then take those and put them on summary sheets and we summarize the whole year, for each of the ditches. And we come up with total amounts that those ditches have received through the year.

E. SKEEN: Do you have any recording devices on the measuring devices on the--

E. HIGBEE: Yes we do now. We've had some in almost--

E. SKEEN: How long have you had those?

E. HIGBEE: Well on the East Jordan Canal, we've had it ever since we built the canal. We have had a measuring device on the East Jordan Canal almost continuously. We have had measuring devices on the Cahoon & Maxfield one, two and three, for most of the time that I have been involved with irrigation measurements. One got discontinued for a period of time because there were no users there and the parshall flumes had deteriorated to where its was no good measurer. But it has been replaced in 1988, wasn't it? You know Tony, when did they replace it.

T. REZAK: They replaced it in 1990.

E. HIGBEE: Those have been replaced.

E. SKEEN: Where is the measuring device on the East Jordan Canal.

E. HIGBEE: It is on 9th East where the East Jordan Canal and the East Jordan extension starts. Or just east of 9th East.

E. SKEEN: Are they parshall flumes or--

E. HIGBEE: That is the rated flume, that is not a parshall flume.

E. SKEEN: And are they constant measurements or periodic?

E. HIGBEE: It is constant recorded measurements. Plus they have also, in the last few years, they have added the sonic water level measuring device that is also sending that same information on up to the 62nd South pump station. So they know what is going on.

E. SKEEN: What measurements do you have on Little Cottonwood Creek?

E. HIGBEE: Probably about the same period of time. But we've got a recorder on the--

E. SKEEN: Where are your recording devices on Little Cottonwood Creek?

E. HIGBEE: On the 15th foot parshall. Okay, the 15 foot parshall on Wasatch Blvd. has recorder.

E. SKEEN: Will you mark on that measuring device so we know where you are pointing on the record.

E. HIGBEE: And it is a 15 foot parshall.

E. SKEEN: And is there a recording device on that?

E. HIGBEE: Yes, I think it is Leitz Leport Stephens 830.

E. SKEEN: How long has that measuring device been there?

E. HIGBEE: Ever since I have worked with Water Department there has been a measuring device except when somebody blew up the recorder house for six months.

E. SKEEN: And you have records in your office or in the City Office of those measurements?

E. HIGBEE: That is correct.

E. SKEEN: From 1979--

E. HIGBEE: Prior to that.

E. SKEEN: I notice on the map that's on the black part of the, which I assume is on the creek.

E. HIGBEE: Well I have the ditches also in black, in many cases here.

E. SKEEN: And is all of the water in the creek measured at that point?

E. HIGBEE: All of the water that arises in the creek between here and here that does not go into the South Despain ditch, south Despain Extension or the North Despain is measured, or somebody steals.

E. SKEEN: It wouldn't measure anything to Alta or Snowbird?

E. HIGBEE: Well, if Alta or Snowbird had taken the water, it has gone down the sewer system. Any water they have let through their system, eventually is there.

E. SKEEN: No consumption over it at all?

E. HIGBEE: I have not added the consumption up there. I added it as part of the sewer flow. And the sewer flow is by the way is in excess of--

E. SKEEN: Do you know what the consumption is?

E. HIGBEE: Yes, we get that, each month. We get that from the records of the Sanitary Sewer District No. 3, -- I think is who I talk to all of the time.

E. SKEEN: You have records showing the consumptive use.

We show the amount of water going through the sewer system yes. And we add that as part of the total flow.

E. HIGBEE: I don't have them right now with me but the City has them because they are paying for the water.

R. L. MORGAN: He means at Alta and Snowbird.

B. MURDOCK: You assume there is no consumptive use then.

E. HIGBEE: What do you mean I assume there is no consumptive use?

B. MURDOCK: You assume, you add only to the major sewer flow and it increased it by nothing for actual consumptive use in the use area.

E. HIGBEE: Let's look at the sewer flow. If you have a sewer flow during the summer of a half a second foot, now

possibly this could go up to as high as 6/10ths of a second foot, and down to as much as about 2/10ths of a second foot. That is the range this might run right now on the use of water coming through this sewer line. Okay, I think during the same period of time the water taken out by Alta City and Snowbird is probably less than a quarter of a second foot. I am picking up more water here and showing more water right here than what those two places are using.

E. SKEEN: Is that also true of Snowbird?

E. HIGBEE: I said Snowbird and Alta. Those are both--whatever is going through their sewer system, is what I am measuring here plus whoever else is putting water in there. And that includes people that Little Cottonwood Water Company has agreements with.

E. SKEEN: I would like, if I may to have permission, to have Bob Murdock ask any questions he would like to ask on that.

E. HIGBEE: Go right ahead, I am easy to get along with.

B. MURDOCK: Do you regard approved rights in the State Engineer's office in any way in your administration of the creek?

E. HIGBEE: I have to.

[three-minute portion of B. Murdock questioning missing from tape]

E. HIGBEE: That precluded getting water to South Despain in the amount they were entitled to. The North Despain seems to have enough with the spring that's there. The South Despain extension--there wasn't enough water there. So when Murray City filed that application, I as court commissioner protested it and said you have got to have "accurate measuring devices" and this device right here--so I know how much water's going. And we've got to have a way to provide water to these ditch companies. Now, we went through that with the State Engineer and with Murray City and everybody. We all talked about it and worked on it and they got the equipment in there.

E. HIGBEE: Okay, let's go down the penstock here. I mean to the tailrace of the power plant.

B. MURDOCK: Okay.

E. HIGBEE: We have three diversions here. There's a big hydraulic gate right there operated by Metropolitan Treatment Plant. Now for water to even get in that headgate, it's got to go over this wall, so that keeps the water to a certain height. Now, over here we have two 30-inch wheel gates. They come through and are fixed with a meter gate measuring device, anyway it's where they take the area and you have to have it submerged and so on. It's a standard irrigation measurement device. We have that on these two, a couple of stilling wheels, we have the wheels here. I control these. Now these two, this one here is the Sandy Syphon. It goes right across the creek and over into the Sandy Ditch. That's right here. It kicks over here into the Sandy Ditch, right there. Then this one is the farmer's gate. It comes out here, does a fast turn and goes down along the bank until it gets beyond the Metro Treatment Plant and then right into the tail race out of the Metro Treatment Plant and from there right straight into the creek. That's where the water goes on this one.

B. MURDOCK: And you control that one.

E. HIGBEE: And I control that. So what I've done in the last week or two, I've watched to see how much water Metropolitan's treating. They have, I have to--I get pressure from them all the time.

B. MURDOCK: Who controls the Metropolitan gate?

E. HIGBEE: They control it there because if there's a storm and they can't use the water, they have to shut it. They can't use the water if there's something goes haywire. They've got to have safety for them. We can't have polluted water--

B. MURDOCK: And it spills and goes on down past the farmer's gate.

E. HIGBEE: Okay, now, if that happens, if this closes, these things--this section right in here raises about two and a half feet or three feet higher and then it

overflows into this. This is an overflow drain that goes right down into the creek. And I can't remember the size of this pipe, I think it's probably three foot in diameter. It's a big one. But in case, anytime that they have to shut down, then it kicks into here. Well, it's in the creek then, plus you've got what's coming through here. So I don't have to change this headgate at all. I don't have to change this headgate at all, but both of these increase because of the additional pressure on them.

