

Server C. C. C.  
Date 2-19-14 Time 4:20PM  
P/S  
ANDERSON INVESTIGATIONS, INC. #0101390  
PO. BOX 836, SLC, UT 84110 877-619-1110

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IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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SALT LAKE CITY CORPORATION, a Utah municipality,	)	
	)	
Plaintiff,	)	SUMMONS (20 Day)
	)	
v.	)	
	)	
KENT L. JONES, the Utah State Engineer, KEVIN D. TOLTON, JUDITH MAACK, MARK C. HAIK and THE BUTLER MANAGEMENT GROUP.	)	Civil No. 140900915
	)	Judge John Paul Kennedy
Defendants.	)	
	)	

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THE STATE OF UTAH TO THE ABOVE-NAMED DEFENDANT: **KENT L. JONES, the  
Utah State Engineer**

You are hereby summoned and required to file an Answer in writing to the attached  
Petition for Judicial Review and Complaint with the Clerk of the above-referenced Court at 450  
South State Street, P. O. Box 1860, Salt Lake City, Utah 84114-1860, and to serve upon or mail

to Shawn E. Draney, Scott H. Martin or Dani Cepernich Snow, Christensen & Martineau, 10 Exchange Place, Eleventh Floor, P.O. Box 45000, Salt Lake City, Utah 84145-5000, plaintiff's attorneys, within (20) days after service of this Summons and Petition for Judicial Review and Complaint upon you.

If you fail to do so, a judgment by default will be taken against you for the relief demanded in said Petition for Judicial Review and Complaint, a copy of which is attached hereto and served upon you.

DATED this 17<sup>th</sup> day of February, 2014.

SNOW, CHRISTENSEN & MARTINEAU



Shawn E. Draney  
Scott H. Martin  
Dani Cepernich  
Attorneys for Salt Lake City Corporation

Serve:

Kent L. Jones, Utah State Engineer  
1594 West North Temple, #220  
Salt Lake City, Utah



1. This first cause of action is brought under Utah Code Ann. §§ 73-3-14 and 63G-4-402. SLC seeks trial *de novo* of two substantially identical Utah State Engineer's Orders, both dated January 9, 2014. These orders are final agency actions in the informal adjudicative proceedings of Permanent Change Application No. a28548, Water Right Number 57-7800, and Permanent Change Application No. a28545, Water Right Number 57-10317, filed by Respondents–Defendants Dr. Kevin D. Tolton and Judith Maack, respectively.<sup>1</sup> True and correct copies of the Tolton change application—Change Application Number a28548, Water Right Number 57-7800—and the order relating to that change application are attached as Exhibits A and B, respectively. True and correct copies of the Maack change application—Change Application Number a28545, Water Right Number 57-10317—and the order relating to that change application are attached as Exhibits C and D, respectively.

2. This court has subject matter jurisdiction pursuant to Utah Code Ann. § 63G-4-402(1)(a).

3. Venue is proper pursuant to Utah Code Ann. §§ 63G-4-402(1)(b) and 73-3-14(1)(b).

4. Respondent–Defendant Kent L. Jones, P.E., is the Utah State Engineer. He is required to be named in his official capacity pursuant to Utah Code Ann. § 73-3-14(2), (3). His professional address is 1594 West North Temple, Suite 220, Salt Lake City, Utah 84114-6300.

5. The other parties to the informal adjudicative proceedings below were as follows:

Sandy City  
Little Cottonwood Creek Distribution Committee  
Sandy Irrigation Company

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<sup>1</sup> Some code provisions relating to trial *de novo* of an informal adjudicative proceeding refer to parties to be named as “Respondents.” Throughout this Petition for Judicial Review and Complaint, the term “Respondents–Defendants” will be used.

Alta Ski Lifts Company  
Town of Alta  
Friends of Alta  
Salt Lake County Service Area #3  
U.S. Forest Service  
Cottonwood Hydro, LLC (Hydro Holdings, LLC)  
Metropolitan Water District of Salt Lake & Sandy

6. The change application process is in part described by Utah Code Ann. § 73-3-3. Utah Code Ann. § 73-3-3(5)(a) incorporates into the change application process the same procedures and the same rights and duties of applicants that are applicable to applications to appropriate. The procedures and rights and duties of applicants are in part described by Utah Code Ann. § 73-3-8.

7. At trial *de novo* of informal adjudicative decisions of the State Engineer, the applicants, here Respondents–Defendants Tolton and Maack, bear the burden of alleging, and proving by the appropriate standard, that their respective applications meet each of the criteria for approval. They cannot meet that burden.

8. SLC is entitled to an order *de novo* rejecting the Tolton and Maack change applications.

**SECOND CAUSE OF ACTION**  
**(Quiet Title, Declaratory Judgment)**

9. SLC incorporates by reference the allegations of paragraphs 1 through 8 as if restated here.

10. This Court has subject matter jurisdiction over the second and third causes of action pursuant to Utah Code Ann. § 78B-6-401.

11. Venue for the second and third causes of action is proper pursuant to Utah Code Ann. §§ 78B-3-301 and -307.

12. All rights to beneficially use the water tributary to Little Cottonwood Creek (with the possible exception of short-duration very high, spring runoff flows) were decreed, adjudicated and affirmed as a part of a comprehensive stream adjudication in 1910. *See Consent Findings of Fact, Conclusions of Law & Decree, Union & E. Jordan Irrigation Co. v. Richards Irrigation Co.*, Third Judicial District Court of Utah, Salt Lake County, Case No. 4802, June 16, 1910 (commonly called the "Little Cottonwood Morse Decree," hereafter referred to as the Morse Decree).

13. SLC is the successor in interest to various parties named in the Morse Decree and, in addition, holds certain rights to beneficially use water saved by prevention of seepage from Little Cottonwood Creek.

14. SLC holds a large fraction of the rights to beneficially use water of, and tributary to, Little Cottonwood Creek.

15. Little Cottonwood Creek water available to SLC and Sandy City is treated at the Little Cottonwood Water Treatment Plant, which is owned and operated by Metropolitan Water District of Salt Lake & Sandy (MWDSLS). That water is provided to MWDSLS member cities, SLC and Sandy.

16. Water available to SLC under SLC Little Cottonwood Creek rights is also used to provide water to SLC's exchange contractors, and to provide water to Snowbird, Alta, Alta Ski Lifts Company (ASL), and others up the canyon.

17. Little Cottonwood Creek water makes up a portion of the water supply for all of the homes and businesses in at least five cities and a large portion of unincorporated Salt Lake

County. SLC Little Cottonwood Creek water provides on average nearly a quarter of the culinary quality water served to retail customers of SLC.

18. Little Cottonwood Creek flow is highly variable through the year, ranging from tens of cubic feet per second (cfs) in the winter to hundreds of cfs in the spring.

19. Prior to 1903, rights to beneficially use surface water could be perfected by diversion of the water and beneficial use of the water without interfering with existing water rights. These water rights are called diligence claims.

20. Such historic beneficial uses that perfected a particular diligence claim are the extent, the limit, and the measure of such a diligence claim.

21. The Morse Decree confirms water rights by maximum flow available to the various right holders based upon the flow in the stream.

22. Rights under the Morse Decree are also limited by the volume of water actually used when the diligence claims were perfected.

23. Irrigation uses are generally limited to the growing season, which is approximately 180 days.

24. Non-irrigation uses under the Morse Decree were essentially limited to domestic and stock watering uses.

25. Respondents–Defendants Tolton, Maack, Haik, and the Butler Management Group (Butler) claim divided portions of the South Despain Ditch “first primary right” described in the Morse Decree.

26. The term “first primary” is a common reference to the rights to the first 2.29 cfs of the flow of the creek described in the Morse Decree.

27. "South Despain Ditch" (which was a reference to the property owners served by the South Despain Ditch) was decreed a .25 cfs first primary right.

28. At the time of the Morse Decree, four families used South Despain Ditch water for irrigation during the growing season in Salt Lake Valley.

29. Thus, at the time of the Morse Decree there were four owners of divided portions of the water rights represented by the South Despain Ditch decree awards.

30. The historic winter uses from the South Despain Ditch were limited to the domestic uses of four homes and unknown but limited livestock uses.

31. Respondents–Defendants Tolton, Maack, Haik, and Butler claim title to South Despain Ditch decreed rights only through one of the four families using the South Despain Ditch at the time of the Morse Decree, the George Despain family.

32. SLC acquired, via a 1934 contract, all of the rights to South Despain Ditch winter water, less and excepting 7,500 gallons per day (gpd), to be delivered by SLC from a specific pipe leading from the Murray Penstock at the mouth of Little Cottonwood Canyon. A true and correct copy of that 1934 Contract is attached as Exhibit E.

33. Respondents–Defendants Tolton, Maack, Haik, and Butler are successors in interest to just one of the five families who jointly shared the 7,500 gpd delivered by SLC under the 1934 Contract.

34. Water rights are conveyed as appurtenant to, a part of, the land where the water is being used at the time of conveyance, unless expressly reserved in the deed to the land, or earlier separately conveyed.

35. Except as otherwise expressly noted here, whatever rights to use a portion of the South Despain Ditch rights the George Despain family and successors had was conveyed as a part of, appurtenant to, the land.

36. Harold and Verna Bentley were successors in interest to the George Despain family in terms of land and water rights under the South Despain Ditch.

37. The Bentleys conveyed an interest in the land and water rights to Saunders and Sweeny, Inc.

38. The Bentleys and Saunders and Sweeny, Inc. later sold any water rights they had relating to lands under the South Despain Ditch to Sandy City. An adjudication in which it was concluded otherwise is not binding upon SLC, as SLC was not a party to that proceeding.

39. Together with Saunders and Sweeny, Inc., the Bentleys subdivided the lands that had belonged to the George Despain family into the Little Cottonwood Subdivision in the late 1970s. From the time of development, the Subdivision and all of the homes in it were served water by Sandy City.

40. The Little Cottonwood Subdivision lots were shortly thereafter sold without reservation of any of the water rights that may have been appurtenant to those lands.

41. Respondents–Defendants Tolton, Maack, Haik, and Butler claim to be successors in interest to Lynn Christensen Biddulph, who they allege is a successor in interest to the Bentleys and Saunders and Sweeny, Inc.

42. The only portion of the former George Despain lands that has been owned by Biddulph is Lot 31.

43. At most, Biddulph could have conveyed a tiny fraction of what is being claimed by Respondents–Defendants Tolton, Maack, Haik, and Butler, particularly with respect to winter water.

44. Any fraction of the South Despain Ditch rights that Respondents–Defendants Tolton, Maack, Haik, and Butler might otherwise claim was lost by forfeiture, abandonment, and adverse possession.

45. Water that would have been available to Little Cottonwood Creek rights that have been forfeited or abandoned is available to others with rights to use Little Cottonwood Creek water, including SLC.

46. SLC is entitled to declaratory judgment adjudicating the extent to which, if any, Respondents–Defendants Tolton, Maack, Haik, and Butler hold any Little Cottonwood Creek water rights.

47. SLC is entitled to judgment adjudicating, declaring and quieting SLC’s title to the winter South Despain Ditch rights.

**THIRD CAUSE OF ACTION**  
**(Declaratory Judgment)**

48. SLC incorporates by reference the allegations of paragraphs 1 through 47 as if restated here.

49. The orders of the State Engineer that are the subject of the First Cause of Action above misstate and misapply Utah law.

50. These are errors of law that are likely to be repeated to the detriment of the water users on the creek.

51. The State Engineer overlooked the fact that the applicants had no rights, or grossly inadequate rights, to take and use winter water. The subject orders effectively approve the applicants changing summer-time rights to year-round rights, to the impairment of all water users on the creek with winter rights. A change in the period of use of Little Cottonwood Creek rights is contrary to law.

52. The subject orders announce an exception to the feasibility requirement of Utah Code Ann. § 73-3-8: "The State Engineer routinely approves applications presuming other necessary permits will be subsequently secured." As a matter of law, the State Engineer may not ignore regulatory hurdles that may impact feasibility.

53. In the subject orders, the State Engineer failed his obligation to look at the potential for impairment of other water rights caused by the proposed changes in use. The orders side step this by conditioning use of water under the subject change applications upon the applicants determining the issue of impairment and buying impaired water rights or providing monetary compensation. The State Engineer did not identify the rights which must be purchased or users who must be compensated, making the condition both literally and practically unenforceable. Moreover, the State Engineer presumes that the applicants can take water that would otherwise be available to SLC and pay compensation, effectively condemning SLC water rights without process. The State Engineer erred as a matter of law.

54. The State Engineer apparently determined that because some or all of the protestants were deemed by the State Engineer to be impure of motive, their concerns could be discounted rather than addressed. The State Engineer stated, "If the protestants believe as a matter of public policy it would be best to restrict further development in Little Cottonwood

Canyon, they should work through other appropriate means to achieve that goal.” SLC has the right to protest change applications to protect the quantity, quality and timing of water available under its rights, regardless of whether its positions are viewed by the State Engineer as anti-development. The State Engineer’s focus on the protestants’ perceived motivations was contrary to law.

55. Historically, the State Engineer has required .45 acre-feet for single family dwellings that might be occupied anytime in the future as full time residences. Here, the State Engineer made an exception to his practice.

56. All of the above-described errors of law are inconsistent with State Engineer precedent. As a matter of law, the State Engineer is bound to follow his administrative precedent unless an adequate explanation for the deviation from precedent is provided.

57. The State Engineer is not empowered to adjudicate anything. His informal administrative adjudications of fact or law do not have binding impact, particularly on non-parties to the proceeding. Notwithstanding this clear principle of law, the State Engineer’s practice is to treat the State Engineer’s historic administrative determinations as if they were *res judicata*, binding on all future State Engineers and all water users. The State Engineer did so in resolving the Tolton and Maack change applications.

58. For example, the State Engineer had long ago updated his records regarding ownership of the South Despain first primary right based on the incorrect notion—questioned even then by the State Engineer’s staff—that all of the South Despain Ditch rights were transferred as an appurtenance to Lot 31 of the Little Cottonwood Creek Subdivision. The State Engineer refused to consider any evidence that might contradict this ancient error. A historic

change application approval relating to the South Despain first primary right included a quantification of the right. The State Engineer again refused to consider any evidence that might contradict this ancient error. The described practice of the State Engineer to view earlier administrative decisions of the State Engineer as having *res judicata* force and effect is incorrect as a matter of law.

59. SLC is entitled to judgment declaring that the above-described practices of the State Engineer are errors of law.

**PRAYER FOR RELIEF**

60. SLC prays for the relief identified above in connection with each cause of action in addition to such other relief as this Court deems appropriate and just, including costs against Respondents–Defendants other than the State Engineer.

DATED this 7<sup>th</sup> day of February, 2014.

SNOW, CHRISTENSEN & MARTINEAU

/s/ Shawn E. Draney

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Shawn E. Draney  
Scott H. Martin  
Dani Cepernich  
Attorneys for Plaintiff

# Exhibit A

# APPLICATION FOR PERMANENT CHANGE OF WATER

## STATE OF UTAH

**RECEIVED**

DEC 17 2003

Rec. by 28  
 Fee Rec. 102  
 Receipt # 03-070

**WATER RIGHTS SALT LAKE**  
 For the purpose of obtaining permission to make a permanent change of water in the State of Utah, application is hereby made to the State Engineer, based upon the following showing of facts, submitted in accordance with the requirements of Section 73-3-3 Utah Code Annotated, as amended.

\*WATER RIGHT NO. 57 - 7800 \*APPLICATION NO. 29548  
 Changes are proposed in (check those applicable)  
 point of diversion.  place of use.  nature of use.  period of use.

