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**IN THE OFFICE OF THE UTAH STATE ENGINEER**

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**IN THE MATTER OF WATER RIGHT  
NUMBERS 57-7800 (a28548) AND 57-  
10317 (a28545)**

**OPPOSITION TO PETITION TO STAY  
JANUARY 9, 2014 ORDERS**

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Judith Maack (“Maack”), through her counsel MAGLEBY & GREENWOOD, P.C.,  
hereby submits this Opposition to Petition to Stay January 9, 2014 Orders.

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## INTRODUCTION

The State Engineer should deny the Petition to Stay (the “Petition”) submitted by Salt Lake City Corporation (“SLCC”). SLCC’s request for a stay of the State Engineer’s January 9, 2014 orders (the “Orders”)<sup>1</sup> is premised upon the misconception that, unlike the State Engineer, the district court will deny Tolton and Maack’s change applications (the “Change Applications”).<sup>2</sup> SLCC’s Petition is not well taken because SLCC is unlikely to succeed in the proceeding before the district court.

First, a threshold impediment to SLCC’s claims is that it lacks standing. To assert any of its claims, SLCC bears the burden to prove that Tolton and Maack’s proposed uses result in a measureable injury to SLCC’s water rights. As SLCC has not quantified any injury or impairment, it has not and cannot satisfy its burden. For the same reason, SLCC cannot substantiate its amorphous claim of damages in gallons or dollars.

Second, SLCC’s claims are barred by operation of the doctrines of *res judicata* and *stare decisis*. Many of SLCC’s arguments before the district court (*i.e.*, adverse possession, abandonment, forfeiture, and appurtenancy) were or could have been asserted by SLCC or its privies in the recently-adjudicated *Haik v. Sandy City* case,

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<sup>1</sup> The Orders for Water Right Numbers 57-7800 (a28548) and 57-10317 (a28545) are attached as Exhibits “1” and “2,” respectively.

<sup>2</sup> The Change Applications for Water Right Numbers 57-7800 (a28548) and 57-10317 (a28545) are attached as Exhibits “3” and “4,” respectively.

wherein those arguments were rejected by the Utah Supreme Court. See 2011 UT 26, 254 P.3d 171.<sup>3</sup>

Third, even if SLCC's claims were considered on the merits, they still fail. For instance, SLCC cannot demonstrate impairment. By statute, water may not be adversely possessed in Utah. No evidence exists to support abandonment or forfeiture of the water right at issue (the "Water Right").<sup>4</sup> The entire Water Right was appurtenant to Tolton and Maack's predecessor-in-interest's real property – Lot 31 of the Little Cottonwood Subdivision.

Fourth, SLCC's attack of the State Engineer's Orders is unsound and hypocritical. For instance, SLCC has successfully obtained change applications on the very legal theories that it now contends are contrary to law. SLCC may not profit from a rule of law one day, only to challenge it the next.

Fifth, SLCC's Petition invites the State Engineer to exceed the scope of that which the State Engineer may consider. SLCC implicitly asks the State Engineer to determine the merits of its claims of adverse possession, forfeiture, abandonment, and appurtenance. Those matters are outside the State Engineer's bailiwick. However, those claims were apparently not given much credence by the State Engineer in the administrative proceedings, where he could have precipitated adjudication of the same.

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<sup>3</sup> A copy of the Utah Supreme Court's opinion in *Haik v. Sandy City*, 2011 UT 26, 254 P.3d 171, is attached as Exhibit "5."

<sup>4</sup> The Water Right was originally only Water Right Number 57-7800, but, through segregation, the Water Right now includes (1) 57-7800, (2) 57-10315, (3) 57-10316, (4) 57-10317, (5) 57-10318, and (6) 57-10319. [See Orders at 1 n.1, Exs. 1-2].

Finally, a stay would be inequitable here. Tolton and Maack's Change Applications were submitted over a decade ago. Through obstreperousness, satellite litigation, and rearguments, among other things, SLCC has enjoyed *de facto* stay for years. Enough is enough.

Accordingly, Maack respectfully requests that the State Engineer deny SLCC's Petition and, in accordance with Utah Code section 63G-4-405(3), specify the reasons set forth herein as the reasons why the stay was not granted. See Utah Code Ann. § 63G-4-405(3) ("If the agency denies a stay or denies other temporary remedies requested by a party, the agency's order of denial shall be mailed to all parties and shall specify the reasons why the stay or other temporary remedy was not granted.").

## **ARGUMENT**

### **I. STANDARD**

It is within the sound discretion of the State Engineer to deny SLCC's Petition. See Utah Code Ann. § 63G-4-405(1) ("Unless precluded by another statute, the agency may grant a stay of its order or other temporary remedy during the pendency of judicial review, according to the agency's rules." (emphasis added)); see *also* Utah Admin. Code R655-6-18.B. ("The Division may grant a stay of its order or other temporary remedy during the pendency of judicial review on its own motion, or upon petition of a party pursuant to the provisions of Section 63G-4-405." (emphasis added)). For the reasons set forth below, the State Engineer should decline to stay its Orders.

## **II. SLCC’S CLAIMS BEFORE THE DISTRICT COURT ARE LIKELY TO FAIL.**

The premise behind SLCC’s request for a stay is that the district court, unlike the State Engineer, will deny the Change Applications. [See *generally* Petition]. SLCC’s premise is folly. Even if SLCC could overcome the threshold impediments of standing and the ramifications of the *Haik v. Sandy City* case (which it cannot), SLCC’s attempts to collaterally attack the validity, scope, or ownership of Tolton and Maack’s Water Right fail on the merits.

As explained in Section III below, the matters on which SLCC asks the State Engineer to grant a stay of the Orders are outside those matters that may properly be determined by the State Engineer. [See *infra* § III]. Nonetheless, to the extent the State Engineer is inclined to engage in an assessment of the merits of SLCC’s claims before the district court, such an assessment warrants denial of SLCC’s Petition.

### **A. SLCC Lacks Standing to Assert its Claims.**

#### **1. Lack of Standing Is a Jurisdictional Bar to SLCC’s Claims.**

SLCC must have standing to assert its claims in the proceedings before the district court.<sup>5</sup> For instance, with respect to SLCC’s first cause of action in the district

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<sup>5</sup> The standing required for SLCC in the proceedings before the district court are more exacting than those required for its participation in the administrative proceedings before the State Engineer. Compare Utah Code Ann. § 63G-4-401(1) (“A party aggrieved may obtain judicial review of final agency action, except in actions where judicial review is expressly prohibited by statute.” (emphasis added)), and Utah Admin. Code R655-6-18.A. (“Any party aggrieved by an order of the State Engineer may obtain judicial review by following the procedures and requirements of Sections 63G-4-401 and -402 and 73-3-14 and -15.” (emphasis added)), with Utah Code Ann. § 73-3-7(1) (“Any person interested may file a protest with the state engineer . . . .” (emphasis added)); see also *Washington Cnty. Water Conservancy Dist. v. Morgan*, 2003 UT 58, ¶ 14, 82

(continued...)

court (*i.e.*, review of the Orders, [see 2-7-14 Petition for Judicial Review and Complaint (“SLCC Complaint”) ¶¶ 1-8, attached without exhibits as Exhibit “6”]), “standing is a jurisdictional requirement that must be satisfied before a district court may even entertain the question of whether the state engineer’s decision was consistent with the requirements of Utah law.” *Washington Cnty. Water Conservancy Dist. v. Morgan*, 2003 UT 58, ¶ 6 n.2, 82 P.3d 1125; *see also Harris v. Springville City*, 712 P.2d 188, 190 (Utah 1986) (“[L]ack of standing is jurisdictional.”); *Jenkins v. Swan*, 675 P.2d 1145, 1148 (Utah 1983) (holding that a party must have standing to invoke the jurisdiction of the court). Likewise, standing must be established to assert SLCC’s second and third causes of action (*i.e.*, declaratory judgment and quiet title, [see SLCC Complaint ¶¶ 9-59, Ex. 6]). *See, e.g., Jenkins*, 675 P.2d at 1148 (ruling that party seeking declaratory judgment must have standing to invoke jurisdiction of the district court); *Andrus v. Bagley*, 775 P.2d 934, 935 (Utah 1989) (finding that plaintiff’s interest did not support standing to assert quiet title claim). Thus, if SLCC lacks standing, its claims must be dismissed by the district court.

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(...continued)

P.3d 1125 (“Unlike the term ‘interested,’ the term ‘aggrieved’ suggests the presence of actual or potential injury. One is not necessarily ‘aggrieved’ within the meaning of section 73-3-14 simply by virtue of having protested a change application that was approved. The commonly understood meaning of the term ‘aggrieved’ is consistent with our traditional standing requirement that a plaintiff show particularized injury. We see nothing in the statutory framework to suggest a legislative attempt to grant a right of judicial review to those who can show no such grievance or injury.”).

2. SLCC Bears the Burden to Prove Its Standing.

To prevent dismissal of its claims, SLCC bears the burden to prove that it has standing. See *Washington Cnty. Water Conservancy Dist.*, 2003 UT 58 at ¶ 4 (“Because the [plaintiff] had not carried its burden of showing a connection between its own water use and that of the [change order applicant], the trial court found that the [plaintiff] lacked standing and therefore entered judgment in favor of the [change order applicant]. We affirm.”). As set forth below, SLCC cannot satisfy its burden.

3. SLCC Has Not and Cannot Prove Its Standing.

Standing for all of SLCC’s causes of action require SLCC to demonstrate (1) “a measurable connection” between their water uses and Tolton and Maack’s proposed water uses and (2) a “particularized injury” from Tolton and Maack’s proposed uses. See *id.* ¶¶ 19-21 (additional quotations and citations omitted) (stating that a measurable connection and particularized injury are required to challenge the state engineer’s order or claim forfeiture); see *also id.* ¶ 14 (“We see nothing in the statutory framework to suggest a legislative attempt to grant a right of judicial review to those who can show no such grievance or injury.”). SLCC has not and cannot demonstrate either a measurable connection or particularized injury sufficient to maintain its claims before the district court.

As an initial matter, SLCC’s pleadings do not even allege the requisite standing. [See *generally* SLCC Complaint, Ex. 6]. The closest that SLCC comes to alleging standing is the following deficient allegation: “The subject orders effectively approve the applicants changing summer-time rights to year-round right, to the impairment of all water users on

the creek with winter rights.” [*Id.* ¶ 51, Ex. 6]. That allegation is devoid of any quantification of connection or injury and, under the *Washington County Water Conservancy District* case, is insufficient to prevent dismissal of SLCC’s claims.

Likewise, an extensive examination of the facts reveals that SLCC lacks standing. For instance, SLCC has never identified a specific water right that would be impaired by the Orders. Further, SLCC has never calculated in gallons or dollars its purported impairment.<sup>6</sup>

The fact is, there is no impairment.

SLCC has not pointed to an impairment affecting any of its rights. [See Authorities Regarding Salt Lake City Corporation Change Application[s], received by State Engineer 8-28-96, attached as Exhibit “7”]. The reason for SLCC’s failure of proof is that SLCC cannot demonstrate impairment. Tolton and Maack’s 0.373 acre-foot proposed use, which water is to come from groundwater without connection to SLCC’s surface water rights, amounts to a drop in the ocean.<sup>7</sup> [See Orders ¶¶ 1-2, Exs. 1-2]. Tolton and Maack’s proposed uses are *de minimis* rounding errors incapable of any measurable connection, let alone particularized injury, to SLCC’s rights.

Even if SLCC were able to demonstrate impairment (which it has not and cannot), the Change Applications cannot be denied by the district court on the sole

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<sup>6</sup> If an actual impairment were found (which appears unlikely), Tolton and Maack remain willing and able to pay at prevailing water rates any legitimate impairment claim that can be proven.

<sup>7</sup> SLCC’s apoplexy in the face of the State Engineer’s Orders is even more unjustified considering that SLCC sits on an unused and monopolistic stockpile of water that it cannot even begin to put to beneficial use.

basis of impairment. See Utah Code Ann. § 73-3-3(7)(a) (“Except as provided by Section 73-3-30, the state engineer may not reject a permanent or temporary change application for the sole reason that the change would impair a vested water right.”). Again, SLCC has failed to identify a specific water right which is impaired and has failed to show a measurable connection between its water right and Tolton or Maack’s. Moreover, SLC has failed to calculate the impairment and has failed to produce a monetary value for any potential impairment.<sup>8</sup>

Additionally, a party has no standing to assert forfeiture unless it has filed change application for water. See *Whitmore v. Welch*, 114 Utah 578, 201 P.2d 954, 960-61 (1949) (“When a vested right is forfeited by nonuse, there is a reversion to the public, and a right to use such water so abandoned can only be initiated by making a new appropriation after the water is available for appropriation.”). Because SLCC has not filed for a change application relating to the purportedly abandoned water, it has no standing to seek adjudication of forfeiture in the district court.

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<sup>8</sup> Were an impairment to be demonstrated, the value would be small. Based upon SLCC’s July 1, 2013 residential Block 1 County surplus water rate of \$1.36 for 748 gallons, a 10-gallon impairment would cost about 1.8 cents, a 100-gallon impairment would cost about 18 cents, a 1,000-gallon impairment would cost about \$1.80, and a 10,000-gallon impairment would cost approximately \$18.00. [See 7-1-13 Water Rates, available at <http://www.slcdocs.com/utilities/PDF%20Files/UtilityRates/Waterratesweb2013.pdf>, attached as Exhibit “8”]. The fact that SLCC has vehemently challenged and expended significant resources prevent an impairment that is, at most, *de minimis* suggests that SLCC “doth protest too much,” and that its motives are to condemn Tolton and Maack’s property without just compensation. WILLIAM SHAKESPEARE, *HAMLET*, act 2, sc. 2.

In sum, because SLCC lacks standing to bring its claims before the district court, those claims are likely to fail and the Orders are likely to stand, obviating the need for or wisdom in staying the Orders.

**B. SLCC's Claims Are Barred by Principles of *Res Judicata* and *Stare Decisis*.**

The district court is likely to dismiss SLCC's claims because they attempt to relitigate issues already fully adjudicated by both a Utah district court and the Utah Supreme Court in favor of Tolton and Maack. See generally *Haik v. Sandy City*, 2011 UT 26, 254 P.3d 171 (quieting title to the Water Rights in the names of Tolton, Maack, and related parties). Thus, as discussed in further detail below, SLCC's claims and arguments are barred by the doctrines of *res judicata* and *stare decisis*. See *Macris & Assocs., Inc. v. Neways, Inc.*, 2000 UT 93, ¶ 19, 16 P.3d 1214 ("The doctrine of *res judicata* embraces two distinct branches: claim preclusion and issue preclusion."); *State v. Shoulderblade*, 858 P.2d 1049, 1052 (Utah Ct. App. 1993) ("The doctrine of *stare decisis* provides that, as a general rule, the first decision by a court on a particular question of law governs later decisions by the same court." (additional quotations and citation omitted)).

1. SLCC's Claims Are Barred by the Doctrine of Issue Preclusion.

"[I]ssue preclusion, or collateral estoppel . . . prevents parties or their privies from relitigating 'particular *issues* that have been contested and resolved.'" *Macris*, 2000 UT 93 at ¶ 34 (emphasis in original) (quoting 18 James Wm. Moore, MOORE'S FEDERAL PRACTICE § 131.13[1] (Matthew Bender, 3d ed. 2000)). "The purposes of issue preclusion include '(1) preserving the integrity of the judicial system by preventing

inconsistent judicial outcomes; (2) promoting judicial economy by preventing previously litigated issues from being relitigated; and (3) protecting litigants from harassment by vexatious litigation.” *Oman v. Davis Sch. Dist.*, 2008 UT 70, ¶ 28, 194 P.3d 956 (quoting *Buckner v. Kennard*, 2004 UT 78, ¶ 14, 99 P.3d 842). “Furthermore, the preclusive effect ‘extends to every matter which was or might have been urged to sustain or defeat the determination actually made.’” *Allen v. Call*, 2005 UT App 223, 2005 WL 1176956, at \*2 (May 19, 2005) (*per curiam*) (quoting *Macris*, 2000 UT 93 at ¶ 40).

To determine whether issue preclusion applies, courts apply a four-part test:

First, the issue challenged must be identical in the previous action and in the case at hand. Second, the issue must have been decided in a final judgment on the merits in the previous action. Third, the issue must have been competently, fully, and fairly litigated in the previous action. Fourth, the party against whom collateral estoppel is invoked in the current action must have been either a party or privy to a party in the previous action.

*Macris*, 2000 UT 93 at ¶ 40. Where, as here, all four elements are present, it is appropriate for the court to apply the doctrine of issue preclusion and prevent further litigation of issues already decided in a prior action. *See id.*

a. Issues Litigated in *Haik v. Sandy City* Are Identical to the Issues in this Case.

The first element of issue preclusion is satisfied here because issues that SLCC is now attempting to litigate are identical to those in the *Haik v. Sandy City* case. For instance, in its Complaint, SLCC seeks to quiet title to the Water Rights, including under an appurtenance argument. [See SLCC Complaint, at ¶¶ 31-42, Ex. 6]. Notably, the recitation of the salient facts in SLCC’s Complaint, SLCC’s Petition, the Orders, and the Utah

Supreme Court's opinion are substantially identical. Those issues were raised (and rejected) in *Haik v. Sandy City*. See 2011 UT 26, ¶ 24, 254 P.3d 171 (analyzing appurtenancy argument in context of quiet title action).

b. The Issues Were Decided in a Final Judgment on the Merits.

The second element of issue preclusion is also present here because the ownership and validity of the Water Right was actually litigated and decided in the *Haik v. Sandy City* case, resulting in a final judgment on the merits. Without question, adjudication of the *Haik v. Sandy City* matter centered on the ownership and scope of the same Water Right that is at issue before the district court. See *id.* at ¶¶ 4-8 & 24. In *Haik v. Sandy City*, both the trial court and the Utah Supreme Court directly addressed those issues and determined that Tolton and Maack (as well as the other so-called “Haik Parties”) “had a clear and inviolate chain of title to the water right.” *Id.* ¶ 24.

Furthermore, there is no question that the *Haik v. Sandy City* decision resulted in a final judgment on the merits as the trial court granted summary judgment to Tolton and Maack on the issues under consideration. See *id.* ¶ 9; see also *Scholzen Product Co. v. Palmer*, 2000 UT App 191, 2000 WL 33250141, at \*2 (June 22, 2000) (recognizing that granting a motion for summary judgment is a final judgment on the merits).

c. SLCC Had a Full and Fair Opportunity to Litigate the Issues.

The third element is satisfied here because SLCC previously had a full and fair opportunity to litigate the issues it now asserts. “[O]ur case law does not require either a motion or a hearing for full and fair litigation but says only that ‘the parties must

receive notice, reasonably calculated, under all the circumstances, to apprise them of the pendency of the action and afford them an opportunity to present their objections.” *Career Serv. Review Bd. v. Utah Dep’t of Corr.*, 942 P.2d 933, 939 (Utah 1997) (emphases added) (quoting *Copper State Thrift & Loan v. Bruno*, 735 P.2d 387, 391 (Utah. Ct. App. 1987)). Moreover, courts have recognized that “a non-party who voluntarily fails to intervene in a relevant lawsuit may be precluded (*i.e.*, subject to the doctrine of collateral estoppel) in a subsequent action.” *In re Mondelblatt*, 350 B.R. 1, 8 (Bankr. E.D. Pa. 2006); *see also Zirger v. General Acc. Ins. Co.*, 676 A.2d 1065, 1073 (N.J. 1996) (recognizing that a party who had the ability to intervene in the first litigation but “declined to exercise its opportunity to intervene” was barred by the doctrine of collateral estoppel from relitigating issues decided in the first action).

In the *Haik v. Sandy City* case, SLCC had a full and fair opportunity to litigate its challenges to Tolton and Maack’s Water Right. It is incontrovertible that SLCC was provided with adequate notice to apprise it of the pendency of the *Haik v. Sandy City* action and to afford it an opportunity to present its objections and/or intervene. This is true because, among other reasons, in July 2005, SLCC actually participated in the *Haik v. Sandy City* action by filing a motion to consolidate that case with another proceeding. [See 7-5-05 Memorandum in Support of Motion to Consolidate, attached as Exhibit “9”].

Additionally, SLCC has judicially admitted that its claims and Sandy City’s claims against Tolton and Maack were “based on substantially identical facts, substantially identical questions of law and nearly identical parties,” and, in particular, “involve[d] the substantially identical issue of competing claims to title to a portion of a decreed Little

Cottonwood Creek water right.” [*Id.* at 1-2 (emphases added), Ex. 9]. The combination of SLCC’s attempt to consolidate the *Haik v. Sandy City* claims, along with SLCC’s admission that its claims, law, and parties were “substantially identical” to those in the *Haik v. Sandy City* case, clearly establishes that SLCC had both adequate notice of prior litigation and a meaningful opportunity to participate in the same, of which opportunity SLCC took advantage in filing a motion to consolidate. [*Id.*, Ex. 9].

SLCC’s intentional and knowing decision to forego the opportunity to challenge Tolton and Maack’s Water Right in the *Haik v. Sandy City* case does not now give it the right to relitigate the very issues fully and fairly adjudicated by the Utah Supreme Court. To permit SLCC to relitigate the exact issues already decided in *Haik v. Sandy City*, especially where it was actually aware of, had ample opportunity to participate and/or intervene in, and did in fact participate in the litigation, would reward “tactical maneuvering” and severely undermine the express public policy against duplicative litigation. *Diversified Wood Recycling, Inc. v. Johnson*, 251 P.3d 908, 916 (Wash. Ct. App. 2011) (noting that one factor for precluding a non-party from maintaining a subsequent action on previously litigated facts is that there is “some sense that the separation of the suits was the product of some manipulation or tactical maneuvering, such as when the nonparty knowingly declined the opportunity to intervene” (citation omitted)).

d. SLCC and Sandy City Were (and Are) Privies.

The fourth and final element of issue preclusion is also established here because SLCC and Sandy City were (and are) privies. In general, “[t]he legal definition of a

person in privity with another, is a person so identified in interest with another that he represents the same legal right.” *Hansen v. Bank of New York Mellon*, 2013 UT App 132, ¶ 7, 303 P.3d 1025 (quoting *Press Publ’g, Ltd. v. Matol Botanical Int’l, Ltd.*, 2001 UT 106, ¶ 20, 37 P.3d 1121) (additional quotations and citations omitted). Furthermore, “[a] privity has been defined as a non-party whose interests were adequately represented by a party in the original suit (through “virtual” or “adequate” representation).” *Doyle v. Smith*, 202 P.3d 856, 866 (Okla. Ct. App. 2008) (quoting *Asahi Glass Co., Ltd. v. Toledo Eng. Co., Inc.*, 505 F. Supp. 2d 423, 434 (N.D. Ohio 2007)).

Here, privity exists between SLCC and Sandy City. For instance, in the context of the *Haik v. Sandy City* case, SLCC and Sandy City filed joint motions proclaiming that they were “nearly identical parties.” [7-5-05 Memorandum in Support of Motion to Consolidate a1 1, Ex. 9]. Consistent with their representations, SLCC, Sandy City, and their shared counsel frequently met, discussed the litigation, strategized, and took coordinated action (as they do still). [See, e.g., 11-18-13 Minutes of Metropolitan Water District of Salt Lake & Sandy, attached as Exhibit “10”]. And, Sandy City and SLCC shared the same attorneys and coordinated strategy in the *Haik v. Sandy City* case. [See Invoices, attached as Exhibit “11”; see also 7-5-05 Memorandum in Support of Motion to Consolidate, Ex. 9]. SLCC even approved and paid Sandy City’s attorney invoices. [See Invoices, Ex, 11].

Also, Sandy City’s goals and arguments in the *Haik v. Sandy City* case were the same as SLCC’s. This is especially true based on SLCC’s representations in that prior case that Sandy City and SLCC’s claims “involve[d] the substantially identical issue of competing claims to title to a portion of a decreed Little Cottonwood Creek water right.”

[7-5-05 Memorandum in Support of Motion to Consolidate, Ex. 9]. Further, SLCC's purported interest in the Water Right stems from Sandy City's rejected claim to ownership. [See SLCC Complaint ¶ 38, Ex. 6].

Those facts alone demonstrate privity between SLCC and Sandy City. Discovery in the district court action is likely to uncover additional evidence of that privity.

2. SLCC's Claims Are Barred by the Doctrine of Claim Preclusion.

SLCC's claims are also barred by the doctrine of claim preclusion. "Claim preclusion is premised on the principle that a controversy should be adjudicated only once." *Mack v. Utah State Dep't of Commerce*, 2009 UT 47, ¶ 29, 221 P.3d 194 (additional quotations and citations omitted). Claim preclusion differentiates from issue preclusion because it "involves the same parties or their privies and also the same cause of action, and this precludes the relitigation of all issues that could have been litigated as well as those that were, in fact, litigated in the prior action." *Macris*, 2000 UT 93 at ¶ 19 (emphasis added) (additional quotations and citations omitted). For claim preclusion to apply, a party must satisfy the following requirements:

First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits.

*Id.* ¶ 20. Where, as here, all three requirements are present, it is appropriate for the district court to apply the doctrine of claim preclusion and prevent further litigation of claims that either were or should have been decided in a prior action. *See id.*

a. SLCC and Sandy City Were (and Are) Privies.

As set forth in Section II.B.1.d. above, the *Haik v. Sandy City* case and the case before the district court involved the same parties or their privies. [See *supra* § II.B.1.d.].

b. SLCC's Claims Were or Could and Should Have Been Addressed in *Haik v. Sandy City*.

SLCC's exact claims – that Tolton and Maack (and the other Haik Parties) did not have title to the full Water Right – were already litigated and decided in *Haik v. Sandy City*. See generally *Haik v. Sandy City*, 2011 UT 26, 254 P.3d 171 (quieting title to the Water Rights in the names of Tolton, Maack, and related parties). “Claims or causes of action are the same as those brought or that could have been brought in the first action if they arise from the same operative facts, or in other words from the same transaction.” *Mack*, 2009 UT 47 at ¶ 30 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982)). The Utah Supreme Court recently explained as follows:

The phrase transaction or a series of transactions “connotes a natural grouping or common nucleus of operative facts.” RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. b. Additionally, determinations of whether a certain factual grouping constitutes a transaction or series of transactions should be made “pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties’ expectations or business understanding or usage.” *Id.* § 24(2). We recognize these considerations as a useful set of tools to aid courts in determining whether *res judicata* bars a claim. But we emphasize that “no single factor is determinative.” *Id.* § 24 cmt. b. Therefore, every consideration need not be addressed or considered in every case.