B. MURDOCK: Now, does Metropolitan take water at your approval?

E. HIGBEE: Yeah, I tell them how much they can take. The key that I use as to how much they can take is how much water we've got down in here. Have I got enough for the Union and Jordan. Have I got enough for the Tanner Ditch? Have I got enough for the Richards Ditch?

B. MURDOCK: What do you base the approval upon, for Metropolitan taking any water?

E. HIGBEE: Their contracts with Salt Lake City and with others. The ditch companies that sold their rights--

B. MURDOCK: What water rights, what legal water rights structure backs that up?

E. HIGBEE: Okay, the four contracts of the four companies that are involved right here.

B. MURDOCK: Has the State Engineer been a party to those?

E. HIGBEE: No, that's Salt Lake City and the Court decree's got that one.

B. MURDOCK: Has the State Engineer granted any approval for those diversions?

E. HIGBEE: Change applications--

J. NOVAK: I'm going to object to that. The record will show what the State Engineer has done. I think it's argumentative, it's not getting us anywhere.

B. MURDOCK: It's not argumentative, I'm simply pointing out that there were, for many year, in place change applications for that purpose.

J. NOVAK: We acknowledge that.

B. MURDOCK: They lapsed in 1983 and since 1983, there has been no approval granted by the State Engineer for any diversion of that sort.

E. HIGBEE: We're still working under the decree--

J. NOVAK: Just a minute, Mr. Higbee, if this is a legal matter, Mr. Murdock. It's been our position as I've explained to Mr. Skeen, that those four change applications were in fact exchange applications. They lapsed because the 50-year period expired when proof was not submitted and our position has been that those were in fact exchange applications that should not require proof of change and were improperly lapsed. And, plus the fact that the decrees on Utah Lake award Salt Lake City the right to utilize that water for exchange of the waters of the canyon stream. But be that as it may, we have filed four exchange applications to conform the State Engineer's records to what the facts are, and it just seems to me that to argue with Mr. Higbee as to whether we have the approval or not is a matter that's not going to get us anywhere. We think we have the right to do what we are doing and what we have done in the past.

B. MURDOCK: I'm just pointing out that since 1983, Mr. Higbee has administered the Creek in a manner that is not in accordance with the State approved rights.

J. NOVAK: We disagree with that because we believe our rights to be otherwise.

M. WIDERBERG: Mr. Morgan, if--Marv Widerberg from Richards Irrigation Company. If the issue here is the change applications, why are we arguing and talking about the diversion down on 9th East? It's--

E. HIGBEE: You asked me about it--

M. WIDERBERG: I know, but it has nothing to do with the change applications. I think we're wasting our time talking about it, Mr. Higbee's time, everybody's

time, talking about all this garbage down below when the issue is the change applications up at the Alta area.

R. L. MORGAN: I think your point's well taken. Any other questions of Mr. Higbee concerning the operation--

B. MURDOCK: No.

E. SKEEN: I think that's all.

E. HIGBEE: Thank you very much.

J. NOVAK: Okay, I would next like to call LeRoy Hooton. Tell the Engineer what your position is and how long you've occupied that position.

L. HOOTON: I'm Director of Public Utilities for Salt Lake City since 1980.

J. NOVAK: Prior to that time, did you, were you employed--

L. HOOTON: Deputy Director since 1972 to '80 and worked for the City since 1958.

J. NOVAK: Are you in charge of the record keeping of water measurements as it relates to the diversions by Alta and Snowbird?

L. HOOTON: Yes, within the various divisions of my department, there's--I have that responsibility.

J. NOVAK: Do your department records compile or include total diversions into the four company ditches that are protestants in this proceeding?

L. HOOTON: Yes.

J. NOVAK: Mr. Hooton, I'm going to show you, and I believe you have one of your own or you can use mine, but I would like the Engineer to look at the document and ask whether or not you've prepared this that shows Little Cottonwood Tanner, Richards, Little Cottonwood Walker, Cahoon & Maxfield, with different colors exchange ditches. I'm going to, for the record, hand a copy to Mr. Skeen, Mr. Morgan and the Attorney General's office, and ask you, Mr.

Hooton, whether that document was prepared under your direction.

L. HOOTON: Yes, I requested information from our irrigation division to provide me the diversion records for the four subject irrigation ditch companies from 1980 to 1991. Those four volumes of water were recorded on this chart. The blue indicates the major diversions for Little Cottonwood Tanner Ditch; the brownish-red color, Little Cottonwood Walker; the green, the Richards Ditch; and the orange-brownish color, the Cahoon-Maxfield Ditch Company. And as the chart indicates, the diversions over the last 11 years have been about 10,000 plus or minus acre feet a year, which are substantially below the amount of water that they would have been entitled to and that reduction is attributed to the urbanization of the lands that were originally irrigated by the properties, and are typical of the water deliveries that we're experiencing in all of our exchange areas where the amount of water has been greatly reduced over the years, although it's been somewhat stable over this period of time.

J. NOVAK: Mr. Hooton, in your position as Director of Public Utilities, have you had complaints from representatives of these four companies as to whether they were receiving sufficient water over the years?

L. HOOTON: Primarily with the Cahoon & Maxfield Irrigation Company a number of years ago, about three or four years ago. And there was a dispute over the measuring devices and so, subsequently, we installed new measuring devices. I believe that was about '88 or '89.

J. NOVAK: The quantities of water shown on this document, to the best of your knowledge, are those the quantities of water that had been requested collectively and individually by these four companies during the past ten years?

L. HOOTON: It is my understanding that the companies have available to them all of the water that they need and that they control the headgates to regulate the flows within their system. Within these numbers also include the total diversions, including the creek diversions and Utah Lake water diversions.

J. NOVAK: Okay. Mr. Hooton, are you familiar with the diversions by Alta and Snowbird?

L. HOOTON: Yes.

J. NOVAK: And those were pursuant to contracts that were entered into between those two entities?

L. HOOTON: That's correct.

J. NOVAK: Or at least the county service area of Snowbird and Salt Lake City. Are those the waters that are delivered to each Alta and Snowbird metered?

L. HOOTON: Yes.

J. NOVAK: And do you keep a record of those meter readings?

L. HOOTON: Yes.

J. NOVAK: Did you prepare a chart designated Little Cottonwood usage or water usage from Little Cottonwood Creek, Alta and Snowbird for the year 1989?

L. HOOTON: Yes.

J. NOVAK: Okay. The figures shown or plotted on the chart, to the left you show cfs and to the right you show billing units. Is there a conversion from billing units to cfs?

L. HOOTON: Not directly. The flows, the cubic feet per second, were calculated dividing the monthly billing reading by 30 days and then breaking that down to a flow of cubic feet per second--it's a calculated figure. But the billing units is actually measured through a culinary water meter with the accuracies of that kind of a meter--very accurate.