1. OWNER INFORMATION Kevin Tolton  
 Name(s): c/o Daniel A. Jensen \*Interest: \_\_\_\_\_ %  
 Address: 185 So. State, Suite 1300  
 City: Salt Lake City State: Utah Zip Code: 84111

2. \*PRIORITY OF CHANGE: \_\_\_\_\_ \*FILING DATE: \_\_\_\_\_  
 \*Is this change amendatory? (Yes/No): \_\_\_\_\_

3. RIGHT EVIDENCED BY: A portion of 57-7800, 1910 Morse Decree  
 Prior Approved Change Applications for this right: a24463

**RECEIVED**  
 DEC 18 2003

\*\*\*\*\*HERETOFORE\*\*\*\*\* **WATER RIGHTS SALT LAKE**

4. QUANTITY OF WATER: 0.0625 cfs and/or \_\_\_\_\_ ac-ft.  
 5. SOURCE: Little Cottonwood Creek, South Despain Ditch  
 6. COUNTY: Salt Lake  
 7. POINT(S) OF DIVERSION: (1) S 318 ft and W 408 ft from E 1/4 corner Sec. 12, T3S, R1E, SLM (South Despain Ditch); (2) S 836 ft and E 4518 ft from W 1/4 corner Sec. 7, T3S, R2E, SLM (pipeline)

Description of Diverting Works: \_\_\_\_\_

8. POINT(S) OF REDIVERSION  
 The water has been rediverted from \_\_\_\_\_ at a point: \_\_\_\_\_

Description of Diverting Works: \_\_\_\_\_

9. POINT(S) OF RETURN  
 The amount of water consumed is \_\_\_\_\_ cfs or \_\_\_\_\_ ac-ft.  
 The amount of water returned is \_\_\_\_\_ cfs or \_\_\_\_\_ ac-ft.  
 The water has been returned to the natural stream/source at a point(s): \_\_\_\_\_

\* These items are to be completed by the Division of Water Rights

Permanent Change

10. NATURE AND PERIOD OF USE

Irrigation:	From	<u>4/1</u>	to	<u>10/31</u>
Stockwatering:	From	<u>1/1</u>	to	<u>12/31</u>
Domestic:	From	<u>1/1</u>	to	<u>12/31</u>
Municipal:	From	_____	to	_____
Mining:	From	_____	to	_____
Power:	From	_____	to	_____
Other:	From	_____	to	_____

11. PURPOSE AND EXTENT OF USE

Irrigation: 0.73 acres. Sole supply of 0.73 acres.  
 Stockwatering (number and kind): 15 ELUs  
 Domestic: 3 Families and/or \_\_\_\_\_ Persons.  
 Municipal (name): \_\_\_\_\_  
 Mining: \_\_\_\_\_ Mining District in the \_\_\_\_\_ Mine.  
 Ores mined: \_\_\_\_\_  
 Power: Plant name: \_\_\_\_\_ Type: \_\_\_\_\_ Capacity: \_\_\_\_\_  
 Other (describe): \_\_\_\_\_

12. PLACE OF USE

Legal description of place of use by 40 acre tract(s): SW/NW Sec. 12, T3S, R1E, S1M  
 \_\_\_\_\_  
 \_\_\_\_\_

13. STORAGE

Reservoir Name: \_\_\_\_\_ Storage Period: from \_\_\_\_\_ to \_\_\_\_\_  
 Capacity: \_\_\_\_\_ ac-ft. Inundated Area: \_\_\_\_\_ acres.  
 Height of dam: \_\_\_\_\_ feet.  
 Legal description of inundated area by 40 acre tract(s): \_\_\_\_\_  
 \_\_\_\_\_

\*\*\*\*\*THE FOLLOWING CHANGES ARE PROPOSED\*\*\*\*\*

14. QUANTITY OF WATER: 0.0012 cfs and/or 0.9 ac-ft.

15. SOURCE: Little Cottonwood Creek, springs, well and Cecret Lake  
 Balance of the water will be abandoned: \_\_\_\_\_, or will be used as heretofore: X

16. COUNTY: Salt Lake

17. POINT(S) OF DIVERSION: See attached

Description of Diverting Works: \_\_\_\_\_  
 \*COMMON DESCRIPTION: \_\_\_\_\_

18. POINT(S) OF REDIVERSION  
 The water will be rediverted from \_\_\_\_\_ at a point: \_\_\_\_\_

Description of Diverting Works: \_\_\_\_\_

**19. POINT(S) OF RETURN**

The amount of water to be consumed is \_\_\_\_\_ cfs or \_\_\_\_\_ ac-ft.

The amount of water to be returned is \_\_\_\_\_ cfs or \_\_\_\_\_ ac-ft.

The water will be returned to the natural stream/source at a point(s): \_\_\_\_\_

**20. NATURE AND PERIOD OF USE**

Irrigation:	From _____	to _____
Stockwatering:	From _____	to _____
Domestic:	From <u>1/1</u>	to <u>12/31</u>
Municipal:	From _____	to _____
Mining:	From _____	to _____
Power:	From _____	to _____
Other:	From <u>1/1</u>	to <u>12/31</u>

**21. PURPOSE AND EXTENT OF USE**

Irrigation: \_\_\_\_\_ acres. Sole supply of \_\_\_\_\_ acres.

Stockwatering (number and kind): \_\_\_\_\_

Domestic: 1 Families and/or \_\_\_\_\_ Persons.

Municipal (name): \_\_\_\_\_

Mining: \_\_\_\_\_ Mining District at the \_\_\_\_\_ Mine.

Ores mined: \_\_\_\_\_

Power: Plant name: \_\_\_\_\_ Type: \_\_\_\_\_ Capacity: \_\_\_\_\_

Other (describe): Fire protection

**22. PLACE OF USE**

Legal description of place of use by 40 acre tract(s): See attached

**23. STORAGE**

Reservoir Name: See attached Storage Period: from \_\_\_\_\_ to \_\_\_\_\_

Capacity: \_\_\_\_\_ ac-ft. Inundated Area: \_\_\_\_\_ acres.

Height of dam: \_\_\_\_\_ feet.

Legal description of inundated area by 40 acre tract(s): \_\_\_\_\_

**24. EXPLANATORY**

The following is set forth to define more clearly the full purpose of this application. Include any supplemental water rights used for the same purpose. (Use additional pages of the same size if necessary): \_\_\_\_\_

See attached

\*\*\*\*\*

The undersigned hereby acknowledges that even though he/she/they may have been assisted in the preparation of the above-numbered application through the courtesy of the employees of the Division of Water Rights, all responsibility for the accuracy of the information contained herein, at the time of filing, rests with the applicant(s).

\_\_\_\_\_  
Signature of Applicant

Paul H. Densen  
Signature of Applicant's Attorney  
and Agent

17. Points of Diversion

1. Unnamed spring: S 37°29'29" E 8240.86' from the N¼ corner Section 5, T3S, R3E, SLM, within tax parcel No. 30-09-176-009 (approx. S 1605' and W 1030' from N¼ corner Section 9, T3S, R3E, SLM).
2. Underground well: S 37°51'39" E 8205.19' from the N¼ corner Section 5, T3S, R3E, SLM, within tax parcel No. 30-09-176-009 (approx. S 1560' and W 1005' from N¼ corner Section 9, T3S, R3E, SLM).
3. Little Cottonwood Creek: S 36°52'47" E 8197.44' from the N¼ corner Section 5, T3S, R3E, SLM, within tax parcel No. 30-09-176-009 (approx. S 1635' and W 1100' from N¼ corner Section 9, T3S, R3E, SLM).
4. Little Cottonwood Creek: S 37°14'05" E 8134.72' from the N¼ corner Section 5, T3S, R3E, SLM, within tax parcel No. 30-09-176-009 (approx. S 1580' and W 1090' from N¼ corner Section 9, T3S, R3E, SLM).
5. Little Cottonwood Creek: S 37°12'41" E 8101.05' from the N¼ corner Section 5, T3S, R3E, SLM, within or near the western edge of tax parcel No. 30-09-176-009 (approx. S 1560' and W 1130' from N¼ corner Section 9, T3S, R3E, SLM).
6. Cecret Lake (also known as Flora Lake): S 835' and E 430' from W¼ corner Section 9, T3S, R3E, SLM (approx), within the patented Cecret No. 2 lode mining claim, Mineral Survey No. 5803.
7. Group of unnamed springs: S 1755' and W 1230' from N¼ corner Section 9, T3S, R3E, SLM (approx.), within tax parcel No. 30-09-176-022.
8. Unnamed spring: S 2470' and W 925' from N¼ corner Section 9, T3S, R3E, SLM (approx.), which spring is referenced in that certain Special Use Permit dated September 1973 issued by the United States Forest Service to the Cecret Lake Water Corporation.

Water will be piped from the points of diversion to the place of use.

22. Place of Use

SE¼NW¼ Section 9, T3S, R3E, SLM (tax parcel No. 30-09-176-009).

23. Storage

Approximately 180,000 gallons of water will be stored year-round in a storage tank in the SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 9, a mine tunnel located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 9 and the SW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 4, and/or Cecret Lake in the NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 9, all in T3S, R3E, SLM, for nonconsumptive fire protection purposes.

24. Explanatory

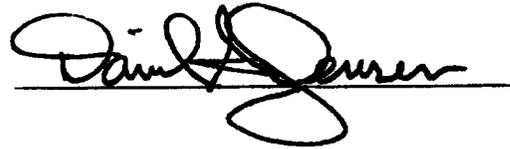
This application moves part of an existing water right upstream within the same hydrologic basin. The hereafter consumption of water will be less than the consumption heretofore, so there will be no enlargement of the water right.

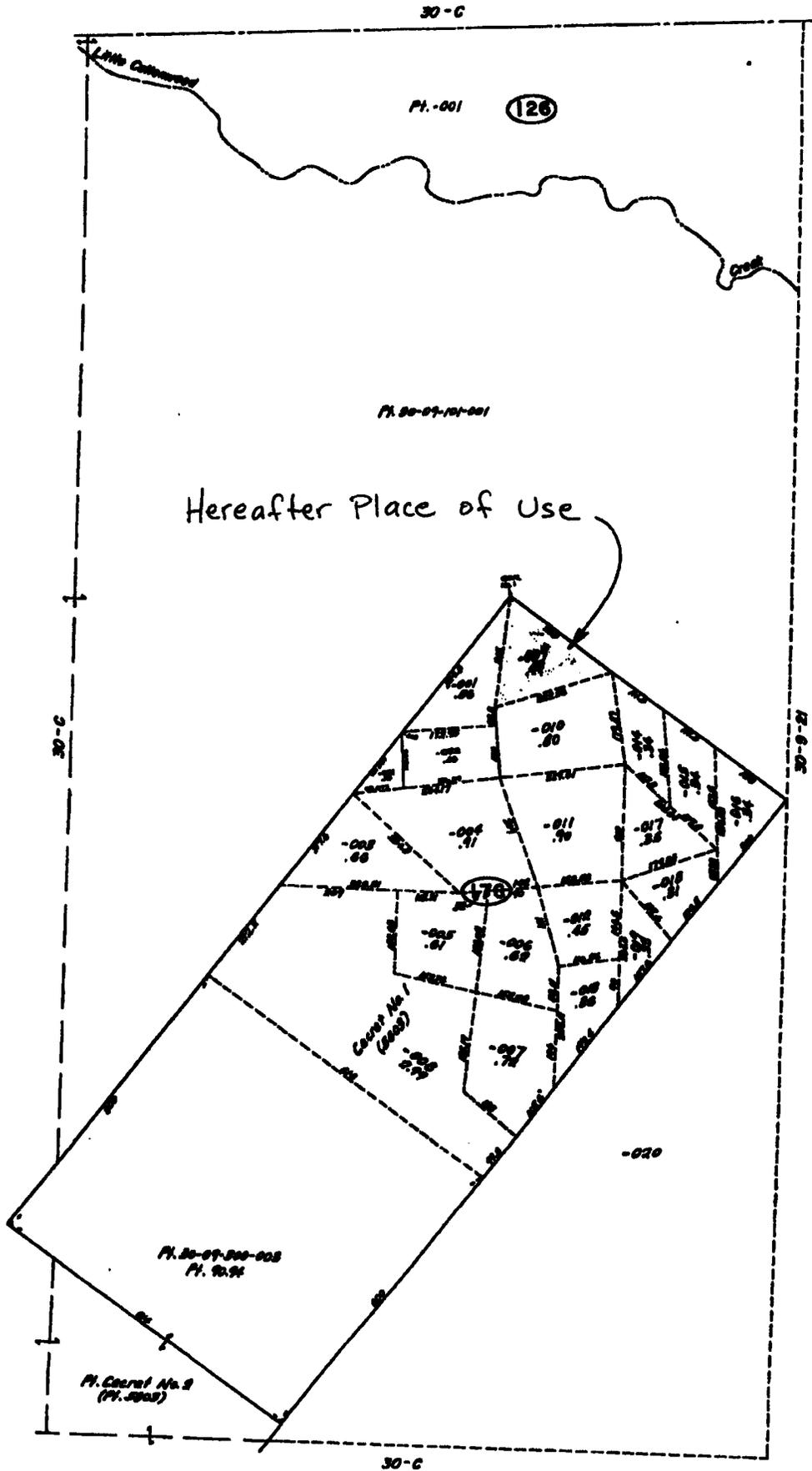
The subject township is only partially surveyed and the location of section corners and section lines remains uncertain. All references to and depictions of section corners, section lines and section subdivisions are approximate.

See attached application maps and verification statement.

**MAP VERIFICATION STATEMENT:**

**I, Daniel A. Jensen, on behalf of the applicant, hereby acknowledge that the maps, consisting of four pages, attached to this application were prepared in support of this application. By my signature below, I hereby accept and submit said maps as true representations of the facts shown thereon to the best of my knowledge and belief.**

A handwritten signature in black ink, appearing to read "Daniel A. Jensen", is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke at the end.