*Gillmor v. Family Link, LLC*, 2012 UT 38, ¶ 14, 284 P.3d 622.

In the case before the district court, claim preclusion applies because the *Haik v. Sandy City* matter addressed the same claims that SLCC now seeks to assert. SLCC cannot reasonably contend its claims do not arise from the same common nucleus of

operative facts as the claims in *Haik v. Sandy City* because both claims specifically contest the validity and scope of Tolton and Maack’s Water Right. [See SLCC Complaint ¶¶ 12-45, Ex. 6]. Moreover, SLCC’s attacks on Tolton and Maack’s Water Right arise from the same set of facts as those addressed in *Haik v. Sandy City*. [Compare SLCC Complaint ¶¶ 12-45, Ex. 6, with *Haik v. Sandy City*, 2011 UT 26 at ¶¶ 3-9, Ex. 5]. Utah Supreme Court unequivocally declared that Tolton and Maack (as well as the remaining Haik Parties) “had a clear and inviolate chain of title to the water right.” *Haik*, 2011 UT 26 at ¶ 24.

SLCC attempts to evade the controlling proclamations in *Haik v. Sandy City* by claiming that it is not bound by that prior action because it was not party to the same. [See SLCC Complaint ¶ 38, Ex. 6]. However, SLCC’s argument fails because “when a party having an interest in the subject matter of a lawsuit has notice of a trial thereon and fails to intervene, such party is bound by the res judicata effect of the judgment in which it originally declined to participate.” *Burtrum v. Wheeler*, 440 N.E. 2d 1147, 1152 (Ind. Ct. App. 1982). Accordingly, claim preclusion applies to bar SLCC’s new claims because those claims arise out of the same operative facts as the claims in *Haik v. Sandy City*, and SLCC could or should have raised its claims in that prior action.

c. The Issues Were Decided in a Final Judgment on the Merits.

As set forth in Section II.B.1.c. above, the issues in *Haik v. Sandy City* were decided in a final judgment on the merits. [See *supra* § II.B.1.c.].

3. SLCC’s Claims Are Barred by the Doctrine of *Stare Decisis*.

The district court is also likely to dismiss SLCC’s claims because they are barred by the doctrine of *stare decisis*. “Under that doctrine, ‘[a] rule of law, whether pre-

existing or newly established, that serves as the major premise of an adjudicatory syllogism, necessarily governs all subsequent cases properly falling within the scope of the rule.” *State v. Shoulderblade*, 858 P.2d 1049, 1052 (Utah Ct. App. 1993) (quoting *Salt Lake Citizens Congress v. Mountain States Tel. & Tel. Co.*, 846 P.2d 1245, 1252 (Utah 1992)). “Simply put, ‘*Stare decisis* means that like facts will receive like treatment in a court of law.” *Steiner Corp. v. Auditing Div. of Utah State Tax Com’n*, 1999 UT 53, ¶ 13, 979 P.2d 357 (quoting *Flowers v. United States*, 764 F.2d 759, 761 (11th Cir. 1985)).

In this case, SLCC’s claims are barred by the doctrine of *stare decisis* because the Utah Supreme Court has already determined, based upon the same facts and law, that Tolton and Maack (and the other Haik Parties) have the entire Water Right. See *Haik*, 2011 UT 26, ¶ 24. This decision is binding on all subsequent cases (e.g., the proceeding before the district court) properly falling within the scope of the ruling, and, more particularly, is dispositive of SLCC’s claims regarding the Water Right.

**C. SLCC’s Phantom Impairment, Even if Demonstrated, Does Not Support a Different Outcome.**

Even if SLCC could demonstrate an impairment of its water rights (which it has not and cannot, as set forth above in Section II.A.3.), that is expressly not a basis for denial of the Change Applications. See Utah Code Ann. § 73-3-3(7)(a) (“Except as provided by Section 73-3-30, the state engineer may not reject a permanent or temporary change application for the sole reason that the change would impair a vested water right.” (emphasis added)). Thus, the district court is unlikely to deny the Change Applications on the basis of impairment.

**D. Water Cannot Be Adversely Possessed in Utah.**

SLCC claims, without any factual detail or support, that Tolton and Maack's Water Rights were lost by adverse possession. [See Petition at 2; see also SLCC Complaint ¶ 44, Ex. 6]. However, under controlling Utah statute, "[a] person may not acquire a right to the use of water either appropriated or unappropriated by adverse use or adverse possession." Utah Code Ann. § 73-3-1(6). Thus, SLCC's adverse possession claim is dead on arrival and will not support a denial of the Change Applications.

**E. SLCC Has Not and Cannot Prove Abandonment or Forfeiture.**

As with its adverse possession claim, SLCC's claims of abandonment and forfeiture are volleyed without support. [See Petition at 4-5; see also SLCC Complaint ¶ 44, Ex. 6]. That lack of support, standing alone, may result in dismissal of those claims.

Furthermore, even if pleaded properly, those claims would fail. Abandonment requires a subjective intent to abandon. See *Delta Canal Co. v. Frank Vincent Family Ranch, LC*, 2013 UT 54, ¶ 35, 741 Utah Adv. Rep. 11 (stating that abandonment "has an intent requirement," requiring an intentional relinquishment of a water right). Tolton and Maack's decade-long fight to use the Water Right, their approved nonuse applications, their predecessors-in-interest's uses, and SLCC's acknowledgements of those uses, expose SLCC's abandonment claim as a loser. [See 9-16-11 Order of the State Engineer on Application for Nonuse of Water for Water Right Number 57-7800, attached as Exhibit "12"; see also 10-1-09 Order of the State Engineer on Application for Nonuse of Water for Water Right Number 57-10317, attached as Exhibit "13"; 4-3-96 Letter L. Hooton to L. Biddulph, attached as Exhibit "14"; 7-9-03 Letter J. Niermeyer to L. Biddulph, attached as Exhibit "15"; 7-26-03 Letter L. Biddulph to J. Niermeyer, attached as Exhibit "16"].

Similarly, SLCC cannot prevail on a forfeiture theory. “Forfeiture occurs when an appropriator fails to use material amounts of a water allowance during . . . seven consecutive years without securing an extension of time from the state engineer.” *Id.* at ¶ 39 (internal footnote omitted) (citing *Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co.*, 104 Utah 202, 135 P.2d 108, 112 (1943); and Utah Code Ann. § 73-1-4(2)(a)); see also Utah Code Ann. § 73-1-4(2)(c)(i) (stating that “a water right or a portion of the water right may not be forfeited unless a judicial action to declare the right forfeited is commenced within 15 years from the end of the latest period of nonuse of at least seven years”). During the past decade, Tolton and Maack have obtained extensions of time from the State Engineer. [See 9-16-11 Order of the State Engineer on Application for Nonuse of Water for Water Right Number 57-7800, Ex. 12; see also 10-1-09 Order of the State Engineer on Application for Nonuse of Water for Water Right Number 57-10317, Ex. 13]. Before that, Tolton and Maack’s predecessors-in-interest used the full amount of water associated with the Water Right, as was confirmed by SLCC. [See 7-9-03 Letter J. Niermeyer to L. Biddulph, Ex. 15; see also 7-26-03 Letter L. Biddulph to J. Niermeyer, Ex. 16; 12-18-98 Letter H. Saunders to J. Anderson, R. 378-80 from *Haik v. Sandy City* case, attached as Exhibit “17”]. Moreover, despite mere speculation that flies in the face of the Utah Supreme Court’s ruling in *Haik v. Sandy City*, 2011 UT 26, 254 P.3d 171, SLCC has not demonstrated a failure, let alone a measureable failure, by Tolton, Maack, or their predecessors-in-interest to use the Water Right. Thus, like its abandonment argument, SLCC’s forfeiture argument is a throw-away.

**F. SLCC's Appurtenancy Argument Is Without Merit.**

SLCC claims that the Water Right was not appurtenant to Lot 31 and was actually conveyed to Sandy City, rather than Tolton and Maack's predecessor-in-interest. [See Petition at 3; see also SLCC Complaint ¶ 38, Ex. 6]. However, that argument was considered and rejected by the Utah Supreme Court. Indeed, in quieting title to the Water Right to Tolton and Maack (and the other Haik Parties), the supreme court expressly analyzed the appurtenancy issue, found that the entire Water Right was appurtenant to Lot 31, and concluded that the entire Water Right was transferred to Tolton and Maack's predecessor-in-interest. See *id.* ¶ 4 ("In 1978, Saunders-Sweeney designated the property to which the water right is appurtenant as Lot 31 of the Little Cottonwood Subdivision."); *id.* ¶ 5 ("In 1999, Saunders-Sweeney separately conveyed "all of its right, title and interest" in the water right to Ms. Biddulph by quitclaim deed, which was recorded."). That and quieting title to the Water Rights in the name of Tolton, Maack, and the other so-called "Haik Parties"); *id.* ¶ 6 ("In 2003, Ms. Biddulph conveyed the water right by quitclaim deed to LWC, L.L.C. Shortly thereafter, LWC conveyed the water right by quitclaim deed to Kevin Tolton (one of the Haik Parties). In October 2003, Kevin Tolton then conveyed the water right by quitclaim deed to the Haik Parties as tenants in common. The Haik Parties recorded the deed on December 10, 2003."); *id.* ¶ 24 ("[W]e find it important that both the Salt Lake County Recorder's Office and the Utah Division of Water Rights (or 'UDWR') showed that the Haik Parties had a clear and inviolate chain of title to the water right. As to the Salt Lake County Recorder's Office, the records show a complete chain of title from Lot 31 – the land to which the Haik

water right was appurtenant – to the Haik Parties.” (emphasis added)); *id.* (holding that “the water right passed to the Haik Parties’ predecessor-in-interest as an appurtenance to the land conveyed by Saunders-Sweeney in 1978” (emphasis added)).

While SLCC does not come out and claim that Utah Supreme Court erred in its findings regarding appurtenancy in *Haik v. Sandy City*, and while such a claim of error would be wasted ink since the supreme court is the court of last resort on that issue, SLCC nonetheless attempts to collaterally attack the Utah Supreme Court’s opinion. In support of its desperate argument, SLCC defies logic and attempts to transform and elevate a 1999 letter from a UDWR specialist into binding precedent overturning a later-in-time Utah Supreme Court opinion. [See Petition at 3-4]. SLCC’s argument is without merit, including because of the evidence upon which the Utah Supreme Court based its finding that, “[i]n 1978, Saunders-Sweeney designated the property to which the water right is appurtenant as Lot 31 of the Little Cottonwood Subdivision.” *Id.* ¶ 4. That evidence included the December 18, 2003 letter from Hy Saunders to John Anderson, which reads, in relevant part, as follows:

**As part of my subdivision plan, I committed to having all lots, with the exception of Lot 31, connected to the Sandy City Culinary Water System. The decreed water and Water Right No. 57-7800 were to remain with Lot 31, which was to be my lot and on which there was a log cabin which still exists.**

**In accordance with my development plan, I leveled and removed the two westerly residences and the barn. Since none of these structures fit within the newly plotted lot lines or were consistent with my project plan, I terminated water service thereon and moved all water use to what is now Lot 31. The remaining water was shared with the other Despain Ditch owners and kept in use.**

In 1978 my ex-wife Judith Saunders took title to Lot 31 and continued sharing the decreed water with the other Despain Ditch owners in a cooperative fashion and as set forth in the Morse Decree. At the time, Saunders and Sweeney made the conveyance to Judith, the Morris Decreed Water Right was being exclusively used on Lot 31 of Little Cottonwood Subdivision and being shared cooperatively with John Despain and other ditch owners. The water well also remained in use as needed to supplement water delivered through the Salt Lake City line. Accordingly, it was not only my intent to convey 100% of my interest in the decreed right and Water Right No. 57-7800 to Judith Saunders when I conveyed to her Lot 31, Little Cottonwood Subdivision, but a goal I thought I had accomplished because the water, at the time of conveyance, was being used exclusively on Lot 31 and being shared cooperatively with the other ditch owners. At the time of conveyance, the two westerly residences had been disconnected from the private water system and committed to Sandy City's Water System. Thus, both the decreed right - .0625 cfs under agreement with Salt Lake City dated August 8, 1934 and Water Right No. 57-7800 were transferred as an appurtenance to the land of Lot 31 when I conveyed the land to Judith Saunders.

[12-18-98 Letter H. Saunders to J. Anderson at 2 (emphases added), R. 378-80 from *Haik v. Sandy City* case, Ex. 17]. Setting aside, for a moment, principles of *res judicata* and *stare decisis*, it is most reasonable to expect that the district court will agree with the Utah Supreme Court's conclusions regarding that evidence and reject SLCC's appurtenancy argument (again).

**G. SLCC's Allegations of Legal Error by the State Engineer Are Without Merit.**

SLCC's claims of error by the State Engineer are without merit and are unlikely to result in the district court denying the Change Applications. For instance, SLCC claims that the State Engineer departed from its precedent by converting seasonal water to year-round use. [See Petition at 5-6; see also SLCC Complaint ¶ 51, Ex. 6]. SLCC's contention is without merit, for at least three reasons. First, the State Engineer routinely converts seasonal water rights to year-round use. [See, e.g., 1-17-97 Memorandum Decision In the Matter of Change Application Number 57-10009 (a16839) ¶ E ("This change application converts the

nature of use from irrigation to municipal for 1.326 acre-feet only as addressed in this change.”), attached as Exhibit “18”; 1-17-97 Memorandum Decision In the Matter of Change Application Number 57-10011 (a16842) ¶ E (same), attached as Exhibit “19”; 1-17-97 Memorandum Decision In the Matter of Change Application Number 57-10014 (a16845) ¶ D (same), attached as Exhibit “20”; 1-17-97 Memorandum Decision In the Matter of Change Application Number 57-10015 (a16846) ¶ D (same), attached as Exhibit “21”].

Second, SLCC itself has requested and obtained orders from the State Engineer converting seasonal water to year-round use.<sup>9</sup> [See *id.*, Exs. 19-21]. Thus, SLCC’s seasonal-conversion argument is not only a red herring, it is hypocrisy and, therefore, an argument that SLCC is estopped from making.<sup>10</sup> See, e.g., *3D Const. & Dev., L.L.C. v. Old Standard Life Ins. Co.*, 2005 UT App 307, ¶ 11, 117 P.3d 1082 (“Under judicial estoppel, a person may not, to the prejudice of another person, deny any position taken in a prior judicial proceeding between the same persons or their privies involving the same subject matter, if such prior position was successfully maintained.”).

Third, there is nothing unlawful or untoward regarding such a conversion. See, e.g., *Washington Cnty. Water Conservancy Dist. v. Morgan*, Case No. 970501420, 2000

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<sup>9</sup> Additionally, State Engineer has converted seasonal water rights to year-round use in the context of change applications submitted by SLCC’s counsel and the head of SLCC public utilities, such as change application numbers 55-12305 (a34230); 55-8940 (a19826); 51-7785 (a27885); 51-7278 (a23095); 55-9343 (a22549); and 55-9453 (a26314).

<sup>10</sup> SLCC’s seasonal-conversion argument is both perplexing and self-destructive because, if its new and inconsistent argument is accepted, SLCC will expose many of its water rights to collateral attack too.

WL 35586989, at ¶ 9 (Utah Dist. Ct. Nov. 2, 2000) (acknowledging ability to convert seasonal water to year-round use).

SLCC also incorrectly argues that a stay be granted because Tolton and Maack cannot obtain holding or septic tanks. [See Petition at 7]. There are flaws in SLCC's argument. For instance, instead of a septic system, Tolton and Maack would rather connect to the existing sewer line, as SLCC purports to prefer, as SLCC stated in its Watershed Management Plan as follows: "To avoid further watershed impacts from new housing developments, Salt Lake City recommends that all new houses be required to connect to the sewer line in Big and Little Cottonwood Canyons." [March 1999 Salt Lake City Watershed Management Plan at ix, available at <http://www.slcdocs.com/utilities/PDF%20Files/slcwatershedmgtplan.pdf>, excerpts attached as Exhibit "22"]. The existing sewer lines run close by Tolton and Maack's property and, if SLCC is honest in its concern for the watershed, SLCC is likely to approve such a connection, especially since that connection must be supplied by the Town of Alta at its expense, under the August 12, 1976 Intergovernmental Agreement-Water Supply Agreement Salt Lake City to Alta City (the "1976 Water Supply Agreement"). [See 1976 Water Supply Agreement § 3, attached as Exhibit "23"].

If SLCC chooses to hypocritically and suspiciously refuse Tolton and Maack a sewer connection (perhaps to further an improper anti-home construction agenda), there are alternative wastewater disposal systems available. See Utah Admin. Code R317-4-10.1.C. (authorizing wastewater holding tanks "where these devices are part of a specific watershed protection program acceptable to the division and the local health department having jurisdiction").

Finally, SLCC argues that “an out-of-state third party may purchase the property, to only later have the district court deny the Change Applications.” [Petition at 8]. That perplexing hypothetical has no basis in fact.

At bottom, the State Engineer has, over the past decade, repeatedly heard SLCC’s arguments in this regard and, upon fulsome consideration, correctly rejected those arguments. There is no need for the State Engineer to effectively reverse itself in the context of SLCC’s rehashing Petition.

#### **H. If Anything, Tolton and Maack Are Entitled to More Water and Utility.**

##### **1. The Water Duty Will Likely Be Reduced.**

The water duty associated with Tolton and Maack’s proposed uses is likely to be reduced. The law allows for part-time or seasonal use. See, e.g., Salt Lake County Health Department, #11 Individual Water Systems Regulation 4.2.1 (“In order for an individual water supply to be approved, the individual system owner shall have the necessary water rights and the system shall have the physical ability to supply a minimum of 400 gallons (800 gallons if landscaping is to be watered) per day per household 365 days a year. For seasonally used recreational housing, the system shall meet the same requirements during the time period the housing is occupied.”).

“In Utah, water duty is not a component of a water right.” *Delta Canal Co. v. Frank Vincent Family Ranch, LC*, 2013 UT 54, ¶ 36 n.7, 741 Utah Adv. Rep. 11. The 400-gallon-per-day figure is merely a use estimate to be employed only “[i]n the absence of firm water data.” Utah Admin. Code R309-510-7(2). That rule is in accord with the Utah Division of Water Rights’ statement that, “[a]s new data is available, these

figures may change. If applicants provide specific figures based on design criteria, testing data, monitored measurements, etc. which differ from these amounts, such information will be reviewed and considered.” [6-24-03 Water Use Information for Water Right Applications, available at <http://www.waterrights.utah.gov/wrinfo/policy/wateruse.asp>, attached as Exhibit “24”].

Here, specific water use data is available; and that data reduces the use estimate. According to the Utah Division of Water Resources Board, water use is declining, and the 2010 water use is 60 gallons per capita per day (gpcd) down from 70 gpcd in 2001. [See 12-29-10 Municipal and Industrial Water Use in Utah at 8, available at <http://www.water.utah.gov/Reports/MUNICIPAL%20AND%20INDUSTRIAL%20WATER%20USE%20in%20UTAH.pdf>, excerpts attached as Exhibit “25”]. Furthermore, the State of Utah, under Governor Gary Herbert’s direction, has a goal to further reduce per capita water use within public community systems by at least 25% by the year 2050. [See September 2012 The Water-Energy Nexus in Utah at 2, available at <http://www.water.utah.gov/PDF/Water%20Energy%20Nexus%20in%20Utah.pdf>, excerpts attached as Exhibit “26”]. Furthermore, technological advances in the form of aerator faucets, low-flow shower heads, low-flow toilets, and other conservation methods will account for further diminution in water usage over time. This means that current firm water data supports and will continue to support substantially lower water duties imposed by the State Engineer on building permit water requirements. The Division of water Rights Administrative Rule R655-6-14 allows the Division of Water Rights to “[t]ake notice of rules of . . . [m]atters of common knowledge and generally recognized technical or scientific facts within the Division's specialized knowledge, and any factual information

which the Division may have gathered from a field inspection of the water sources or area involved in the proceeding.” Utah Admin. Code R655-6-14.G.2. Additionally, in 2012, the 64 houses in the Town of Alta used a combined total 15 acre-feet, or .23 acre-feet per house. [See 2012 Town of Alta Water Use Data, available at [http://www.waterrights.utah.gov/cgi-bin/wuseview.exe?Modinfo=Pwsview&SYSTEM\\_ID=1348](http://www.waterrights.utah.gov/cgi-bin/wuseview.exe?Modinfo=Pwsview&SYSTEM_ID=1348), attached as Exhibit “27”]. Thus, the firm water use data should replace the .45 acre-feet domestic duty estimate in the Town of Alta, which is where Tolton and Maack’s property sits. The new gallons-per-day requirement should be 209 gallons, down from 400.

2. The Depletion Penalty Will Likely Be Reduced.

Tolton and Maack’s current depletion penalty of 46.5% is likely to be reduced to 0% because Tolton and Maack will submit a specific plan or information regarding treatment of domestic waste water. That plan will likely include return of the water used into the sewer through connection or delivery to the stub dump station. That return reduces the depletion penalty to zero, in accordance with the State Engineer’s prior determinations that sewer flow is counted the same as creek flow, which determinations were based upon evidence offered by SLCC.<sup>11</sup> [See 6-22-92 Hr’g Tr. at 120:16-20 (“Q. The sewer goes where? A. It goes right on up the canyon and feeds clear from Alta City on down and picks up waster from Alta, Snowbird and other users of water. I count that as part of the total stream flow.”), 21:9-19 (“I figure it as part of the stream flow.”), 72:7-10 (“[SLCC has] taken that which is a tributary to the creek and sold it to Alta and Snowbird, then at the bottom of the canyon measure that sewage and add it

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<sup>11</sup> Relatedly, as all sewer flows are counted as part of Little Cottonwood Creek flow and are not depleted from the hydrologic system, there can be no possibility of impairment.

back into the total flow of the stream.”), & 74:1-9 (“The evidence conclusively shows that there will be no impairment.”), excerpts attached as Exhibit “28”].

### **III. SLCC’S GROUNDS FOR A STAY ARE OUTSIDE THE MATTERS THAT MAY BE CONSIDERED BY THE STATE ENGINEER AND UNPERSUASIVE.**

#### **A. SLCC Asks the State Engineer to Exceed His Authority.**

Through its petition, SLCC improperly invites the State Engineer to effectively determine issues beyond his authority. In particular, SLCC asks the State Engineer to determine “title and forfeiture questions.” [Petition at 2]. However, as recently pronounced by the Utah Supreme Court, such issues are outside of those that the State Engineer may determine. See *Jensen v. Jones*, 2011 UT 67, ¶¶ 10-11 & 13, 270 P.3d 425 (ruling that state engineer does not have authority to rights of the parties). For better or worse, the State Engineer’s determination is constrained to the five enumerated conditions set forth in Utah Code section 73-3-8(1).<sup>12</sup> See *id.* ¶ 14 (stating that “the state engineer must approve an application if the five enumerated conditions are met”). Thus, were the State Engineer to stay its Orders based upon its determinations regarding the rights of the parties, the State Engineer would be running afoul of the supreme court’s directives in *Jenson v. Jones*.

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<sup>12</sup> While the State Engineer may, as it did in this case, stay a change application pending resolution of an adjudication affecting the underlying water rights, the State Engineer may not and should not stay its post-adjudication order. See *Jensen v. Jones*, 2011 UT 67, ¶ 15, 270 P.3d 425. Were the rule otherwise, then the final administrative action of the State Engineer would be perpetually stayed through tactical waterfall litigation, while protestants in cahoots prolong and multiply proceedings. Indeed, such is the strategy adopted by the protestants here.

**B. Even if SLCC’s Grounds May Be Considered, the State Engineer Appears to Have Previously Found those Grounds Unpersuasive.**

If the State Engineer attempts to determine the parties’ rights, it apparently did not previously perceive infirmities with Tolton and Maack’s Water Right, because the State Engineer could have done something about such concerns, but did not. Indeed, as explained by the Utah Supreme Court:

The state engineer still has several options if it appears that the water right may have been forfeited through nonuse. “Section 73–2–1 confers upon the state engineer full authority to bring suit to enjoin unlawful appropriation and diversion,” which we noted “is the consequence if [the applicant’s] right has reverted to the public.” *Glenwood Irrigation Co. v. Myers*, 24 Utah 2d 78, 465 P.2d 1013, 1015 (1970). The state engineer may stay a change application pending resolution of such an adjudication. *Cf. Salt Lake City v. Silver Fork Pipeline Corp.*, 2000 UT 3, ¶ 14, 5 P.3d 1206 (noting state engineer stayed consideration of change applications pending resolution of quiet title litigation), *overruled on other grounds by Otter Creek Reservoir Co. v. New Escalante Irrigation Co.*, 2009 UT 16, 203 P.3d 1015. The state engineer also appears to have the authority to “grant[ ] conditional approval of change applications.” *Strawberry Water Users Ass’n v. Bureau of Reclamation*, 2006 UT 19, ¶ 5, 133 P.3d 410; *see also* Utah Code Ann. § 73–3–3(7)(b); *Tanner v. Humphreys*, 87 Utah 164, 48 P.2d 484, 488 (1935). However, the state engineer lacks the authority to simply declare that a forfeiture has occurred and thereby deny a change application. If the state engineer cannot identify a basis for rejecting the change application pursuant to section 73–3–8(1), the state engineer must either approve the application or pursue one of the other options listed above.

*Id.* at ¶ 15 (alteration in original). To the extent that the State Engineer determines that the he can weigh in on the rights of the parties, SLCC’s claims do not support a stay of the Orders any more than they supported a stay of the Change Applications.

#### **IV. A STAY WOULD BE INEQUITABLE.**

##### **A. SLCC Has Already Enjoyed a 10-Year Stay.**

The Change Applications were submitted in 2003. Due to legal challenges initiated by protestants, including SLCC, the State Engineer did not rule upon the merits of the Change Applications until 2013 – after those challenges had been fully adjudicated all the way to the Utah Supreme Court. [See 1-3-13 Order of the State Engineer for Permanent Change Application Number 57-7800 (a28548), attached as Exhibit “29”].