J. NOVAK: For the record, I am handing to the State Engineer, Mr. Skeen, and the Attorney General's Office, the chart I have shown. Explain, if you will, to the Engineer, Mr. Hooton, what that chart--

L. HOOTON: These figures are derived from my billing department, who has the records of all of the meter readings and the billings to these two entities, and this chart here represents 1989, which I believe is

typical of the water deliveries to Alta and Snowbird. As you can see, inasmuch as both of these entities are winter sports oriented, that the volumes of water delivered to them are much greater during the winter months and then subside in the summer months to a much lower value. Approximately, in this particular year in April, the combined flow of Alta and Snowbird equaled 20,000 billing units. A billing unit, under our system, represents 748 gallons. And so we bill on 100 cubic feet. And again, the number on the left is some number, just to try to make some reference to what an average flow that would represent, because we don't have an actual flow measurement and that's calculated. But again, you can see that the flows or the usage are substantially lower in the summer months versus the winter months. Somewhere averaging around a quarter of a second foot, if it was averaged.

J. NOVAK: And that's the combined usage of both Alta and Snowbird?

L. HOOTON: Yes, the top line represents a total, and then the shaded area is the volume used by Snowbird and the dark area is the volume used by Alta.

J. NOVAK: Did you also prepare a similar bar chart for three years to reflect what the conditions have been during the past three years?

L. HOOTON: Yes.

J. NOVAK: Let the record show that I'm handing a copy of Water Usage Little Cottonwood Creek bar chart to Mr. Skeen, State Engineer, for his record and the Attorney General's Office. And quickly, Mr. Hooton, will you explain--

L. HOOTON: Yes. This chart's just an attempt to give a little more dimension to the time frame. We have records going back to the date of the agreements, but this gives you a three-year period and it's the same principle as the earlier chart. It does show that there is no substantial amount of use during the winter months when the ski season is on and a corresponding reduction during the summer months, during the irrigation season.

And I guess the only comment I'd have on this is in the court commissioner's calculation of total stream flow, he uses the sewer reading which is a higher reading than the actual amounts diverted into Alta and Snowbird, because it takes some infiltration from other flows that are coming out of the canyon. So this is an actual measurement of the amount consumed by Alta and Snowbird as measured through a culinary quality meter.

J. NOVAK: Thank you, Mr. Hooton. I have no further questions.

R. L. MORGAN: Mr. Skeen, do you have questions of Mr. Hooton?

E. SKEEN: You have here at the head on each chart, on the right hand side, 1,000 times a billing unit. What did you say is a billing unit?

L. HOOTON: One billing unit is 748 cubic feet -- or gallons. I'm sorry.

E. SKEEN: 748 gallons?

B. MURDOCK: That's 100 cubic feet Ed.

E. SKEEN: Same on both these charts?

L. HOOTON: Except I think on the one chart it printed out 1,000 on the scale, where the other was a multiplier.

E. SKEEN: Now, referring to the first chart you've identified entitled Little Cottonwood Exchange Ditches, on the left hand side you have acre feet and then at the top, 20,000 and then 15,000, 10,000, 5,000 and 0. What records did you use to make these computations?

L. HOOTON: We used records that were provided to me by the irrigation division through our hydrologist department.

E. SKEEN: Do you have a copy of those records with you?

L. HOOTON: No.

E. SKEEN: Where are they?

L. HOOTON: They're at our office at 1530 South West Temple.

E. SKEEN: Did you know that for a period of many years, there were no operating measuring devices on the Cahoon & Maxfield Ditch System?

L. HOOTON: No.

E. SKEEN: You didn't know that? Well, all you know is that you were furnished certain records. And that was from the Department of Natural Resources?

L. HOOTON: No, from the Department of Public Utilities.

E. HIGBEE: May I explain something here?

E. SKEEN: Well, not right now.

J. NOVAK: You can explain it later than Ed.

E. HIGBEE: I think it needs to be understood.

E. SKEEN: Who did the actual work in computing these charts?

L. HOOTON: The raw data comes through our hydraulics statistician and is compiled basically from Ed Skene--or not Ed Skene--Doug Skene.

E. SKEEN: Who?

L. HOOTON: Doug Skene.

E. SKEEN: That's S-K-E-N-E?

L. HOOTON: E-N-E, uh-huh.

E. SKEEN: Are you willing to make those records available to us?

L. HOOTON: Yes.

E. SKEEN: To see just how these computations were made? We'll have someone telephone and make--

B. MURDOCK: Can we take it one step further? Could we obtained copies of the actual field records upon which the measurements at the supposed weirs were recorded -- as a part of that record?

E. SKEEN: When will they be made available?

L. HOOTON: Upon request.

E. SKEEN: Do you know whether the chart, the first chart that you furnished is based on measurements in second feet?

L. HOOTON: Yes.

E. SKEEN: And computed to acre feet? Do you know whether those measurements were made on Little Cottonwood Creek as well as on the ditch systems of these four irrigation companies?

L. HOOTON: The measurements Mr. Higbee would make?

E. SKEEN: Yeah.

L. HOOTON: I don't see his records.

E. SKEEN: You don't know?

L. HOOTON: No.

E. SKEEN: I think that's all.

B. MURDOCK: I have a question.

E. SKEEN: Do you have anything else?

B. MURDOCK: Yes, Mr. Higbee, is Salt Lake City a regulated public utility?

E. HIGBEE: No.

B. MURDOCK: Is Salt Lake City incorporated to be in the business of a public utility in marketing water outside the City--

L. HOOTON: I'll let the attorneys answer that one.

J. NOVAK: Salt Lake City is a municipal corporation and it is not subject to the regulation by the Public Service Commission in the sale of its water either to its inhabitants or its surplus waters outside of its corporate boundaries.

B. MURDOCK: Is it incorporated to be in the business of water utility?

J. NOVAK: The statute authorizes Salt Lake City to provide water to its inhabitants and to sell its surplus waters beyond its corporate limits. It's a statutory authorization by the legislature to all municipal corporations, including Salt Lake City.

B. MURDOCK: The water that it sells outside its corporate limits, is it only surplus water?

J. NOVAK: That's correct. Surplus as to the needs of the inhabitants of Salt Lake City.

B. MURDOCK: Is it the intent of these sales to comply with the State Division of Drinking Water's regulations in such sales?

J. NOVAK: Well, I would assume that Alta and Snowbird must comply with those requirements.

B. MURDOCK: Are you acquainted that those regulations require that the service must supply 800 gallons per day for residential connections, and it would not seem to me that surplus water is able to meet that requirement, that regulation.

J. NOVAK: That's Sandy City, or excuse me, that is Alta and Snowbird's concern. We have Mr. Kapaloski and Mr. Veasey, counsel for both of those entities here, if it's material here. If the Engineer thinks it is, I suppose they can answer your question.

B. MURDOCK: I think it's a little relative--we're providing a supply for someplace that is not able to meet other state regulations. I think its germane.

LEE KAPALOSKI: I think its--this is Lee Kapaloski for the record. I can answer that question quite simply. Well, County Service Area 3--Snowbird and Alta town are served by the Bureau of Public Water Supplies and are approved systems.

B. MURDOCK: That may be, but there's no reference in their records of adequate water rights. I've researched it.

L. KAPALOSKI: Let me say for the record, the question was, Are they approved systems, or they in compliance and I say the answer to that is affirmative.

B. MURDOCK: And this exchange, for the record, I'd like to point out that this exchange, or this sale, or this continuance of it, still does not meet the regulations and requirements of the State Division of Drinking Water in supplying Alta or Snowbird. Well, I have the regulations here--

J. NOVAK: I don't see your point, Mr. Murdock, because as Mr. Kapaloski says, both have the necessary approval certification from the State.