SALT LAKE COUNTY OFFICIAL RECORDS  
 PROVIDED BY SALT LAKE COUNTY RECORDER

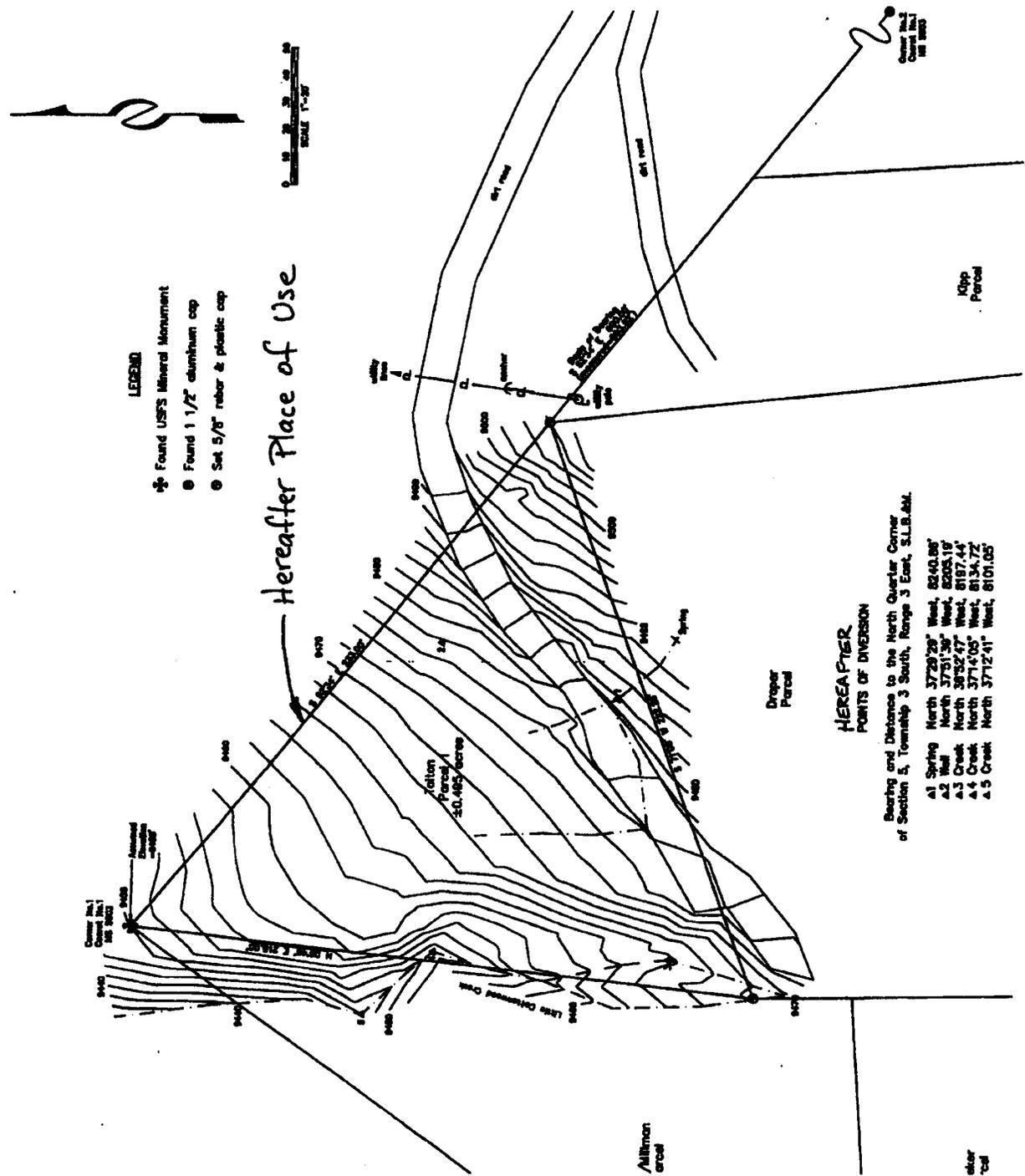


SCALE 1" = 100'

SALT LAKE CO.

SCANNED

*Portions of Concret No.1,  
Mineral Survey No. 5803  
T. 3 S., R. 3 E., S.L.B.&M.*



- LEGEND**
- ⊕ Found USFS Mineral Monument
  - ⊙ Found 1 1/2" aluminum cap
  - ⊙ Set 5/8" rebar & plastic cap

Hereafter Place of Use

**HEREAFTER  
POINTS OF DIVERSION**

Bearings and Distances to the North Quarter Corner of Section 5, Township 3 South, Range 3 East, S.L.B.&M.

- A1 Spring North 37°29'29" West, 8240.89'
- A2 Well North 37°51'30" West, 8205.19'
- A3 Creek North 38°32'47" West, 8187.44'
- A4 Creek North 37°14'05" West, 8134.72'
- A5 Creek North 37°12'41" West, 8101.05'

**NARRATIVE**

1. Survey requested by Kevin Tolton.
2. Purpose of survey: locate the topographic relief.
3. Basis of survey: found USFS Mineral Monuments, a
4. Date of survey: October 14, 2003.
5. Property monuments set or found as shown.
6. Located in the Northwest Quarter of Section 9, To South, Range 3 East, Salt Lake Base & Meridian.
7. The corner of the property should be aware of any affecting the property that may appear in a 1886 report.
8. The 1/4 from Corner No.1, Concret No.1, MS 5803, 1 North Quarter Corner of Section 5, Township 3 S, Range 3 East, Salt Lake Base & Meridian was found at 37°43'52" West, 8057.45 feet.
9. An assumed elevation of 8450 feet was used of the USFS Mineral Monument found at the north of the property, as shown.

**LEGAL DESCRIPTION**

Tolton Parcel 1

A Portion of Concret No.1 Lode Mining Claim designate Surveyor General as Survey No. 5803 embracing a po Township 3 South, Range 3 East of the Salt Lake Me in the Little Cottonwood Mining District, Salt Lake Co Commencing at the corner No.1 of said Concret No.1 Claim (which corner bears South 51°2' West, 64.5 feet pipe tree which was blazed and scribbled B.T. 1-5803 the line of location of said claim); and running then South 71°08' West, 222.28 feet to the middle of Little road Creek; thence North 6°46' East, 215 feet to the beginning containing 0.465 acres, more or less.

**SURVEYOR'S CERTIFICATE**

I, J.D. Galley, a Registered Land Surveyor as prescribed laws of the State of Utah and holding License No. 31 hereby certify that I have supervised a survey of the described property and that this plot is a true representation of said survey.



Name: J.D. Galley  
Date: 10/14/03

Alpine Survey, Inc.  
19 Prospector Dr.  
Park City, Utah 84060  
(435) 635-8016

# Exhibit B



GARY R. HERBERT  
Governor  
SPENCER J. COX  
Lieutenant Governor

**State of Utah**  
**DEPARTMENT OF NATURAL RESOURCES**  
**Division of Water Rights**

MICHAEL R. STYLER      KENT L. JONES  
Executive Director      State Engineer/Division Director

JAN 09 2014

**AMENDED ORDER OF THE STATE ENGINEER**  
**For Permanent Change Application Number 57-7800 (a28548)**

Permanent Change Application Number 57-7800 (a28548), in the name of Kevin Tolton, was filed on December 18, 2003, to change the points of diversion, place of use, and uses of 0.0104 cubic foot per second (cfs) or 0.9033 acre-foot (af) of water as evidenced by Water Right Number 57-7800. Heretofore, the water has been diverted from the following points located: (1) Surface - South 318 feet and West 408 feet from the E $\frac{1}{4}$  Corner of Section 12, T3S, R1E, SLB&M; and (2) Surface - South 836 feet and East 4518 feet from the W $\frac{1}{4}$  Corner of Section 7, T3S, R2E, SLB&M. The water has been used for the irrigation of 0.1217 acre from April 1 to October 31, the domestic use of 0.5 equivalent domestic units from January 1 to December 31, and the stockwatering requirements of 2.5 head of cattle or equivalent livestock (ELU) from January 1 to December 31.<sup>1</sup> The water was used in all or portion(s) of Section 12, T3S, R1E, SLB&M.

Hereafter, it is proposed to divert 0.0104 cfs or 0.9033 acre-foot of water to points of diversion changed to: (1) Well - South 1560 feet and West 1005 feet from the N $\frac{1}{4}$  Corner; (2) Spring - South 1605 feet and West 1030 feet from the N $\frac{1}{4}$  Corner; (3) Spring - South 2470 feet and West 925 feet from the N $\frac{1}{4}$  Corner; (4) Surface - South 1580 feet and West 1090 feet from the N $\frac{1}{4}$  Corner (Little Cottonwood Creek); (5) Surface - South 835 feet and East 430 feet from the W $\frac{1}{4}$  Corner (Little Cottonwood Creek); (6) Spring - South 1755 feet and West 1230 feet from the N $\frac{1}{4}$  Corner; (7) Surface - South 1635 feet and West 1100 feet from the N $\frac{1}{4}$  Corner (Little Cottonwood Creek); and (8) Surface - South 1560 feet and West 1130 feet from the N $\frac{1}{4}$  Corner (Little Cottonwood Creek). All locations are in Section 9, T3S, R3E, SLB&M. The water is to be used for the indoor domestic requirements of one equivalent domestic unit from January 1 to December 31, and for fire protection. The water is proposed to be stored year-round in a storage tank, mine tunnels and Cecret Lake. The place of use of the water is being changed to all or portion(s) of Section 9, T3S, R3E, SLB&M.

Notice of the application was published in the Deseret News on January 15 and 22, 2004, and protests were received from Alta Energy LLC, Alta Ski Lifts Company, Friends of Alta, Little Cottonwood Creek Distribution Committee, Metropolitan Water District of Salt Lake & Sandy, Salt Lake City Corporation, Salt Lake County Service Area #3, Sandy City, Sandy Irrigation Company, Town of Alta, and USA Forest Service. A hearing was held on July 13, 2011.

<sup>1</sup> As part of the reconsideration of this change application, a letter was sent requesting clarification as to the ownership interest in the uses under this right. The ownership interest was clarified by the current owners of the water rights and the owners agreed that it is intended a 1/6<sup>th</sup> interest was received by all six parties (Water Right Numbers 57-7800, 57-10315, 57-10316, 57-10317, 57-10318, and 57-10319). These amounts were corrected on the Division's records and each water right now reflects the following amounts: 0.0104 cfs or 0.9033 acre-feet to be used for the irrigation of 0.1217 acre, watering of 2.5 equivalent livestock units, and 0.5 equivalent domestic units.

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This change application was approved on January 3, 2013. Several requests for reconsideration of the decision were filed. The State Engineer granted the reconsideration requests on January 24, 2013.

In the written protests, testimony presented at the hearing, and additional reconsideration comments received, the protestants expressed concern with the impact this change application would have on existing rights, the ownership interest to the underlying water right, and whether the application meets statutory criteria for approval. Specific concerns were expressed by each protestant as follows:

Cottonwood Hydro (asserts to be successor to Alta Energy LLC) operates a hydroelectric facility downstream from the use proposed under this application. It expresses concern with this change and the impairment this change would create if any reduction of the winter water flows were to occur as a result of this application.

Alta Ski Lifts (hereafter ASL) expresses concern that the applicant has not demonstrated sufficient title interest in the underlying water right and question the assertions made to update title on the Division of Water Rights records based on appurtenance and use of the water. ASL is also concerned that the application does not meet the statutory requirements for approval and must be rejected.

Friends of Alta (hereafter FOA) assert if the change application is granted, it would unreasonably affect public recreation and the natural stream environment and the application is filed for speculative purposes. FOA requests the entire eco-geographic area of Albion Basin be investigated to ensure no negative impact occurs.

Little Cottonwood Creek Distribution Committee (hereafter LCCDC) is concerned that there is no unappropriated water in the proposed sources. LCCDC also believes impairment of existing rights would occur because the change proposes the use of winter water and the proposed use of water could create a potential increase in the amount of water depleted.

Metropolitan Water District of Salt Lake and Sandy (hereafter METRO) explains it is a wholesale water supplier whose member cities include Salt Lake City and Sandy City. Metro treats water from Little Cottonwood Creek and states this surface water source is critical to conjunctively manage water sources in the Salt Lake Valley. Specific concern is expressed for the second primary right owned by Sandy Irrigation Company and the contract agreement with Sandy City that makes water available for treatment. Metro is concerned about the impacts this application will have on rights relying on this limited resource and supports the concerns expressed by Salt Lake City in its protest.

Salt Lake City Corporation (hereafter SLC) explains it has a majority ownership of the rights to divert the water of Little Cottonwood Creek and its prior contractual agreement with the South Despain Ditch users for water during the 'winter and non-irrigation' season. That agreement transfers the winter portion of the South Despain decree award to SLC, except for 7,500 gallons

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per day to be delivered off the Murray Penstock through a 6-inch pipeline to the South Despain users. SLC believes this contract is binding on the State Engineer and must be considered under this change and that an enlargement of the underlying right would occur if the application is approved. SLC believes the application does not meet the statutory criteria that must be considered by the State Engineer to approve or deny a change application.

Salt Lake County Service Area #3 expresses concern with the change application and supports the position of Salt Lake City in its protest. The service area relies on a water supply agreement with the city for its water supply and use of water. Along with the issues raised by Salt Lake City, the service area is also concerned with any proposed diversion of water within the Town of Alta's drinking water source protection zone.

Sandy City explains it owns existing rights to the use of Little Cottonwood Creek water and expresses concern that its existing rights would be impaired by any enlargement of the underlying water right. Impairment would occur not only based on water quantity but also water quality as a result of the proposed use. Sandy City is also concerned that the person filing this application is not the person entitled to the use of water. Sandy City does not believe this application meets statutory criteria for approval and, therefore, must be denied.

Sandy Irrigation Company is the owner of water rights from Little Cottonwood Creek and is concerned that this change application would impair its existing rights by increased depletion associated with the proposed use. The company believes its rights will be directly impaired during the non-irrigation season by any diversion of water under the change application. The company is also concerned about the impacts the change application will have on water quality, public recreation and the natural stream environment. The company believes this change will interfere with the more beneficial use of water it provides for Sandy City.

Town of Alta (Alta) is concerned with the impacts this change application would have on existing rights held by SLC. Alta's right to use water is based on a water supply agreement with SLC. Alta explains the proposed place of use is included in annexations where restrictions on water use and related development were placed. Without the appropriate permits, any development in this area would create negative impacts to public recreation and natural stream environments.

US Forest Service protests the application and asserts ownership of the lands upon which the applicant proposes to develop a source of water. The Forest Service also notes that the applicants have no Special Use Permit(s) that would allow them to place improvements or infrastructure on public lands. Concern is also expressed as to impairment of its existing rights for the Albion Basin Campground.

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The State Engineer has reviewed the change application, underlying water right, Little Cottonwood Decree information, written protests and testimony received during the hearing, and additional information received during reconsideration of the application. From these numerous documents and sources of information, the following paragraphs summarize the elements of the historical right and subsequent actions affecting the water claimed under this change application.

- A. The water right on which this change application is filed stems from a 0.25 cfs primary decree award to the South Despain Ditch with a priority date of 1848.<sup>2</sup> Historically, water in the South Despain ditch was diverted from Little Cottonwood Creek near the mouth of Little Cottonwood Canyon and used on lands located near the ditch. The decree did not specify names of the South Despain Ditch users, nor did it indicate exact lands upon which the water was used.
- B. A 1934 agreement was entered into between Salt Lake City and the South Despain Ditch users. The South Despain Ditch parties to the agreement included L.E. Despain and his wife Annie Bulter Despain; Alva J. Butler and his wife Anna Laura Butler; George F. Despain and his wife Prudence B. Despain; De Bart Despain and his wife Bertha K. Despain; and Clarence L. Giles and his wife Laura Sue Giles. Under the agreement, Salt Lake City was to provide a pipeline and deliver 7,500 gallons of water per day for culinary purposes from October 1<sup>st</sup> to April 1<sup>st</sup> of each year to the five listed South Despain Ditch users. The agreement covered only the 'winter or non-irrigation season'. The summer water would continue to be diverted as had historically occurred through the ditch. The ditch users for consideration granted, bargained, sold and conveyed to SLC the right to the use of the remaining portion of the decree award during the non-irrigation season.
- C. On September 25, 1962, Change Application Number a4178 was filed by Harold H. Bentley who asserted an ownership interest of one-fourth of the decree award to the South Despain Ditch. The change application has been identified on the State Engineer's records as Water Right Number 57-7800. This change application proposed moving the point of diversion for this one-fourth interest in the water right to a well. It was approved and a *Certificate of Permanent Change of Point of Diversion, Place, Purpose or Period of Use of Water* was issued by the State Engineer on May 24, 1971. The Certificate indicates water was diverted from a well drilled to a depth of 145 feet, and used for the domestic use of three families, 0.73 acre of irrigation, and the watering of six horses, six cattle and 100 chickens. Change Application a4178 and Water Right Number 57-7800 do not include any other portion of the other awards in the decree. Title updates or

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<sup>2</sup> *Union & East Jordan Irr. Co. v. Richards Irr. Co., et al.*; slip op. at paragraph 28 (Third Judicial District Court Salt Lake County, June 16, 1910).

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changes to any other award in the decree must be addressed under a separate action of the State Engineer.