Even after the *Haik v. Sandy City* opinion, SLCC successfully obtained further delay through reconsideration of the State Engineer’s first order approving the Change Applications. [See 1-30-13 Letter K. Jones to Interested Party, attached as Exhibit “30”]. Now, in the instant Petition, SLCC the exact same arguments that have already been rejected not once, but twice by the State Engineer after careful consideration. The Petition should be denied for all the same reasons that those arguments were previously rejected.

##### **B. Economy Is Not Served by a Stay.**

SLCC claims that Tolton and Maack’s attempts to build their homes is impossible in light of further ‘red tape,’ but then inconsistently argues that the State Engineer should issue a stay to prevent Tolton and Maack from advancing toward their goal. [See Petition at 7-8]. While SLCC no doubt will continue to attempt to frustrate Tolton and Maack’s efforts to build their homes on their property, the purported impediments from other bodies and insincere concerns about Tolton and Maack wasting their resources do not warrant the imposition of a stay by the State Engineer. Moreover, like a scene

from the film *Brazil*, the various other bodies often skirt their duties based on their circular claims that action from the other body is first needed. The State Engineer should not facilitate such obstruction and dereliction of duty.

**C. SLCC Has Ulterior Motives.**

As observed by the State Engineer, SLCC and other protestants are attempting to curtail development through the change application process. [See Orders at 6, Exs. 1-2]. Those improper efforts frustrate the State Engineer’s primary duty – to put water to beneficial use. [See *id.*, Exs. 1-2].

Moreover, no legitimate grounds can exist for SLCC’s war on two inconsequential change applications involving inconsequential amounts of water. SLCC may have actually deluded itself into believing, as it purportedly did in the recently-settled case of *The Estate of Joanne L. Shrontz v. Town of Alta*,<sup>13</sup> that these few drops of water pose an “existential threat” to SLCC’s “ability to manage [its] water supplies.” [10-28-13 Hr’g Tr. at 28:3-4, attached as Exhibit “31”]. But, like the court in that case, the State Engineer need not subscribe to SLCC’s irrational beliefs, particularly where SLCC has benefited from the very arguments it assails now and has already moved upstream massive quantities of water for the specific purpose of canyon development. [See *id.* at 41:3-4, Ex. 31].

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<sup>13</sup> That case bares Case No. 090921163, was pending in the Third Judicial District Court, and was before the Honorable John Paul Kennedy – the district court assigned to SLCC’s current action challenging the Orders.

**CONCLUSION**

For the reasons set forth above, the State Engineer should deny SLCC's Petition and specify that the stay was not granted for the reasons stated herein.

DATED this 19<sup>th</sup> day of March, 2014.

**MAGLEBY & GREENWOOD, P.C.**



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James E. Magleby  
Christopher M. Von Maack  
*Attorneys for Judith Maack*

# **EXHIBIT 1**



GARY R. HERBERT  
Governor  
SPENCER J. COX  
Lieutenant Governor

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

MICHAEL R. STYLER  
Executive Director

KENT L. JONES  
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

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<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

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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

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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.

AMENDED ORDER OF THE STATE ENGINEER

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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.

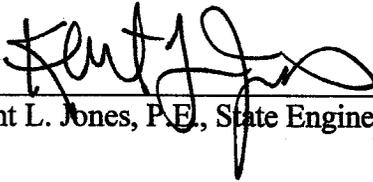
Failure on your part to comply with the requirements of the applicable statutes may result in the lapsing of this permanent change application.

**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

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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

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 2**



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.

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

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.

SCANNED

- 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).

- 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.

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<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 giving each an interest during the non-irrigation season of 312.5 gallons per day.

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, Secret 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

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 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, 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.

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.

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 N¼ 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 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 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

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.

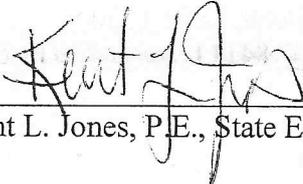
Failure on your part to comply with the requirements of the applicable statutes may result in the lapsing of this permanent change application.

**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:

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

SCANNED

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

ORDER OF THE STATE ENGINEER  
Permanent Change Application Number  
57-10317 (a28545)  
Page 13

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 3**

# APPLICATION FOR PERMANENT CHANGE OF WATER

## RECEIVED

### STATE OF UTAH

DEC 17 2003

Rec. by 28  
Fee Rec. 1502  
Receipt # 03-0570

**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. a 25548

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  
**WATER RIGHTS SALT LAKE**

\*\*\*\*\*HERETOFORE\*\*\*\*\*

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

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 <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

David J. Jensen  
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

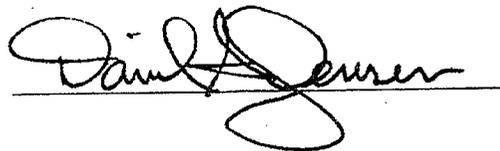
This application moves part of an existing water right upstream within the same hydrologic basin. The hereafter consumption of water will be less than the consumption heretofore, so there will be no enlargement of the water right.

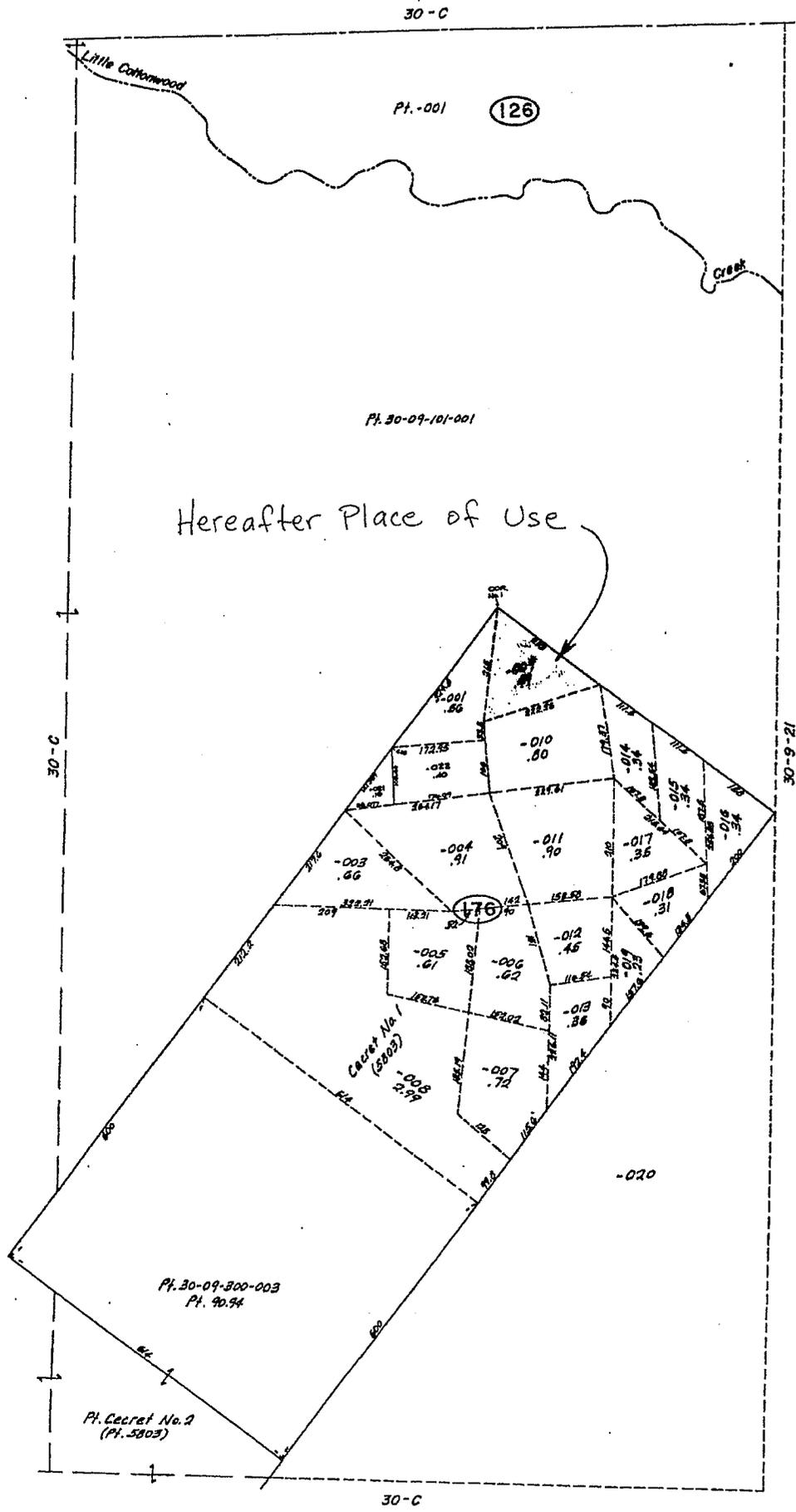
The subject township is only partially surveyed and the location of section corners and section lines remains uncertain. All references to and depictions of section corners, section lines and section subdivisions are approximate.

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, Utah  
 PREPARED BY SALT LAKE COUNTY RECORDER  
 Copyright © 1976



SALT LAKE CO.

SCALE: 1" = 100'

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

## 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, T. 3 S., R. 3 E., S.L.B. & Meridian.
7. The owner of the property should be aware of any affecting the property that may appear in a title report.
8. The tie from Corner No. 1, Secret No. 1, MS 5803, 1 North Quarter Corner of Section 5, Township 3 So 3 East, Salt Lake Base & Meridian was found to be 37'43.55" West, 8057.45 feet.
9. An assumed elevation of 9450 feet was assigned of the USFS Mineral Monument found at the north of the property, as shown.

## LEGAL DESCRIPTION

Tolton Parcel 1

A Portion of Secret No. 1 Lode Mining Claim designate Survey General as Survey No. 5803 embracing a 10 Township 3 South, Range 3 East of the Salt Lake Meridian in the Little Cottonwood Mining District, Salt Lake County, Utah, commencing at the corner No. 1 of said Secret No. 1 Claim (which corner bears South 57°2' West, 64.5 feet from the corner of Section 5, Township 3 So 3 East, Salt Lake Base & Meridian) and running then North 23°34' East, 233 feet along the end line of said claim South 71°08' West, 222.28 feet to the middle of Little Cottonwood Creek; thence North 6°46' East, 213 feet to the beginning; containing 0.495 acres, more or less.

## SURVEYOR'S CERTIFICATE

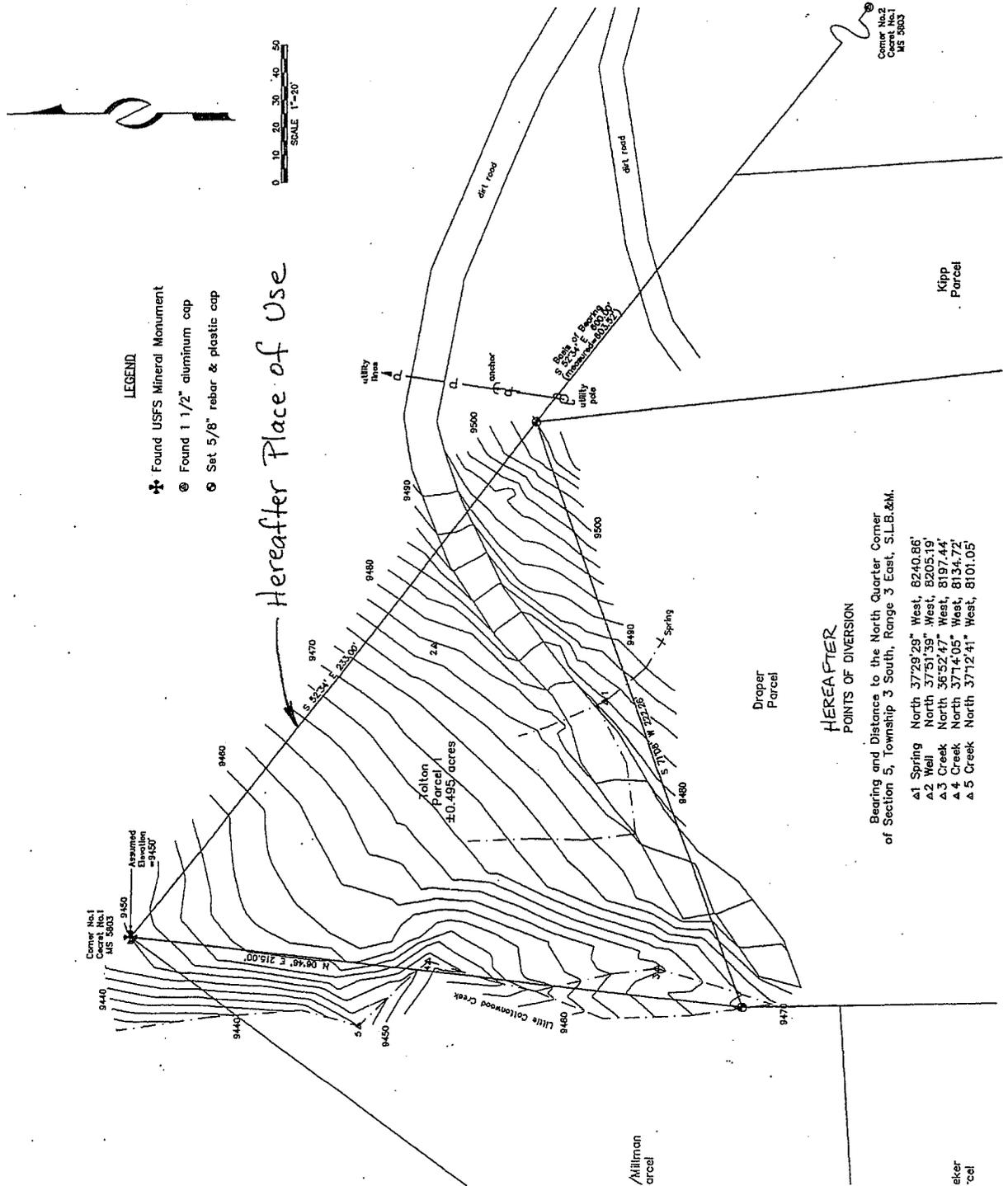
I, J.D. Galley, a Registered Land Surveyor as prescribed by the laws of the State of Utah and holding License No. 31 hereby certify that I have supervised a survey of the described property and that this plot is a true representation of said survey.

Nautilus, UT  
Date

J.D. Galley  
Professional No. 2359



Alpine Survey, Inc.  
19 Prospector Dr.  
Park City, Utah 84060  
(435) 655-8016



### 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

- Bearing and Distance to the North Quarter Corner of Section 5, Township 3 South, Range 3 East, S.L.B.&M.
- 4.1 Spring North 37°29'29" West, 8240.86'
  - 4.2 Well North 37°51'39" West, 8205.19'
  - 4.3 Creek North 36°52'47" West, 8187.44'
  - 4.4 Creek North 37°14'05" West, 8154.77'
  - 4.5 Creek North 37°12'41" West, 8101.05'

# **EXHIBIT 4**



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 Deuser*  
\_\_\_\_\_  
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).

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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:

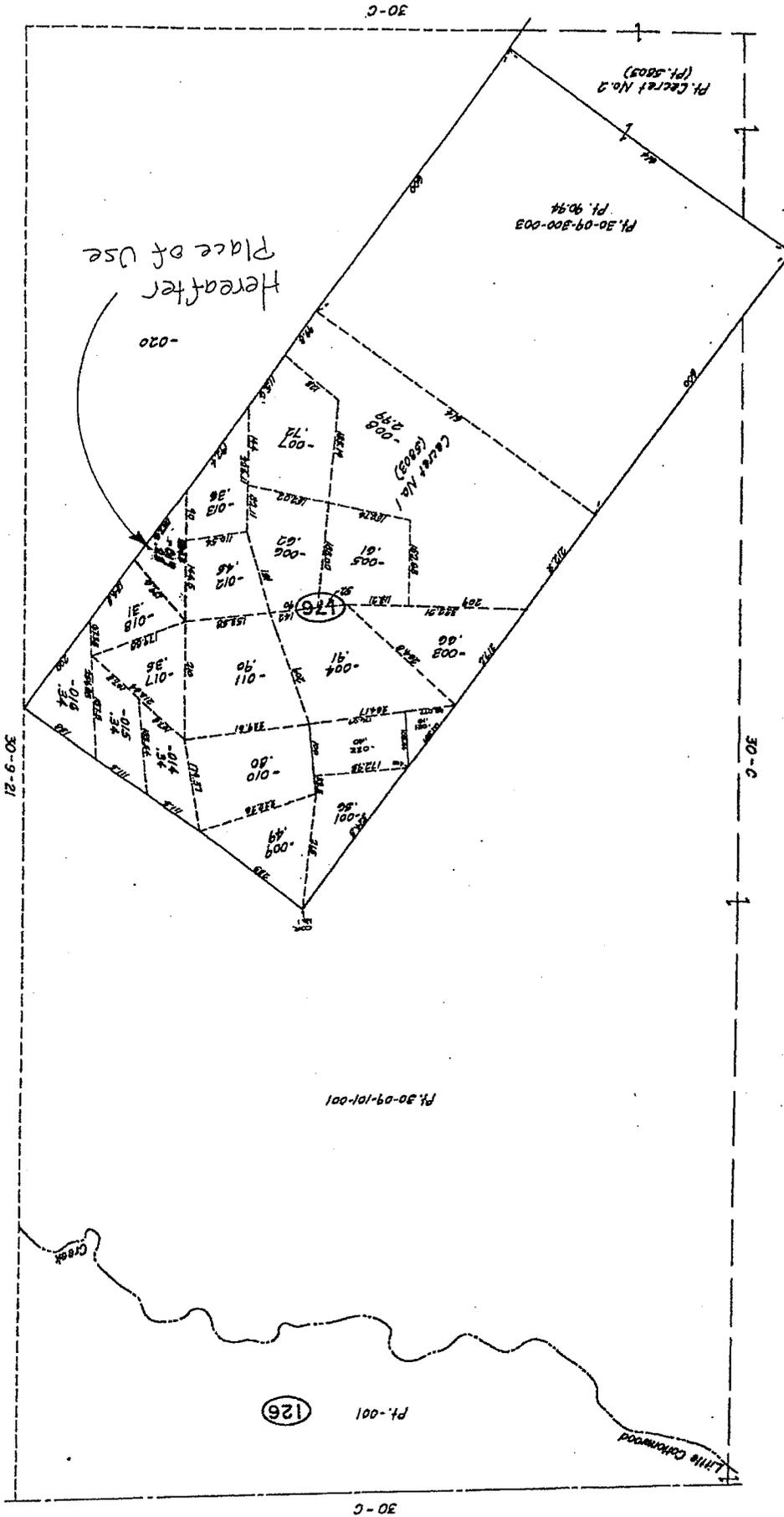
I, Daniel A. Jensen, on behalf of the applicant, hereby acknowledge that the maps, consisting of five pages, attached to this application were prepared in support of this application. By my signature below, I hereby accept and submit said maps as true representations of the facts shown thereon to the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

Daniel A. Jensen

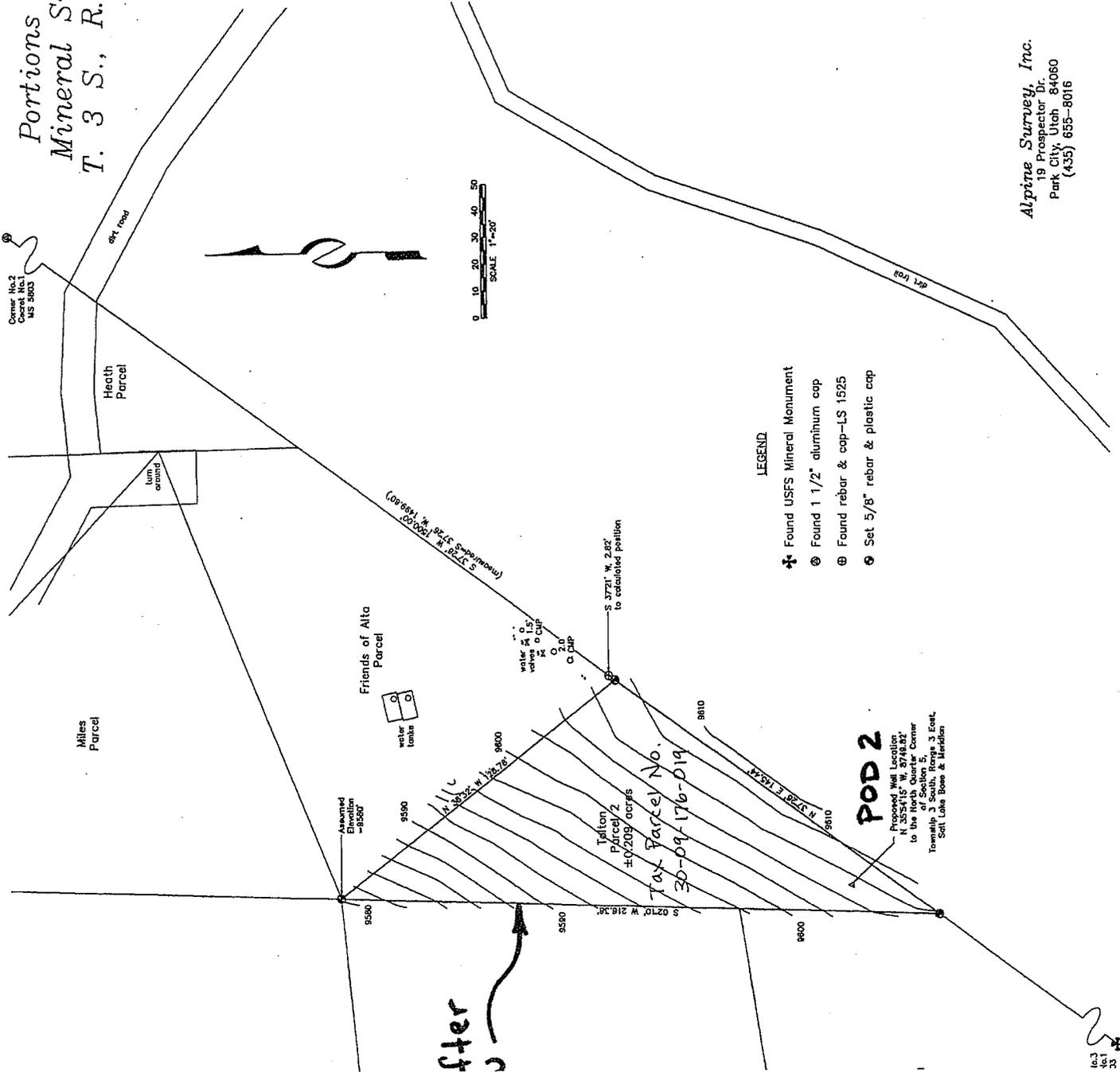


SALT LAKE COUNTY Copyright © 1996  
PREPARED BY SALT LAKE COUNTY RECORDER

This map is not intended to represent actual physical property lines. In order to establish exact physical boundaries a survey of the property may be necessary.



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



NARRATIVE

1. Survey requested by: Kevin Toltan.
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, 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 North 37°43'55" West, 8057.45 feet.
9. An assumed elevation of 9580 feet was assigned to the top of the property monument at the north corner of the property, as shown.

LEGAL DESCRIPTIONS

Toltan Parcel 2

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 a point which is 529.71 feet South and 197.23 feet East from corner No. 1 of said Cecret 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° West, 234.50 feet, more or less, to the side line of said claim; thence North 37°26' East, 157.60 feet along the side line of said claim; thence North 38°37' West, 128.78 feet to the point of beginning.

SURVEY DESCRIPTION

Commencing at a point which is 529.71 feet South and 197.23 feet East from Corner No. 1 of Cecret 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° West, 216.38 feet, more or less, to the side line of said claim; thence North 37°26' East, 145.44 feet along the side line of said claim; thence North 38°37' West, 128.78 feet to the point of beginning, containing 0.209 acres, more or less.

SURVEYOR'S CERTIFICATE

I, J.D. Gailey, a Registered Land Surveyor as prescribed by the laws of the State of Utah and holding License No. 3599005, 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.



Nov 19 2003  
Date

J.D. Gailey License # 3599005

**Alpine Survey, Inc.**  
19 Prospector Dr.  
Park City, Utah 84080  
(435) 655-8016

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

NARRATIVE

1. Survey requested by: Kevin Tolton.
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, Ceceat 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 North 37°43'55" West, 8057.45 feet.
9. An assumed elevation of 9450 feet was assigned to the top of the USFS Mineral Monument found at the north corner of the property, as shown.

LEGAL DESCRIPTION

Tolton Parcel 1

A Portion of Ceceat 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 Ceceat 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 52°34' East, 233 feet along the end line of said claim; thence South 71°08' West, 222.26 feet to the middle of Little Cottonwood Creek; thence North 6°46' East, 215 feet to the point of beginning; containing 0.495 acres, more or less.