B. MURDOCK: I'm aware that they do.

J. NOVAK: Then, what's the problem?

B. MURDOCK: I'm also aware that it was a revelation to their director very recently that there were no water rights to back it up.

J. NOVAK: Well, it seems to me that we've got, you know, these two contracts that are the subject matter of this temporary, these temporary change applications.

That's all that we have.

R. L. MORGAN: Okay.

J. NOVAK: Unless, did you want to explain something?

E. HIGBEE: One thing that Ed Skeen mentioned here, and I disagree with. He said no measuring devices. That I disagree with. There are measuring devices monitored on spot readings. There was not recorders, but there were measuring devices and there's a big difference. There's always--there used to be a Lyman Weir on the Cahoon & Maxfield No. 3 and it was a measuring device and was satisfactory, it worked. You guys disagreed, they've replaced it with another one. Okay, that's past history.

There were, there are measuring devices, were measuring devices on all three of those.

B. MURDOCK: But, by your argument, any place in any ditch or any creek is a measuring device.

E. HIGBEE: It can be.

B. MURDOCK: It can be if you want to use the appropriate equipment, but not in the normal vernacular of a measuring device, although--

E. HIGBEE: If there's a parshall flume

B. MURDOCK: A measuring device--

J. NOVAK: Okay, you've made your explanation, Mr. Higbee, and we'll just let the Engineer sort it out.

R. L. MORGAN: Mr. Skeen, your comments.

E. SKEEN: Very well, I'll ask Mr. Murdock a few questions and then I'd like to make a statement.

Mr. Murdock, were you employed by the four irrigation companies to make a study of the records of the State Engineer to see what water rights or records were in the name of Salt Lake City?

B. MURDOCK: I was.

E. SKEEN: And what did you do in response to that employment?

B. MURDOCK: You're particular in reference to water rights on and about Little Cottonwood Creek?

E. SKEEN: Yes.

B. MURDOCK: In response to that, I made a very detailed study of the records of the State Division of Water Rights and the State Engineer's Office to try and determine what rights were of record, if any, for Salt Lake City in that drainage. We looked in all of the logs and the files of the State Engineer's Office for source information, given their computer base and logs of filings and change applications. The thing that we found was number one, a change application a746 that was filed March 28, 1921 by Salt Lake City related to the Cahoon & Maxfield Irrigation Company. The change application was for 60 second feet. It listed a point of diversion that was to be the proposed Little Cottonwood Conduit point of diversion. That point of diversion was later moved some 1,000 feet and no further change was made. The change was at a time when no proof was required. However, the change was subsequently superseded by change application a1175 and by memorandum in the

State Engineer's files, it states that A756 is considered modified and superseded by a1177. On May 29, 1931, other water rights agreements were signed with the other three companies involved here and on September 4, 1931, Salt Lake City Corporation listed itself as agent for each of the four irrigation companies and filed change application numbers a1174 through a1177. These were based on the agreements with the companies. The quantities listed were 30 cfs under 1174, 55 cfs under 1175, 16 cfs each under 1176 and 1177. The four change applications listed two new points of diversion, which were the Murray City power diversion and the Little Cottonwood Conduit diversion point.

In explanation, on each of the changes it was said that the City seeks to change the right to the primary rights only. However, the quantity listed for the four changes was 117 second feet which exceeds the 94.79 cfs, the total primary right as listed in the decree. The explanatory on each filing also allows for the change to be suspended at times and the waters to be diverted and used as heretofore by the irrigation companies. Waters were diverted under these changes for many years. Proof was never filed on these changes, even though the conduit was built and the diversions were made and water was conveyed and all four filings lapsed on March 28, 1983, and there are no approved changes in force for Salt Lake City to use the water associated with the four agreements. There was change application A1239 on June 1, 1933, Salt Lake City Corporation filed a change for point of diversion place and nature of use .65 cfs awarded in the Morris decree to Brady Ditch No. 2.

B. MURDOCK: The change involved the .10 cfs of primary right and .55 cfs as secondary right and in effect enlarged the right to .65 cfs of year round use for municipal, domestic and stockwater. A certificate was issued on that Certificate No. 37 on June 27, 1935. Salt Lake City filed applications A11370 and A11487. These were filed on May 27, 1933 and December 15, 1933. One was for 5 cfs, the other was for 3 cfs. These were filed based upon to appropriate the savings of seepage and evaporation by the exchanges upstream to be realized by the change applications of the four changed applications

of the irrigation companies' water. In other words, these two applications are based upon the four change applications that have lapsed. Certificates were issued for these two applications. They are numbers 4219 and 5870. They were issued on March 29, 1960. Also, application A34942 was filed by the Metropolitan Water District of Salt Lake on February 19, 1963. It is for a dam about 410 feet high, to store about 500,000 acre feet near the mouth of Little Cottonwood Canyon. The application is unapproved.

J. NOVAK: It was 500,000?

B. MURDOCK: 400,000 acre feet. 500,000 acre feet -- that what I listed.

J. NOVAK: My memory is that I filed it and it, was for 60,000.

B. MURDOCK: Well, somebody made a typo error. It is listed as 500,000 acre feet Joe.

J. NOVAK: It would be the mother of all dams.

B. MURDOCK: 410 foot high is a very high dam and a very short reservoir at that location and built on moraine, I don't think I'd give it much chance of being successful. Anyway, it's unapproved. That's the summary of what is of record in the State Engineer's Office of water rights and changes related to Salt Lake City and Little Cottonwood Canyon. Nothing for diversions for Alta or Snowbird are of record.

E. SKEEN: You have copies in your file of the four change applications?

B. MURDOCK: I do have.

E. SKEEN: I wonder if you would produce them.

B. MURDOCK: Here.

E. SKEEN: Bob can you read from the applications the description of the rights to be changed.

B. MURDOCK: I need a magnifying glass here. The description of the right to be changed, well, the name of the applicant is listed here as Salt Lake City Corporation agent and it lists an address as Salt

Lake City, Utah. The flow is 32 second foot in the Utah Lake/Jordan River drainage. The direct source of supply is Little Cottonwood Creek in Salt Lake County. The point of diversion, do you need the detail of the point of diversion?

E. SKEEN: No, that won't be necessary.

B. MURDOCK: The water involved has been used for the following purposes: culinary and irrigation on lands in Sections, well it lists several Sections. This is changed application a1174.

E. SKEEN: Do you find anywhere a description of the water rights sought have to be changed? I have a copy here but here but --

B. MURDOCK: It simply lists decree. The one word, Decree, is listed there and that doesn't state what decree, it simply says decree on all four changed applications.

E. SKEEN: And on the bottom of the third page, do the words appear, City Engineer for Salt Lake City Corporation agent for Richards Irrigation Company or the others?

B. MURDOCK: Well, this. Oh yes, it's on the second page. City Engineer for Salt Lake City Corporation agent for Richards Irrigation Company is what that one reads.

E. SKEEN: And does the same writing appear on the other three?

B. MURDOCK: You may have a better -- it does on that one and that one. It does on at least three of them. My copies are not very good.

E. SKEEN: Mr. Murdock.

B. MURDOCK: It could say that here, the copies are not very good, but it does on at least three of them.

E. SKEEN: When you made your search of the records in the State Engineer's Office, did you exam a deed file showing recorded deeds conveying water rights?