- D. Title documents were submitted to the Division to update ownership of the certificated right (57-7800). Based on the submitted documents, ownership on the Division's records was updated to Lynn Christensen Biddulph.
- E. On May 8, 2000, Lynn Christensen Biddulph submitted Change Application Number a24463 on Water Right Number 57-7800. The application proposed changing the point of diversion from a well back to the historical source at the historical location of the South Despain Ditch and pipeline. The explanatory of the signed change application indicated the applicant was returning to the decreed point of diversion to reflect the actual use and historical use of the water. Change Application a24463 was approved August 4, 2000, and proof was last due for a24463 on August 31, 2012. The applicant submitted a request for an extension of time on a24463 on August 8, 2012. The extension of time was granted until August 31, 2014.
- F. Additional title documents were submitted to the Division in 2003 to update ownership of 57-7800 on the records of this office. Portions of the water right have been segregated to Water Right Numbers 57-10315, 10316, 10317, 10318, and 10319 leaving uses of 0.1217 acre of irrigation, 2.5 ELU, and 0.5 equivalent domestic units on the subject water right. Questions related to competing deeds and a lawsuit filed because those deeds each purported to convey title to this water right delayed action on this application. The Utah Supreme Court concluded in a 2011 ruling that the competing deed was not effective since it was recorded after the deed relied upon in the modification of the State Engineer's records. The State Engineer is not aware of other deeds or pending legal action that may potentially affect ownership of the water right sought for change.<sup>3</sup>
- G. The State Engineer recognized in granting reconsideration of the approval of this change application that there was a discrepancy between the deeds which created the segregated portions of this water right and amounts segregated to water right files 57-10315, 10316, 10317, 10318, and 10319. Correspondence with all of the water right owners followed. All of the owners responded and the ownership interest was clarified with the current owners of the water rights. The owners

<sup>3</sup> The State Engineer is aware of the Report of Water Right Conveyance filed by Salt Lake City on Water Right Number 57-9001, filed October 19, 2005. Water Right 57-9001 represents the primary decree award to the South Despain Ditch. Water Right Number 57-7800 is a segregated portion of 57-9001. The State Engineer believes Water Right Number 57-7800 represents only the 1/4 -interest asserted by Harold Bentley, less any amounts of water contained in the 1934 agreement with Salt Lake City. Salt Lake City's entire interest to the South Despain Ditch award exists on Water Right 57-9001. Water Right 57-7800 asserts representation of the 1/4-interest in 7,500 gallons per day (1,875 gallons per day) during the non-irrigation season defined in the contract agreement. At the request of the current owners, Water Right 57-7800 has been segregated into six equal parts, thus the remaining interest during the non-irrigation season would be 312.5 gallons per day.

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agree that it is intended a 1/6<sup>th</sup> interest was received by all six parties. This amount was corrected on the Division's records and each water right now reflects the following amounts: 0.0104 cfs or 0.9033 acre-feet to be used for the irrigation of 0.1217 acre, watering of 2.5 equivalent livestock units, and 0.5 equivalent domestic units.

Utah Code Ann. §73-3-3(2)(a), states that any person entitled to the use of water may, through the change application process, make a permanent change to an existing water right. Additionally, §73-3-3(5)(a) directs the State Engineer to follow the same procedures for a permanent change application as provided by statute for applications to appropriate water. The State Engineer must approve a change application if it meets the provisions of §73-3-3 and criteria listed in §73-3-8(1). A primary consideration for a change application to be approved is that it not impair a vested water right without just compensation. The State Engineer may not reject a change application for the sole reason that it would impair a vested water right. But, if the application is otherwise proper, he may approve it for part of the water involved or with the condition that the applicant acquire the conflicting rights.

The protestants' opposition to this application focuses primarily on impairment of existing rights and support of local policies restricting development in Little Cottonwood Canyon. The State Engineer supports efforts to maintain and improve watersheds and preserve the quality of the public waters. However, limiting access to water as a land planning tool would usually conflict with a fundamental public policy the State Engineer implements - making public waters available for beneficial use. Nothing in the State Engineer's statutory authority allows him to construe a private party's desire to secure a water supply for development of private property, such as the applicant here proposes, as detrimental to the public welfare. If the protestants believe as a matter of public policy it would be best to restrict further development in Little Cottonwood Canyon, they should work through other appropriate means to achieve that goal.

Utah Code Section 73-3-8(1)(a) directs the State Engineer to approve an application if "*there is unappropriated water in the proposed source, the proposed use will not impair existing rights or interfere with the more beneficial use of the water.*" This change application proposes to divert water from eight different points of diversion, which include two unnamed springs, a "group of unnamed springs," a well, Cecret Lake and three locations along Little Cottonwood Creek. All the proposed sources are located at the headwaters of Little Cottonwood Creek, a tributary to the Jordan River basin. All surface and groundwater in the Eastern Salt Lake Valley are considered fully appropriated. No additional water is available for appropriation. Any new development must be accomplished by change applications based on existing rights, which this application proposes to do. In the hereafter proposed area there is no water to appropriate from surface sources without impairing existing rights, specifically those related to power generation downstream or winter uses. The State Engineer is of the opinion all surface water and groundwater originating within the canyon is source-water supplying the decreed rights diverting water near the mouth of the canyon. The State Engineer presumes deep groundwater in this canyon area is directly tributary to surface supplies near the mouth of the canyon. However, that deep groundwater has not been shown to be directly connected to surface water in the hereafter

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area of use. If conditions contained herein are followed, development of this application is not likely to have a direct affect on surface flows within Albion Basin. Given the conflict with other water users demonstrated by the protestants to this application, the potential for direct interference with surface water rights from some of the proposed points of diversion, the management complexity associated with regulating the multiple points of diversion identified in this change application, and the limited requirement to serve the inside domestic use of one family, the diversion of water under this application is limited to the well proposed to be located South 1560 feet and West 1005 feet from the N¼ Corner of Section 9, T3S, R3E, SLB&M. In addition, any diversions made must be limited to historical diversion amounts of the underlying right which, based on existing contracts, restricts the amount of water that can be diverted during the "winter or non-irrigation season."

It is the State Engineer's understanding septic and drain field disposal of waste is not allowed in the watershed where the domestic use is planned under this application because of water quality considerations designed to protect drinking water to Salt Lake City, Sandy and others. The applicant has provided no specific plan or information regarding treatment of domestic waste water. Therefore, the State Engineer believes it appropriate to consider the water proposed to be used for domestic purposes in Albion Basin under the application to be totally consumed or depleted from the hydrologic system locally.

As noted, the water right on which this change application is filed stems from a 0.25 cfs primary decree award to the South Despain Ditch with a priority date of 1848.<sup>4</sup> The State Engineer believes the priority of a change application may affect the ability of a water right holder to divert water based on the change application if water is not available at the new diversion location without impairing existing rights. For localized interference, diversions under this change application could have a priority as late as December 18, 2003, which would make it junior to most established rights of the protestants.

In evaluating applications that propose to change the nature of use of a water right, the State Engineer believes it is appropriate to examine the rates and amounts of hydrologic depletion associated with the historical water use as compared to the proposed use to assure that there is no enlargement of the underlying water right. In this case, the amount of water diversion considered necessary for year round domestic purposes is 0.45 acre-foot.

The State Engineer, in evaluating applications which historically diverted water for indoor domestic use, assumes an annual diversion of 0.45 acre-foot, or 400 gallons per day, and a depletion of approximately 20% if wastewater is treated by a septic system or other means short of total containment lagoons.<sup>5</sup> Stockwatering is assumed to divert 0.028 acre-foot of water

<sup>4</sup> *Union & East Jordan Irr. Co. v. Richards Irr. Co., et al.*; slip op. at paragraph 28 (Third Judicial District Court Salt Lake County, June 16, 1910).

<sup>5</sup> The domestic use associated with the underlying water right was for a fraction of a home use that is 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

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annually for a cow or horse and is considered 100% consumptive. Irrigation in the Salt Lake Valley is evaluated at 5.0 acre-feet per acre diversion with a 42.4% depletion rate.<sup>6</sup> Based on these values, this application historically could have diverted, from the well indicated on the Certificate, a maximum of 0.903 acre-foot annually with an associated depletion of 0.373 acre-foot. Based on this analysis, using the water for the proposed domestic needs of one family and assuming all domestic water diverted would no longer be available to the Little Cottonwood drainage, consuming 0.45 acre-foot for that purpose would enlarge the depletion associated with the uses certificated for this underlying water right. Utah Code Ann. §73-3-3(7)(b) allows, if proper, for an application to be approved for a part of the water involved. It is believed if the proposed domestic use is limited to a part-time domestic use and the conditions listed below are met, the change can be considered. According to the State Engineer's guidelines, a part-time domestic use is considered to divert up to 0.25 acre-foot of water per year. The diversion of water for domestic use in Albion Basin would be considered totally consumptive to that localized basin.

Utah Code Section 73-3-8(1)(a) directs the State Engineer to approve an application if *"the proposed plan is physically and economically feasible, would not prove detrimental to the public welfare, the applicant has the financial ability to complete the proposed works, and the application was filed in good faith and not for purposes of speculation or monopoly."* Protestants have questioned whether the proposed project is physically feasible given local ordinances and permits required. The applicant has not represented that all necessary permits have been secured, but the State Engineer is aware many local approving entities require evidence of water supply before such permits are granted. The State Engineer routinely approves applications presuming other necessary permits will be subsequently secured. Acquiring all other permits and authorizations necessary for the proposed project is the sole responsibility of the applicant and must be obtained before the project proceeds.

The applicant has stated this application was filed to build a family cabin. On small applications proposing the domestic use of one family, the State Engineer typically does not ask for a specific statement or documentation of applicant's financial ability to complete the proposed works. It is the opinion of the State Engineer that there is sufficient reason to believe the applicant has the financial ability to construct the proposed works as limited by this decision.

Each change application submitted to the State Engineer is to be evaluated based on its own merits. This change application filed by Kevin Tolton appears to be filed for the purpose of building a cabin on a parcel of land he owns. Mr. Tolton has indicated his intent with this application is to build a family cabin. The State Engineer is aware that protestants have expressed that the applicant may not intend to build a cabin but may have speculative motives.

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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 for this decision.

<sup>6</sup>Consumptive Use of Irrigated Crops in Utah," Research Report 145, Utah Agricultural Experiment Station, Utah State University, Logan, Utah, October 1994, Table 25" Salt Lake Ct NWSFO AP Station.

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Documents submitted assert the land identified in this application has had a contract for water service with the Little Cottonwood Water Company and was previously planned for development. The land was subsequently annexed into the city of Alta. The commitments of Little Cottonwood Water Company proved insufficient and it was hoped additional water would be supplied by Alta. Over time, limitations on development due to watershed, water quantity, and water quality concerns, outweighed development commitments. Local entities seemed to make a decision that acquisition of the remaining private lands would be in the best interest of the public to protect a valuable source of water for residents of the Salt Lake Valley. Without water, the land is less valuable. It has been suggested the applicant does not intend to build a family cabin but to profit solely from increased valuation of the property after approval of this application. This application must be acted on based on the facts provided by protestants in written or verbal submissions and the merits of the application. The State Engineer has no reason to believe the applicant has acted in bad faith by filing the application. The framework set forth in statute requiring applicants to diligently pursue placing water to approved beneficial uses and the necessity to file change applications if a different project is desired should be satisfactory to alleviate the protesting parties' concerns related to speculation.

In evaluating the various elements of the underlying rights, it is not the intention of the State Engineer to adjudicate the extent of these rights, but rather to provide sufficient definition of the rights to assure that other vested rights are not impaired by the change and/or no enlargement occurs.

It is, therefore, **ORDERED** and Permanent Change Application Number 57-7800 (a28548) is hereby **APPROVED** subject to prior rights with the following conditions:

1. This application is limited to a maximum annual diversion of 0.373 acre-foot of water which is typically sufficient, according to the State Engineer's guidelines, for the part-time indoor domestic use of one family (0.25 acre-feet) and incidental fire protection solely from the well source.
2. The only point of diversion approved to be developed under this application is the well to be located: South 1560 feet and West 1005 feet from the N $\frac{1}{4}$  Corner of Section 9, T3S, R3E, SLB&M. The well must be constructed to seal water from unconsolidated material from direct communication with the well bore and it must be completed and screened or perforated in bedrock. The driller is to provide samples of drill cuttings at five foot intervals to document that the water produced from the well is encountered in the bedrock. The applicant is also cautioned that other permits may be required for drilling a well in this area.
3. The applicant(s) shall install and maintain measuring and totalizing recording devices to meter all water diverted under this application.
4. The storage of water as applied for in the application is approved only for storage of the pumped well water to be contained, measured, and controlled in an on-site

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tank, or mine tunnels the applicant owns. The proposed storage in Cecret Lake is not approved under this application.

5. As noted, this approval is granted subject to prior rights. The applicant must mitigate or provide compensation for any impairment of or interference with prior rights, including compensation for any losses in water for the generation of power, as such may be stipulated among the parties or decreed by a court of competent jurisdiction.
6. Whereas this change application has been filed to entirely replace and supercede prior approved Change Application Number 57-7800 (a24463), with this approval a24463 is considered to be **WITHDRAWN**.
7. The approval for prior Change Application a24463 was conditioned that the well drilled under change a4178 be permanently abandoned and sealed according to the requirements of R655-4-12 of The Administrative Rules for Water Well Drillers. This applicant and the owners of the other segregated interests shall coordinate the abandonment of that well and submit evidence of such prior to any certification of this change.
8. To accommodate the approval of this permanent change application, the use of 0.0104 cfs or 0.9033 acre-foot of water for the irrigation of 0.1217 acre, the domestic use of 0.5 equivalent domestic units, and the stockwatering requirements of 2.5 head of livestock (in cattle or horses or equivalent species) at the historic points of diversion and place of use must cease.

The State Engineer has statutory responsibility to create and maintain water right records based on an administrative process outlined in statute. The State Engineer is not authorized by statute to adjudicate water right title or the validity of established water rights. It is noted that failure to exercise a water right within the statutory period could render all or a portion of a water right invalid through forfeiture. Parties who wish to challenge the validity of a water right are advised that a declaration of forfeiture is a judicial action and the courts are available to pursue such suits (Utah Code Ann. §73-1-4).

The applicant is strongly cautioned that other permits may be required before any development of this application can begin and it is the responsibility of the applicant to determine the applicability of and acquisition of such permits. Once all other permits have been acquired, this is your authority to develop the water under the above referenced application which under Sections 73-3-10 and 73-3-12, Utah Code Annotated, 1953, as amended, must be diligently prosecuted to completion. The water must be put to beneficial use and proof must be filed on or before **January 31, 2020**, or a request for extension of time must be acceptably filed; otherwise the application will lapse. This approval is limited to the rights to divert and beneficially use water and does not grant any rights of access to, or use of land or facilities not owned by the applicant.

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Proof of beneficial use is evidence to the State Engineer that the water has been fully placed to its intended beneficial use. By law, it must be prepared by a registered engineer or land surveyor, who will certify to the location, uses, and extent of your water right. Upon the submission of proof as required by Section 73-3-16, Utah Code, for this application, the applicant must identify every source of water used under this application and the amount of water used from that source. The proof must also show the capacity of the sources of supply and demonstrate that each source can provide the water claimed to be diverted under this right as well as all other water rights which may be approved to be diverted from those sources.

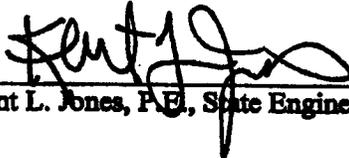
Failure on your part to comply with the requirements of the applicable statutes may result in the lapsing of this permanent change application.

It is the applicant's responsibility to maintain a current address with this office and to update ownership of their water right. Please notify this office immediately of any change of address or for assistance in updating ownership.