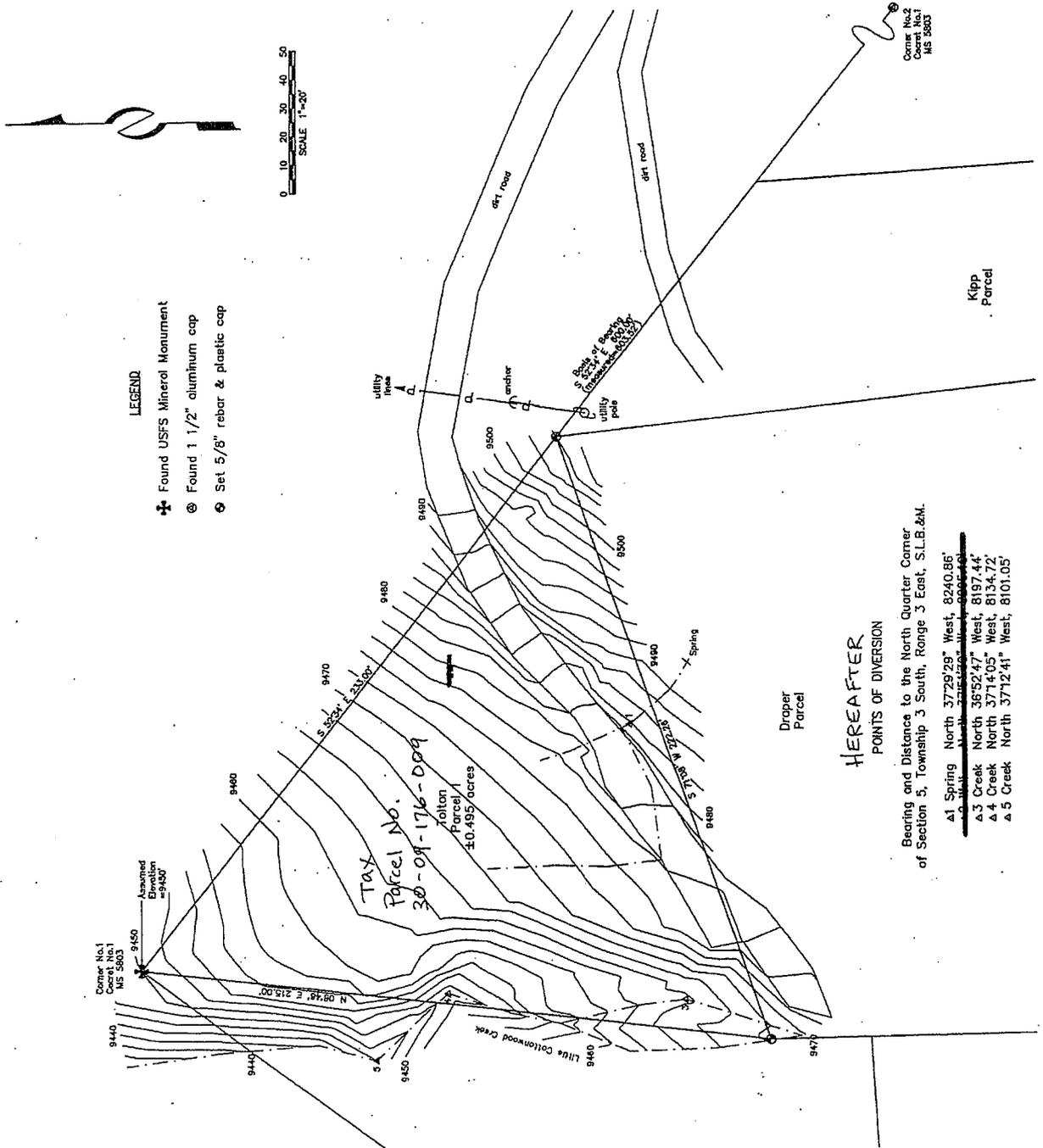
SURVEYOR'S CERTIFICATE

I, J.D. Gailey, a Registered Land Surveyor as prescribed by the laws of the State of Utah and holding License No. 359005, 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 03 Date  
J.D. Gailey License No. 359005

Alpine Survey, Inc.  
19 Prospector Dr.  
Park City, Utah 84060  
(435) 655-8016



# **EXHIBIT 5**

254 P.3d 171  
Supreme Court of Utah.

Mark C. HAIK; William S. Hoge; The  
Butler Management Group; Marvin A.  
Melville, as Trustee of the Marvin A. Melville  
Trust, et al., Plaintiffs, Counterclaim  
Defendants, Appellees, and Cross–Appellants,

v.

SANDY CITY, Defendant, Counterclaimant,  
Appellant, and Cross–Appellee.  
Sandy City, Third-party Plaintiff,  
Appellant, and Cross–Appellee,

v.

Lynn Christensen Biddulph and Charles  
Biddulph, Third-party Defendants.

No. 20090451. | May 10, 2011.

#### Synopsis

**Background:** Plaintiff holders of recorded deed for water right brought quiet title action against defendant, which had recorded its purchase agreement for the water right before plaintiffs recorded their deed, but which had recorded its deed after plaintiffs recorded their deed. The Third District Court, Salt Lake Department, [Sandra N. Peuler, J.](#), granted summary judgment to plaintiffs. Defendant appealed.

**Holdings:** The Supreme Court, [Nehring, J.](#), held that:

[1] defendant's recorded purchase agreement would be treated as an executory contract, and

[2] as a matter of first impression, assuming a recorded executory contract could subvert a subsequent purchaser's claim of good faith, plaintiffs purchased the water right in good faith.

Affirmed on alternative grounds.

West Headnotes (12)

#### [1] Appeal and Error

#### Extent of Review Dependent on Nature of Decision Appealed from

Because summary judgment involves questions of law, the appellate court grants no deference to the district court's ruling and reviews it for correctness. [Rules Civ.Proc., Rule 56\(c\)](#).

1 Cases that cite this headnote

#### [2] Appeal and Error

Scope and theory of case

#### Appeal and Error

Reasons for Decision

The appellate court may affirm a district court's entry of summary judgment if it is sustainable on any legal ground or theory apparent on the record. [Rules Civ.Proc., Rule 56\(c\)](#).

1 Cases that cite this headnote

#### [3] Vendor and Purchaser

Records

#### Water Law

Transfers or conveyances and contracts in general

Utah is a race-notice jurisdiction, and under Utah's Recording Act and Utah's Water and Irrigation Act, a subsequent purchaser for value prevails over the previous purchaser if the subsequent purchaser: (1) takes title in good faith, and (2) records before the previous purchaser. West's U.C.A. §§ 57–3–103, 73–1–12.

1 Cases that cite this headnote

#### [4] Vendor and Purchaser

Unrecorded or defectively recorded instrument in general

#### Water Law

Transfers or conveyances and contracts in general

For a subsequent purchaser, whose interest is recorded before previous purchaser's interest, to take title in good faith, as required for subsequent purchaser to prevail over previous purchaser under Utah's Recording Act or Utah's Water and

Irrigation Act, the subsequent purchaser must take title without notice of previous purchaser's prior, unrecorded interest. West's U.C.A. §§ 57-3-103, 73-1-12.

[2 Cases that cite this headnote](#)

[5] **Vendor and Purchaser**

🔑 [Unrecorded instrument](#)

**Vendor and Purchaser**

🔑 [Records](#)

**Water Law**

🔑 [Transfers or conveyances and contracts in general](#)

Constructive notice, for purposes of determining under Utah's Recording Act or Utah's Water and Irrigation Act whether subsequent purchaser, whose interest was recorded before previous purchaser's interest, took title in good faith without notice of previous purchaser's prior, unrecorded interest, can be either "inquiry notice," in which a person must have actual knowledge of certain facts and circumstances that are sufficient to give rise to a duty to inquire further, or "record notice," which results from a record or is imputed by the recording statutes. West's U.C.A. §§ 57-3-103, 73-1-12.

[2 Cases that cite this headnote](#)

[6] **Contracts**

🔑 [Executed contract](#)

An "executory contract" is a contract that contemplates that the performance of a contractual duty is to occur in the future.

[7] **Vendor and Purchaser**

🔑 [Failure to record deed or other instrument](#)

**Water Law**

🔑 [Transfers or conveyances and contracts in general](#)

Previous purchaser's recorded agreement to purchase the water right would be treated as an executory contract, for purposes of determining under Utah's Recording Act or Utah's Water and Irrigation Act whether subsequent purchaser,

whose deed was recorded before previous purchaser's deed, took title in good faith without notice of previous purchaser's prior, unrecorded interest, where the purchase agreement was ambiguous regarding whether it memorialized a contemporaneous exchange of payments and delivery of the deed, or instead indicated a proposed transaction in which payments and delivery of the deed had not yet occurred. West's U.C.A. §§ 57-3-103, 73-1-12.

[8] **Vendor and Purchaser**

🔑 [Unrecorded instrument](#)

**Water Law**

🔑 [Transfers or conveyances and contracts in general](#)

Assuming that record notice of a previous purchaser's equitable interest in property could subvert a claim by a subsequent purchaser, whose deed was recorded before previous purchaser's deed, that subsequent purchaser took title in good faith, as required for subsequent purchaser to prevail over previous purchaser under Utah's Recording Act or Utah's Water and Irrigation Act, though subsequent purchaser had constructive record notice of previous purchaser's equitable interest in the water right, which equitable interest arose from previous purchaser's recorded executory contract to purchase the water right, where previous purchaser did not record its deed until nearly 27 years after it had recorded its purchase agreement, so that it would have been reasonable for subsequent purchaser to conclude that purchase agreement had not been executed and deed had not been delivered to previous purchaser, the land records and the water rights records made it reasonable for subsequent purchaser to conclude that subsequent purchaser had clear and inviolate chain of title to the water right, and previous purchaser had not asserted its interest in the water right when subsequent purchaser's predecessor-in-interest had filed a change application for the water right. West's U.C.A. §§ 57-3-103, 73-1-10(1)(a, b), 73-1-12.

2 Cases that cite this headnote

previous purchaser's prior, unrecorded interest.  
West's U.C.A. §§ 57-3-103, 73-1-12, 73-2-11.

[9] **Equitable Conversion**

🔑 Conveyances and Contracts

Under the doctrine of equitable conversion, the vendee of an executory land sale contract holds equitable ownership of the property but not legal title, and thus, even though the vendor may retain title to the property, that title is effectively held for the benefit of the vendee, to whom it will pass if the contract is carried out.

**Attorneys and Law Firms**

\*173 [David C. Wright, John H. Mabey, Jr.](#), Salt Lake City, UT, for Appellant and Cross-Appellee.

[Ronald G. Russell, Rodger M. Burge](#), Salt Lake City, UT, for Appellee and Cross-Appellant.

**Opinion**

Justice [NEHRING](#), opinion of the Court:

[10] **Equitable Conversion**

🔑 Conveyances and Contracts

**Equitable Conversion**

🔑 Time of conversion

Under the doctrine of equitable conversion, pursuant to which the vendee of an executory land sale contract holds equitable ownership of the property but not legal title, the vendee acquires the equitable interest in the property at the moment the contract is created and is thereafter treated as the owner of the property.

**INTRODUCTION**

¶ 1 This case illustrates the importance of promptly recording a deed to a property right. Sandy City and the Plaintiffs (“Haik Parties”) each hold deeds to the same water right. Sandy City recorded an “Agreement of Sale” for the water right in 1977, but did not record the deed until 2004. The Haik Parties purchased the same water right in 2003 and recorded their deed that year. We are asked to determine whether the district court erred when it quieted title in favor of the Haik Parties after concluding that the Haik Parties had first recorded their deed to the water right in good faith. The district court reasoned that the Agreement of Sale did not put the Haik Parties on notice of Sandy City’s interest in the water right because it was an executory contract, i.e., there was no way to determine whether the contract \*174 was performed and whether the deed to the water right was delivered to Sandy City.

[11] **Notice**

🔑 Constructive Notice

Constructive notice from a record is wholly a creature of statute, and no record will operate to give constructive notice unless such effect is given such record by statute.

¶ 2 We conclude that the Agreement of Sale put the Haik Parties on record notice that Sandy City had an equitable interest in the water right. Whether record notice of an equitable interest in property defeats another’s claim of having subsequently purchased the same property in good faith is a question of first impression. Although record notice of an equitable interest in a water right can, in some circumstances, subvert a claim of having subsequently purchased the same water right in good faith, those circumstances are not present in this case. Accordingly, we hold that the Haik Parties first recorded their deed to the disputed water right in good faith and affirm the decision of the district court.

[12] **Vendor and Purchaser**

🔑 Record as notice of unrecorded instrument

**Water Law**

🔑 Transfers or conveyances and contracts in general

Utah Division of Water Rights (UDWR) records do not impart record notice, for purposes of determining under Utah’s Recording Act or Utah’s Water and Irrigation Act whether subsequent purchaser of a water right, whose interest was recorded before previous purchaser’s interest, took title in good faith without notice of

## BACKGROUND

¶ 3 Sandy City and the Haik Parties hold deeds to the same water right. Sandy City's chain of title is relatively straightforward. In 1974, Harold Bentley conveyed certain property, to which the disputed water right is appurtenant, to Saunders-Sweeney, Inc. About two years later, both Mr. Bentley and Saunders-Sweeney, as grantors, each signed quitclaim deeds that named Sandy City as grantee of the water right. Shortly thereafter, Mr. Bentley, Saunders-Sweeney, and the mayor of Sandy City Corporation signed an "Agreement of Sale" for the water right. The Agreement of Sale was recorded on January 14, 1977, in the Salt Lake County Recorder's Office. Sandy City thereafter received a quitclaim deed conveying the water right, but that deed was not recorded. It was simply kept in a separate file in the Sandy City Recorder's Office.

¶ 4 The Haik Parties' chain of title is a bit more circuitous. In 1978, Saunders-Sweeney designated the property to which the water right is appurtenant as Lot 31 of the Little Cottonwood Subdivision. That same year, Saunders-Sweeney conveyed Lot 31 to Judith Saunders. The deed was recorded. Lot 31 was subsequently conveyed, through intermediate owners, to Lynn Biddulph in 1983. The water right was not reserved in any of these conveyances.

¶ 5 In 1999, Saunders-Sweeney separately conveyed "all of its right, title and interest" in the water right to Ms. Biddulph by quitclaim deed, which was recorded. Shortly thereafter, Ms. Biddulph filed an application with the Utah State Engineer for a permanent change of water, which was approved. In response to the change application, Sandy City wrote a letter to the State Engineer expressing concern "if any activity to expand or further change the water right were to take place," but Sandy City did not claim ownership of the water right or otherwise contest Ms. Biddulph's ownership of the water right. Ms. Biddulph then expended money and effort to maintain the water right and related facilities.

¶ 6 In 2003, Ms. Biddulph conveyed the water right by quitclaim deed to LWC, L.L.C. Shortly thereafter, LWC conveyed the water right by quitclaim deed to Kevin Tolton (one of the Haik Parties). In October 2003, Kevin Tolton then conveyed the water right by quitclaim deed to the Haik Parties as tenants in common. The Haik Parties recorded the deed on December 10, 2003.

¶ 7 Before the water right was conveyed to the Haik Parties, Mark Haik, a professional title examiner, searched the Salt Lake County Recorder's records concerning the water right. Mr. Haik did not locate the 1977 Agreement of Sale because his search started with records beginning in 1983 or 1984. Had Mr. Haik searched back to 1977, he likely would have found the Agreement of Sale.

¶ 8 In 2004, the Haik Parties filed an application with the Utah Division of Water Rights to change the diversion point of the water right. In an effort to oppose the application, Sandy City investigated the water right and located the Agreement of Sale from 1977. Sandy City then asked the Sandy City Recorder to find the referenced water right deed. The city recorder quickly located the original deed in the Sandy City Recorder's Office. At Sandy City's request, the city recorder recorded the deed in April 2004. But when Sandy City sought to update title with the Division of Water Rights, its request was rejected.

¶ 9 The Haik Parties filed an action to quiet title to the water right. Both parties \*175 moved for summary judgment. The district court granted the Haik Parties' motion for summary judgment and denied Sandy City's cross-motion for summary judgment. The district court found that the Haik Parties (1) recorded their deed before Sandy City and (2) purchased the water right in good faith because they did not have notice of Sandy City's unrecorded deed to the water right. The court reasoned that even though the Agreement of Sale referenced the disputed water right, the Agreement of Sale did not put the Haik Parties on record notice of Sandy City's interest in the water right because it was merely an executory contract with "no way to determine whether performance under the agreement actually occurred." Sandy City now appeals. We have jurisdiction under [Utah Code section 78A-3-102\(3\)\(j\)](#) (Supp. 2010).

## STANDARD OF REVIEW

[1] [2] ¶ 10 Summary judgment is appropriate only when there "is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law."<sup>1</sup> Because summary judgment involves questions of law, we grant no deference to the district court's ruling and review it for correctness.<sup>2</sup> We may affirm a district court's entry of summary judgment " 'if it is sustainable on any legal ground or theory apparent on the record.' "<sup>3</sup>

## ANALYSIS

¶ 11 The issue in this case is whether the Agreement of Sale put the Haik Parties on record notice of Sandy City's unrecorded interest in the disputed water right. The Haik Parties contend that the Agreement of Sale did not impart record notice because it is merely an executory contract, i.e., it is impossible to know from the text of the Agreement of Sale whether it was executed and whether the deed was actually delivered. Sandy City contends that the Agreement of Sale imparted record notice because it unambiguously describes a conveyance of the water right to Sandy City. Alternatively, Sandy City contends that even if the Agreement of Sale is an executory contract, it nevertheless put the Haik Parties on record notice that Sandy City possessed an equitable interest in the water right.

¶ 12 It is unclear whether the Agreement of Sale was an executory contract or whether it was fully performed. Nevertheless, we conclude that the Agreement of Sale put the Haik Parties on record notice that Sandy City had an equitable interest in the water right. There are circumstances where record notice of an equitable interest in property may subvert a subsequent purchaser's claim of having purchased the same property in good faith. But those circumstances are not present here for three reasons: (1) the Haik Parties reasonably believed they had a clear and inviolate chain of title to the disputed water right; (2) nearly twenty-seven years had passed since the Agreement of Sale was recorded and Sandy City had still not recorded its deed to the water right; and (3) the Haik Parties' predecessors-in-interest maintained the water right and filed a change application in 1999, yet Sandy City never contested ownership to the water right. Accordingly, we hold that the Haik Parties purchased their deed to the water right in good faith. We therefore affirm the district court's grant of summary judgment in favor of the Haik Parties on these alternative grounds.<sup>4</sup>

### I. THE AGREEMENT OF SALE DID NOT PUT THE HAIK PARTIES ON CONSTRUCTIVE RECORD NOTICE THAT SANDY CITY HAD A DEED TO THE WATER RIGHT

[3] ¶ 13 Utah is a race-notice jurisdiction.<sup>5</sup> Under Utah's Recording Act and \*176 Utah's Water and Irrigation Act, a subsequent purchaser for value prevails over a previous

purchaser if the subsequent purchaser (1) takes title in good faith and (2) records before the previous purchaser.<sup>6</sup> There is no dispute that the Haik Parties were the first to record their deed to the disputed water right. Thus, the only issue is whether the Haik Parties took title to the water right in good faith.

[4] [5] ¶ 14 “To be in good faith, a subsequent purchaser must take [title to] the property without notice of a prior, unrecorded interest in the property.”<sup>7</sup> This court recognizes two types of notice: (1) actual notice and (2) constructive notice.<sup>8</sup> Actual notice arises from actual knowledge “of an unrecorded interest or infirmity in the grantor's title.”<sup>9</sup> Constructive notice can be either inquiry or record notice. To be on inquiry notice, a person must have “[actual] knowledge of certain facts and circumstances that are sufficient to give rise to a duty to inquire further.”<sup>10</sup> But inquiry notice “does not arise from a record.”<sup>11</sup> Record notice “results from a record or ... is imputed by the recording statutes.”<sup>12</sup> Thus, purchasers of real property are charged with having record notice of the contents of recorded documents.<sup>13</sup>

¶ 15 Because it is undisputed that the Haik Parties had neither actual nor constructive inquiry notice of Sandy City's interest in the water right,<sup>14</sup> the only question is whether the Agreement of Sale put the Haik Parties on constructive record notice that Sandy City possessed an unrecorded deed to the water right.

#### ***\*177 A. Sandy City's Failure to Record Its Deed to the Water Right Deprived the Haik Parties of Notice of the Unrecorded Deed and Made It Ambiguous Whether the Agreement of Sale Had Been Fully Performed. Because of This Ambiguity, We Treat the Agreement of Sale as Executory.***

¶ 16 In Utah, real estate documents filed with the county recorder “impart notice to all persons *of their contents*.”<sup>15</sup> A real estate “document” is defined as “every instrument in writing, including every conveyance, affecting, purporting to affect, describing, or otherwise concerning any right, title, or interest in real property.”<sup>16</sup> Thus, the Agreement of Sale imparted to the Haik Parties notice of its contents. But what did *the contents* of the Agreement of Sale communicate?

¶ 17 The Agreement of Sale describes the disputed water right both by its certificate number (A-702) and its precise point of diversion. It further states:

This Agreement of Sale is made ... this 13th day of January 1977

....

1. That [Sandy City], for Ten Dollars and other valuable consideration, the receipt of which is hereby acknowledged, agrees to purchase said water right as described above.

....

5. Payments shall be tendered upon the execution of this agreement and the deed to the above described water right shall be delivered upon receipt of the payment as herein provided.

The Agreement was signed by Harold Bentley as seller, Saunders-Sweeney, Inc. as seller, and Sandy City Corporation as buyer.

¶ 18 The district court concluded that the Agreement of Sale was an executory contract because it was impossible to determine whether the deed to the disputed water right was ever actually transferred to Sandy City. We disagree. The Agreement of Sale is ambiguous as to whether it was executory or whether it was fully performed. On the one hand, certain language can be read to support Sandy City's argument that the Agreement of Sale imparted record notice of a completed sale and transfer of the water deed. Paragraph one states, "[Sandy City], for ... valuable consideration, the receipt of which is *hereby acknowledged*, agrees to purchase said water right." And paragraph five states, "[p]ayments shall be tendered *upon the execution of this agreement and the deed* to the above described water right *shall be delivered upon receipt of payment* as herein provided." The term "upon" can be read to mean that the deed was conveyed contemporaneously with the execution of the contract.<sup>17</sup>

And because the parties executed the Agreement of Sale that same day, it is reasonable to conclude that the Agreement of Sale memorialized a *contemporaneous exchange* of payments and delivery of the deed on January 13, 1977.

[6] ¶ 19 On the other hand, the language of the Agreement of Sale supports the Haik Parties' argument that the Agreement of Sale was merely executory. An executory contract is a contract that contemplates that the performance of a

contractual duty is to occur in the future.<sup>18</sup> Nothing in the Agreement of Sale proves that the "payments" referenced in paragraph five were ever made, or that Sandy City actually received the deed to the water right. Indeed, the phrases "shall be tendered" and "shall be delivered" can be read to indicate a proposed transaction rather than a completed transaction. Likewise, the term "upon" can be read to mean that the payments would be tendered "very soon after" the execution of the Agreement of Sale.<sup>19</sup> Furthermore, while paragraph one speaks to valuable consideration "the receipt of which is hereby \*178 acknowledged," paragraph five speaks to "payments" that "*shall be* tendered upon the execution of the agreement" and conditions the delivery of the deed "upon receipt of [those payments]." But it is impossible to determine, based solely on the contents of the Agreement of Sale, whether such "payments" were ever actually made. Accordingly, we conclude that it is ambiguous whether the Agreement of Sale was an executory contract or whether it was fully performed.

[7] ¶ 20 Where a party has record notice of a contract but the degree to which the contract has been performed is ambiguous, we will treat that contract as executory. Here, Sandy City recorded the Agreement of Sale in 1977. However, as discussed above, nothing in the recorded Agreement of Sale sufficiently specified whether Sandy City had performed its agreement. Moreover, the degree of any such performance could not be ascertained by the Haik Parties due to Sandy City's failure to record the deed to the water right. Nonetheless, the recorded Agreement of Sale put the Haik Parties on record notice that Sandy City had agreed to purchase the water right at one time—regardless of whether the agreement was fully performed or remained executory. Thus, at the very least, the Haik Parties had record notice of an executory contract regarding the water rights. Therefore, for purposes of record notice, we must treat a contract as executory if it is ambiguous whether it is executory or has been fully performed. This conclusion, however, does not end our inquiry.

***B. The Haik Parties Were on Record Notice That Sandy City Possessed an Equitable Interest in the Water Right When the Agreement of Sale Was Recorded in 1977. Nevertheless, Under the Circumstances Presented Here, the Haik Parties Purchased the Water Right in Good Faith.***

[8] [9] [10] ¶ 21 Sandy City contends that even if the Agreement of Sale is an executory contract, it nevertheless put the Haik Parties on record notice that Sandy City possessed an equitable interest in the water right. Sandy City argues that under the doctrine of equitable conversion, “the vendee of an executory land sale contract holds equitable ownership of the property but not legal title.”<sup>20</sup> Thus, “[e]ven though the vendor may retain title to the property, that title is effectively held for the benefit of the vendee, to whom it will pass if the contract is carried out.”<sup>21</sup> And the vendee “acquires the equitable interest in the property at the moment the contract is created and is thereafter treated as the owner of the [property].”<sup>22</sup> Sandy City argues that like other instruments affecting an interest in real property—such as an option contract, mechanics lien, or mortgage—the Agreement of Sale put the Haik Parties on notice that Sandy City had an equitable interest in the water right, and that notice of this equitable interest defeats the Haik Parties’ claim to having purchased the water right in good faith.

¶ 22 We agree that the Agreement of Sale put the Haik Parties on record notice that Sandy City had equitable interest in the water right *at the time the Agreement of Sale was recorded*. But we have not previously addressed whether notice of an equitable interest in property will defeat a subsequent purchaser’s claim of having obtained title to the property in good faith. Assuming without deciding that there are circumstances under which record notice of an equitable interest in property may subvert a subsequent purchaser’s claim to having purchased the property in good faith, those circumstances are not present here. Thus, we hold that the Haik Parties took title to the water right in good faith.

¶ 23 First, we find it telling that Sandy City recorded the Agreement of Sale in 1977 but failed to record the deed to the water right for nearly twenty-seven years. This fact is particularly relevant given the statutory requirement that water rights be recorded by deed. [Utah Code section 73–1–10](#) provides \*179 that “[a] water right ... shall be transferred by deed in substantially the same manner as is real estate,”<sup>23</sup> and clearly states that “[t]he deed must be recorded in the office of the recorder of the county where the point of diversion of the water is located and in the county where the water is used.”<sup>24</sup> Moreover, [section 73–1–12](#) warns that “[e]very deed of a water right which shall not be recorded ... shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same water right, or any portion thereof, where his own deed shall be first duly recorded.”<sup>25</sup>

This statutory language, combined with the fact that Sandy City had not recorded its deed to the water right more than twenty-seven years after the Agreement of Sale was recorded, weighs heavily in favor of concluding that the Agreement of Sale was never executed and the deed never delivered to Sandy City. That a recorded deed will destroy a subsequent purchaser’s claim of having purchased the same property in good faith could not be more clear. It falls, therefore, to the grantee of the water right to take responsibility for protecting its legal interests by recording the deed.