B. MURDOCK: We examined every file that we knew to be possible in the State Engineer's Office. We had the assistance of Dorothy Bolton in finding what places there were records. I think there was one that was called a deed file. I know we examined a log of

applications and change applications and there was another file and it could very well have been a deed file but I don't know positive for sure.

E. SKEEN: Well do you know whether the State Engineer as required by law, maintains a file for water deeds?

B. MURDOCK: I know that the State Engineer is the office of record of water rights in this state, yes, that he does. I do know that copies of deeds are often in the files, the various files of projects or of water rights showing transfer of title from one owner to another.

E. SKEEN: Did you find any reference in anything you examined that showed any deeded water rights to Salt Lake City?

B. MURDOCK: No, I didn't. Not in Little Cottonwood Canyon, no. There were many, many other filings elsewhere in the valley that we investigated each one until we found either its location or it was an underground source or something that would eliminate it from applicability to the questions involved.

E. SKEEN: You found no deeds?

B. MURDOCK: Found no deeds.

E. SKEEN: From the four irrigation companies to Salt Lake City?

B. MURDOCK: That's correct.

E. SKEEN: We've been in this hearing from 3:00 until seven minutes to 5:00 and we've had fifteen minutes. I would like permission to review the records that they indicate will be made available to us and we would like to have a further hearing on the other problems involved.

J. NOVAK: I would object to that, Mr. Morgan. These are temporary change applications. What Mr. Skeen is requesting I think is simply delay. The action by the State Engineer -- this is the time set for the hearing and I'm prepared to go until midnight if we have to -- but I think we ought to finish the hearing. If Mr. Skeen wanted to look at our records, he could have made his requests earlier.

So I would resist a continuance of the hearing, I think we ought to take it through to its conclusion and the State Engineer make his decision.

E. SKEEN: It's all amusing to me sitting here to hear counsel make that statement about delay when these contracts were made, one in 1921, seventy one years ago. The others were made in 1930. No change application has been filed on any of them since until after this litigation was commenced, and that was on May 30, 1992. He's complaining about delay. I'll say it's amusing to me.

R. L. MORGAN: How long would it take you to review the records?

E. SKEEN: Well, I'd like to have a couple of weeks.

E. HIGBEE: May I make a questions, ask a question?

J. NOVAK: No, just a minute.

R. L. MORGAN: I think in the essence of the temporary change applications, that's a little long. How long would it take you to produce the records for Mr. Skeen?

L. HOOTON: I would have to--

E. HIGBEE: It would probably take more than a week to do that -- to get them all together. If I'm able to make this statement -- as long as I have been with the Salt Lake City Water Department and I have been thirty some odd years.

B. MURDOCK: I thought you were the River Commissioner.

E. HIGBEE: I was Court Commissioner since 1979. I also work for Salt Lake City as a water rights specialist now, and I used to be involved with irrigation. But, as long as I have worked with Salt Lake City, the ditch companies controlled the amount of water they received. I don't see what the amount has to do anything with it. They were allowed to control how much they put into their systems? They have taken what they could use or more, I don't know, but they have taken through their system what they could use and just what difference is that going to make?

J. NOVAK: Please, Please. I take it Mr. Skeen that you wanted review the records to verify the accuracy of this chart.

E. SKEEN: That and for other reasons. And as far as the law is concerned, I would like to make a statement on the law, and I have hurriedly reviewed these cases you have cited. None of them are in point and I would like to go back to the law as it was when these contracts were made and the changed applications should have been filed. I don't want to be put in a position of trying to be forced to make a legal statement in five minutes or three minutes. I think it's unfair to me personally and I think I should have full opportunity to review the hour and a half submission that was made by the applicant. Further, I would like to add one statement that I don't think the State Engineer has any authority to pass on legal questions as to whether Salt Lake City acquired a water right or merely acquired the right to a supply of water separate from the water right. I have been in the business for something like sixty years and I have heard many arguments like the one Mr. Novak made confusing water and water rights. You can't file a change application on water itself, it has to be on a water right. That is a legal question that the State Engineer I think should look at. He has no authority under the law to pass on it.

R. L. MORGAN: Would you gentlemen give me a couple of minutes with counsel?

Conferring with counsel, at least it's my opinion that first of all, State Engineer is holding this hearing really just as a courtesy. We really are not required to hold hearings concerning temporary change applications. I think it would be my decision that we should continue with the hearing tonight. We would ask that Salt Lake City make available to Mr. Skeen, all of the records so he could make an examination and if you wish, submit to our office in writing a statement to supplement the record no later than the first of July. And I would extend the same courtesy to Mr. Novak and Salt Lake City if you wish. So we will continue with the hearing.

E. SKEEN: Well, now, are those records to be furnished to me.

J. NOVAK: You will have to send someone down to review them, they are too extensive. Aren't they, LeRoy.

L. HOOTON: Yeah, I would imagine.

J. NOVAK: They're down at the Salt Lake City Department of Public Utilities.

E. SKEEN: How are you people involved with going down and looking at the records?

B. MURDOCK: I'll have to make time.

R. L. MORGAN: I would ask Salt Lake City, I realize that you are under certain constraints too but, I think that there is a time element here, and if it requires that your consultant and the City extend the hours a little bit, then I would ask your indulgence in doing that.

B. MURDOCK: Would I contact you LeRoy?

L. HOOTON: Yes, please. I will make the arrangements. 483-6768.

J. NOVAK: So as I understand it, Mr. Morgan, you're concluding the hearing subject only to submission of statements by Mr. Skeen or even us, based on the review of the records?

R. L. MORGAN: No, I'm not concluding the hearing. If there's other things that you want to talk about, we can keep on going. What I'm saying is as far as Mr. Skeen's request to be able to examine the record or continue the hearing until a later date, come in and let him examine the record and then reconvene the hearing, I don't think, I'm not going to allow that. What I am saying is that we will keep going with the hearing right now. He can supplement the record, and would have until the first of July to do that.

J. NOVAK: Very good.

R. L. MORGAN: For the record, the first of July is a Tuesday, and you would have until 5:00 that closing hour.

E. SKEEN: Very well.

R. L. MORGAN: Does anyone need to stretch their legs, do we need to take five minutes or do we want to keep going?

E. SKEEN: Well, I think I would like to make a brief statement on the law and then reserve anything on the facts until after I hear from Bob.

R. L. MORGAN: Okay.

E. SKEEN: The law in effect in 1921--in 1931 to '33 is -- regarding the transfer of water rights -- in Section 16 of Chapter 67 Laws of Utah 1919. It provides:

> 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 and books kept for that purpose in the Office of the Recorder of the county where the place where the diversion of water from its natural channel is situated and in the county where the water is applied. Every deed of water rights so recorded shall from the time of filing the same with the Recorder for record and part notice to all persons or the contents thereof and subsequent purchasers, mortgagees and lienholders shall be deemed to purchase and take with notice.

That section was later changed to require a copy to be filed in the Office of the State Engineer of the State of Utah. At the same time section -- let's see -- permitted the exchange of water, that's section 9 of Chapter 67, Laws of Utah 1919.

> Upon application in writing and approval of the State Engineer, any appropriated water may be turned into the channel of any natural stream or natural body of water or into a reservoir constructed across the bed of any natural stream and commingled with its waters and then be taken out either above or below the point where emptied into the stream, body of water, or reservoir. But in so doing,

> the original water in such stream, body of water or reservoir must not be deteriorated in quality or diminished in quantity and the additional water turned shall bear a share of loss by evaporation and seepage of the end of said maintenance of said reservoirs, an equatable proportion of the costs of the reservoir site and the construction.