Your contact with this office, should you need it, is with the Utah Lake/Jordan River Regional Office. The telephone number is 801-538-7240.

This Order is subject to the provisions of Administrative Rule R655-6-17 of the Division of Water Rights and to Sections 63G-4-302, 63G-4-402, and 73-3-14 of the Utah Code which provide for filing either a Request for Reconsideration with the State Engineer or an appeal with the appropriate District Court. A Request for Reconsideration must be filed with the State Engineer within 20 days of the date of this Order. However, a Request for Reconsideration is not a prerequisite to filing a court appeal. A court appeal must be filed within 30 days after the date of this Order, or if a Request for Reconsideration has been filed, within 30 days after the date the Request for Reconsideration is denied. A Request for Reconsideration is considered denied when no action is taken 20 days after the Request is filed.

Dated this 9<sup>th</sup> day of January, 2014.

  
Kent L. Jones, P.E., State Engineer

Mailed a copy of the foregoing Order this 9<sup>th</sup> day of January 2014 to:

Kevin Tolton  
622 Mountain View Circle  
North Salt Lake, UT 84054

Sandy City  
c/o Patrick R. Casaday  
10000 Centennial Parkway  
Sandy, UT 84070-4148

**AMENDED ORDER OF THE STATE ENGINEER**  
Permanent Change Application Number  
57-7800 (a28548)  
Page 12

USA Forest Service  
c/o Jeanne A. Evenden  
324 25th Street  
Ogden, UT 84401

Cottonwood Hydro, LLC  
(Hydro Holdings, LLC)  
c/o Susannah Williams  
9950 South Power Plant Lane  
Sandy, UT 84092

Friends of Alta  
c/o Patrick A. Shea  
252 South 1300 East, Suite A  
Salt Lake City, UT 84102

Little Cottonwood Creek Distribution  
Committee  
c/o Rodney S. Sorensen, P.E.  
10000 Centennial Parkway, Suite 241  
Sandy, UT 84070

Salt Lake City Corporation  
c/o Shawn E. Draney  
PO Box 45000  
Salt Lake City, UT 84145-5000

Metropolitan Water District of Salt Lake and  
Sandy  
c/o Scott H. Martin  
PO Box 45000  
Salt Lake City, UT 84145-5000

Alta Ski Lifts Company  
c/o Onno Wieringa  
PO Box 8007  
Alta, UT 84092

Sandy Irrigation Company  
c/o John H. Mabey, Jr.  
175 South Main Street, Suite 1330  
Salt Lake City, UT 84111

Town of Alta  
c/o Lee Kapaloski  
201 South Main Street, Suite 1800  
Salt Lake City, UT 84111

Salt Lake County Service Area #3  
c/o David J. Smith  
36 South State Street, Suite 1900  
Salt Lake City, UT 84111

Tim O'Hara, Co-River Commissioner  
1501 South 500 East  
Salt Lake City, UT 84105

Max Reese, Co-River Commissioner  
Tanner Ditch  
977 East 5600 South  
Salt Lake City, UT 84121

Division of Water Rights  
Distribution Section  
c/o Mike Silva  
LITTLE COTTONWOOD CREEK

Division of Water Rights  
Stream Alteration Section

Utah Division of Drinking Water  
PO Box 144830  
Salt Lake City, UT 84114-4830

Utah Division of Water Quality  
PO Box 144870  
Salt Lake City, UT 84114-4870

Division of Water Rights  
Well Drilling Program  
c/o Jim Goddard, Coordinator

BY: 

Sonia R. Nava, Applications/Records Secretary

# Exhibit C

# APPLICATION FOR PERMANENT CHANGE OF WATER

## STATE OF UTAH

Rec. by 2  
Fee Rec. 72  
Receipt # B-03700

For the purpose of obtaining permission to make a permanent change of water in the State of Utah, application is hereby made to the State Engineer, based upon the following showing of facts, submitted in accordance with the requirements of Section 73-3-3 Utah Code Annotated, as amended.

\*WATER RIGHT NO. 57-10317 \*APPLICATION NO. 28545

Changes are proposed in (check those applicable)

point of diversion.  place of use.  nature of use.  period of use.

1. OWNER INFORMATION Judith Maack

Name(s): c/o Daniel A. Jensen \*Interest: \_\_\_\_\_ %

Address: 185 So. State, Suite 1300

City: Salt Lake City State: Utah Zip Code: 84111

2. \*PRIORITY OF CHANGE: \_\_\_\_\_ \*FILING DATE: \_\_\_\_\_

\*Is this change amendatory? (Yes/No): \_\_\_\_\_

3. RIGHT EVIDENCED BY: A portion of 57-7800, 1910 Morse Decree

Prior Approved Change Applications for this right: a24463

\*\*\*\*\*HERETOFORE\*\*\*\*\* **RECEIVED**

4. QUANTITY OF WATER: 0.0625 cfs and/or \_\_\_\_\_ ac-ft.

5. SOURCE: Little Cottonwood Creek, South Despain Ditch

6. COUNTY: Salt Lake

7. POINT(S) OF DIVERSION: (1) S 318 ft and W 408 ft from E 1/4 corner Sec. 12, T3S, R1E, SLM (South Despain Ditch); (2) S 836 ft and E 4518 ft from W 1/4 corner Sec. 7, T3S, R2E, SLM (pipeline)

Description of Diverting Works: \_\_\_\_\_

8. POINT(S) OF REDIVERSION

The water has been rediverted from \_\_\_\_\_ at a point: \_\_\_\_\_

Description of Diverting Works: \_\_\_\_\_ **RECEIVED**

9. POINT(S) OF RETURN

The amount of water consumed is \_\_\_\_\_ cfs or \_\_\_\_\_ ac-ft.

The amount of water returned is \_\_\_\_\_ cfs or \_\_\_\_\_ ac-ft.

The water has been returned to the natural stream/source at a point(s): \_\_\_\_\_

DEC 17 2003  
WATER RIGHTS  
SALT LAKE

\* These items are to be completed by the Division of Water Rights

Permanent Change

SCANNED

10. NATURE AND PERIOD OF USE

Irrigation:	From	<u>4/1</u>	to	<u>10/31</u>
Stockwatering:	From	<u>1/1</u>	to	<u>12/31</u>
Domestic:	From	<u>1/1</u>	to	<u>12/31</u>
Municipal:	From	_____	to	_____
Mining:	From	_____	to	_____
Power:	From	_____	to	_____
Other:	From	_____	to	_____

11. PURPOSE AND EXTENT OF USE

Irrigation: 0.73 acres. Sole supply of 0.73 acres.  
 Stockwatering (number and kind): 15 ELUs  
 Domestic: 3 Families and/or \_\_\_\_\_ Persons.  
 Municipal (name): \_\_\_\_\_  
 Mining: \_\_\_\_\_ Mining District in the \_\_\_\_\_ Mine.  
 Ores mined: \_\_\_\_\_  
 Power: Plant name: \_\_\_\_\_ Type: \_\_\_\_\_ Capacity: \_\_\_\_\_  
 Other (describe): \_\_\_\_\_

12. PLACE OF USE

Legal description of place of use by 40 acre tract(s): SW/NW Sec. 12, T3S, R1E, SLM  
 \_\_\_\_\_  
 \_\_\_\_\_

13. STORAGE

Reservoir Name: \_\_\_\_\_ Storage Period: from \_\_\_\_\_ to \_\_\_\_\_  
 Capacity: \_\_\_\_\_ ac-ft. Inundated Area: \_\_\_\_\_ acres.  
 Height of dam: \_\_\_\_\_ feet.  
 Legal description of inundated area by 40 acre tract(s): \_\_\_\_\_  
 \_\_\_\_\_

\*\*\*\*\*THE FOLLOWING CHANGES ARE PROPOSED\*\*\*\*\*

14. QUANTITY OF WATER: 0.0012 cfs and/or 0.9 ac-ft.

15. SOURCE: Little Cottonwood Creek, springs, well and Cecret Lake  
 Balance of the water will be abandoned: \_\_\_\_\_, or will be used as heretofore: X

16. COUNTY: Salt Lake

17. POINT(S) OF DIVERSION: See attached  
 \_\_\_\_\_  
 \_\_\_\_\_

Description of Diverting Works: \_\_\_\_\_  
 \*COMMON DESCRIPTION: \_\_\_\_\_

18. POINT(S) OF REDIVERSION

The water will be rediverted from \_\_\_\_\_ at a point: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Description of Diverting Works: \_\_\_\_\_

**19. POINT(S) OF RETURN**

The amount of water to be consumed is \_\_\_\_\_ cfs or \_\_\_\_\_ ac-ft.

The amount of water to be returned is \_\_\_\_\_ cfs or \_\_\_\_\_ ac-ft.

The water will be returned to the natural stream/source at a point(s): \_\_\_\_\_

**20. NATURE AND PERIOD OF USE**

Irrigation:	From _____	to _____
Stockwatering:	From _____	to _____
Domestic:	From 1/1	to 12/31
Municipal:	From _____	to _____
Mining:	From _____	to _____
Power:	From _____	to _____
Other:	From 1/1	to 12/31

**21. PURPOSE AND EXTENT OF USE**

Irrigation: \_\_\_\_\_ acres. Sole supply of \_\_\_\_\_ acres.

Stockwatering (number and kind): \_\_\_\_\_

Domestic: 1 Families and/or \_\_\_\_\_ Persons.

Municipal (name): \_\_\_\_\_

Mining: \_\_\_\_\_ Mining District at the \_\_\_\_\_ Mine.

Ores mined: \_\_\_\_\_

Power: Plant name: \_\_\_\_\_ Type: \_\_\_\_\_ Capacity: \_\_\_\_\_

Other (describe): Fire protection

**22. PLACE OF USE**

Legal description of place of use by 40 acre tract(s): See attached

**23. STORAGE**

Reservoir Name: See attached Storage Period: from \_\_\_\_\_ to \_\_\_\_\_

Capacity: \_\_\_\_\_ ac-ft. Inundated Area: \_\_\_\_\_ acres.

Height of dam: \_\_\_\_\_ feet.

Legal description of inundated area by 40 acre tract(s): \_\_\_\_\_

**24. EXPLANATORY**

The following is set forth to define more clearly the full purpose of this application. Include any supplemental water rights used for the same purpose. (Use additional pages of the same size if necessary):

See attached

\*\*\*\*\*

The undersigned hereby acknowledges that even though he/she/they may have been assisted in the preparation of the above-numbered application through the courtesy of the employees of the Division of Water Rights, all responsibility for the accuracy of the information contained herein, at the time of filing, rests with the applicant(s).

\_\_\_\_\_  
Signature of Applicant

*Sam Deiner*  
\_\_\_\_\_  
Signature of Applicant's Attorney and Agent

17. Points of Diversion

1. Unnamed spring: S 37°29'29" E 8240.86' from the N¼ corner Section 5, T3S, R3E, SLM, within tax parcel No. 30-09-176-009 (approx. S 1605' and W 1030' from N¼ corner Section 9, T3S, R3E, SLM).
2. Underground well: S 35°54'15" E 8749.82' from the N¼ corner Section 5, T3S, R3E, SLM, within tax parcel No. 30-09-176-019 (approx. S 2165' and W 915' from N¼ corner Section 9, T3S, R3E, SLM).
3. Little Cottonwood Creek: S 36°52'47" E 8197.44' from the N¼ corner Section 5, T3S, R3E, SLM, within tax parcel No. 30-09-176-009 (approx. S 1635' and W 1100' from N¼ corner Section 9, T3S, R3E, SLM).
4. Little Cottonwood Creek: S 37°14'05" E 8134.72' from the N¼ corner Section 5, T3S, R3E, SLM, within tax parcel No. 30-09-176-009 (approx. S 1580' and W 1090' from N¼ corner Section 9, T3S, R3E, SLM).
5. Little Cottonwood Creek: S 37°12'41" E 8101.05' from the N¼ corner Section 5, T3S, R3E, SLM, within or near the western edge of tax parcel No. 30-09-176-009 (approx. S 1560' and W 1130' from N¼ corner Section 9, T3S, R3E, SLM).
6. Cecret Lake (also known as Flora Lake): S 835' and E 430' from W¼ corner Section 9, T3S, R3E, SLM (approx), within the patented Cecret No. 2 lode mining claim, Mineral Survey No. 5803.
7. Group of unnamed springs: S 1755' and W 1230' from N¼ corner Section 9, T3S, R3E, SLM (approx.), within tax parcel No. 30-09-176-022.
8. Unnamed spring: S 2470' and W 925' from N¼ corner Section 9, T3S, R3E, SLM (approx.), which spring is referenced in that certain Special Use Permit dated September 1973 issued by the United States Forest Service to the Cecret Lake Water Corporation.

Water will be piped from the points of diversion to the place of use.

22. Place of Use

SE¼NW¼ Section 9, T3S, R3E, SLM (tax parcel No. 30-09-176-019).

**23. Storage**

Approximately 180,000 gallons of water will be stored year-round in a storage tank in the SE  $\frac{1}{4}$  NW  $\frac{1}{4}$  of Section 9, a mine tunnel located in the NW  $\frac{1}{4}$  NE  $\frac{1}{4}$  of Section 9 and the SW  $\frac{1}{4}$  SE  $\frac{1}{4}$  of Section 4, and/or Cecret Lake in the NW  $\frac{1}{4}$  SW  $\frac{1}{4}$  of Section 9, all in T3S, R3E, SLM, for nonconsumptive fire protection purposes.

**24. Explanatory**

This application moves part of an existing water right upstream within the same hydrologic basin. The hereafter consumption of water will be less than the consumption heretofore, so there will be no enlargement of the water right.

The subject township is only partially surveyed and the location of section corners and section lines remains uncertain. All references to and depictions of section corners, section lines and section subdivisions are approximate.

See attached application maps and verification statement.