¶ 24 Second, we find it important that both the Salt Lake County Recorder’s Office and the Utah Division of Water Rights (or “UDWR”) showed that the Haik Parties had a clear and inviolate chain of title to the water right. As to the Salt Lake County Recorder’s Office, the records show a complete chain of title from Lot 31—the land to which the Haik water right was appurtenant—to the Haik Parties. The records show the following: In 1974, the land that would eventually become Lot 31 was conveyed to Saunders-Sweeney and the deed was recorded. In 1978, the land was conveyed to Judith Saunders and the deed was recorded. In 1983, the land was conveyed to Lynn Biddulph and the deed was recorded. Importantly, the water right was not reserved in any of these conveyances. [Utah Code section 73–1–11](#) states in relevant part:

A water right appurtenant to land shall pass to the grantee of the land unless the grantor:

- (a) specifically reserves the water right or any part of the water right in the land conveyance document;
- (b) conveys a part of the water right in the land conveyance document; or
- (c) conveys the water right in a separate conveyance document prior to or contemporaneously with *the execution of the land conveyance document*.<sup>26</sup>

And in 1999, Saunders-Sweeney separately conveyed “all of its right, title and interest” in the water right to Lynn Biddulph (the Haik Parties’ predecessor-in-interest) and the deed was recorded. Thus, under [Utah Code section 73–1–11](#), the Haik Parties had a clear chain of title to the water right unless the right was “convey[ed] ... in a separate conveyance document prior to or contemporaneously with the execution of the land conveyance document.”<sup>27</sup> And the only possible conveyance was the Agreement of Sale. But as we explained above, it is ambiguous whether the Agreement of Sale was performed or was merely an executory contract, particularly

since twenty-seven years had passed since the Agreement of Sale was recorded and no deed to the water right had yet been recorded. Thus, it would have been reasonable for the Haik Parties to conclude that the Agreement of Sale was never executed and, therefore, the water right passed to the Haik Parties' predecessor-in-interest as an appurtenance to the land conveyed by Saunders-Sweeney in 1978.

¶ 25 This conclusion is particularly compelling considering that Saunders-Sweeney, a named grantor on the Agreement of Sale, separately conveyed “all of its right, title and interest” in the water right in 1999. Had the Agreement of Sale been performed and the deed to the water right been delivered to Sandy City, it would be reasonable to conclude that Saunders-Sweeney would not have \*180 transferred the water right again in 1999. In other words, it would be reasonable to conclude that Saunders-Sweeney did not twice convey the same water right. Likewise, even assuming Saunders-Sweeney did twice convey the same water right—once in the 1977 Agreement of Sale and once in the 1999 conveyance—it would be reasonable to conclude that Sandy City would have contested the 1999 conveyance. Yet when Lynn Biddulph filed a change application for the water right in 1999, Sandy City wrote a letter to the State Engineer that merely expressed concern “if any activity to expand or further change the water right were to take place,” but did not claim ownership of the water right or otherwise contest Ms. Biddulph's ownership of the water right.

[11] [12] ¶ 26 Likewise, the records from the Utah Division of Water Rights showed a complete chain of title to the water right. Although UDWR records do not impart record notice or warrant or guarantee title to water rights,<sup>28</sup> the fact that the UDWR records corroborate the official Salt Lake County Recorder's Office records weighs in favor of finding that the Haik Parties would have been justified in believing they had a clear and inviolate chain of title to the disputed water right.

¶ 27 Third, we find it persuasive that the Haik Parties and their predecessor-in-interest, Ms. Biddulph, expended money and effort to maintain the water right, and that Sandy City knew Ms. Biddulph filed a change application for the water right, yet Sandy City never asserted its own interest in the water right. Again, if Sandy City had obtained a deed to the water right under the Agreement of Sale, it would be reasonable to conclude that Sandy City would have contested such efforts to maintain the water right. Instead, when Ms. Biddulph filed the change application, Sandy City did not assert ownership of the right, but stated in a letter to the State Engineer that it did “not have any concerns” if the change application “is merely a correction in the point of diversion to reflect historical water use practices.” Thus, even with record notice of the Agreement of Sale, it would have been reasonable for the Haik Parties to conclude that Sandy City no longer had an equitable interest in the water right.

## CONCLUSION

¶ 28 We hold that under the facts presented in this case, the Haik Parties were the first to record their deed to the disputed water right in good faith. We therefore affirm the district court's entry of summary judgment quieting title to the water right in favor of the Haik Parties.

¶ 29 Associate Chief Justice [DURRANT](#), Justice [PARRISH](#), Justice [LEE](#), and Judge [VOROS](#) concur in Justice [NEHRING](#)'s opinion.

¶ 30 Having disqualified herself, Chief Justice [DURHAM](#) does not participate herein; Court of Appeals Judge [J. FREDERIC VOROS, Jr.](#) sat.

## Parallel Citations

682 Utah Adv. Rep. 17, 2011 UT 26

## Footnotes

- 1 [UTAH R. CIV. P. 56\(c\)](#).
- 2 [Mitchell v. Christensen](#), 2001 UT 80, ¶ 8, 31 P.3d 572.
- 3 [Francis v. State](#), 2010 UT 62, ¶ 19, 248 P.3d 44 (emphasis omitted) (quoting [Bailey v. Bayles](#), 2002 UT 58, ¶ 10, 52 P.3d 1158); accord [Angel Investors, LLC v. Garrity](#), 2009 UT 40, ¶ 38, 216 P.3d 944.
- 4 Because we affirm the district court's grant of summary judgment in favor of the Haik Parties, we do not address their argument that Sandy City is barred from asserting ownership of the water right under the equitable doctrines of estoppel, laches, and waiver.

- 5 See *Utah Farm Prod. Credit Ass'n v. Wasatch Bank of Pleasant Grove*, 734 P.2d 904, 906 n. 2 (Utah 1986) (“[Utah’s] [R]ecording [A]ct is a race-notice statute which requires lack of actual notice *or* of prior recording for a subsequent purchaser to prevail in multiple conveyances of the same land.”).
- 6 Utah’s Recording Act provides:  
Each document not recorded as provided in this title is *void as against any subsequent purchaser* of the same real property, or any portion of it, if:  
(1) the subsequent purchaser purchased the property *in good faith* and for a valuable consideration; and  
(2) the subsequent purchaser’s document is *first duly recorded*.  
UTAH CODE ANN. § 57–3–103 (Supp.2010) (emphases added).  
Utah’s Water and Irrigation Act provides:  
Every deed of a water right which shall not be recorded as provided in this title shall be *void as against any subsequent purchaser, in good faith* and for a valuable consideration, of the same water right, or any portion thereof, where his own deed shall be *first duly recorded*.  
*Id.* § 73–1–12 (Supp. 2010) (emphases added).
- 7 *Salt Lake Cnty. v. Metro W. Ready Mix, Inc.*, 2004 UT 23, ¶ 13, 89 P.3d 155.
- 8 *See id.*
- 9 *Id.*
- 10 *First Am. Title Ins. Co. v. J.B. Ranch, Inc.*, 966 P.2d 834, 838 (Utah 1998).
- 11 *Id.*
- 12 *Id.* at 837.
- 13 *See Crompton v. Jenson*, 78 Utah 55, 1 P.2d 242, 247 (1931) (“One who deals with real property is charged with notice of what is shown by the records of the county recorder of the county in which the property is situated.”); *see also* UTAH CODE ANN. § 57–3–102(1) (Supp. 2010) (“Each document [properly recorded] ... shall, from the time of recording with the *appropriate county recorder*, impart notice to all persons of their contents.” (emphasis added)).
- 14 Inquiry notice is not at issue in this case because the Haik Parties did not have actual knowledge of any facts, such as the existence of the Agreement of Sale, giving rise to a duty to inquire further. *See J.B. Ranch*, 966 P.2d at 838 (“[I]nquiry notice arises from knowledge of certain facts and circumstances, not from records.”). Had the Haik Parties known of the Agreement of Sale, they would have had actual knowledge about the possible defect in title and would have been on inquiry notice to inquire further. And upon further inquiry, it is likely that the Haik Parties would have discovered Sandy City’s deed to the water right. But because the Haik Parties did not have any knowledge of the Agreement of Sale, our inquiry is limited to whether the *contents of the Agreement of Sale* would have imparted notice to the Haik Parties of Sandy City’s unrecorded deed to the water right.
- 15 UTAH CODE ANN. § 57–3–102(1) (emphasis added); *see also J.B. Ranch*, 966 P.2d at 839.
- 16 UTAH CODE ANN. § 57–1–1(2).
- 17 *See* AMERICAN HERITAGE DICTIONARY 1328 (2d college ed. 1985) (defining “upon” as “on”).
- 18 *See* David A. Thomas, THOMPSON ON REAL PROPERTY § 96.03(e) (2d ed. 2002).
- 19 WEBSTER’S THIRD NEW INT’L DICTIONARY 2518 (1961) (defining “upon” as “immediately following on” or “very soon after”).
- 20 *Cannefax v. Clement*, 818 P.2d 546, 549 (Utah 1991).
- 21 *Id.* at 549–50.
- 22 *Lach v. Deseret Bank*, 746 P.2d 802, 805 (Utah Ct.App.1987).
- 23 UTAH CODE ANN. § 73–1–10(1)(a) (emphasis added).
- 24 *Id.* § 73–1–10(1)(b) (emphasis added).
- 25 *Id.* § 73–1–12 (emphasis added).
- 26 *Id.* § 73–1–11(1) (emphasis added).
- 27 *Id.* § 73–1–11(1)(c).
- 28 The UDWR Title Abstract states, “No agency of the State of Utah warrants or guarantees title to certain water rights. The State Engineer’s Office serves only as an office of public record.... If an opinion of title assurance is desired, an attorney or other qualified professional should be retained.” Likewise, “[c]onstructive notice from a record is wholly a creature of statute. No record will operate to give constructive notice unless such effect is given such record by statute.” *Doris Trust Co. v. Quermbach*, 103 Utah 120, 133 P.2d 1003, 1006 (1943) (Wolfe, C.J., concurring). Thus, record notice does not automatically occur simply because a record is made public or must be filed with a government agency. Rather, “[t]he general rule ... is that in the absence of an express declaration in the statute, records and documents filed pursuant to statute do not impart constructive notice.” *J.B. Ranch*, 966 P.2d at 839. Here,

Utah Code section 73-2-11 provides, “The office of the state engineer is hereby declared to be an office of public record.... Certified copies of any record or document shall be furnished by the state engineer on demand, ... [and] shall be competent evidence, and shall have the same force and effect as the originals.” UTAH CODE ANN. § 73-2-11. Because this statute does not clearly evince an intent to give constructive notice, the UDWR records do not impart record notice.

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# **EXHIBIT 6**



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

---

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

# **EXHIBIT 7**

*Received  
at hearing  
from applicant  
for all filings  
M.T.*

---

**AUTHORITIES REGARDING  
SALT LAKE CITY CORPORATION  
CHANGE APPLICATION NOS.**

RE: App. Nos.

57-10016 (a16811), 57-10017 (a16812), 57-10018 (a16813), 57-10019 (a16814),  
57-10020 (a16815), 57-10021 (a16816), 57-10022 (a16817), 57-10023 (a16818),  
57-10024 (a16819), 57-10025 (a16820), 57-10026 (a16821), 57-10027 (a16822),  
57-10028 (a16823), 57-10029 (a16824), 57-10030 (a16825), 57-10031 (a16826),  
57-10032 (a16827), 57-10033 (a16828), 57-10034 (a16829), 57-10035 (a16840),  
57-10009 (a16839), 57-10010 (a16841), 57-10011 (a16842), 57-10012 (a16843),  
57-10013 (a16844), 57-10014 (a16845), 57-10015 (a16846), 57-10040 (a16836),  
57-10041 (a16837), 57-10042 (a16838), 57-10036 (a16786), 57-10037 (a16787),  
57-10039 (a16789), 57-10038 (a16788), 57-10039 (a16789)

Devo, Christensen & Martinson  
16 Exchange Place, Eleventh Floor  
Salt Lake City, Utah 84111  
Telephone (801)321-9999

Joseph Nevak, Of Counsel

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*Received at  
 from  
 applicant 8-28-96  
 WJ*

LITTLE COTTONWOOD CANYON  
 PERMANENT CHANGE APPLICATIONS

DATE	NAME	WATER RIGHT NUMBER	APPLICATION NUMBER	AF QUANTITY
6/26/92	Forest Service	57-10009	a16839	1.326
5/2/75	Alta Peruvian Lodge	57-10010	a16841	167.9
8/19/80	Charlette Sturdy	57-10011	a16842	.442
7/15/80	Service Area #3- Snowbird	57-10012	a16843	1152
8/12/76	Town of Alta	57-10013	a16844	296.8
12/18/79	John D. Cahill	57-10014	a16845	.221
5/22/63	The Canyonlands	57-10015	a16846	15.75

*Review of  
 being from  
 applied 0.25%  
 mt*

BIG COTTONWOOD  
 PERMANENT CHANGE APPLICATIONS

DATE	NAME	WATER RIGHT NUMBER	APPLICATION NUMBER	AP QUANTITY
6/19/79	Brighton Lodge	57-10016	a16811	.52
9/20/77	Brighton LDS Camp	57-10017	a16812	15.9
8/29/89	Cardiff Fork Ass.	57-10018	a16813	10.00
6/51	Evergreen			
	Summer Homes	57-10019	a16814	6.75
8/22/95	Giles Flat Users	57-10020	a16815	7.65
Group Change:		57-10021	a16816	5.304
3/13/84	Harvey Hansen			
11/15/88	Theodore (Ted) Jones			
12/27/82	Carl S. Liljegren			
7/7/87	Armand Martin			
1/7/91	Gary G. Mills			
12/9/81	Marcia Mitchell			
11/8/83	Bruce L. Moesser			
8/22/79	William O. Adams			
12/30/76	James W. Bayles			
1/29/80	James A. Crookston			
5/1/84	Barbara L. Empey			
11/21/91	Roger Uhrhahn			
7/11/91	Lady of the Lake	57-10022	a16817	4.05
8/2/61	Mill "D" Homes	57-10023	a16818	10.35
10/4/88	Male Bollow	57-10024	a16819	11.7
6/29/83	Walter J. Plumb, III	57-10025	a16820	4.5
2/1/79	Robert R. Scott	57-10026	a16821	2.21
10/6/70	Silver Lake Ests.	57-10027	a16822	13.95
1/7/82	Timpine Water Co.	57-10028	a16823	1.768
8/17/65	John A. Ward			
	/Bear Trap	57-10029	a16824	54.9
12/1/93	Pinetree Water Co.	57-10030	a16825	18.00
7/3/62	Joy F. Dunyon			
	/Forest Glen	57-10031	a16826	29.172
7/1/71	Mount Haven Owners	57-10032	a16827	41.4
9/21/82	Bravo Ski Corp.	57-10033	a16828	144.0
8/1/63	Silver Fork			
	Pipeline	57-10034	a16829	148.5
6/26/92	Forest Service	57-10035	a16840	1.326

*Received for  
application of  
Henry 8/28/96  
57-10036 → 57-10037  
JK*

PARLEYS/LAMBS CANYON  
PERMANENT CHANGE APPLICATION

DATE	NAME	WATER RIGHT NUMBER	APPLICATION NUMBER	AF QUANTITY
6/17/86	Forest Homes	57-10036	a16786	29.0
Group Change:		57-10037	a16787	4.301
7/31/75	Morse E. Anderson			
11/25/81	Robert D. Witmer			
2/27/79	Al John Walkowski			
8/25/81	Alvin L. Smith			
10/15/81	Mary Bohn			
10/5/82	Ron Smith			
4/13/80	Roy Heagren			
6/7/79	Derald Smith			
7/18/78	A. Grant Holman			
1/7/91	Beehive-Wasatch Bowhunters, Inc.			
1/20/84	Beckstead	57-10038	a16788	<sup>10</sup> 10.87
12/11/90	Lost Acres	57-10039	a16789	6.74

*Received at  
 being from applica  
 8/20/98 mt*

HILLCREEK CANYON  
 PERMANENT CHANGE APPLICATIONS

DATE	NAME	WATER RIGHT NUMBER	APPLICATION NUMBER	AF QUANTITY
<i>9/28/94</i> 11/17/94	Porter Fork Summer Home	57-10040	a16836	7.75
8/9/88	Alan Erandsen	57-10041	a16837	5.304
6/28/92	Forest Service	57-10042	a16838	1.768
9/21/94	Boy Scouts	57-10100	a19448	3.0

# **EXHIBIT 8**

**Water Rates: July 1, 2013**

*Minimum charge for service based on meter size before consumption*

Meter size	City Per Day	County Per Day	Monthly City	Monthly County
5/8-1"	\$0.3003	\$0.3962	\$9.14	\$12.06
1.5"	\$0.3548	\$0.4659	\$10.80	\$14.18
2"	\$0.3851	\$0.5069	\$11.72	\$15.43
3"	\$0.6462	\$0.8598	\$19.67	\$26.17
4"	\$0.6919	\$0.9212	\$21.06	\$28.04
6"	\$0.9988	\$1.3355	\$30.40	\$40.65
8"	\$1.7955	\$2.4118	\$54.65	\$73.41
10"	\$3.3301	\$4.4830	\$101.36	\$136.45
Fire hydrant meters	\$6.5708	\$8.8706	\$200.00	\$270.00

**Units of measure 1 unit = 100 cubic feet of water or 748 gallons in a unit**

Each customer is measured in units and charged consumption based on the cost per unit in each block if a City or County Customer. Meter size cost per month is added as shown above to the consumption amounts.

***Charges based on Consumption: 4 tier conservation rate structure for April thru October***

<b><u>Residential</u></b>	<b><u>Block1</u></b>		<b><u>Block2</u></b>		<b><u>Block3</u></b>		<b><u>Block 4</u></b>	
	<u>City</u>	<u>County</u>	<u>City</u>	<u>County</u>	<u>City</u>	<u>County</u>	<u>City</u>	<u>County</u>
	\$1.01	\$1.36	\$1.55	\$2.09	\$2.14	\$2.89	\$2.25	\$3.03
Single	1 Thru 10		11 Thru 30		31 Thru 70		70 & above	
Duplex	1 Thru 13		14 Thru 30		31 Thru 70		71 & Above	
Triplex	1 Thru 16		17 Thru 30		31 Thru 70		71 & Above	
Fourplex	1 Thru awc		100% to 300% awc		300% To 700% awc		700% awc & above	
Commercial	1 Thru awc		100% to 300% awc		300% To 700% awc		700% awc & above	

**Note:** AWC is the Average winter water consumption and varies with each commercial customer

**Winter: All consumption bills at lowest rate including monthly meter base fee**

<u>City</u>	<u>County</u>	November to March
\$1.01	\$1.36	

# **EXHIBIT 9**

SHAWN E. DRANEY (A4026)  
SCOTT H. MARTIN (A7750)  
SNOW, CHRISTENSEN & MARTINEAU  
10 Exchange Place, Eleventh Floor  
Salt Lake City, Utah 84111  
Telephone: (801) 521-9000  
Telecopy: (801) 363-0400

JOHN H. MABEY, JR. (A4625)  
DAVID C. WRIGHT (A5566)  
MABEY & WRIGHT, LLC  
265 East 100 South, #300  
Salt Lake City, Utah 84111  
Telephone: (801) 359-3663  
Telecopy: (801) 359-2320

CHRISTOPHER E. BRAMHALL (A3996)  
Assistant City Attorney  
SALT LAKE CITY, LAW DEPARTMENT  
451 South State Street, Room 505  
Salt Lake City, Utah 84111  
Telephone: (801) 535-7788

BRYCE D. MCEUEN (A2182)  
Assistant City Attorney  
SANDY CITY CORPORATION  
10000 Centennial Parkway  
Sandy, Utah 84070  
Telephone: (801) 568-7170

Attorneys for Petitioner Salt Lake City

Attorneys for Petitioner Sandy City

---

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

SALT LAKE DEPARTMENT, STATE OF UTAH

---

IN THE MATTER OF THE GENERAL  
DETERMINATION OF THE RIGHTS TO  
THE USE OF ALL THE WATER, BOTH  
SURFACE AND UNDERGROUND, WITHIN  
THE DRAINAGE AREA OF UTAH LAKE  
AND JORDAN RIVER IN UTAH, SALT  
LAKE, DAVIS, SUMMIT, WASATCH,  
SANPETE AND JUAB COUNTIES;

SALT LAKE CITY CORPORATION and  
SANDY CITY, Utah Municipal Corporations,

Petitioners,

vs.

KEVIN TOLTON, M.D., MARK C. HAIK,  
JUDITH MAACK, WILLIAM S. HOGE, Utah  
residents, BUTLER MANAGEMENT  
GROUP, a Utah Limited Partnership, and  
MARVIN A. MELVILLE, a Utah resident,  
individually and as Trustee of the MARVIN A.  
MELVILLE TRUST, a Utah trust.

Respondents.

---

RESPONSE DUE BY PWBG&L  
July 22, 2005

MEMORANDUM IN SUPPORT OF  
MOTION TO CONSOLIDATE *AMK*

**Consolidated Cases:**

Case No. 360057298 (Subcase No. 57-General)  
Case No. 050911311

Judge Timothy R. Hanson

LITTLE COTTONWOOD CREEK  
AREA 57

## INTRODUCTION

These are two cases based on substantially identical facts, substantially identical questions of law and nearly identical parties. Petitioners Sandy City and Salt Lake City filed their joint petition for interlocutory decree in the Little Cottonwood Creek Subcase of the Utah Lake/Jordan River Water Right General Adjudication pursuant to Utah Code Ann. § 73-4-24 on June 3, 2005. The case number is 360057298. The Respondents, in part reacting to the Petitioners' joint petition, filed their own separate action on June 24, 2005. It was assigned to Judge Peuler. The case number is 050911311. A copy of the Complaint is attached hereto at Tab A.

Under Rule 42(a), a Motion to Consolidate is brought before the judge assigned to the first case filed. Likewise, should the Motion be granted, the cases are consolidated into the first case filed. Petitioners request this relief.

## ARGUMENT

### POINT I

#### **UNDER RULE 42(a), THESE IDENTICAL ACTIONS SHOULD BE CONSOLIDATED INTO THE CASE BEFORE JUDGE HANSON**

Rule 42(a) reads:

*Consolidation.* When actions involving a common question of law or fact are pending before the Court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(a)(1) A motion to consolidate cases shall be heard by the judge assigned to the first case filed. Notice of a motion to consolidate cases shall be given to all parties in each case. The order denying or granting the motion shall be filed in each case.

(a)(2) If a motion to consolidate is granted, the case number of the first case filed shall be used for all subsequent papers and the case shall be heard by the judge assigned to the first case. The presiding judge may assign the case to another judge for good cause.

*Utah R. Civ. P. 42(a); see, e.g., Lignell v. Berg, 593 P.2d 800, 806 (Utah 1979) (Trial court is free to consolidate cases under Rule 42(a) as it sees fit subject only to an abuse of discretion standard).*

Both cases involve the substantially identical issue of competing claims to title to a portion of a decreed Little Cottonwood Creek water right. Petitioners section 24 joint petition reads:

This Petition seeks the adjudication of conflicting claims to the ownership of certain Little Cottonwood Creek water rights [Water Right Number 57-7800, as a portion of the South Despain Ditch decreed right]. Petitioners and Respondents claim through a common root of title, but the title of Petitioners is superior, and the Respondents have no title.

*See, Joint Petition for Interlocutory Decree, ¶ 5. Likewise, Plaintiffs' (Respondents) Complaint reads:*

This action concerns title to and the right to possession of a decreed Little Cottonwood Creek water right [Water Right Number 57-7800 from the South Despain Ditch water right]... .

*See, Complaint, ¶ 4.*

The facts are substantially the same. The applicable law is substantially same. As such, this case should be consolidated into "the first case filed" which is the general adjudication subcase before Judge Hanson.

///

///

///

///

**CONCLUSION**

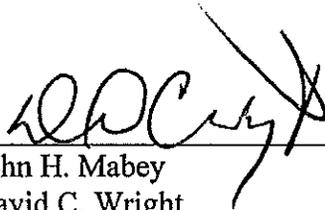
Based on the foregoing, petitioners respectfully request this Court consolidate the Judge Peuler action into Case No. 360057298, Subcase 57-General.

Respectfully submitted this 5<sup>TH</sup> day of July, 2005.

**SNOW, CHRISTENSEN & MARTINEAU**

By:   
\_\_\_\_\_  
Shawn E. Draney  
Scott H. Martin  
Attorneys for Petitioner Salt Lake City

**MABEY & WRIGHT, LLC**

By:   
\_\_\_\_\_  
John H. Mabey  
David C. Wright  
Attorneys for Petitioner Sandy City

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO CONSOLIDATE** to be mailed first-class, U.S. mail, postage prepaid, on the 5 day of July, 2005, to the following:

Daniel A. Jensen  
PARR WADDOUPS BROWN GEE & LOVELESS  
185 South State, #1300  
Salt Lake City, Utah 84111



---

# **EXHIBIT 10**

**MONDAY, NOVEMBER 18, 2013**

Minutes of the 775<sup>th</sup> meeting of the Metropolitan Water District of Salt Lake & Sandy

The Board Meeting of the Metropolitan Water District of Salt Lake & Sandy on Monday, November 18, 2013 began at 4:30 p.m. in the District's Board Room located at 3430 East Danish Road, Cottonwood Heights, Utah 84093.