For the first time, Salt Lake City has of record claimed title to the water rights by these exchange agreements. I think a fair reading of all four contracts makes it clear that they were for exchange of water only and not water rights. In fact, provision after provision would support that statement. The Supreme Court has held that the transfer of water rights must be by deed, that says shall and it's a mandatory provision of the law. And after filing change applications in 1931 and making numerous requests for extension of time and naming themselves as agent only, they now come up and say that they own the water rights.

Even if they owned the water rights, there is no change application filed on the water for use in Snowbird and Alta, and no change of the water rights for use outside of Salt Lake City. The application involved mentioned a few minutes ago, a746 which was filed, as I remember somewhere around 1921 or 22, that states in the application itself that the use of the water shall be in Salt Lake City and the City has by signing all of these documents, plainly indicated an intent to treat that as merely an exchange of water and not the transfer of water rights itself. That legal question is being litigated at present, and the City must take it fairly seriously because this is one of the pleadings filed by Salt Lake City in the case.

J. NOVAK: I'll stipulate that Salt Lake City takes this case very seriously Mr. Skeen.

E. SKEEN: I'm sure they take it seriously, but I'm just showing how serious they take it to file a pleading this thick. Anyway, I feel very strongly that we are right on the question of law and I got a case before the Supreme Court right now involving the

question as to whether the State Engineer can for any purpose determine ownership of water rights. That's pending right now and I think there is a lot of support for our position on that, and I intend to pursue it. I think if we handle it in an orderly way, that we ought to await the decision in the case to determine the meaning of that contract and not start making temporary change in three cases about sixty years after the change they relied on was made, and the other seventy years. I know the right, and you're no doubt aware that they have also filed four exchange applications. They were filed sixty and seventy years late. For some reason they have done all this to cover up for what they didn't do sixty or seventy years ago. I'm personally convinced that Salt Lake City does not own any of these water rights and that its subterfuge to argue the contrary. With the State Engineer's permission I will submit a brief statement distinguishing these cases counsel has cited.

R. L. MORGAN: Okay.

E. SKEEN: I think in a lot of the memoranda that Salt Lake City has contended that those change applications were really exchanges that were filed in 1921 and 1931, and I happen to recall, and I have looked it up to verify it, that there was no blank change application form in the State Engineer's Office until 1937 or 1938, and I prepared the form while I was counsel for the State Engineer. That is stated in the State Engineer's biennial report for the years 36 to 38. I think I've got the page number. They weren't exchanges and wouldn't be proper exchanges, they were simply change applications. Let's see that.

In the State Engineer's biennial report from 1936 to 38, page 41 it states "not until the current biennium, however, were blanks prepared and made available for specific use in making exchange applications."

Well, subject to our right to review the records and make a further statement in writing, we'll submit the matter.

R. L. MORGAN: Anyone else of your group want to make a statement?

M. WIDERBERG: I would like to make a couple please.

R. L. MORGAN: Okay, identify yourself please.

M. WIDERBERG: Marv Widerberg, Richards Irrigation. In reference to Mr. Novak stating that case, and where there had been no default with Salt Lake City, I would say that the fact that they have taken a portion of that water at Alta and Snowbird is in fact a default. They have taken that which is contributory to the creek and sold it to Alta and Snowbird and then down at the bottom of the Canyon, measure that sewage and add it back into the total flow of the stream. That portion that they have already taken up there should have been a portion of the stream usable. So I submit Mr. Novak that you have defaulted in the fact that you have taken that water.

Then, I would argue with you also that I find no place in my agreement that gives you one year to correct a situation. It says forty-eight hours, not one year. Now I have reviewed this several times and just gone through it just now and it is not one year. I think the matter for us wasting more time, I'll conclude with that but I would just like to put that point in. The fact that they have defaulted where they have taken our water and our agreement states that they should protect our water rights at all times, and they have not done that by taking that water up there.

B. MURDOCK: I would like to make one additional comment. The temporary change application lists currently the places of use and it refers to an attachment 3 which is map which shows all of Salt Lake City and other areas within Salt Lake County. As of right now, the exchange application is simply an advertisement to make that legal. They are, by this change application, asking a change on something that is not yet legally approved by the State Engineer's Office. I don't know the point of law but on a technicality it seems like getting the cart before the horse.

R. L. MORGAN: Questions to protestants?

J. NOVAK: No questions, I just want to make a very short response to what has been presented.

R. L. MORGAN: Okay, do we want to go into summation?

E. SKEEN: I think we'll submit it. Do you have any questions Tony?

T. REZAK: No.

R. L. MORGAN: Okay, go ahead Mr. Novak.

J. NOVAK: Okay, Mr. Widerberg if you'll look at paragraph 4 of your exchange agreement, that covers the default provision. I just want to comment Mr. Morgan that Salt Lake City has demonstrated that it is entitled to the use of water to meet the requirement of 73-3-3 for the purpose of making this change. There has been absolutely no evidence to show that making the exchange will impair any existing rights, either the rights of the protestants or anyone else on this system. In fact, the evidence conclusively shows that there will be no impairment. Under the law and I'm sure, Mr. Quealy will advise you on it, all the State Engineer is required to do is to find reason to believe that the temporary change can be approved without impairing existing rights. And I think the record is replete with that sort of evidence, and we think that after Mr. Skeen responds, the temporary changes must be approved.

R. L. MORGAN: Okay. Change of heart Mr. Skeen.

E. SKEEN: No, I'll submit the matter.

R. L. MORGAN: Okay. Thank you. If there are no other statements we'll conclude the hearing at this time. Again reminding you that the record will stay open for written comments until 5 pm, the first of July 1992. Thank you gentlemen.

J. NOVAK: Thank you Mr. Morgan.

Exhibit B

BEFORE THE UTAH DIVISION OF WATER RIGHTS

In Re: ~~Temporary~~ Permit Nos. 57-10100, 57-10009, 57-10010, 57-10011, 57-10014 and 57-10015

Before Hearing Officer Kent Jones

August 28, 1996

THE HEARING OFFICER: This is a hearing before the State Engineer on five applications for permanent change of water, under 57-10009, change A16839; 10010, change A16841; 10011, change A16842; 10014, change A16845; and 10015, change A16846. These applications are all filed in the name of Salt Lake City Corporation.

They are all representing Morse decree rights for Little Cottonwood Creek. No. 10015 is representing 15.75 acre feet of water, indicates that historically the water has been taken from Little Cottonwood Creek. It lists points of diversion as Little Cottonwood Tanner ditch, Cahoon-Maxfield Irrigation Company, Walker Ditch Company, Richards Irrigation, Murray City Power Plant diversion, and Little Cottonwood Creek Diversion Dam.

The change is proposing to take the 15.75 acre feet to divert it from a spring and a mine tunnel with those points of diversion both in Section 9 of 3 south and 3 east. It indicates water is to be used for municipal purposes by Salt Lake City, and indicates a note that this is Little Cottonwood Canyonlands, Incorporated. Under 10014 it is representing .221 acre foot of water.