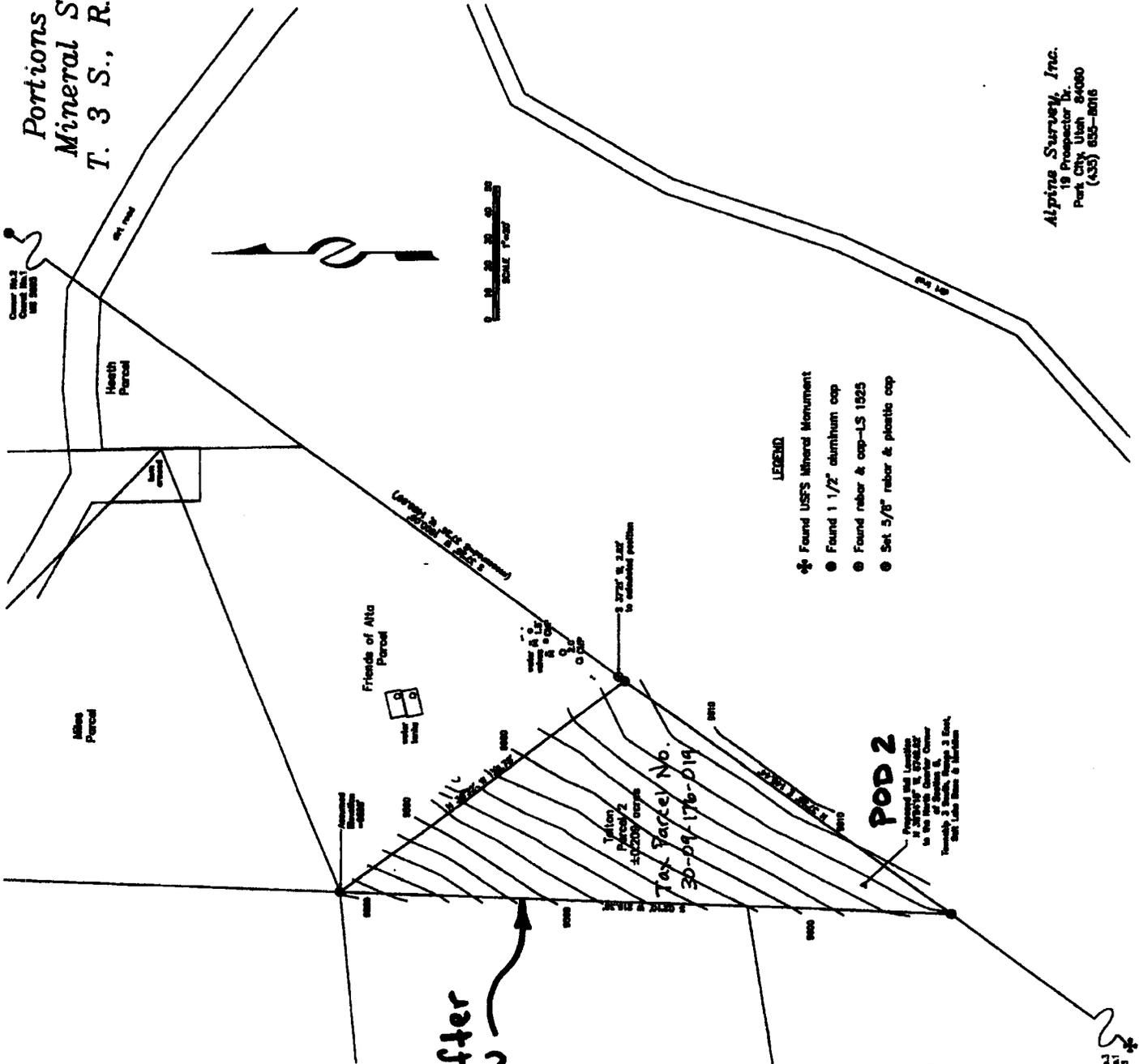
**MAP VERIFICATION STATEMENT:**

I, Daniel A. Jensen, on behalf of the applicant, hereby acknowledge that the maps, consisting of five pages, attached to this application were prepared in support of this application. By my signature below, I hereby accept and submit said maps as true representations of the facts shown thereon to the best of my knowledge and belief.

Daniel Jensen



# Portions of Cearet No.1, Mineral Survey No. 5803 T. 3 S., R. 3 E., S.L.B.&M.



**MARRATIVE**

1. Survey requested by Kevin Tollon.
2. Purpose of survey: locate the topographic relief.
3. Basis of survey: found USFS Mineral Monuments, as shown.
4. Date of survey: October 14, 2003.
5. Property monuments set or found as shown.
6. Located in the Northwest Quarter of Section 9, Township 3 South, Range 3 East, Salt Lake Base & Meridian.
7. The owner of the property should be aware of any items affecting the property that may appear in a title insurance report.
8. The tie from Corner No.1, Cearet No.1, MS 5803, to the North Quarter Corner of Section 5, Township 3 South, Range 3 East, Salt Lake Base & Meridian was found to be 37'43.55" West, 8037.45 feet.
9. An assumed deviation of 9880 feet was assigned to the top of the property monument at the north corner of the property, as shown.

**LEGAL DESCRIPTIONS**

**Tollon Parcel 2**  
 A Portion of Cearet No.1 Lode Mining Claim designated by the Surveyor General as Survey No. 5803 embracing a portion of Township 3 South, Range 3 East of the Salt Lake Meridian, and in the Little Cottonwood Mining District, Salt Lake County, Utah.  
 Commencing at a point which is 528.71 feet South and 187.23 feet East from corner No.1 of said Cearet No.1 Lode Mining Claim (which corner bears South 51'2" West, 64.5 feet from a pine tree which was blazed and scribed B.T. 1-5803 in 1905 at the time of location of said claim); and running thence South 21'0" West, 254.36 feet, more or less, to the side line of said claim; thence North 37'28" East, 145.44 feet along the side line of said claim; thence North 38'32" West, 139.80 feet to the point of beginning.

**SURVEY DESCRIPTION**

Commencing at a point which is 508.71 feet South and 187.23 feet East from Corner No.1 of Cearet No.1 Mining Claim, MS 5803, (which corner bears South 51'2" West, 64.5 feet from a pine tree which was blazed and scribed B.T. 1-5803 in 1905 at the time of location of said claim); and running thence South 21'0" West, 216.36 feet, more or less, to the side line of said claim; thence North 37'28" East, 145.44 feet along the side line of said claim; thence North 38'32" West, 128.78 feet to the point of beginning, containing 0.209 acres, more or less.

**SURVEYOR'S CERTIFICATE**

I, J.D. Gately, a Registered Land Surveyor as prescribed by the laws of the State of Utah and holding License No. 3588005, do hereby certify that I have supervised a survey of the hereon described property and that this plat is a true representation of said survey.

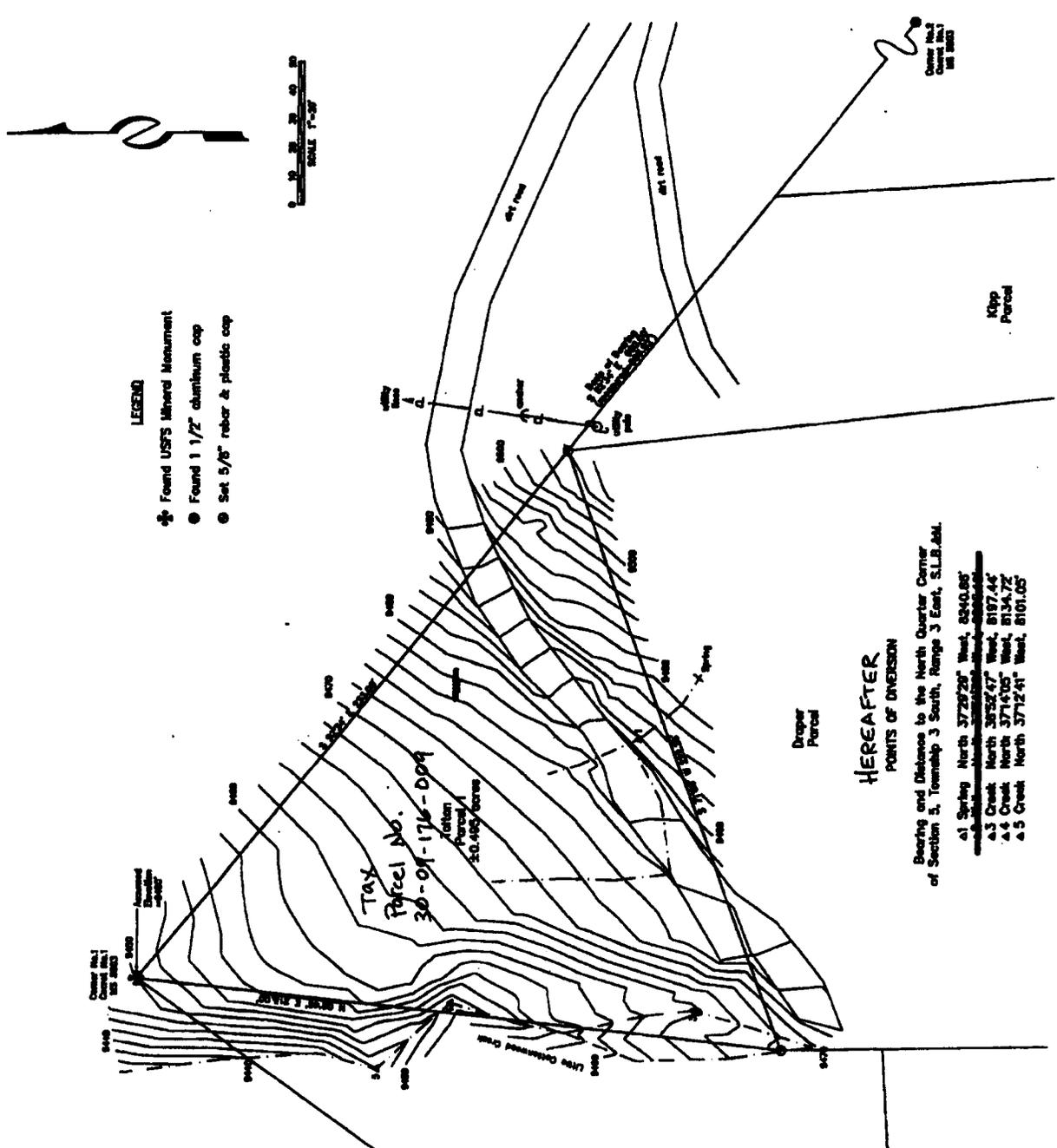


Approved:                       
 Date

**Alpina Survey, Inc.**  
 19 Propector Dr.  
 Park City, Utah 84080  
 (435) 835-8016

SCANNED

# Portions of Cecret No.1, Mineral Survey No. 5803 T. 3 S., R. 3 E., S.L.B.&M.



- MARRATIVE**
- Survey requested by Kevin Totton.
  - Purpose of survey: locate the topographic relief.
  - Base of survey: found USFS Mineral Monuments, as shown.
  - Date of survey: October 14, 2003.
  - Property monuments set or found as shown.
  - Located in the Northwest Quarter of Section 9, Township 3 South, Range 3 East, Salt Lake Base & Meridian.
  - The owner of the property should be aware of any items affecting the property that may appear in a title insurance report.
  - The tie from Corner No.1, Cecret No.1, MS 5803, to the North Quarter Corner of Section 5, Township 3 South, Range 3 East, Salt Lake Base & Meridian was found to be 3743.55' West, 8057.45 feet.
  - An assumed elevation of 8450 feet was assigned to the top of the USFS Mineral Monument found at the north corner of the property, as shown.

**LEGAL DESCRIPTION**  
Teton Parcel 1

A Portion of Cecret No.1 Lode Mining Claim designated by the Surveyor General as Survey No. 5803 embracing a portion of Township 3 South, Range 3 East of the Salt Lake Meridian, and in the Little Cottonwood Mining District, Salt Lake County, Utah, Commencing at the corner No.1 of said Cecret No.1 Lode Mining Claim (which corner bears South 51°2' West, 84.5 feet from a pine tree which was blazed and scribbled B.T. 1-5803 in 1905 at the time of location of said claim); and running thence South 52°34' East, 233 feet along the end line of said claim; thence South 71°08' West, 222.28 feet to the middle of Little Cottonwood Creek; thence North 6°46' East, 215 feet to the point of beginning; containing 0.485 acres, more or less.

**SURVEYOR'S CERTIFICATE**

I, J.D. Cooley, a Registered Land Surveyor as prescribed by the laws of the State of Utah and holding License No. 358005, do hereby certify that I have supervised a survey of the hereon described property and that this plot is a true representation of said survey.

August 13, 2003 Date  
J.D. Cooley  
358005



Alpine Survey, Inc.  
18 Promontory Blvd.  
Park City, Utah 84060  
(435) 655-8018

**HEREAFTER**  
POINTS OF INTEREST

Bearing and Distances to the North Quarter Corner of Section 5, Township 3 South, Range 3 East, S.L.B.&M.

- a1 Spring North 37°29' West, 8940.05'
- a3 Creek North 35°24' West, 8197.44'
- a4 Creek North 37°15' West, 8134.72'
- a5 Creek North 37°24' West, 8101.05'

# Exhibit D



GARY R. HERBERT  
Governor  
SPENCER J. COX  
Lieutenant Governor

**State of Utah**  
DEPARTMENT OF NATURAL RESOURCES  
Division of Water Rights

MICHAEL R. STYLER      KENT L. JONES  
Executive Director      State Engineer/Division Director

JAN 09 2014

**ORDER OF THE STATE ENGINEER**  
For Permanent Change Application Number 57-10317 (a28545)

Permanent Change Application Number 57-10317 (a28545) in the name of Judith Maack was filed on December 18, 2003, to change the points of diversion, place of use, and uses of 0.0104 cubic foot per second (cfs) or 0.9033 acre-foot (af) of water as evidenced by Water Right Number 57-10317. Heretofore, the water has been diverted from the following points located: (1) Surface - South 318 feet and West 408 feet from the E $\frac{1}{4}$  Corner of Section 12, T3S, R1E, SLB&M; (2) Surface - South 838 feet and East 4518 feet from the W $\frac{1}{4}$  Corner of Section 7, T3S, R2E, SLB&M. The water has been used for the irrigation of 0.1217 acre from April 1 to October 31, and the indoor domestic requirements of 0.5 equivalent domestic unit from January 1 to December 31, and the stockwatering requirements of 2.5 head of livestock (in cattle or horses or equivalent species) from January 1 to December 31.<sup>1</sup> The water has been used in all or portion(s) of Section 12, T3S, R1E, SLB&M.

Hereafter, it is proposed to divert 0.0104 cfs or 0.9033 acre-foot of water from points of diversion changed to: (1) Spring - South 1605 feet and West 1030 feet from the N $\frac{1}{4}$  Corner of Section 9, T3S, R3E, SLB&M; (2) Spring - South 2470 feet and West 925 feet from the N $\frac{1}{4}$  Corner of Section 9, T3S, R3E, SLB&M; (3) Spring - South 1755 feet and West 1230 feet from the N $\frac{1}{4}$  Corner of Section 9, T3S, R3E, SLB&M; (4) Surface - South 1635 feet and West 1100 feet from the N $\frac{1}{4}$  Corner of Section 9, T3S, R3E, SLB&M (Little Cottonwood Creek); (5) Surface - South 1580 feet and West 1090 feet from the N $\frac{1}{4}$  Corner of Section 9, T3S, R3E, SLB&M (Little Cottonwood Creek); (6) Surface - South 1560 feet and West 1130 feet from the N $\frac{1}{4}$  Corner of Section 9, T3S, R3E, SLB&M (Little Cottonwood Creek); (7) Surface - South 835 feet and East 430 feet from the W $\frac{1}{4}$  Corner of Section 9, T3S, R3E, SLB&M (Cecret Lake (aka Flora Lake)); (8) Well - South 2165 feet and West 915 feet from the N $\frac{1}{4}$  Corner of Section 9, T3S, R3E, SLB&M. The water is to be used for the indoor domestic requirements of one equivalent domestic unit from January 1 to December 31, and for fire protection. The water is proposed to be stored year-round in a storage tank, mine tunnels and Cecret Lake. The place of use of the water is being changed to all or portion(s) of Section 9, T3S, R3E, SLB&M.

Notice of the application was published in the Deseret News on January 15 and 22, 2004, and protests were received from Alta Energy LLC, Alta Ski Lifts Company, Friends of Alta, Little Cottonwood Creek Distribution Committee, Metropolitan Water District of Salt Lake & Sandy,

<sup>1</sup> As part of the reconsideration of Change Application a28548 (57-7800), a letter was sent requesting clarification as to the ownership interest in the uses under this right. The ownership interest was clarified by the current owners of the water rights and the owners agreed that it is intended a 1/6<sup>th</sup> interest was received by all six parties (Water Right Numbers 57-7800, 57-10315, 57-10316, 57-10317, 57-10318, and 57-10319). These amounts were corrected on the Division's records and each water right now reflects the following amounts: 0.0104 cfs or 0.9033 acre-feet to be used for the irrigation of 0.1217 acre, watering of 2.5 equivalent livestock units, and 0.5 equivalent domestic units.