The following Trustees were present:

John S. Kirkham	-Chair
Tom Godfrey	-Vice Chair
Lee Kapaloski	-Secretary
Patricia Comarell	-Trustee
Donald Y. Milne	-Trustee

Excused:

David L. Buhler	-Trustee
Kathy W. Loveless	-Trustee

Also present:

Michael Wilson, General Manager  
Mike DeVries, Information Services Manager/Assistant General Manager  
Wayne Winsor, Engineering & Maintenance Manager  
Cláudia Wheeler, Environmental Services Manager  
Annalee Munsey, Administrative Supervisor  
Sonya Shepherd, Accountant  
Gardner Olson, Project Engineer  
Shawn Draney, Snow Christensen & Martineau  
Dani Cepernich, Snow Christensen & Martineau  
Shane Pace, Sandy City Public Utilities  
Jeff Niermeyer, Salt Lake City Public Utilities  
Tom Ward, Salt Lake City Public Utilities  
Laura Briefer, Salt Lake City Public Utilities  
Keith Denos, Provo River Water Users Association  
Chris Finlinson, Central Utah Water Conservancy District  
Bart Forsyth, Jordan Valley Water Conservancy District  
Mike Collins, Bowen Collins & Associates  
Tim Bardsley, Western Water Assessment

**Board Meeting Agenda**

1. Call to order
2. Public comment
3. Engineering Committee report
  - a. Consider approval of Terminal Reservoir Replacement Project change order to Alder Construction for replacement of existing pipelines.
  - b. Consider approval of self-help in Loridan Lane area
  - c. Reporting items
4. Tree Ring Reconstruction presentation—Salt Lake City/Western Water Assessment
5. Consider resolution regarding watershed planning
6. Consider acceptance of financial reports
7. Consider approval of Board Meeting minutes dated October 21, 2013
8. Reporting/Scheduling items
9. Other Business
10. Items to be discussed at future meetings
11. Closed session
12. Adjourn

## **Board Meeting**

### **Call to order**

At 4:40 p.m. the Chair called the meeting to order and welcomed board members, staff and guests. All board members were present except Ms. Loveless and Mr. Buhler who were excused.

### **Public comment**

The Chair invited any public comment and no comments were made.

### **Tree Ring Reconstruction presentation—Salt Lake City/Western Water Assessment**

Ms. Laura Briefer and Mr. Tim Bardsley presented the findings from their study titled "Planning for an Uncertain Future: Climate Change Sensitivity Assessment toward Adaptation Planning for Public Water Supply." Their research explored the impact of different weather conditions and the reliability of Salt Lake City's water supply systems.

### **Consider approval of Terminal Reservoir Replacement Project change order to Alder Construction for replacement of existing pipelines.**

The board discussed at length the original installation of the Sam Park bypass line and the funding for its replacement. The engineer recommends that approximately 300 lineal feet of existing Sam Park bypass pipe be replaced with 3/8-inch wall welded steel pipe with cement mortar lining and cement mortar coating.

Ms. Comarell motioned to approve Change Order No. 15 for the replacement of Sam Park Reservoir 48-inch bypass pipeline in the amount of \$325,019.91; Mr. Godfrey seconded the motion, and the motion passed unanimously.

### **Consider approval of self-help in Loridan Lane area**

Since 2010, the Loridan Lane area (Tract 411) has presented a series of challenges. Attempts to resolve unauthorized, unacceptable encroachments have been met with resistance, some disregard or procrastinated cooperation. Despite the challenges, only 5 affected property owners remain to be licensed. Staff desires to use self-help to remove trees within 20-feet of the SLA centerline as well as concrete flatwork, trampoline, and a basketball standard that are on the District's property. The Engineering Committee met prior to the Board Meeting and discussed at length the unauthorized use of District property.

Mr. Kapaloski motioned to approve self-help in Loridan Lane area but any costs that are incurred by the District would be recovered through a contractual relationship, if and when the homeowner requests to use the District's property; Ms. Comarell seconded the motion. All board members voted unanimously, except Mr. Kirkham who abstained from voting.

The Chair requested that legal counsel consider obtaining written permission from the homeowner in order to gain access to the District's property, prior to self-help.

### **Engineering Committee Reporting Items**

The Chair referred the board members to the Engineering Committee reporting items included in the Board packet. The Engineering Committee met prior to the board meeting and discussed the proposed removal of approximately 3,000 trees along the Jordan Aqueduct corridor. The District will be involved in these discussions. Mr. Wilson reported that a meeting has been scheduled with UDOT (Utah Department of Transportation) to discuss an agreement regarding the seventeen crossings of the Salt Lake Aqueduct.

### **Consider resolution regarding watershed planning**

The District is involved in the Wasatch Summit Program which is a three to five year public process that seeks to identify issues and make critical decisions regarding the future of the

Wasatch Mountains. The UTA (Utah Transportation Authority) is the lead agency for the Wasatch Summit process. Mr. Wilson reviewed the proposed resolution regarding watershed planning. The purpose of the resolution is to establish the District's perspective on current watershed planning efforts and outline its perspectives and reasons for participating in the Wasatch Summit planning process. The resolution has been forwarded to Salt Lake City and Sandy City representatives for their input. The board provided input on the resolution and further discussion will take place in the January board meeting.

Mr. Kapaloski was excused at 6:13 p.m.

**Consider acceptance of financial reports**

Mr. Godfrey motioned to accept the October 2013 financial reports; Ms. Comarell seconded the motion, and the motion passed unanimously.

**Consider approval of Board Meeting minutes dated October 21, 2013**

Mr. Godfrey motioned to approve the Board Meeting Minutes dated October 21, 2013; Ms. Comarell seconded the motion and it passed unanimously.

**Reporting/Scheduling items**

As part of ongoing rating surveillance, a phone call with Fitch Ratings has been scheduled for November 20, 2013.

**Other Business**

No other business was discussed.

**Closed session**

Mr. Draney deemed it appropriate to go into closed session to discuss pending or imminent litigation and to discuss the deployment of security personnel, devices, or systems. Mr. Godfrey motioned to go into closed session; Ms. Comarell seconded the motion and it passed unanimously. Staff and guests were excused. All other board members, except Mr. Kapaloski, Mr. Buhler, and Ms. Loveless, were present including Mr. Draney, Mr. Wilson, Mr. DeVries, Mr. Winsor, Ms. Wheeler and Ms. Munsey.

Mr. Milne moved to go out of closed session; Ms. Comarell seconded the motion and the motion carried unanimously.

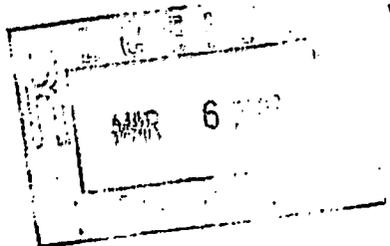
**Adjourn**

At 6:45 p.m. the meeting adjourned.

  
Chair

  
Secretary

# **EXHIBIT 11**



LAW OFFICES OF

**MABEY & WRIGHT, LLC**

265 East 100 South #300 Salt Lake City, Utah 84111  
Phone: (801) 359-3663 Fax: (801) 359-2320

Salt Lake City Public Utilities  
c/o Jeff Niermeyer  
1530 South West Temple  
Salt Lake City, Utah 84115

February 28, 2006  
File #: 208-002  
Inv #: 4608

The Silver Lake Company

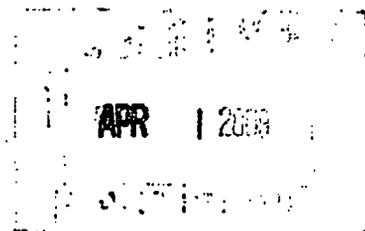
<i>Date</i>	<i>Description</i>	<i>Attorney</i>	<i>Hours</i>	<i>Amount</i>
Feb-06-06	Worked on Silver Lake Co. water rights.	JHM	0.60	105.00
Feb-07-06	Prepared for and attended meeting regarding Butler Ditch and Big Cott. Creek matters.	JHM	3.00	525.00
	<b>Totals</b>		<b>3.60</b>	<b>\$630.00</b>
	<b>Total Fees &amp; Disbursements</b>			<b>\$630.00</b>
	Previous Balance			\$0.00
	Interest on Past Due Balance			\$0.00
	Previous Payments			\$0.00
	Transferred from Trust			\$0.00
	<b>Balance Due Now</b>			<b>\$630.00</b>

*Does not reflect payments or charges after the billing date or services rendered other than on the matter(s) referred to herein. Interest at 12% charged on amounts over 30 days past due.*

*Approved  
3/7/06  
Jeff Niermeyer*

SNOW, CHRISTENSEN & MARTINEAU

A Professional Corporation  
10 Exchange Place, Eleventh Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145-5000  
Telephone (801) 521-9000  
Facsimile (801) 363-0400  
www.scmfaw.com



Salt Lake City Corporation  
Attention: Jeff Niermeyer  
1530 South West Temple  
Salt Lake City, UT 84115

March 31, 2009  
Invoice #319505

Int. Rev. No. 87-0298631

Duns. No. 08-532-3715

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REMITTANCE PAGE

Matter Name: Tolton, Mark C. and David Haik  
Our Matter Number: 016005-0007

Prior Balance	\$ 484.20
Payments received	( 484.20)
Balance Forward	\$ .00
<b>Invoice Total</b>	<b>7,026.45</b>
Total Account Balance	<u>\$7,026.45</u>

Approved  
Jeff Niermeyer  
4-1-09

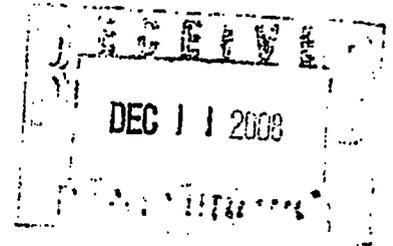
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BILLING QUESTIONS CAN BE DIRECTED TO 801-322-9308

SNOW, CHRISTENSEN & MARTINEAU

A Professional Corporation  
10 Exchange Place, Eleventh Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145-5000  
Telephone (801) 521-9000  
Facsimile (801) 363-0400  
www.scmfaw.com



Salt Lake City Corporation  
Attention: Jeff Niermeyer  
1530 South West Temple  
Salt Lake City, UT 84115

December 10, 2008  
Invoice #315934

Int. Rev. No. 87-0298631

Duns. No. 08-532-3715

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REMITTANCE PAGE

*Matter Name:* Tolton, Mark C. and David Haik  
*Our Matter Number:* 016005-0907

Prior Balance	\$1,476.00
Payments received	(1,476.00)
Balance Forward	\$ .00
<b>Invoice Total</b>	<b>484.20</b>
Total Account Balance	<u>\$ 484.20</u>

12-12-08

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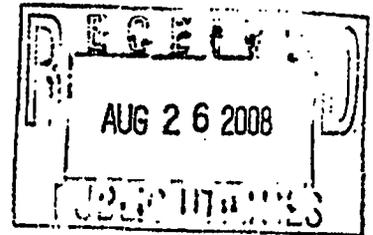
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SNOW, CHRISTENSEN & MARTINEAU

SALT LAKE CITY • ST. GEORGE

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Salt Lake City, Utah 84145-5000  
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Facsimile (801) 363-0400  
www.scmlaw.com



August 20, 2008  
Invoice #312409

Ut Lake City Corporation  
Attention: Jeff Niermeyer  
30 South West Temple  
Salt Lake City, UT 84115

Rev. No. 87-0298631

Duns. No. 08-532-3715

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REMITTANCE PAGE

Matter Name: Tolton, Mark C. and David Haik  
Our Matter Number: 016005-0007

Prior Balance	\$1,927.73
Payments received	<u>(1,927.73)</u>
Balance Forward	\$ .00
Invoice Total	1,476.00
Total Account Balance	<u>\$1,476.00</u>

*Approved*  
*[Signature]*  
9/2/8

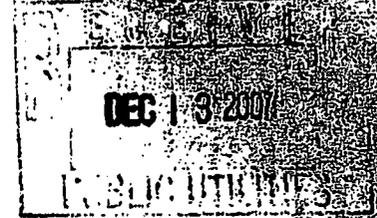
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BILLING QUESTIONS CAN BE DIRECTED TO 801-322-9308

SNOW, CHRISTENSEN & MARTINEAU

A Professional Corporation  
10 Exchange Place, Eleventh Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145-5000  
Telephone (801) 521-9000  
Facsimile (801) 363-0400  
www.scmlaw.com



Salt Lake City Corporation  
Attention: LeRoy Hooton  
1530 South West Temple  
Salt Lake City, UT 84115

December 12, 2007  
Invoice #305270

Int. Rev. No. 87-0298631

Duns. No. 08-532-3715

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REMITTANCE PAGE

*Matter Name:* Tolton, Mark C. and David Haik  
*Our Matter Number:* 016005-0007

Prior Balance	\$ 95.00
Payments received	( 95.00)
Balance Forward	\$ .00
<b>Invoice Total</b>	<b>1,927.73</b>
<b>Total Account Balance</b>	<b><u>\$1,927.73</u></b>

Approved  
12-15-07

*[Handwritten signature]*

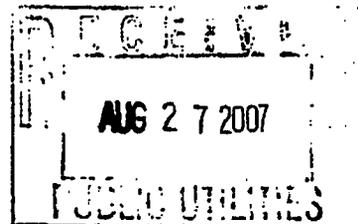
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BILLING QUESTIONS CAN BE DIRECTED TO 801-322-9308

SNOW, CHRISTENSEN & MARTINEAU

A Professional Corporation  
10 Exchange Place, Eleventh Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145-5000  
Telephone (801) 521-9000  
Facsimile (801) 363-0400  
www.scmLaw.com



Salt Lake City Corporation  
Attention: LeRoy Hooton  
1530 South West Temple  
Salt Lake City, UT 84115

August 24, 2007  
Invoice #301845

Int. Rev. No. 87-0298631

Duns. No. 08-532-3715

REMITTANCE PAGE

Matter Name: Tolton, Mark C. and David Haik  
Our Matter Number: 016005-0007

Prior Balance	\$ 47.50
Payments received	( 47.50)
Balance Forward	\$ .00
<b>Invoice Total</b>	<b>95.00</b>
Total Account Balance	<u>\$ 95.00</u>

Approved  
John J. Martineau

Please remit this page with payment

BILLING QUESTIONS CAN BE DIRECTED TO 801-322-9308

**SNOW CHRISTENSEN & MARTINEAU**

A Professional Corporation  
10 Exchange Place, Eleventh Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145-5000  
Telephone (801) 521-9000  
Facsimile (801) 363-0400  
www.scmlaw.com

JUN 4 2007

Salt Lake City Corporation  
Attention: LeRoy Hooton  
1530 South West Temple  
Salt Lake City, UT 84115

May 31, 2007  
Invoice #299373

Int. Rev. No. 87-0298631

Duns. No. 08-532-3715

---

**REMITTANCE PAGE**

*Matter Name:* Tolton, Mark C. and David Haik  
*Our Matter Number:* 016005-0007

Prior Balance	\$ 142.50
Payments received	<u>(142.50)</u>
Balance Forward	\$ .00
<b>Invoice Total</b>	<b>47.50</b>
<b>Total Account Balance</b>	<b><u>\$ 47.50</u></b>

*Approved  
PFA Manager  
6/4/07*

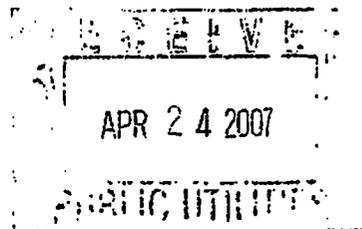
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Post Office Box 45000  
Salt Lake City, Utah 84145-5000  
Telephone (801) 521-9000  
Facsimile (801) 363-0400  
www.scmlaw.com



Salt Lake City Corporation  
Attention: LeRoy Hooton  
1530 South West Temple  
Salt Lake City, UT 84115

April 23, 2007  
Invoice #298360

Int. Rev. No. 87-0298631

Duns. No. 08-532-3715

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REMITTANCE PAGE

*Matter Name:* Tolton, Mark C. and David Haik  
*Our Matter Number:* 016005-0007

Prior Balance	\$ 95.00
Payments received	( 95.00)
Balance Forward	\$ .00
<b>Invoice Total</b>	<b>142.50</b>
Total Account Balance	<u>\$ 142.50</u>

Approved  
4-27-07  
JAH/11/07/07

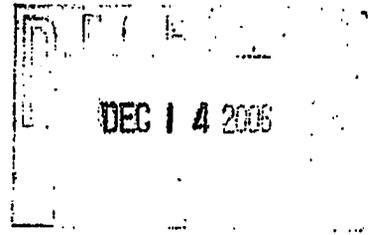
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Salt Lake City Corporation  
Attention: LeRoy Hooton  
1530 South West Temple  
Salt Lake City, UT 84115

December 13, 2006  
Invoice #294964

Int. Rev. No. 87-0298631

Duns. No. 08-532-3715

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REMITTANCE PAGE

Matter Name: Tolton, Mark C. and David Haik  
Our Matter Number: 016005-0007

Prior Balance	\$ 190.00
Payments received	( 190.00)
Balance Forward	\$ .00
Invoice Total	142.50
Less Credits on Account	( 47.50)
Total Account Balance	\$ 95.00

Approved  
J. M. [Signature]  
12/15/06

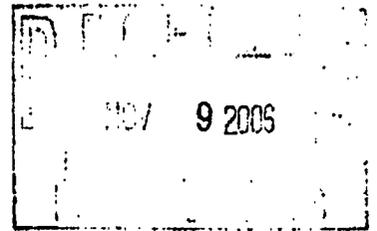
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Salt Lake City Corporation  
Attention: LeRoy Hooton  
1530 South West Temple  
Salt Lake City, UT 84115

November 7, 2006  
Invoice #294017

Int. Rev. No. 87-0298631

Duns. No. 08-532-3715

---

REMITTANCE PAGE

*Matter Name:* Tolton, Mark C. and David Haik  
*Our Matter Number:* 016005-0007

Prior Balance	\$ 95.00
Payments received	( .00)
Balance Forward	\$ 95.00 pd.
<b>Invoice Total</b>	<b>47.50</b>
Total Account Balance	<u>\$ 142.50</u>

*J. J. M...*

11-14-06

OK

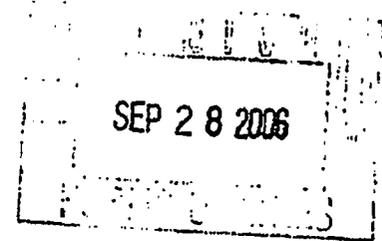
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Salt Lake City Corporation  
Attention: LeRoy Hooton  
1530 South West Temple  
Salt Lake City, UT 84115

September 25, 2006  
Invoice #292497

Int. Rev. No. 87-0298631

Duns. No. 08-532-3715

---

REMITTANCE PAGE

*Matter Name:* Tolton, Mark C. and David Haik  
*Our Matter Number:* 016005-0007

Prior Balance	\$ 280.00
Payments received	<u>( 280.00)</u>
Balance Forward	\$ .00
<b>Invoice Total</b>	<b>95.00</b>
Total Account Balance	<u>\$ 95.00</u>

*[Handwritten Signature]*

*10/3/06*

*Approved.*

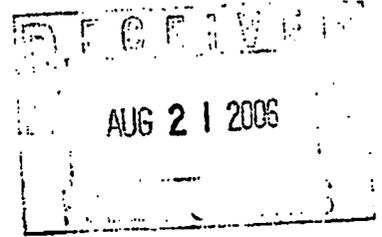
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Salt Lake City Corporation  
Attention: LeRoy Hooton  
1530 South West Temple  
Salt Lake City, UT 84115

August 17, 2006  
Invoice #291361

Int. Rev. No. 87-0298631

Duns. No. 08-532-3715

REMITTANCE PAGE

Matter Name: Tolton, Mark C. and David Haik  
Our Matter Number: 016005-0007

Prior Balance	\$ 185.00
Payments received	( .00)
Balance Forward	\$ 185.00 pd
Invoice Total	95.00
Total Account Balance	<del>\$ 280.00</del>

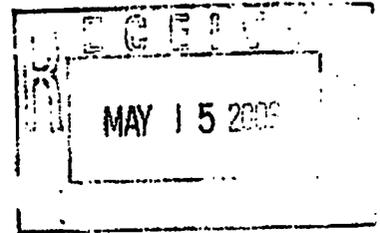
Approved  
A. Hooton  
8/21/06

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SALT LAKE CITY CORPORATION  
ATTENTION: LEROY HOOTON  
1530 SOUTH WEST TEMPLE  
SALT LAKE CITY, UT 84115

May 12, 2006  
Invoice #288734

Int. Rev. No. 87-0298631

Duns. No. 08-532-3715

REMITTANCE PAGE

Matter Name: Tolton, Mark C. and David Haik  
Our Matter Number: 016005-0007

Prior Balance	\$ 958.75
Payments received	(457.50)
Balance Forward	<del>\$ 501.25</del> paid
Invoice Total	1,507.50
Total Account Balance	<del>\$2,008.75</del>

check  
as this  
in voice

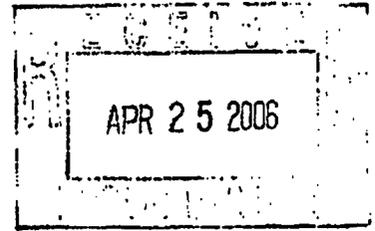
Approved  
5/15/06  
977 [signature]

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SALT LAKE CITY CORPORATION  
ATTENTION: LEROY HOOTON  
1530 SOUTH WEST TEMPLE  
SALT LAKE CITY, UT 84115

April 24, 2006  
Invoice #288104

Int. Rev. No. 87-0298631

Duns. No. 08-532-3715

REMITTANCE PAGE

Matter Name: Tolton, Mark C. and David Haik  
Our Matter Number: 016005-0007

Prior Balance	\$ 457.50
Payments received	( .00)
Balance Forward	<del>\$ 457.50</del> pd.
Invoice Total	<u>501.25</u>
Total Account Balance	<del>\$ 958.75</del>

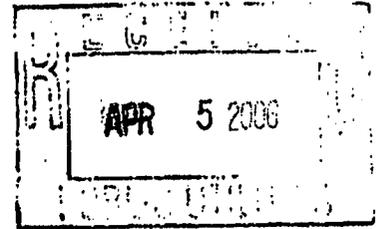
4/25/06  
Jeff Mena  
Approved

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SALT LAKE CITY CORPORATION  
ATTENTION: LEROY HOOTON  
1530 SOUTH WEST TEMPLE  
SALT LAKE CITY, UT 84115

March 31, 2006  
Invoice #287528

Int. Rev. No. 87-0298631

Duns. No. 08-532-3715

---

REMITTANCE PAGE

Matter Name: Tolton, Mark C. and David Haik  
Our Matter Number: 016005-0007

Prior Balance	\$1,705.15
Payments received	(1,705.15)
Balance Forward	\$ .00
Invoice Total	<u>457.50</u>
Total Account Balance	<u>\$ 457.50</u>

*Approved  
A. Hooton  
4/4/06*

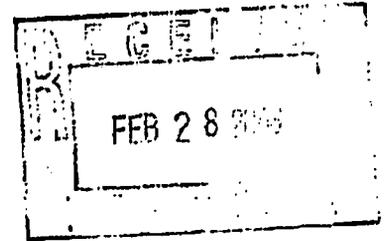
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**SALT LAKE CITY CORPORATION  
ATTENTION: LEROY HOOTON  
1530 SOUTH WEST TEMPLE  
SALT LAKE CITY, UT 84115**

February 27, 2006  
Invoice #286673

Int. Rev. No. 87-0298631

Duns. No. 08-532-3715

---

**REMITTANCE PAGE**

*Matter Name:* Tolton, Mark C. and David Haik  
*Our Matter Number:* 016005-0007

Prior Balance	\$7,677.40
Payments received	<u>(7,677.40)</u>
Balance Forward	\$ .00
<b>Invoice Total</b>	<b>1,705.15</b>
<b>Total Account Balance</b>	<b><u>\$1,705.15</u></b>

*Approved*  
*2-28-06*  
*D. Hooton*

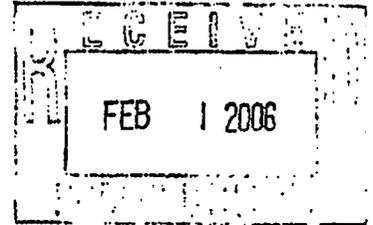
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SALT LAKE CITY CORPORATION  
ATTENTION: LEROY HOOTON  
1530 SOUTH WEST TEMPLE  
SALT LAKE CITY, UT 84115

January 31, 2006  
Invoice #286021

Int. Rev. No. 87-0298631

Duns. No. 08-532-3715

---

REMITTANCE PAGE

*Matter Name:* Tolton, Mark C. and David Haik  
*Our Matter Number:* 016005-0007

Prior Balance	\$ 608.52
Payments received	<u>( 608.52)</u>
Balance Forward	\$ .00
<b>Invoice Total</b>	<b>7,677.40</b>
Total Account Balance	<u><b>\$7,677.40</b></u>

*Approved*  
*[Signature]*  
*2-1-06*

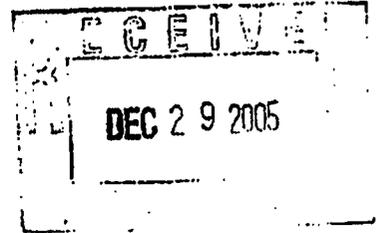
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SALT LAKE CITY CORPORATION  
ATTENTION: LEROY HOOTON  
1530 SOUTH WEST TEMPLE  
SALT LAKE CITY, UT 84115

December 28, 2005  
Invoice #285105

Int. Rev. No. 87-0298631

Duns. No. 08-532-3715

---

REMITTANCE PAGE

*Matter Name:* Tolton, Mark C. and David Haik  
*Our Matter Number:* 016005-0007

Prior Balance	\$10,783.17
Payments received	<u>(10,783.17)</u>
Balance Forward	\$ .00
Invoice Total	608.52
Total Account Balance	<u>\$ 608.52</u>

**A** APPROVED **D**  
DEC 29 2005  
PUBLIC UTILITIES  
*[Signature]*

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NOV 22 2005

SALT LAKE CITY CORPORATION  
ATTENTION: LEROY HOOTON  
1530 SOUTH WEST TEMPLE  
SALT LAKE CITY, UT 84115

November 18, 2005  
Invoice #283957

Int. Rev. No. 87-0298631

Duns. No. 08-532-3715

---

REMITTANCE PAGE

*Matter Name:* Tolton, Mark C. and David Haik  
*Our Matter Number:* 016005-0007

Prior Balance	\$2,202.43
Payments received	<u>(2,202.43)</u>
Balance Forward	\$ .00
Invoice Total	10,783.17
Total Account Balance	<u>\$10,783.17</u>