It looks like all of these have the heretofore points are all the same six points as I read in on the other application. The historic use is all listed as

Salt Lake City municipal water. The change is proposing to take the .221 acre foot and divert it from an unnamed spring in Section 4 of 3 south and 3 east to be used for municipal purposes by Salt Lake City. And this is associated with John D. Kayhill with a contract with him for the use of that water.

Under 10011 it is representing .442 acre foot, delivered from the same historic points and listing that the .442 acre foot will be diverted from an unnamed spring Section 12 of 3 south and 1 east, and this is associated with the Charlotte's 30 contract, indicates the uses will be for municipal purposes by Salt Lake City.

10010, representing 167.9 acre feet diverted from the historic points as previously read in, and it is proposing to take the 167.9 acre feet from the Quincy mine tunnel, Section 5 of 3 south and 3 west, use is municipal for Salt Lake City, and this is associated with the Alta Peruvian Lodge, et al.

Under 10009, representing 1.326 acre feet of water being diverted from the same points for municipal use by Salt Lake City. It is proposing to take 1.326 acre feet to be diverted from spring areas. The spring areas are assigned as the Tanner Flat campground, Albion guard station, and the Albion base campground. Those

points of diversion vary, Section (inaudible) South, 2 east, Section 32 2 South of 3 east, and Section 9 of 3 South 3 east. It is to be used for municipal purposes by Salt Lake City based on a contract with the U.S. Forest Service.

Those are the five applications we have before us. We will turn now to the applicant to speak in support.

MR. NOVAK: Thank you, Mr. Jones. I suppose I ought to reiterate some of the general statements that I made this morning concerning applications in Parley's and Mill and Big Cottonwood Creek, but basically it is the position of Salt Lake City that it is the owner of and has title to the water rights that are involved. We submitted to the State Engineer a document, authorities, relating, regarding Salt Lake City Corporation change applications that has in it copies of six decisions of our Utah Supreme Court, and the one that's probably key is the 1905 decision that where our Supreme Court held that in reviewing proposed exchange agreements such as those that are involved here that the City, by reason of those exchange agreements, acquired title and ownership to the water rights subject only to defeasance in the event Salt Lake City did not comply with the conditions subsequent by a material breach of the contract.

So our position is that Salt Lake City does own the water rights, and that's further fortified by two additional cases, the (inaudible) case and the Green ditch case. We have also included copies of three other Supreme Court opinions, two of them Boundary Springs case and the Crafts case that set forth the standard that's to be applied in acting on change applications, and that is that the State Engineer merely need find reason to believe that the changes can be approved without impairing existing rights. Applicant has the burden of establishing that generally but the protestants have the burden of showing specifically that their rights might be impaired.

And so with that backdrop and that setting, we put together packets that include on all the canyon streams the Morse decree applicable to those streams, that includes Little Cottonwood Creek and the exchange agreements, the Little Cottonwood Creek, that Salt Lake City has with Cahoon and Maxfield Irrigation Company, with Little Cottonwood Tanner, Richards, and the Walker ditch, and they are all in those packets.

I should point out that Salt Lake City had filed two other change applications that involve surplus sales contracts for water to Alta and Snowbird, and we have been -- those were set for hearing. We have been

through those hearings, and the State Engineer finally acted on those and approved those over the very objections that are being raised in these five change applications that are now before you.

TIM DOXEY,

called as a witness, having been duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. NOVAK:

Q. And so with that I would like to call on Mr. Doxey from the Department of Public Utilities, Salt Lake City, to present to the State Engineer copies of the sales contracts we have in Little Cottonwood Creek and as related to the maps that have been put together that are color coded, but first to ask what is your name?

A. Tim Doxey.

Q. And by whom are you employed?

A. Salt Lake City Corporation, Public Utilities.

Q. In what capacity?

A. Deputy director.

Q. And how long have you been employed by Salt Lake City Public Utilities?

A. Forty-one years.

Q. And how long in the capacity of deputy

director?

A. I can't remember.

Q. You are familiar, are you not, with the water rights on Little Cottonwood Creek and the exchange agreement between Salt Lake City and these four companies?

A. Yes.

Q. And you are familiar, are you not, with the sales contracts that Salt Lake City has with individuals, entities in the Little Cottonwood Creek drainage?

A. Yes, I am.

Q. Will you, Mr. Doxey, explain to the State Engineer the book that you have and what you want to present and how it relates to the maps?

A. Okay, first, the maps, as with the other canyons being color coded, the blue is a reference to the Little Cottonwood Canyon, and there is also indication to the application numbers on each one of those points, and along with that we have a three-ring binder that has a summary and an index in it that refers to the sales contracts that we have in Little Cottonwood Canyon, and each one of those are identified with the same blue markings.

Q. Mr. Doxey, based on your experience and review

of the water rights on Little Cottonwood Creek, the exchange agreements and the sales contracts and the change applications that are before the State Engineer, do you have an opinion as to whether the approval of the five change applications or any of those would interfere with or impair existing rights in Little Cottonwood Creek?

A. It is my personal opinion after review of those that there shouldn't be any impairment.

Q. And what's the basis for that?

A. Review of the contracts and the decrees.

Q. There is a sewer line, is there not, down Little Cottonwood Creek?

A. Yes, there is, in Little Cottonwood Canyon.

Q. Little Cottonwood Canyon, yes. It better not be down the creek.

Can you tell us, Mr. Doxey, probably get it from the commissioner, how the water going into the sewer line from the cabins or buildings that are -- that have these sales contracts with the City, how those waters are accounted for as far as other rights on Little Cottonwood Creek, including the exchange users?

A. The contracts we have with Alta City and with the service district No. 3 up there require that that water be metered, and then that water that goes into the

sewer or through those is added to the water in the stream, and then the court commissioner is supposed to apportion it properly.

Q. So the quantity of water going through the sewer is added to the physical quantity of Little Cottonwood Creek and the percentage interest under the decree or applied to the sum of the existing plus water going through the sewer line; is that correct?

A. That's my understanding, yes.

MR. NOVAK: I have nothing further of Mr. Doxey on these change applications. Do you have anything, Mr. Bramhall?

MR. BRAMHALL: No.

MR. NOVAK: We will call Mr. Higbee, Ed Higbee.

MR. WILSON: I would like to state an objection for the record on Mr. Higbee, based on conflict of interest and the Code of Judicial Conduct, being applied to a commissioner appointed by the court. If the record could so reflect.

THE HEARING OFFICER: Note that for the record.

EDWARD HIGBEE,

called as a witness, having been duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. NOVAK:

Q. Would you state your name, Mr. Higbee.

A. Edward Higbee.

Q. Are you the court-appointed water commissioner on Little Cottonwood Creek?

A. Yes, I am.

Q. Are you familiar with the five change applications that are before the State Engineer?

A. Yes.

Q. Are you familiar the exchange agreements that Salt Lake City has with the four irrigation companies on Little Cottonwood Creek?

A. Yes.

Q. And are you familiar with the sales contracts that have been entered into between Salt Lake City and other entities up in Little Cottonwood Canyon that form the basis for these change applications?

A. Yes, I have read them.

Q. Do you have an opinion, Mr. Higbee, as to whether the approval of these five change applications would interfere with or impair other water rights on Little Cottonwood Creek?

A. There should be no impairment to any of the decreed water users. It may impair a little bit the

quantity that Salt Lake City is able to receive through the treatment plant and through the, put into the culinary system through Metropolitan.