**ORDER OF THE STATE ENGINEER  
Permanent Change Application Number  
57-10317 (a28545)  
Page 2**

**Salt Lake City Corporation, Salt Lake County Service Area #3, Sandy City, Sandy Irrigation Company, Town of Alta, and USA Forest Service. A hearing was held on July 13, 2011.**

**In the written protests, testimony presented at the hearing, and additional comments received pertaining to this application the protestants expressed concern with the impact this change application would have on existing rights, the ownership interest to the underlying water right, and whether the application meets statutory criteria for approval. Specific concerns were expressed by each protestant as follows:**

**Cottonwood Hydro (asserts to be successor to Alta Energy LLC) operates a hydroelectric facility downstream from the use proposed under this application. It expresses concern with this change and the impairment this change would create if any reduction of the winter water flows were to occur as a result of this application.**

**Alta Ski Lifts (hereafter ASL) expresses concern that the applicant has not demonstrated sufficient title interest in the underlying water right and question the assertions made to update title on the Division of Water Rights records based on appurtenance and use of the water. ASL is also concerned that the application does not meet the statutory requirements for approval and must be rejected.**

**Friends of Alta (hereafter FOA) assert if the change application is granted, it would unreasonably affect public recreation and the natural stream environment and the application is filed for speculative purposes. FOA requests the entire eco-geographic area of Albion Basin be investigated to ensure no negative impact occurs.**

**Little Cottonwood Creek Distribution Committee (hereafter LCCDC) is concerned that there is no unappropriated water in the proposed sources. LCCDC also believes impairment of existing rights would occur because the change proposes the use of winter water and the proposed use of water could create a potential increase in the amount of water depleted.**

**Metropolitan Water District of Salt Lake and Sandy (hereafter METRO) explains it is a wholesale water supplier whose member cities include Salt Lake City and Sandy City. Metro treats water from Little Cottonwood Creek and states this surface water source is critical to conjunctively manage water sources in the Salt Lake Valley. Specific concern is expressed for the second primary right owned by Sandy Irrigation Company and the contract agreement with Sandy City that makes water available for treatment. Metro is concerned about the impacts this application will have on rights relying on this limited resource and supports the concerns expressed by Salt Lake City in its protest.**

**Salt Lake City Corporation (hereafter SLC) explains it has a majority ownership of the rights to divert the water of Little Cottonwood Creek and its prior contractual agreement with the South Despain Ditch users for water during the 'winter and non-irrigation' season. That agreement transfers the winter portion of the South Despain decree award to SLC, except for 7,500 gallons per day to be delivered off the Murray Penstock through a 6-inch pipeline to the South Despain**

**ORDER OF THE STATE ENGINEER  
Permanent Change Application Number  
57-10317 (a28545)  
Page 3**

users. SLC believes this contract is binding on the State Engineer and must be considered under this change and that an enlargement of the underlying right would occur if the application is approved. SLC believes the application does not meet the statutory criteria that must be considered by the State Engineer to approve or deny a change application.

Salt Lake County Service Area #3 expresses concern with the change application and supports the position of Salt Lake City in its protest. The service area relies on a water supply agreement with the city for its water supply and use of water. Along with the issues raised by Salt Lake City, the service area is also concerned with any proposed diversion of water within the Town of Alta's drinking water source protection zone.

Sandy City explains it owns existing rights to the use of Little Cottonwood Creek water and expresses concern that its existing rights would be impaired by any enlargement of the underlying water right. Impairment would occur not only based on water quantity but also water quality as a result of the proposed use. Sandy City is also concerned that the person filing this application is not the person entitled to the use of water. Sandy City does not believe this application meets statutory criteria for approval and, therefore, must be denied.

Sandy Irrigation Company is the owner of water rights from Little Cottonwood Creek and is concerned that this change application would impair its existing rights by increased depletion associated with the proposed use. The company believes its rights will be directly impaired during the non-irrigation season by any diversion of water under the change application. The company is also concerned about the impacts the change application will have on water quality, public recreation and the natural stream environment. The company believes this change will interfere with the more beneficial use of water it provides for Sandy City.

Town of Alta (Alta) is concerned with the impacts this change application would have on existing rights held by SLC. Alta's right to use water is based on a water supply agreement with SLC. Alta explains the proposed place of use is included in annexations where restrictions on water use and related development were placed. Without the appropriate permits, any development in this area would create negative impacts to public recreation and natural stream environments.

US Forest Service protests the application and asserts ownership of the lands upon which the applicant proposes to develop a source of water. The Forest Service also notes that the applicants have no Special Use Permit(s) that would allow them to place improvements or infrastructure on public lands. Concern is also expressed as to impairment of its existing rights for the Albion Basin Campground.

The State Engineer has reviewed the change application, underlying water right, Little Cottonwood Decree information, written protests and testimony received during the hearing. From these numerous documents and sources of information, the following paragraphs summarize the elements of the historical right and subsequent actions affecting the water claimed under this change application.

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- A. The water right on which this change application is filed stems from a 0.25 cfs primary decree award to the South Despain Ditch with a priority date of 1848.<sup>2</sup> Historically, water in the South Despain ditch was diverted from Little Cottonwood Creek near the mouth of Little Cottonwood Canyon and used on lands located near the ditch. The decree did not specify names of the South Despain Ditch users, nor did it indicate exact lands upon which the water was used.
- B. A 1934 agreement was entered into between Salt Lake City and the South Despain Ditch users. The South Despain Ditch parties to the agreement included L.E. Despain and his wife Annie Bulter Despain; Alva J. Butler and his wife Anna Laura Butler; George F. Despain and his wife Prudence B. Despain; De Bart Despain and his wife Bertha K. Despain; and Clarence L. Giles and his wife Laura Sue Giles. Under the agreement, Salt Lake City was to provide a pipeline and deliver 7,500 gallons of water per day for culinary purposes from October 1<sup>st</sup> to April 1<sup>st</sup> of each year to the five listed South Despain Ditch users. The agreement covered only the 'winter or non-irrigation season.' The summer water would continue to be diverted as had historically occurred through the ditch. The ditch users for consideration granted, bargained, sold and conveyed to SLC the right to the use of the remaining portion of the decree award during the non-irrigation season.
- C. On September 25, 1962, Change Application Number a4178 was filed by Harold H. Bentley who asserted an ownership interest of one-fourth of the decree award to the South Despain Ditch. The change application has been identified on the State Engineer's records as Water Right Number 57-7800. This change application proposed moving the point of diversion for this one-fourth interest in the water right to a well. It was approved and a *Certificate of Permanent Change of Point of Diversion, Place, Purpose or Period of Use of Water* was issued by the State Engineer on May 24, 1971. The Certificate indicates water was diverted from a well drilled to a depth of 145 feet, and used for the domestic use of three families, 0.73 acre of irrigation, and the watering of six horses, six cattle and 100 chickens. The Change Application a4178 and Water Right Number 57-7800 do not include any other portion of the other awards in the decree. Title updates or changes to any other award in the decree must be addressed under a separate action of the State Engineer.
- D. Title documents were submitted to the Division to update ownership of the certificated right (57-7800). Based on the submitted documents, ownership on the Division's records was updated to Lynn Christensen Biddulph.

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<sup>2</sup> *Union & East Jordan Irr. Co. v. Richards Irr. Co., et al.*; slip op. at paragraph 28 (Third Judicial District Court Salt Lake County, June 16, 1910).

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- E. On May 8, 2000, Lynn Christensen Biddulph submitted Change Application Number a24463 on Water Right Number 57-7800. The application proposed changing the point of diversion from a well back to the historical source at the historical location of the South Despain Ditch and pipeline. The explanatory of the signed change application indicated the applicant was returning to the decreed point of diversion to reflect the actual use and historical use of the water. Change Application a24463 was approved August 4, 2000. This water right reflects a 1/6th portion of this change and is numbered a24463c. Proof of Beneficial Use is due August 31, 2014.
- F. Additional title documents were submitted to the Division in 2003 to update ownership of Water Right Number 57-7800 on the records of this office. Portions of that water right were segregated to Water Right Numbers 57-10315, 10316, 10317, 10318, and 10319 giving each right the use of 0.1217 acre of irrigation, 2.5 ELU, and 0.5 equivalent domestic units. Questions related to competing deeds and a lawsuit filed because those deeds each purported to convey title to this water right delayed action on this application. The Utah Supreme Court concluded in a 2011 ruling that the competing deed was not effective since it was recorded after the deed relied upon in the modification of the State Engineer's records. The State Engineer is not aware of other deeds or pending legal action that may potentially affect ownership of the water right sought for change.<sup>3</sup>
- G. The State Engineer recognized in granting reconsideration of the approval of Change Application a28548 (57-7800) that there was a discrepancy between the deeds which created the segregated portions of this water right and amounts segregated to water right files 57-10315, 10316, 10317, 10318, and 10319. Correspondence with all of the water right owners followed. All of the owners responded and the ownership interest was clarified with the current owners of the water rights. The owners agree that it is intended a 1/6<sup>th</sup> interest was received by all six parties. This amount was corrected on the Division's records and each water right now reflects the following amounts: 0.0104 cfs or 0.9033 acre-feet to be used for the irrigation of 0.1217 acre, watering of 2.5 equivalent livestock units, and 0.5 equivalent domestic units.

<sup>3</sup> The State Engineer is aware of the Report of Water Right Conveyance filed by Salt Lake City on Water Right Number 57-9001, filed October 19, 2005. Water Right 57-9001 represents the primary decree award to the South Despain Ditch. Water Right Number 57-7800 is a segregated portion of 57-9001. The State Engineer believes Water Right Number 57-7800 represents only the 1/4 interest asserted by Harold Bentley, less any amounts of water contained in the 1934 agreement with Salt Lake City. Salt Lake City's entire interest to the South Despain Ditch award exists on Water Right 57-9001. Water Right 57-7800 asserts representation of the 1/6 interest in 7,500 gallons per day (1,875 gallons per day) during the non-irrigation season defined in the contract agreement. At the request of the current owners, Water Right 57-7800 has been segregated into six equal parts, thus giving each an interest during the non-irrigation season of 312.5 gallons per day.

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Utah Code Ann. §73-3-3(2)(a), states that any person entitled to the use of water may, through the change application process, make a permanent change to an existing water right. Additionally, §73-3-3(5)(a) directs the State Engineer to follow the same procedures for a permanent change application as provided by statute for applications to appropriate water. The State Engineer must approve a change application if it meets the provisions of §73-3-3 and criteria listed in §73-3-8(1). A primary consideration for a change application to be approved is that it not impair a vested water right without just compensation. The State Engineer may not reject a change application for the sole reason that it would impair a vested water right. But, if the application is otherwise proper, he may approve it for part of the water involved or with the condition that the applicant acquire the conflicting rights.

The protestants' opposition to this application focuses primarily on impairment of existing rights and support of local policies restricting development in Little Cottonwood Canyon. The State Engineer supports efforts to maintain and improve watersheds and preserve the quality of the public waters. However, limiting access to water as a land planning tool would usually conflict with a fundamental public policy the State Engineer implements - making public waters available for beneficial use. Nothing in the State Engineer's statutory authority allows him to construe a private party's desire to secure a water supply for development of private property, such as the applicant here proposes, as detrimental to the public welfare. If the protestants believe as a matter of public policy it would be best to restrict further development in Little Cottonwood Canyon, they should work through other appropriate means to achieve that goal.

Utah Code Section 73-3-8(1)(a) directs the State Engineer to approve an application if "*there is unappropriated water in the proposed source, the proposed use will not impair existing rights or interfere with the more beneficial use of the water.*" This change application proposes to divert water from eight different points of diversion, which include two unnamed springs, a "group of unnamed springs," a well, Cecret Lake and three locations along Little Cottonwood Creek. All the proposed sources are located at the headwaters of Little Cottonwood Creek, a tributary to the Jordan River basin. All surface and groundwater in the Eastern Salt Lake Valley are considered fully appropriated. No additional water is available for appropriation. Any new development must be accomplished by change applications based on existing rights, which this application proposes to do. In the hereafter proposed area there is no water to appropriate from surface sources without impairing existing rights, specifically those related to power generation downstream or winter uses. The State Engineer is of the opinion all surface water and groundwater originating within the canyon is source-water supplying the decreed rights diverting water near the mouth of the canyon. The State Engineer presumes deep groundwater in this canyon area is directly tributary to surface supplies near the mouth of the canyon. However, that deep groundwater has not been shown to be directly connected to surface water in the hereafter area of use. If conditions contained herein are followed, development of this application is not likely to have a direct affect on surface flows within Albion Basin. Given the conflict with other water users demonstrated by the protestants to this application, the potential for direct interference with surface water rights from some of the proposed points of diversion, the management complexity associated with regulating the multiple points of diversion identified in this change application, and the limited requirement to serve the inside domestic use of one

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family, the diversion of water under this application is limited to the well proposed to be located South 2165 feet and West 915 feet from the N $\frac{1}{4}$  Corner of Section 9, T3S, R3E, SLB&M. In addition, any diversions made must be limited to historical diversion amounts of the underlying right which, based on existing contracts, restricts the amount of water that can be diverted during the "winter or non-irrigation season."

It is the State Engineer's understanding septic and drain field disposal of waste is not allowed in the watershed where the domestic use is planned under this application because of water quality considerations designed to protect drinking water to Salt Lake City, Sandy and others. The applicant has provided no specific plan or information regarding treatment of domestic waste water. Therefore, the State Engineer believes it appropriate to consider the water proposed to be used for domestic purposes in Albion Basin under the application to be totally consumed or depleted from the hydrologic system locally.

As noted, the water right on which this change application is filed stems from a 0.25 cfs primary decree award to the South Despain Ditch with a priority date of 1848.<sup>4</sup> The State Engineer believes the priority of a change application may affect the ability of a water right holder to divert water based on the change application if water is not available at the new diversion location without impairing existing rights. For localized interference, diversion under this change application could have a priority as late as December 18, 2003, which would make it junior to most established rights of the protestants.

In evaluating applications that propose to change the nature of use of a water right, the State Engineer believes it is appropriate to examine the rates and amounts of hydrologic depletion associated with the historical water use as compared to the proposed use to assure that there is no enlargement of the underlying water right. In this case, the amount of water diversion considered necessary for year round domestic purposes is 0.45 acre-foot.

The State Engineer, in evaluating applications which historically diverted water for indoor domestic use, assumes an annual diversion of 0.45 acre-foot, or 400 gallons per day, and a depletion of approximately 20% if wastewater is treated by a septic system or other means short of total containment lagoons.<sup>5</sup> Stockwatering is assumed to divert 0.028 acre-foot of water annually for a cow or horse and is considered 100% consumptive. Irrigation in the Salt Lake Valley is evaluated at 5.0 acre-feet per acre diversion with a 42.4% depletion rate.<sup>6</sup> Based on

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<sup>4</sup> *Union & East Jordan Irr. Co. v. Richards Irr. Co., et al.*; slip op. at paragraph 28 (Third Judicial District Court Salt Lake County, June 16, 1910).

<sup>5</sup> The domestic use associated with the underlying water right was for a fraction of a home use that is 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 for this decision.

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these values, this application historically could have diverted, from the well indicated on the Certificate, a maximum of 0.903 acre-foot annually with an associated depletion of 0.373 acre-foot. Based on this analysis, using the water for the proposed domestic needs of one family and assuming all domestic water diverted would no longer be available to the Little Cottonwood drainage, consuming 0.45 acre-foot for that purpose would enlarge the depletion associated with the uses certificated for this underlying water right. Utah Code Ann. §73-3-3(7)(b) allows, if proper, for an application to be approved for a part of the water involved. It is believed if the proposed domestic use is limited to a part-time domestic use and the conditions listed below are met, the change can be considered. According to the State Engineer's guidelines, a part-time domestic use is considered to divert up to 0.25 acre-foot of water per year. The diversion of water for domestic use in Albion Basin would be considered totally consumptive to that localized basin.