Approved  
J. Morgan  
11/22/05

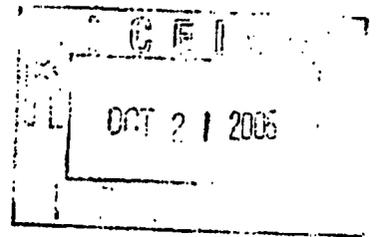
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SALT LAKE CITY CORPORATION  
ATTENTION: LEROY HOOTON  
1530 SOUTH WEST TEMPLE  
SALT LAKE CITY, UT 84115

October 20, 2005  
Invoice #282851

Int. Rev. No. 87-0298631

Duns. No. 08-532-3715

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REMITTANCE PAGE

*Matter Name:* Tolton, Mark C. and David Haik  
*Our Matter Number:* 016005-0007

Prior Balance	\$1,602.40
Payments received	<u>(1,602.40)</u>
Balance Forward	\$ .00
Invoice Total	2,202.43
Total Account Balance	<u>\$2,202.43</u>

*Approved*  
*10/20/05*  
*[Signature]*

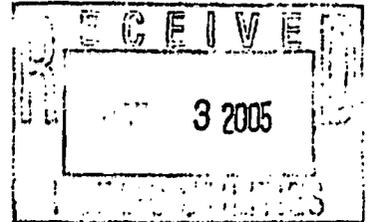
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SALT LAKE CITY CORPORATION  
ATTENTION: LEROY HOOTON  
1530 SOUTH WEST TEMPLE  
SALT LAKE CITY, UT 84115

September 28, 2005  
Invoice #282363

Int. Rev. No. 87-0298631

Duns. No. 08-532-3715

---

REMITTANCE PAGE

Matter Name: Tolton, Mark C. and David Haik  
Our Matter Number: 016005-0007

Prior Balance	\$2,494.30
Payments received	<u>(2,494.30)</u>
Balance Forward	\$ .00
Invoice Total	1,602.40
Total Account Balance	<u>\$1,602.40</u>

Approved  
J. Hooton  
10/3/05

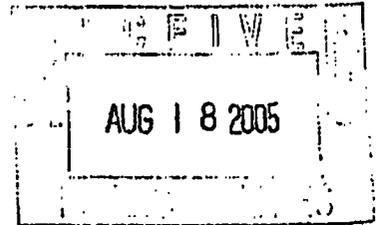
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SALT LAKE CITY CORPORATION  
ATTENTION: LEROY HOOTON  
1530 SOUTH WEST TEMPLE  
SALT LAKE CITY, UT 84115

August 16, 2005  
Invoice #281037

Int. Rev. No. 87-0298631

Duns. No. 08-532-3715

---

REMITTANCE PAGE

*Matter Name:* Tolton, Mark C. and David Haik  
*Our Matter Number:* 016005-0007

Prior Balance	\$4,451.55
Payments received	<u>(4,451.55)</u>
Balance Forward	\$ .00
Invoice Total	2,494.30
Total Account Balance	<u>\$2,494.30</u>

*Approved*  
*J. Mervyn*  
*8/19/05*

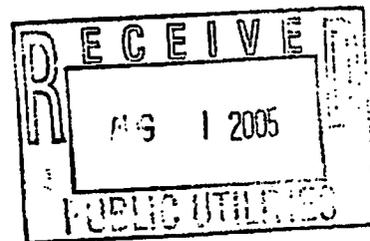
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SALT LAKE CITY CORPORATION  
ATTENTION: LEROY HOOTON  
1530 SOUTH WEST TEMPLE  
SALT LAKE CITY, UT 84115

July 29, 2005  
Invoice #280502

Int. Rev. No. 87-0298631

Duns. No. 08-532-3715

---

REMITTANCE PAGE

*Matter Name:* Tolton, Mark C. and David Haik  
*Our Matter Number:* 016005-0007

Prior Balance	\$3,361.75
Payments received	<u>(3,361.75)</u>
Balance Forward	\$ .00
<b>Invoice Total</b>	<b>4,451.55</b>
Total Account Balance	<u>\$4,451.55</u>

8/2/05  
Approved  
J. N. [Signature]

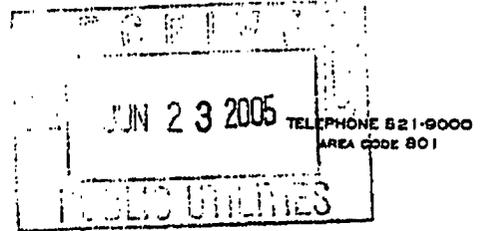
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REV. NO. 87-0298631  
LANS NO 08-532-3715

STATEMENT OF ACCOUNT  
LAW OFFICES  
**SNOW, CHRISTENSEN & MARTINEAU**  
10 EXCHANGE PLACE, ELEVENTH FLOOR  
POST OFFICE BOX 45000  
SALT LAKE CITY, UTAH 84145-5000



June 22, 2005  
Invoice #279596

SALT LAKE CITY CORPORATION  
ATTENTION: LEROY HOOTON  
1530 SOUTH WEST TEMPLE  
SALT LAKE CITY, UT 84115

Re: Tolton, Mark C. and David Haik  
Our Matter Number: 016005-0007

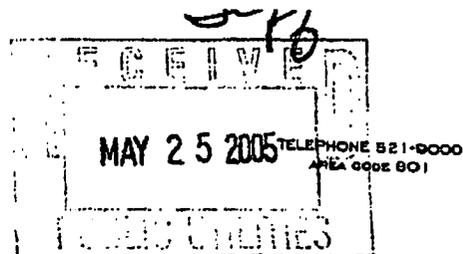
Balance from Previous Statement	\$2,517.25
Payments Received	<u>(2,517.25)</u>
Balance Forward	.00
<b>Invoice Total</b>	<b>3,361.75</b>
Account Balance as of 06/22/05 (including unpaid amounts previously invoiced)	<u>\$3,361.75</u>

*Approved*  
*J. Martineau*  
*6/22/05*

REMITTANCE PAGE  
PLEASE INCLUDE WITH PAYMENT

STATEMENT OF ACCOUNT

LAW OFFICES  
**SNOW, CHRISTENSEN & MARTINEAU**  
10 EXCHANGE PLACE, ELEVENTH FLOOR  
POST OFFICE BOX 45000  
SALT LAKE CITY, UTAH 84145-5000



May 23, 2005  
Invoice #278625

SALT LAKE CITY CORPORATION  
ATTENTION: LEROY HOOTON  
1530 SOUTH WEST TEMPLE  
SALT LAKE CITY, UT 84115

Re: Tolton, Mark C. and David Haik  
Our Matter Number: 016005-0007

Balance from Previous Statement	\$ 350.00
Payments Received	( 350.00)
Balance Forward	.00

Invoice Total 2,517.25

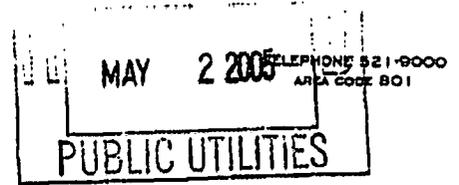
Account Balance as of 05/23/05  
(including unpaid amounts previously invoiced) \$2,517.25

REMITTANCE PAGE  
PLEASE INCLUDE WITH PAYMENT

REV. NO. 87-0298631  
DUNS NO 08-532-3715

STATEMENT OF ACCOUNT

LAW OFFICES  
**SNOW, CHRISTENSEN & MARTINEAU**  
10 EXCHANGE PLACE, ELEVENTH FLOOR  
POST OFFICE BOX 45000  
SALT LAKE CITY, UTAH 84145-5000



April 27, 2005  
Invoice #277714

SALT LAKE CITY CORPORATION  
ATTENTION: LEROY HOOTON  
1530 SOUTH WEST TEMPLE  
SALT LAKE CITY, UT 84115

Re: Tolton, Mark C. and David Haik  
Our Matter Number: 016005-0007

Balance from Previous Statement	\$ 393.75
Payments Received	<u>( 393.75)</u>
Balance Forward	.00
Invoice Total	350.00
Account Balance as of 04/27/05	<u>\$ 350.00</u>
(including unpaid amounts previously invoiced)	

*Approved for Payment*  
*Leroy W. Hooton*

REMITTANCE PAGE  
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SNOW, CHRISTENSEN & MARTINEAU

MAR 1 2005

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 David W. Slagle  
 C. Dennis Norton  
 Allan L. Larson  
 John E. Gates  
 R. Brent Stephens  
 Kim R. Wilson  
 Michael R. Carlston  
 David G. Williams  
 Rex E. Madsen  
 Max D. Wheeler  
 David W. Slaughter  
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 Judith D. Wolferts  
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 Sam Harkness  
 David F. Mull  
 Bryan M. Scott  
 P. Matthew Cox  
 Derek J. Williams  
 Ryan B. Bell

A Professional Corporation  
 10 Exchange Place, Eleventh Floor  
 Post Office Box 45000  
 Salt Lake City, Utah 84145-5000  
 Telephone (801) 521-9000  
 Facsimile (801) 363-0400  
 www.scmlaw.com

Thurman & Sutherland 1886  
 Thurman, Sutherland & King 1888  
 Thurman, Wedgwood & Irvine 1906  
 Irvine, Skeen & Thurman 1923  
 Skeen, Thurman, Worsley & Snow 1952  
 Worsley, Snow & Christensen 1967  
 John H. Snow 1917-1980  
 Of Counsel  
 Harold G. Christensen  
 Joseph Novak

To Contact Writer:  
 (801) 322-9138

February 28, 2005

John Robert Carman  
 Mike Wilson  
 Metropolitan Water District of Salt Lake & Sandy  
 3430 E. Danish Road  
 Sandy, UT 84093

Shane Pace  
 Pat Casaday  
 Sandy City Public Utilities  
 10000 Centennial Parkway  
 Sandy, UT 84070

G. Keith Denos  
 Provo River Water Users Association  
 285 West 1100 North  
 Pleasant Grove, UT 84062

Jeff Niermeyer  
 Salt Lake City Public Utilities  
 1530 So. West Temple  
 Salt Lake City, UT 84115

Re: Salt Lake City Suburban Sanitary District #1  
 Legal Services - Snow, Christensen & Martineau

Dear Gentlemen:

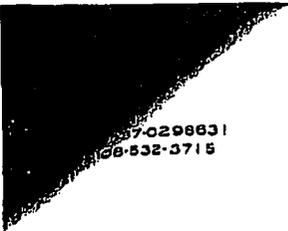
Enclosed please find Invoice #275741 addressed to Metropolitan Water District of Salt Lake & Sandy for fees and costs for the month of January 2005 in the amount of \$4,046.85. Please remit your 1/4 share in the amount of \$1,011.71 to Snow, Christensen & Martineau. If you have any questions concerning the statement, please do not hesitate to call.

Very truly yours,

SNOW, CHRISTENSEN & MARTINEAU

*Approved  
 & Forwarded  
 3/1/05*

*Shawn Draney*  
 Shawn E. Draney 152



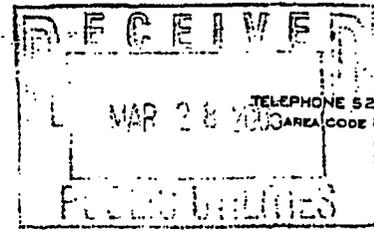
87-0298831  
88-532-3715

STATEMENT OF ACCOUNT

LAW OFFICES

**SNOW, CHRISTENSEN & MARTINEAU**

10 EXCHANGE PLACE, ELEVENTH FLOOR  
POST OFFICE BOX 45000  
SALT LAKE CITY, UTAH 84145-5000



March 24, 2005  
Invoice #276638

SALT LAKE CITY CORPORATION  
ATTENTION: LEROY HOOTON  
1530 SOUTH WEST TEMPLE  
SALT LAKE CITY, UT 84115

*Re:* Tolton, Mark C. and David Haik  
*Our Matter Number:* 016005-0007

Balance from Previous Statement	\$ 87.50
Payments Received	<u>( 87.50)</u>
Balance Forward	.00
<b>Invoice Total</b>	<b>393.75</b>
Account Balance as of 03/24/05	<u>\$ 393.75</u>
(including unpaid amounts previously invoiced)	

*Asst Manager*  
*3/29/05*

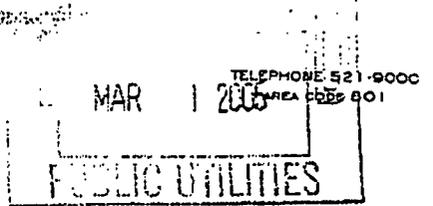
REMITTANCE PAGE  
PLEASE INCLUDE WITH PAYMENT

STATEMENT OF ACCOUNT

LAW OFFICES

**SNOW, CHRISTENSEN & MARTINEAU**

10 EXCHANGE PLACE, ELEVENTH FLOOR  
POST OFFICE BOX 45000  
SALT LAKE CITY, UTAH 84145-5000



298631  
2-3715

February 25, 2005  
Invoice #275744

SALT LAKE CITY CORPORATION  
ATTENTION: LEROY HOOTON  
1530 SOUTH WEST TEMPLE  
SALT LAKE CITY, UT 84115

*Jeffery R. Thompson*  
*Approved*  
*3-1-05*  
*Approved*

Re: Mark C. and David Haik  
Our Matter Number: 016005-0007

Balance from Previous Statement	\$ 87.50
Payments Received	<u>( 87.50)</u>
Balance Forward	.00
<b>Invoice Total</b>	<b>87.50</b>
Account Balance as of 02/25/05 (including unpaid amounts previously invoiced)	<u>\$ 87.50</u>

REMITTANCE PAGE  
PLEASE INCLUDE WITH PAYMENT

STATEMENT OF ACCOUNT

LAW OFFICES  
**SNOW, CHRISTENSEN & MARTINEAU**  
10 EXCHANGE PLACE, ELEVENTH FLOOR  
POST OFFICE BOX 45000  
SALT LAKE CITY, UTAH 84145-5000

TELEPHONE 521-0000  
AREA CODE 801

October 21, 2004  
Invoice #271971

SALT LAKE CITY CORPORATION  
ATTENTION: LEROY HOOTON  
1530 SOUTH WEST TEMPLE  
SALT LAKE CITY, UT 84115

Re: Mark C. and David Haik  
Our Matter Number: 016005-0007

Balance from Previous Statement	\$6,543.95
Payments Received	<u>(6,543.95)</u>
Balance Forward	.00
<b>Invoice Total</b>	<b>87.50</b>
Account Balance as of 10/21/04	<u>\$ 87.50</u>
(including unpaid amounts previously invoiced)	

Approved  
10/26/04

Jeff Martineau

REMITTANCE PAGE  
PLEASE INCLUDE WITH PAYMENT

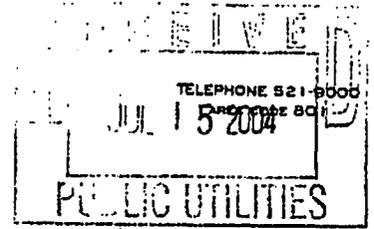
17-0298631  
8-532-3715

STATEMENT OF ACCOUNT

LAW OFFICES

**SNOW, CHRISTENSEN & MARTINEAU**

10 EXCHANGE PLACE, ELEVENTH FLOOR  
POST OFFICE BOX 45000  
SALT LAKE CITY, UTAH 84145-5000



July 14, 2004  
Invoice #268642

SALT LAKE CITY CORPORATION  
ATTENTION: LEROY HOOTON  
1530 SOUTH WEST TEMPLE  
SALT LAKE CITY, UT 84115

Re: Mark C. and David Haik  
Our Matter Number: 016005-0007

Balance from Previous Statement	\$5,523.45
Payments Received	(.00)
Balance Forward	5,523.45 pd.

**Invoice Total**

1,020.50

Account Balance as of 07/14/04  
(including unpaid amounts previously invoiced)

\$6,543.95

**APPROVED**  
JUL 15 2004  
PUBLIC UTILITIES  
*[Signature]*

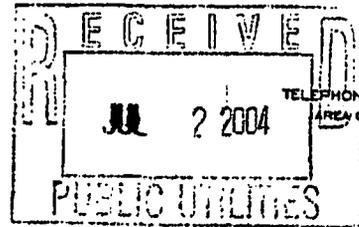
REMITTANCE PAGE  
PLEASE INCLUDE WITH PAYMENT

STATEMENT OF ACCOUNT

LAW OFFICES

**SNOW, CHRISTENSEN & MARTINEAU**

10 EXCHANGE PLACE, ELEVENTH FLOOR  
POST OFFICE BOX 45000  
SALT LAKE CITY, UTAH 84145-5000



June 30, 2004  
Invoice #268168

SALT LAKE CITY CORPORATION  
ATTENTION: LEROY HOOTON  
1530 SOUTH WEST TEMPLE  
SALT LAKE CITY, UT 84115

Re: ~~Mark C. and David Haik~~  
Our Matter Number: 016005-0007

*Talbot / Haik et al.*

Balance from Previous Statement	\$8,286.05
Payments Received	<u>(8,286.05)</u>
Balance Forward	.00
Invoice Total	5,523.45
Account Balance as of 06/30/04 (including unpaid amounts previously invoiced)	<u>\$5,523.45</u>

*Approved  
g. Meyer  
7/7/04*

REMITTANCE PAGE  
PLEASE INCLUDE WITH PAYMENT

STATEMENT OF ACCOUNT

LAW OFFICES

**SNOW, CHRISTENSEN & MARTINEAU**

10 EXCHANGE PLACE, ELEVENTH FLOOR  
POST OFFICE BOX 45000  
SALT LAKE CITY, UTAH 84145-5000

TELEPHONE 521-9000  
AREA CODE 801

NO. 87-0298631  
NO 08-532-3715

May 29, 2004  
Invoice #267069

SALT LAKE CITY CORPORATION  
ATTENTION: LEROY HOOTON  
1530 SOUTH WEST TEMPLE  
SALT LAKE CITY, UT 84115

Re: Mark C. and David Haik  
Our Matter Number: 016005-0007

Balance from Previous Statement	\$9,743.48
Payments Received	<u>(9,743.48)</u>
Balance Forward	.00
Invoice Total	8,286.05
Account Balance as of 05/29/04 (including unpaid amounts previously invoiced)	<u>\$8,286.05</u>

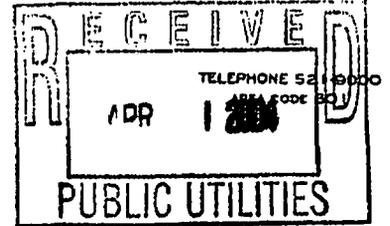
6/18/04  
JF) Manager

REMITTANCE PAGE  
PLEASE INCLUDE WITH PAYMENT

87-0298831  
09-532-3715

STATEMENT OF ACCOUNT

LAW OFFICES  
**SNOW, CHRISTENSEN & MARTINEAU**  
10 EXCHANGE PLACE, ELEVENTH FLOOR  
POST OFFICE BOX 45000  
SALT LAKE CITY, UTAH 84145-5000



March 27, 2004  
Invoice #264286

SALT LAKE CITY CORPORATION  
ATTENTION: LEROY HOOTON  
1530 SOUTH WEST TEMPLE  
SALT LAKE CITY, UT 84115

Re: Mark C. and David Haik  
Our Matter Number: 016005-0007

Balance from Previous Statement	\$11,379.11
Payments Received	<u>(11,379.11)</u>
Balance Forward	.00
Invoice Total	9,743.48
Account Balance as of 03/27/04 (including unpaid amounts previously invoiced)	<u>\$9,743.48</u>

4/1/04  
J. Meyer  
Approve

REMITTANCE PAGE  
PLEASE INCLUDE WITH PAYMENT

STATEMENT OF ACCOUNT

LAW OFFICES

**SNOW, CHRISTENSEN & MARTINEAU**

10 EXCHANGE PLACE, ELEVENTH FLOOR  
POST OFFICE BOX 45000  
SALT LAKE CITY, UTAH 84145-5000

TELEPHONE 521-9000  
AREA CODE 801

REV. NO. 87-0298831  
DUNS NO 08-532-3715

February 29, 2004  
Invoice #263119

*3-2-04  
Approved  
galt M. Sawyer*

SALT LAKE CITY CORPORATION  
ATTENTION: LEROY HOOTON  
1530 SOUTH WEST TEMPLE  
SALT LAKE CITY, UT 84115

Re: Mark C. and David Haik  
Our Matter Number: 016005-0007

Balance from Previous Statement	\$ .00
Payments Received	(.00)
Balance Forward	.00
<b>Invoice Total</b>	<b>11,379.11</b>
Account Balance as of 03/01/04 (including unpaid amounts previously invoiced)	<u><u>\$11,379.11</u></u>

REMITTANCE PAGE  
PLEASE INCLUDE WITH PAYMENT

06/20/2005	Draney, S.	Review of Cottonwood Heights City General Plan; email correspondence with Mike Wilson regarding Cottonwood Heights City General Plan; telephone conference with Mike Wilson regarding [REDACTED] status of Tolton matter, preparation for member cities meeting; email correspondence to Mike Wilson regarding CUP Water Management Improvement Plan; telephone conference with Mike Wilson and Robyn Clayton regarding [REDACTED] telephone conference with [REDACTED] regarding [REDACTED]; review of incoming email from [REDACTED] regarding [REDACTED]; telephone conference with [REDACTED] regarding [REDACTED] email correspondence with Bryce McEuen regarding [REDACTED]	3.00	525.00
06/20/2005	Martin, S.	Received and assembled entire CUP Water Management Plan and attachments; e-mails to Mike Wilson regarding same	.50	81.00
06/20/2005	Wharff, D.	Review emails and information regarding Cottonwood Heights City General Plan per Shawn Draney	.25	25.00

06/21/2005	Draney, S.	Telephone conference with [REDACTED] regarding [REDACTED]; review of P&P, Municipal Bond Act, Money Management Act and Fiscal Procedures for Special District's Act to determine if special Board meeting is required for LIBOR swap; attend telephone conference regarding LIBOR swap; review of [REDACTED]; email correspondence [REDACTED] regarding [REDACTED]; email correspondence with Pat Casaday regarding 207 give back; office conference with Joe Novak regarding 207 give back; review of CUPCA 207; telephone conference with Bryce McEuen regarding 207 give back; email correspondence with Mike Wilson and John Carman regarding 207 give back	3.00	525.00
06/22/2005	Draney, S.	Telephone conference with Mike Wilson regarding [REDACTED] attend [REDACTED] meeting at MWDSL; telephone conference with Lon Richardson regarding [REDACTED]	2.00	350.00
06/23/2005	Draney, S.	Email correspondence with [REDACTED] regarding [REDACTED]	1.50	262.50
06/24/2005	Draney, S.	Assist with preparation of [REDACTED]	1.25	218.75
06/24/2005	Martin, S.	Pulled and reviewed State Engineer files and records [REDACTED] prepared [REDACTED]; reviewed correspondence regarding [REDACTED]	2.50	405.00

06/07/2005	Martin, S.	Further review of [REDACTED] s [REDACTED] [REDACTED] [REDACTED] [REDACTED] office conference [REDACTED] [REDACTED] [REDACTED] [REDACTED]	4.75	769.50
06/09/2005	Draney, S.	Email correspondence and telephone conferences regarding proposed new changes to sewage effluent reuse bill	.75	131.25
06/10/2005	Draney, S.	Extensive email correspondence regarding proposed changes to sewage effluent reuse bill; numerous telephone conferences regarding proposed changes to sewage effluent reuse bill; attend conference at Central Water Reclamation regarding proposed changes to sewage effluent reuse bill	3.00	525.00
06/10/2005	Martin, S.	Review of numerous e-mails and drafts of re-use memos and legislation from numerous parties; lengthy telephone conferences with Chris Bramhall, Jeff Niermeyer, Warren Peterson and Shawn Draney; e-mail with Fred Finlinson; office conference with Shawn Draney; attended Water Task Force Re-use Subcommittee meeting at CVWTF; lengthy discussion with Craig Smith regarding legislative effort [REDACTED]	4.75	769.50
06/13/2005	Draney, S.	Review of incoming revised version of sewage reuse bill from Jerry Kinghorn; telephone conference with Scott Martin and Chris Bramhall regarding sewage reuse bill; preparation of language for sewage effluent bill	1.75	306.25

Original Lost



WHITE, MABEY, WRIGHT & RICHARDS

265 East 100 South #300 Salt Lake City, Utah 84111  
Phone: (801) 359-3663 Fax: (801) 359-2320

Salt Lake City Public Utilities  
c/o Christopher Bramhall  
451 South State Street, Suite 505A  
Salt Lake City, Utah 84111

April 30, 2003

File #: 208-001

Inv #: 2414

This bill is 50% of Schneiter Litigation charges

Schneiter Litigation

<i>Date</i>	<i>Description</i>	<i>Attorney</i>	<i>Hours</i>	<i>Amount</i>
Apr-03-03	Telephone calls with co-defense counsel.	DCW	0.25	40.00
Apr-15-03	Telephone call with co-defense counsel.	DCW	0.15	24.00
Apr-25-03	Conference with JHM; teleconference with M. Wilson.	DCW	0.25	40.00
	Totals		0.65	\$104.00

*Dishorsements*

*Amount*

Apr-19-03	5 Proof Maps at Division of Water Rights	7.50	
	Deposition transcript - George & Gary Schneiter	300.25	
	Totals	\$307.75	\$307.75

Original Lost



WHITE, MABEY, WRIGHT & RICHARDS

265 East 100 South #300 Salt Lake City, Utah 84111  
Phone (801) 359-3663 Fax: (801) 359-2320

Salt Lake City Public Utilities  
c/o Christopher Bramhall  
451 South State Street, Suite 505A  
Salt Lake City, Utah 84111

April 30, 2003  
File #: 208-001  
Inv #: 2414

This bill is 50% of Schneiter litigation charges

Schneiter Litigation

<i>Date</i>	<i>Description</i>	<i>Attorney</i>	<i>Hours</i>	<i>Amount</i>
Apr-03-03	Telephone calls with co-defense counsel.	DCW	0.25	40.00
Apr-15-03	Telephone call with co-defense counsel.	DCW	0.15	24.00
Apr-25-03	Conference with JHM; teleconference with M. Wilson.	DCW	0.25	40.00
	Totals		0.65	\$104.00