Q. The waters that, to the extent under these sales contracts and change applications, to the extent that those waters go into the sewer coming down Little Cottonwood Canyon, are they accounted for in determining the total quantity of Little Cottonwood Creek?

A. That's correct. In coming up with the total bill at the mouth of the canyon I take the stream flow that's going through the power plant at Murray City, that Murray City has used, I take the amount of 15-foot Parshall from the water, then I include the sewer flow, the amount that's coming down the sewer system, and I also include the wells that Sandy City has in the mouth of the canyon and charge that as part of the total flow, because that affects the seepage flow into the creek.

Q. And I take it to the extent that the water that's used in the upper canyon under these sales contracts, to the extent that those waters find their way into the sewer, the net effect is that that comes out of Salt Lake City's share of the waters of Little Cottonwood Creek?

A. That's correct.

MR. NOVAK: I have nothing further.

THE HEARING OFFICER: Are there questions of the applicant?

MR. RESACK: The only objection I have is that I received this letter on the 24th of this month for this hearing, and did not properly (inaudible) review it with counsel or anything of that nature (inaudible) have time to take and review the applications, have to go back through all of these.

THE HEARING OFFICER: Unfortunately, the address that we had for you, Mr. Resack, on there was through Mr. Skeen, that was not picked out I guess when notices were sent out and was never requested for us to have that address changed. The notices were sent out to Mr. Skeen's address two weeks before the hearing, and then when it came back we got the return mail and realized it, we tried to get ahold of you to let you know that the proceedings were going ahead. You should have that now. Mr. Wilson will be his counsel?

MR. RESACK: That's correct. One thing I object is where Mr. Novak stated that the ownership and title of water, that it is still held by the irrigation company. That's when it was all filed back in the late 1800's and 1900's. Those are still on record. Salt Lake City does not have that ownership or title to that.

And how did they form the contracts with Alta

and Snowbird when all of the water was supposed to be taken at the base of Little Cottonwood Creek? They are not allowed to take and do their business up above where the water is measured. What rights do they have to enter into contracts and businesses above there?

UNIDENTIFIED SPEAKER: I think Mr. Resack was referring to the fact that these were done without -- I guess we could maybe present our case after other people ask their questions.

THE HEARING OFFICER: We will have that be part of that. Do you have any specific questions of the applicant to help clarify? Other questions?

MR. CONRAD: We should go on record, the Forest Service should go on record, I am Charles Conrad, the hydrologist for the Wasatch-Cache National Forest, and just wanted to go on record that any water right for uses on Forest Service owned property should be in the name of the United States, and that any uses of water on the United States land should, will have to go through the special use permit process, and if there is any changes in the agreements that the City has, Salt Lake City has with the U.S. Government regarding these waters that create the (inaudible), we negotiate it.

MR. NOVAK: My records show, Mr. Jones, that the only application that the initial protest from the

U.S. Forest Service came in on was the 57-10009, and that the, according to my records, the other four change applications, there was no protest filed by the Forest Service, and we talked earlier about the modified protest of the Forest Service, and we have a copy of, we read that last paragraph where the Forest Service does not object to those change applications but was to be informed, kept advised. So that applies here also; is that correct?

THE HEARING OFFICER: Yes, that's correct. Anything additional on the protest of the Forest Service?

MR. CONRAD: No.

THE HEARING OFFICER: I guess we return to the Cahoon-Maxfield Irrigation Company and for your protest on these applications.

MR. WILSON: Yes (inaudible) say the same things. By the way, Ben Wilson on behalf of Cahoon-Maxfield Irrigation Company. Our position is that Salt Lake City is not an owner of any of the water that they claim in the Cahoon-Maxfield Irrigation Company, that under the case that Mr. Novak cites, the Ellertson case and the other subsequent cases, that they are not the owner and title holder of the water, it remains in the hands of the Cahoon-Maxfield Irrigation Company under

its award under the Morse decree.

As a practical question to ask yourself, why -- why -- why would it be in their names if it's under the exchange agreement? The clear language is very clear that Cahoon-Maxfield retains ownership and title. There can't be two owners of the same piece of property, and this wasn't an outright sale.

The Ellertson case was only an advisory opinion by the Supreme Court based on a writ of prohibition brought by a taxpayer to determine whether it was unconstitutional for the City to enter into this type of an agreement. And, therefore, it does not apply to the contract that's at issue between Cahoon-Maxfield and Salt Lake City.

There is current litigation ongoing over this filed in Third District Court in front of Judge Hanson, and Cahoon-Maxfield has alleged a breach of the contract, and pursuant to the contract it is our position that the water right automatically reverted to Cahoon-Maxfield under the language of that exchange agreement, and that it may be another alternative position is that Cahoon-Maxfield owned it outright even, a technical version wasn't even necessary, it still retained that ownership that it is entitled to.

The other protest that we have is that Salt

Lake City has gone about and taken the water without following through the proper procedures under the State Engineer's Office for filing a change application, they -- the Little Cottonwood Water Company was a different owner and other ditch companies were owners of water that was meant to be measured and withdrawn traditionally from the mouth of the canyon, and what they did is enter into these contracts without ever filing change applications and selling the water that was not theirs to sell, that was water that could not be sold until it had been properly changed by appropriation up into the canyon, and it is a violation of the law to do that without all of the owners of water of Little Cottonwood Canyon participating in that agreement or in that sale.

It's also our contention that under the Little Cottonwood Water Company any water right that they propose or purport to own and use as the base for these base rights does not entitle them to use that water, because of the improper assumption of the water rights of both the Cahoon-Maxfield Company and other shareholders of Little Cottonwood Water Company. So on that basis we object to the alleged ownership of Salt Lake City owning the water right.

So we object to all of these change

applications that purport to base the water right on the Cahoon-Maxfield Morse decree rights or any other water rights that the Cahoon-Maxfield Company may have by virtue of ownership in Little Cottonwood Water Company.

That's it.

THE HEARING OFFICER: Okay. Thank you. Other concerns that need to come before us? We would return to the applicant for a response and concluding statements.

MR. NOVAK: Mr. Jones, I think that our initial comments clearly state Salt Lake City's position, and we certainly disagree with Mr. Wilson and his interpretation of those contracts and the Ellerbeck case that we talked about. There certainly hasn't been any evidence presented to show that there will be any impairment of any existing water rights by reason of the approval of these change applications. By the contrary, all of the evidence and the witnesses who testified state their opinion that there will be no impairment, and under the standards of the Boundary Springs case, the Pratt case, we think the State Engineer should approve all five change applications.

THE HEARING OFFICER: Okay. Anything additional we need to have come before us? Okay. We appreciate the discussion and for you being here and the

comments, and we will take them under advisement, and we will conclude the hearing.

(End of side B of tape 1.)

(This proceeding was concluded.)

C E R T I F I C A T E

I, BRAD J. YOUNG, hereby certify that I personally appeared at the Utah Division of Water Rights, Department of Natural Resources, in their office, on December 23, 2011, and there transcribed the electronic recording from tapes on file in their office of the proceedings dated August 28, 1996, in the above-entitled and numbered matter, and that the foregoing is a true and correct transcription, except where it is indicated that the recording was inaudible, to the best of my understanding, skill and ability on said date.

Dated at Salt Lake City, Utah, this 9th day of January, 2012.

BRAD YOUNG
COURT REPORTER