Utah Code Section 73-3-8(1)(a) directs the State Engineer to approve an application if *"the proposed plan is physically and economically feasible, would not prove detrimental to the public welfare, the applicant has the financial ability to complete the proposed works, and the application was filed in good faith and not for purposes of speculation or monopoly."* Protestants have questioned whether the proposed project is physically feasible given local ordinances and permits required. The applicant has not represented that all necessary permits have been secured, but the State Engineer is aware most local approving entities require evidence of water supply before such permits are granted. The State Engineer routinely approves applications presuming other necessary permits would be subsequently secured. Acquiring all other permits and authorizations necessary for the proposed project is the sole responsibility of the applicant and must be obtained before the project proceeds.

The applicant has stated this application was filed to build a family cabin. On small applications proposing the domestic use of one family, the State Engineer typically does not ask for a specific statement or documentation of applicant's financial ability to complete the proposed works. It is the opinion of the State Engineer that there is sufficient reason to believe the applicant has the financial ability to construct the proposed works as limited by this decision.

Each change application submitted to the State Engineer is to be evaluated based on its own merits. This change application was filed for the purpose of building a cabin on a parcel of land owned by the applicant. The State Engineer is aware that protestants have expressed that the applicant may not intend to build a cabin but may have speculative motives. Documents submitted assert the land indicated in this application has had a contract for water service with the Little Cottonwood Water Company and was previously planned for development. The land was subsequently annexed into the city of Alta. The commitments of Little Cottonwood Water Company proved insufficient and it was hoped additional water would be supplied by Alta. Over time, limitations on development due to watershed, water quantity, and water quality concerns, outweighed development commitments. Local entities seemed to make a decision that

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<sup>6</sup>Consumptive Use of Irrigated Crops in Utah," Research Report 145, Utah Agricultural Experiment Station, Utah State University, Logan, Utah, October 1994, Table 25" Salt Lake Ct NWSFO AP Station.

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acquisition of the remaining private lands would be in the best interest of the public to protect a valuable source of water for residents of the Salt Lake Valley. Without water, the land is less valuable. It has been suggested the applicant does not intend to build a family cabin but to profit solely from increased valuation of the property after approval of this application. This application must be acted on based on the facts provided by protestants in written or verbal submissions and the merits of the application. It does not appear there is evidence to disbelieve that the applicant is acting in good faith by filing this application. The framework set forth in statute requiring applicants to diligently pursue placing water to approved beneficial uses and the necessity to file change applications if a different project is desired should be satisfactory to alleviate the protesting parties' concerns related to speculation.

In evaluating the various elements of the underlying rights, it is not the intention of the State Engineer to adjudicate the extent of these rights, but rather to provide sufficient definition of the rights to assure that other vested rights are not impaired by the change and/or no enlargement occurs.

It is, therefore, **ORDERED** and Permanent Change Application Number 57-10317 (a28545) is hereby **APPROVED** subject to prior rights with the following conditions:

1. This application is limited to a maximum annual diversion of 0.373 acre-foot of water which is typically sufficient, according to the State Engineer's guideline, for the part-time indoor domestic use of one family (0.25 acre-foot) and incidental fire protection solely from the well source.
2. The only point of diversion approved to be developed under this application is the well to be located: **South 2165 feet and West 915 feet from the N $\frac{1}{4}$  Corner of Section 9, T3S, R3E, SLB&M.** The well must be constructed to seal water from unconsolidated material from direct communication with the well bore and it must be completed and screened or perforated in bedrock. The driller is to provide samples of drill cuttings at five foot intervals to document that the water produced from the well is encountered in the bedrock. The applicant is also cautioned that other permits may be required for drilling a well in this area.
3. The applicant(s) shall install and maintain measuring and totalizing recording devices to meter all water diverted under this application.
4. The storage of water as applied for in the application is approved only for storage of the pumped well water to be contained, measured, and controlled in an on-site tank, or mine tunnels the applicant owns. The proposed storage in Ceçret Lake is not approved under this application.
5. As noted, this approval is granted subject to prior rights. The applicant must mitigate or provide compensation for any impairment of or interference with prior rights, including compensation for any losses in water for the generation of

power, as such may be stipulated among the parties or decreed by a court of competent jurisdiction.

6. Whereas this Change Application has been filed to entirely replace and supersede prior approved Change Application Number 57-10317 (a24463c), with this approval that prior application is considered to have been **WITHDRAWN**.
7. The approval for prior Change Application a24463 was conditioned that the well drilled under Change a4178 be permanently abandoned and sealed according to the requirements of R655-4-12 of The Administrative Rules for Water Well Drillers. This applicant and the owners of the parent right and other segregated interests shall coordinate the abandonment of that well and submit evidence of such prior to any certification of this change.
8. To accommodate the approval of this permanent change application, the use of 0.0104 cfs or 0.9033 acre-foot of water for the irrigation of 0.1217 acre, the domestic use of 0.5 equivalent domestic units, and the stockwatering requirements of 2.5 head of livestock (in cattle or horses or equivalent species) at the historic points of diversion and place of use must cease.

The State Engineer has statutory responsibility to create and maintain water right records based on an administrative process outlined in statute. The State Engineer is not authorized by statute to adjudicate water right title or the validity of established water rights. It is noted that failure to exercise a water right within the statutory period could render all or a portion of a water right invalid through forfeiture. Parties who wish to challenge the validity of a water right are advised that a declaration of forfeiture is a judicial action and the courts are available to pursue such suits. (UCA 73-1-4).

The applicant is strongly cautioned that other permits may be required before any development of this application can begin and it is the responsibility of the applicant to determine the applicability of and acquisition of such permits. Once all other permits have been acquired, this is your authority to develop the water under the above referenced application which under Sections 73-3-10 and 73-3-12, Utah Code Annotated, 1953, as amended, must be diligently prosecuted to completion. The water must be put to beneficial use and proof must be filed on or before January 31, 2020, or a request for extension of time must be acceptably filed; otherwise the application will be lapsed. This approval is limited to the rights to divert and beneficially use water and does not grant any rights of access to, or use of land or facilities not owned by the applicant. This approval is limited to the rights to divert and beneficially use water and does not grant any rights of access to, or use of land or facilities not owned by the applicant.

Proof of beneficial use is evidence to the State Engineer that the water has been fully placed to its intended beneficial use. By law, it must be prepared by a registered engineer or land surveyor, who will certify to the location, uses, and extent of your water right. Upon the submission of proof as required by Section 73-3-16, Utah Code, for this application, the

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applicant must identify every source of water used under this application and the amount of water used from that source. The proof must also show the capacity of the sources of supply and demonstrate that each source can provide the water claimed to be diverted under this right as well as all other water rights which may be approved to be diverted from those sources.

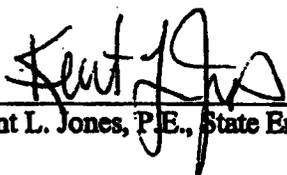
Failure on your part to comply with the requirements of the applicable statutes may result in the lapsing of this permanent change application.

It is the applicant's responsibility to maintain a current address with this office and to update ownership of their water right. Please notify this office immediately of any change of address or for assistance in updating ownership.

Your contact with this office, should you need it, is with the Utah Lake/Jordan River Regional Office. The telephone number is 801-538-7240.

This Order is subject to the provisions of Administrative Rule R655-6-17 of the Division of Water Rights and to Sections 63G-4-302, 63G-4-402, and 73-3-14 of the Utah Code which provide for filing either a Request for Reconsideration with the State Engineer or an appeal with the appropriate District Court. A Request for Reconsideration must be filed with the State Engineer within 20 days of the date of this Order. However, a Request for Reconsideration is not a prerequisite to filing a court appeal. A court appeal must be filed within 30 days after the date of this Order, or if a Request for Reconsideration has been filed, within 30 days after the date the Request for Reconsideration is denied. A Request for Reconsideration is considered denied when no action is taken 20 days after the Request is filed.

Dated this 9<sup>th</sup> day of January, 2014.

  
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Kent L. Jones, P.E., State Engineer

Mailed a copy of the foregoing Order this 9<sup>th</sup> day of January, 2014 to:

Judith Maack  
c/o Daniel A. Jensen  
185 South State, #1300  
Salt Lake City, UT 84111

Sandy City  
c/o John H. Mabey, Jr.  
175 South Main Street, Suite 1330  
Salt Lake City, UT 84111

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**USA Forest Service  
c/o Jeanne A. Evenden  
324 25th Street  
Ogden, UT 84401**

**Cottonwood Hydro, LLC (Hydro Holdings, LLC)  
c/o Susannah Williams  
9950 South Power Plant Lane  
Sandy, UT 84092**

**Salt Lake City Corporation  
c/o Shawn E. Draney  
PO Box 45000  
Salt Lake City, UT 84145-5000**

**Metropolitan Water District of Salt Lake & Sandy  
c/o Scott H. Martin  
PO Box 45000  
Salt Lake City, UT 84145-5000**

**Alta Ski Lifts Company  
c/o Onno Wieringa  
PO Box 8007  
Alta, UT 84092**

**Sandy Irrigation Company  
c/o John H. Mabey, Jr.  
175 South Main Street, Suite 1330  
Salt Lake City, UT 84111**

**Town of Alta  
c/o Lee Kapaloski  
201 South Main Street, Suite 1800  
Salt Lake City, UT 84111**

**Salt Lake County Service Area #3  
c/o David J. Smith  
36 South State Street, Suite 1900  
Salt Lake City, UT 84111**

**Friends of Alta  
c/o Patrick A. Shea  
252 South 1300 East, Suite A  
Salt Lake City, UT 84102**

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**Little Cottonwood Creek Distribution Committee**  
**c/o Rodney S. Sorensen, P.E.**  
**10000 Centennial Parkway, Suite 241**  
**Sandy, UT 84070**

**Tim O'Hara, Co-River Commissioner**  
**1501 South 500 East**  
**Salt Lake City, UT 84105**

**Max Reese, Co-River Commissioner**  
**Tanner Ditch**  
**977 East 5600 South**  
**Salt Lake City, UT 84121**

**Division of Water Rights**  
**Distribution Section**  
**c/o Mike Silva**  
**LITTLE COTTONWOOD CREEK**

BY:   
**Sonia R. Nava, Applications/Records Secretary**

SCANNED

# Exhibit E

477/100 61-2-1

A G R E E M E N T.

THIS AGREEMENT Entered into this 8th day of August, 1934, by and between SALT LAKE CITY, a municipal corporation, party of the first part, and L. E. DESPAIN and ANNIE BUTLER DESPAIN, his wife; ALVA J. BUTLER and ANNA LAURA BUTLER, his wife; GEORGE F. DESPAIN and PRUDENCE B. DESPAIN, his wife; De BART DESPAIN and BERTHA K. DESPAIN, his wife; and CLARENCE L. GILES and LAURA SUE GILES, his wife; parties of the second part, WITNESSETH:

THAT WHEREAS, the parties of the second part are the owners of primary water rights in Little Cottonwood Creek, Salt Lake County, and said primary water rights comprise the total primary rights decreed to the South Despain Ditch in that certain decree of the Third Judicial District Court of Utah, signed by the Honorable C. W. Morse, Judge, on June 16th, 1910.

AND WHEREAS, the party of the first part is desirous of acquiring a portion of the above mentioned primary waters during the winter or non-irrigation season.

NOW, THEREFORE, in consideration of the premises and the agreements herein contained, party of the first part hereby agrees to construct and maintain a main pipe line for the conveyance of the primary waters above mentioned from the Murray City Power Pipe Line at a point near where said pipe line crosses the center of Section 12, T. 5 S., R. 1 E., S. L. B. & M., to the South Despain Ditch, at a point near the east line of the N. W. 1/4 of Section 12 above mentioned, and to construct a branch pipe line of first grade galvanized pipe, said branch line to be

maintained by the parties of the second part, running westerly from the pipe line above described to a convenient location near the residence of Geo. F. Despain and will provide service pipes from said branch line to convenient points on De Bart Despain's, L. E. Despain's, Alva J. Butler's and Clarence L. Giles' property and will provide an outlet at the crossing of the North Despain Ditch of sufficient size to discharge that portion of the Primary water now owned by L. E. Despain; and furthermore a metered service pipe will be laid from the above mentioned branch line to a point on L. B. Maxfield's property which point will be located as near to the house on said property as the present ditch is located.

IT IS FURTHER AGREED that Salt Lake City is to install a meter in the pipe system between the Murray Power Pipe Line and the North Despain Ditch and will deliver the decreed primary waters into said pipe system as measured through said meter and the responsibility for the distribution of the water among the parties of the second part shall rest with the parties of the second part.

IT IS FURTHER AGREED THAT permission is hereby granted to Salt Lake City to enter upon the premises of each of the parties of the second part to construct the pipe system and to maintain the main pipe line and said parties of the second part hereby grant unto Salt Lake City an easement for the construction and maintenance of said main pipe line and reserve unto themselves the surface rights to the land traversed by said pipe line.

Said parties of the second part hereby grant, bargain, sell and convey unto party of the first part the right to the use of the primary waters aforementioned during the winter or non-irrigation season from October 1st to April 1st of the following year, excepting therefrom a culinary reserve of 7,500 gallons per day which is to be delivered into said pipe system during such winter or non-irrigation season, together with 500 gallons per day which the parties of the second part agree to allow to flow through the branch line for delivery to L. E. Maxfield, his successors assigns.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

S E A L

SALT LAKE CITY,

Ethel Macdonald  
City Recorder.

By Louis Marcus  
Mayor

L. E. Daspain

Annie Butler Daspain

Alva J. Butler

Anna Laura Butler

George F. Daspain

Prudence B. Daspain

De Bart Daspain

Bertha K. Daspain

Clarence L. Giles

Laura Sue Giles

Parties of the Second Part.

STATE OF UTAH )  
( SS.  
COUNTY OF SALT LAKE )

On the 8th day of Aug., 1934, personally appeared before me Louis Marcus and Ethel Macdonald, who, being by me duly sworn, did say that they are the Mayor and City Recorder, respectively, of Salt Lake City, and that the name of Salt Lake City was attached to the foregoing instrument by Louis Marcus as Mayor and signed by him and countersigned by Ethel Macdonald

as City Recorder, by authority of a resolution of the Board of Commissioners of Salt Lake City on the 8th day of Aug., A. D. 1934, and the said persons acknowledged to me that said corporation executed the same.

Frank A. Shields  
Notary Public, residing at  
Salt Lake City, Utah.

S E A L  
My commission expires Feb. 14, 1936

STATE OF UTAH )  
( SS.  
COUNTY OF SALT LAKE )

On the 16th day of July, 1934, personally appeared before me L. E. Despain, Annie Butler Despain, his wife; Alva J. Butler, Anna Laura Butler, his wife; George F. Despain and Prudence B. Despain, his wife; some of the signers of the foregoing instrument, who duly acknowledged to me that they executed the same.

S E A L  
My commission expires  
September 4, 1935

Laura Sue Giles  
Notary Public, residing at  
Salt Lake City, Utah.

STATE OF UTAH )  
( SS.  
COUNTY OF SALT LAKE )

On the 18th day of July, 1934, personally appeared before me CLARENCE L. GILES and Laura Sue Giles, his wife, some of the signers of the foregoing instrument, who duly acknowledged to me that they executed the same.

L. E. Haynes  
Notary Public, residing at  
Salt Lake City, Utah.

S E A L  
My commission expires March 12, 1938

STATE OF CALIFORNIA )  
                          ( SS.  
COUNTY OF LOS ANGELES )

On the 20 day of July, 1934, personally appeared before me De Bart Despain and Bertha K. Despain, his wife, some of the signers of the foregoing instrument, who duly acknowledged to me that they executed the same.

H. E. Nightingale  
Notary Public, residing at  
Los Angeles, California

S E A L

My commission expires July 10, 1938