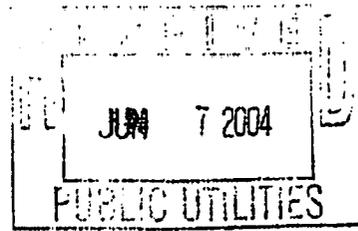
<i>Dishorsements</i>	<i>Amount</i>
Apr-19-03	5 Proof Maps at Division of Water Rights
	Deposition transcript - George & Gary Schneiter
Totals	\$307.75

\$307.75

LAW OFFICES OF

MABEY & WRIGHT, LLC

265 East 100 South #300 Salt Lake City, Utah 84111  
Phone: (801) 359-3663 Fax: (801) 359-2320



Salt Lake City Public Utilities

May 31, 2004

c/o Christopher Bramhall  
451 South State Street, Suite 505  
Salt Lake City, Utah 84111

File #: 208-001

Inv #: 3325

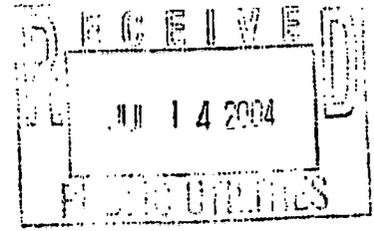
**APPROVED**  
JUN 7 2004

This bill is 50% of Schneider Litigation charges

Schneider Litigation

PUBLIC UTILITIES

Date	Description	Attorney	Hours	Amount
May-05-04	Telephone call with co-defense counsel regarding summary judgment hearing; prepare for hearing.	DCW	1.15	172.50
May-06-04	Summary judgment preparation.	DCW	0.40	60.00
May-07-04	Prepared for court hearing.	JHM	0.75	112.50
	Conference with JHM; prepare for summary judgment hearing; telephone call with M. Wheeler.	DCW	1.40	210.00
May-10-04	Prepared for and attended hearing on Motion for Partial Summary Judgment.	JHM	1.25	187.50
	Prepare for and attend summary judgment hearing.	DCW	2.00	300.00
May-19-04	Reviewed proposed Order of Partial Summary Judgment; conference with D. Wright.	JHM	0.25	37.50
May-20-04	Conference with DCW.	JHM	0.10	15.00
	Review proposed order; conference with JHM; telephone call with Sandy City counsel.	DCW	0.25	37.50
May-25-04	Review objections to summary judgment order; telephone call with S. Martin.	DCW	0.25	37.50
May-26-04	Telephone call with court reporter regarding hearing transcript.	DCW	0.15	22.50



LAW OFFICES OF

**MABEY & WRIGHT, LLC**

265 East 100 South #300 Salt Lake City, Utah 84111  
Phone: (801) 359-3663 Fax: (801) 359-2320

Salt Lake City Public Utilities  
c/o Christopher Bramhall  
451 South State Street, Suite 505A  
Salt Lake City, Utah 84111

June 30, 2004

File #: 208-001

Inv #: 3385

This bill is 50% of Schneiter Litigation charges

**Schneiter Litigation**

<i>Date</i>	<i>Description</i>	<i>Attorney</i>	<i>Hours</i>	<i>Amount</i>
Jun-02-04	Telephone call with Sandy City counsel.	DCW	0.15	22.50
Jun-16-04	Telephone call with S. Martin.	DCW	0.15	22.50
<b>Totals</b>			<b>0.30</b>	<b>\$45.00</b>

**Total Fees & Disbursements**

**\$45.00**

Previous Balance

\$1,230.00

Interest on Past Due Balance

\$0.00

Previous Payments

\$1,230.00

Transferred from Trust

\$0.00

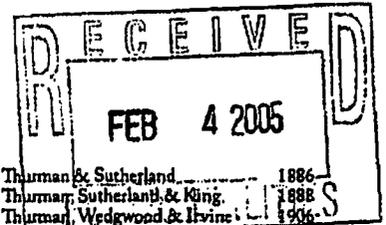
**Balance Due Now**

**\$45.00**

*Does not reflect payments or charges after the billing date or services rendered other than on the matter(s) referred to herein. Interest at 12% charged on amounts over 30 days past due.*

*Approved  
J. M. Mays  
7/14/04*

SNOW, CHRISTENSEN & MARTINEAU



Reed L. Martineau  
 David W. Slagle  
 A. Dennis Norton  
 Allan L. Larson  
 John E. Gates  
 R. Brent Stephens  
 Kim R. Wilson  
 Michael R. Carlston  
 David G. Williams  
 Rex E. Madsen  
 Max D. Wheeler  
 David W. Slaughter  
 Stanley J. Preston  
 Shawn E. Draney  
 John R. Lund  
 Rodney R. Parker  
 Richard A. Van Wagoner  
 Andrew M. Morse  
 Camille N. Johnson  
 Dennis V. Dahle  
 Korey D. Rasmussen  
 Terence L. Rooney  
 David L. Pinkston  
 Julianne Blanch

Brian P. Miller  
 Judith D. Wolferts  
 Keith A. Call  
 Kara L. Pettit  
 Elizabeth L. Willey  
 Heather S. White  
 Robert R. Harrison  
 Robert W. Thompson  
 Jill L. Dunyon  
 Scott H. Martin  
 Trystan B. Smith  
 Maralyn M. Reger  
 Kenneth L. Reich  
 Joseph P. Barrett  
 Rebecca C. Hyde  
 D. Jason Hawkins  
 Richard A. Vazquez  
 Bradley R. Blackham  
 Sam Harkness  
 David F. Mull  
 Bryan M. Scott  
 P. Matthew Cox  
 Ryan B. Bell

A Professional Corporation  
 10 Exchange Place, Eleventh Floor  
 Post Office Box 45000  
 Salt Lake City, Utah 84145-5000  
 Telephone (801) 521-9000  
 Facsimile (801) 363-0400  
 www.scmlaw.com

Thurman & Sutherland	1886
Thurman, Sutherland & King	1888
Thurman, Wedgwood & Irvine	1906
Irvine, Skeen & Thurman	1923
Skeen, Thurman, Worley & Snow	1952
Worley, Snow & Christensen	1967

John H. Snow 1917-1980

Of Counsel  
Harold G. Christensen  
Joseph Novak

Writer's Direct Number:

(801) 322-9138

February 3, 2005

John Robert Carman  
 Mike Wilson  
 Metropolitan Water District of Salt Lake & Sandy  
 3430 E. Danish Road  
 Sandy, UT 84093

Shane Pace  
 Pat Casaday  
 Sandy City Public Utilities  
 10000 Centennial Parkway  
 Sandy, UT 84070

G. Keith Denos  
 Provo River Water Users Association  
 285 West 1100 North  
 Pleasant Grove, UT 84062

Jeff Niermeyer  
 Salt Lake City Public Utilities  
 1530 So. West Temple  
 Salt Lake City, UT 84115

Re: Salt Lake City Suburban Sanitary District #1  
 Legal Services - Snow, Christensen & Martineau

Dear Gentlemen:

Enclosed please find Invoice #273608 addressed to Metropolitan Water District of Salt Lake & Sandy for fees and costs for the month of November, 2004 in the amount of \$6,281.20, together with Invoice #274785 for fees and costs for the month of December, 2004 in the amount of \$4,254.25 for a total of \$10,535.45. Please remit your 1/4 share in the amount of \$2,633.86 to Snow, Christensen & Martineau. If you have any questions concerning the statement, please do not hesitate to call.

Very truly yours,

SNOW, CHRISTENSEN & MARTINEAU

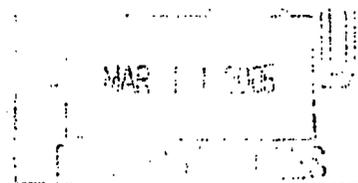
Shawn E. Draney

*Approved*  
 2-4-05  
*J. Martineau*

LAW OFFICES OF

MABEY & WRIGHT, LLC

265 East 100 South #300 Salt Lake City, Utah 84111  
Phone: (801) 359-3663 Fax: (801) 359-2320



Salt Lake City Public Utilities  
c/o Christopher Bramhall  
451 South State Street, Suite 505A  
Salt Lake City, Utah 84111

February 28, 2005

File #: 208-001

Inv #: 3876

This bill is 50% of Schneiter Litigation charges

Schneiter Litigation

<i>Date</i>	<i>Description</i>	<i>Attorney</i>	<i>Hours</i>	<i>Amount</i>
Feb-09-05	Review memoranda on pending motions; hearing preparation.	DCW	0.50	75.00
Feb-10-05	Telephone call with S. Martin; hearing preparation.	DCW	0.50	75.00
Feb-11-05	Prepare for hearing on motion to reconsider summary judgment and injunction.	DCW	1.00	150.00
Feb-14-05	Prepared for and attended court hearing.	JHM	1.25	187.50
	Prepare for and attend hearing on Schneiter motion to reconsider.	DCW	1.50	225.00
Feb-22-05	Reviewed court's ruling; calls with M. Wilson and J. Niermeyer.	JHM	0.25	37.50
	Review ruling on motions; conference with JHM.	DCW	0.25	37.50
	Totals		5.25	\$787.50

*Approved*  
*Jeff D. Wright*  
3-11-05

# **EXHIBIT 12**



GARY R. HERBERT  
Governor  
GREG BELL  
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*

## ORDER OF THE STATE ENGINEER

### On Application for Nonuse of Water For Water Right Number 57-7800

SEP 10 2011

Water Right Number 57-7800 in the name of Kevin Tolton, was filed for the use of 0.0565 cubic-feet per second (cfs) or 0.92 acre-foot (af) of water from a well located: North 242 feet and East 770 feet from the W $\frac{1}{4}$  Corner of Section 12, T3S, R1E, SLB&M (existing 8-inch, 145 feet deep). The water is for the irrigation of 0.01 acre, the year-round, indoor, domestic requirements of 1.0 equivalent domestic unit, and the year-round stockwatering requirements of 15.0 equivalent livestock units (in cattle, horses, or equivalent species). The water is used in all or portion(s) of Section 12, T3S, R1E, SLB&M.

Notice of the Application for Nonuse of Water was published in the Deseret News on April 30 and May 7, 2009, and late protests were received from Salt Lake City Corporation ("SLC"), Metropolitan Water District of Salt Lake & Sandy ("MWDSLS"), and Sandy City ("Sandy"). Review of the application has been made to verify compliance with statutory criteria. A hearing was held Wednesday, July 13, 2011.

The applicant indicated the non-use application is appropriate because he has not been able to use the water due to pending litigation. He indicates he is the owner of the right and there is an approved change application filed on the right. The water right is in association with the South Despain Ditch, which is an association of several users. The water has been used cooperatively from the South Despain Ditch. The applicant has no personal knowledge of the well.

SLC and MWDSLS expressed concern that the applicant is not the appropriate person to file the application. Title was updated by appurtenance using an assumption of a quarter interest in the underlying right. The amount of water transferred is questioned if based on appurtenance. The filing of the non-use application is also questioned because the title to the right was in question when the application was filed. SLC also explained a 1934 contract in which the original families transferred the winter portion of this right to SLC subject to a reservation of 7500 gallons per day to be delivered by a 6-inch tee from the Murray Penstock. Sandy City currently serves the subdivision located at the historic place of use. Sandy concurred with the other protestants' statements.

The State Engineer has reviewed the water right and requested clarification on the use of water. It is noted a Change Application (a24463) was filed on this water right May 8, 2000, and was approved on August 4, 2000. The purpose of the change is to change the point of diversion from the well to the South Despain Ditch on Little Cottonwood Creek. It was also noted the approved change application stated the development proposed under the certificate for the well was never developed. It appears winter water was delivered under the winter water contract with SLC, but it is unclear how this portion of the decreed right was utilized during the summer.

ORDER OF THE STATE ENGINEER  
Application for Nonuse of Water Decision  
57-7800  
Page 2

The State Engineer believes this water right derives from the Morse Decree. The State Engineer recognizes the concerns of the protestants in regard to the title of this application and in this regard has reviewed the recent Supreme Court decision in Haik v. Sandy City. The State Engineer has no authority to adjudicate the title of a water right<sup>1</sup>. Therefore, the State Engineer is not in a position to refuse the processing of this application because of the protestant's assertion in regard to the title.

The State Engineer is of the opinion that an approved nonuse application only protects a water right from forfeiture for nonuse from the date the nonuse application is filed until the approved application's expiration date.

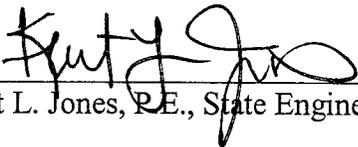
**Your Application for Nonuse of Water has been APPROVED. Under Section 73-1-4, Utah Code Annotated, 1953, approval of your application grants a nonuse period for this water right from the date it was filed until the date it expires on September 30, 2018.**

**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 16<sup>th</sup> day of September, 2011.

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

<sup>1</sup> Daniels Irrigation Co. v. Daniel Summit Co., 571 P.2d 1323, 1324 (Utah 1977)

ORDER OF THE STATE ENGINEER  
Application for Nonuse of Water Decision  
57-7800  
Page 3

Mailed a copy of the foregoing Order this 16<sup>th</sup> day of September, 2011 to:

Kevin Tolton  
585 Lofty Lane  
North Salt Lake, UT 84054

Salt Lake City Corporation  
c/o Scott H. Martin  
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

Sandy City  
c/o David C. Wright  
175 South Main, Suite 1330  
Salt Lake City, UT 84111

BY:   
Sonia R. Nava, Applications/Records Secretary

# **EXHIBIT 13**



GARY R. HERBERT  
Governor  
GREGORY S. BELL  
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

OCT 1 2009

OCT 1 2009

**ORDER OF THE STATE ENGINEER**  
**On Application for Nonuse of Water**  
**For Water Right Number 57-10317**

Water Right Number 57-10317 in the name of Judith Maack, was filed on September 25, 1962, for the use of 0.0012 cfs or 0.9 acre-foot of water from a well located North 242 feet and East 770 feet from the W¼ Corner of Section 12, T3S, R1E, SLB&M (existing 8-inch, 145 feet deep). The water is to be used for the irrigation of 15.00 acres (sole supply of 0.18 acre) from April 1 to October 31. The water is to be used in all or portion(s) of Section 12, T3S, R1E, SLB&M.

An Application for Nonuse of Water has been filed. Notice of the application was published in the Deseret News on April 30 and May 7, 2009. No protests were received. Review of the application has been made to verify compliance with statutory criteria.

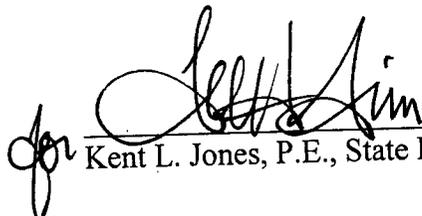
**Your Application for Nonuse of Water has been APPROVED. Under Section 73-1-4, Utah Code Annotated, 1953, approval of your application grants a nonuse period for this water right from the date it was filed until the date it expires on September 30, 2016.**

**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 1 day of October, 2009.

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

ORDER OF THE STATE ENGINEER  
Application for Nonuse of Water Decision  
57-10317  
Page 2

Mailed a copy of the foregoing Order this 1 day of October, 2009 to:

Judith Judith Maack  
3992 South 2280 East  
Holladay, UT 84124

BY: Kelly K. Home  
Kelly K. Home, Applications/Records Secretary

# **EXHIBIT 14**

LEROY W. HOOTON, JR.  
DIRECTOR

# SALT LAKE CITY CORPORATION

DEPARTMENT OF PUBLIC UTILITIES  
WATER SUPPLY AND WATERWORKS  
WATER RECLAMATION AND STORMWATER

DEEDEE CORRADINI  
MAYOR

April 3, 1996

Ms. Lynn Biddulph  
3515 E. Little Cottonwood Road  
Salt Lake City, Utah 84092

Dear Ms. Biddulph:

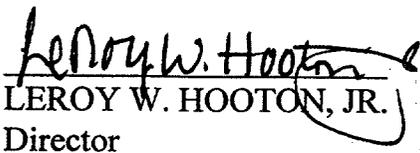
We appreciated the time that you have taken to resolve the South Despain Water Users issue regarding Salt Lake City supplying water to the South Despain users under the agreement with the Despain's dated January 31, 1913. It is Salt Lake City's intent to comply with the agreement.

Salt Lake City has installed a meter on the 6-inch pipeline which is connected to the Murray City penstock pipe. To be in compliance with the 1913 agreement, please be advised that during the summer months Salt Lake City intends to throttle the valve to the 6-inch meter in a manner which will only allow the South Despain users to receive .25 cfs. The distribution of water to the users beyond the 6-inch meter is the responsibility of the South Despain water right owners. If any of the South Despain users desire to have any of their water rights conveyed from the diversion in Little Cottonwood Creek into the South Despain ditch, an appropriate reduction of water through the meter will be made.

During the winter months, the meter will be restricted to provide to the users a maximum of 7500 gallons per day as stipulated in the contract.

We would appreciate you sending us copies of records of those people who have water rights under the agreement. All previous water billings from the City to South Despain users have been voided by the department.

Sincerely,

  
LERROY W. HOOTON, JR.

Director

ETD/srb

CC: Jim Lewis

So. Despain Water Users

File

1530 SOUTH WEST TEMPLE, SALT LAKE CITY, UTAH 84115  
TELEPHONE: 801-483-6768 FAX: 801-483-6818



# **EXHIBIT 15**

LEROY W. HOOTON, JR.  
DIRECTOR

# SALT LAKE CITY CORPORATION

DEPARTMENT OF PUBLIC UTILITIES  
WATER SUPPLY AND WATERWORKS  
WATER RECLAMATION AND STORMWATER

ROSE C. "ROCKY" ANDERSON  
MAYOR

July 9, 2003

Lynn Christensen-Biddulph  
664 Bench Lago Road  
Grace, Idaho 84241

Re: South Despain Ditch Information

Dear Lynn:

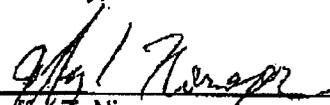
Per our conversation please find information below to answer questions you presented to me regarding the diversion of water off of Little Cottonwood Creek for the South Despain Irrigation Company. I understand that you need the following information for filing your proof due for water right 57-7800 (a24463) with the Utah State Engineer.

We have previously provided you with diversion records for the summer irrigation season for the South Despain diversions for the period of 1989 to 2002. The summer irrigation water of 0.25 cfs was delivered during 1990, 1991, and 1997, however the diversion records for those years cannot be found.

As you are aware, the City has a contract with South Despain for all of its non-irrigation season water right except for a requirement to deliver 7500 gallons per day through a 6 inch pipe off of the Murray penstock. Salt Lake City has diverted the water under our agreement with the South Despain Company, during the non-irrigation season, at the Metropolitan Water Treatment Plant located on Little Cottonwood Creek. The water was beneficially used within the City's service area. The 7500 gallons (0.0116 cfs) of water required to be delivered to the South Despain Company through the 6 inch pipe off the Murray penstock was also delivered during the time period. The 6 inch meter on the 6 inch pipe was sized for the summer flow of 0.25 cfs and does not record the low flows of 0.0116 cfs during the winter months. Also, the meter is buried under snow much of the winter months and cannot be read.

I trust this provides the information you need.

Sincerely,

  
\_\_\_\_\_  
Jeffrey T. Niermeyer  
Deputy Director

JN

cc:   
Chris Bramhall - Deputy City Attorney  
file



# **EXHIBIT 16**

Lynn Christensen-Biddulph  
1045 Tuomppian Court  
Ivins, Utah 84738

July 26, 2003

Jeffrey T. Niermeyer  
Salt Lake City Corporation  
1530 S. W. Temple  
Salt Lake City, Utah 84115

Dear Jeff,

I have received your letter regarding the missing records of 1990, 1991, and 1997 and the confirmation of the delivery of the my winter water for my right #57-7800.

I feel there are a three inaccurate statements in the letter.

First, there is no such thing as the "South Despain Company". We are not a company; simply owners in agreement by the signed Agreement of 1934 with SLC Corporation.

Second," the diversion Cannot be at the Metropolitan Water Treatment Plant"; because if it is, it is in violation of the Agreement. It states on page 1 of the Agreement that the conveyance of the Primary waters are to be diverted where said pipe line crosses the center of Section 12, T.3S., R. 1E., 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.

Third, stating that" the use of the water was beneficially used within the City's service", really cannot be verified, because as you stated, SLC cannot and does not measure that small of amount of 1,875 gals a day which is my water right in #57-7800.

I do appreciate the letter in the fact that you, representing SLC Corpration confirms that the records are missing in 1990, 91, 97 and that my winter water of 1,875 gallons a day has been delivered since 1934.

Regards



LYNN CHRISTENSEN-BIDDULPH  
cc: John Flintton/ Chris Bramhall/ Leroy Hooten

# **EXHIBIT 17**

December 18, 1998

John W. Anderson  
PRUITT, GUSHEE & BACHTELL  
1850 Beneficial Life Tower  
Salt Lake City, UT 84111

*RE: Morse Decreed Right (South Despain Ditch) and Water Right No. 57-7800*

Dear John:

You have asked me to describe my use of water under the above-referenced water rights during my period of ownership of the lands now known as the Little Cottonwood subdivision.

In approximately 1972, I purchased - through Saunders and Sweeny, Inc. - the property upon which I later created the Little Cottonwood Subdivision. At the time of purchase, there were three existing residences and a barn located thereon - all being served by an existing well and by a six inch water pipeline under an agreement with Salt Lake City. Both sources of water supply were initially used by me to meet the water needs of the residences and shared with the other ditch owners. The land was purchased for the express purpose of subdividing it and selling individual lots created thereby to the general public. A copy of the deed by which I subsequently took title is attached hereto as Exhibit A. A copy of the proof map, which generally identifies the three residences, barn and water well, is attached hereto as Exhibit B. A copy of the agreement with Salt Lake City whereby City agreed to provide water in exchange for a portion of the decreed water right is attached hereto as Exhibit C.

At the time of my purchase, it was my understanding that I was entitled to a one-quarter share of the water right which was decreed to the South Despain Ditch under the Morris Decree dated June 16, 1910. This entitled me to receive .0625 cfs of primary water and some additional surplus water. Under agreement with Salt Lake City dated August 8, 1934, said water was to be delivered through a pipeline Salt Lake City constructed to my land. See Exhibit C hereto. In addition, and by virtue of Water Right No. 57-7800(a-4178) I was also entitled to take water from a water well drilled by Harold

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John W. Anderson  
December 18, 1998  
Page 2

Bentley and thereby provide water to three residences, six horses, six cattle, 100 chickens and incidental irrigation.

During the period of my ownership I cooperatively shared the use of the water being provided under agreement with Salt Lake City with the other Despain Ditch owners. Although there was no formal incorporated ditch company, the owners thereof nevertheless shared the water supply like a mutual water company, albeit informally. Well water was used, as needed, by the Bentleys who retained possession of their home for several years after my initial purchase, and for other uses.

As part of my subdivision plan, I committed to having all lots, with the exception of Lot 31, connected to the Sandy City Culinary Water System. The decreed water and Water Right No. 57-7800 were to remain with Lot 31, which was to be my lot and on which there was a log cabin which still exists.

In accordance with my development plan, I leveled and removed the two westerly residences and the barn. Since none of these structures fit within the newly plotted lot lines or were consistent with my project plan, I terminated water service thereon and moved all water use to what is now Lot 31. The remaining water was shared with the other Despain Ditch owners and kept in use.

In 1978 my ex-wife Judith Saunders took title to Lot 31 and continued sharing the decreed water with the other Despain Ditch owners in a cooperative fashion and as set forth in the Morse Decree. At the time, Saunders and Sweeney made the conveyance to Judith, the Morris Decreed Water Right was being exclusively used on Lot 31 of Little Cottonwood Subdivision and being shared cooperatively with John Despain and other ditch owners. The water well also remained in use as needed to supplement water delivered through the Salt Lake City line. Accordingly, it was not only my intent to convey 100% of my interest in the decreed right and Water Right No. 57-7800 to Judith Saunders when I conveyed to her Lot 31, Little Cottonwood Subdivision, but a goal I thought I had accomplished because the water, at the time of conveyance, was being used exclusively on Lot 31 and being shared cooperatively with the other ditch owners. At the time of conveyance, the two westerly residences had been disconnected from the private water system and committed to Sandy City's Water System. Thus, both the decreed right - .0625 cfs under agreement with Salt Lake City dated August 8, 1934 and Water Right No. 57-7800 were transferred as an appurtenance to the land of Lot 31 when I conveyed the land to Judith Saunders.

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John W. Anderson  
December 18, 1998  
Page 3

If you have additional questions regarding my use of water at the Little Cottonwood Subdivision, please let me know.

Very truly yours,

  
Hy Saunders

A

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Recorded at Request of Western States Title Company  
 a/b Id. Fee Paid \$ 500 Katie L. Dixon, Salt Lake County Recorder  
 by Fabrice R. Brown Dep. Book \_\_\_\_\_ Page \_\_\_\_\_ Ref. \_\_\_\_\_  
 Mail tax notice to \_\_\_\_\_ Address \_\_\_\_\_ JUL 25 1978

**3142010 WARRANTY DEED**

HAROLD W. BENTLEY and VERNA D. BENTLEY, his wife, grantors  
 of Salt Lake City, County of Salt Lake, State of Utah, hereby  
 CONVEY and WARRANT to SAUNDERS AND SWEENEY, INC., a Utah corpora-  
 tion,

of Salt Lake City, Utah grantee  
 TEN for the sum of \_\_\_\_\_ DOLLARS,  
 and other good and valuable consideration  
 the following described tract of land in \_\_\_\_\_ County,  
 State of Utah: Salt Lake

See Exhibit "A" attached hereto.

**RECEIVED**  
 SEP 15 1989  
 WATER RIGHTS  
 SALT LAKE

WITNESS, the hands of said grantors, this \_\_\_\_\_ day of \_\_\_\_\_  
 \_\_\_\_\_, A. D. 1974

Signed in the Presence of

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

STATE OF UTAH,

County of SALT LAKE } ss.

On the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 1974  
 personally appeared before me Harold W. Bentley and Verna D. Bentley, his  
 wife, the signers of the within instrument, who duly acknowledged to me that they executed the  
 same.

My commission expires \_\_\_\_\_ Residing in \_\_\_\_\_  
 \_\_\_\_\_

BLANK #101-WARRANTY DEED - GEN. FTS. CO. - 1115 SO. 2000 EAST - SALT LAKE CITY

43455

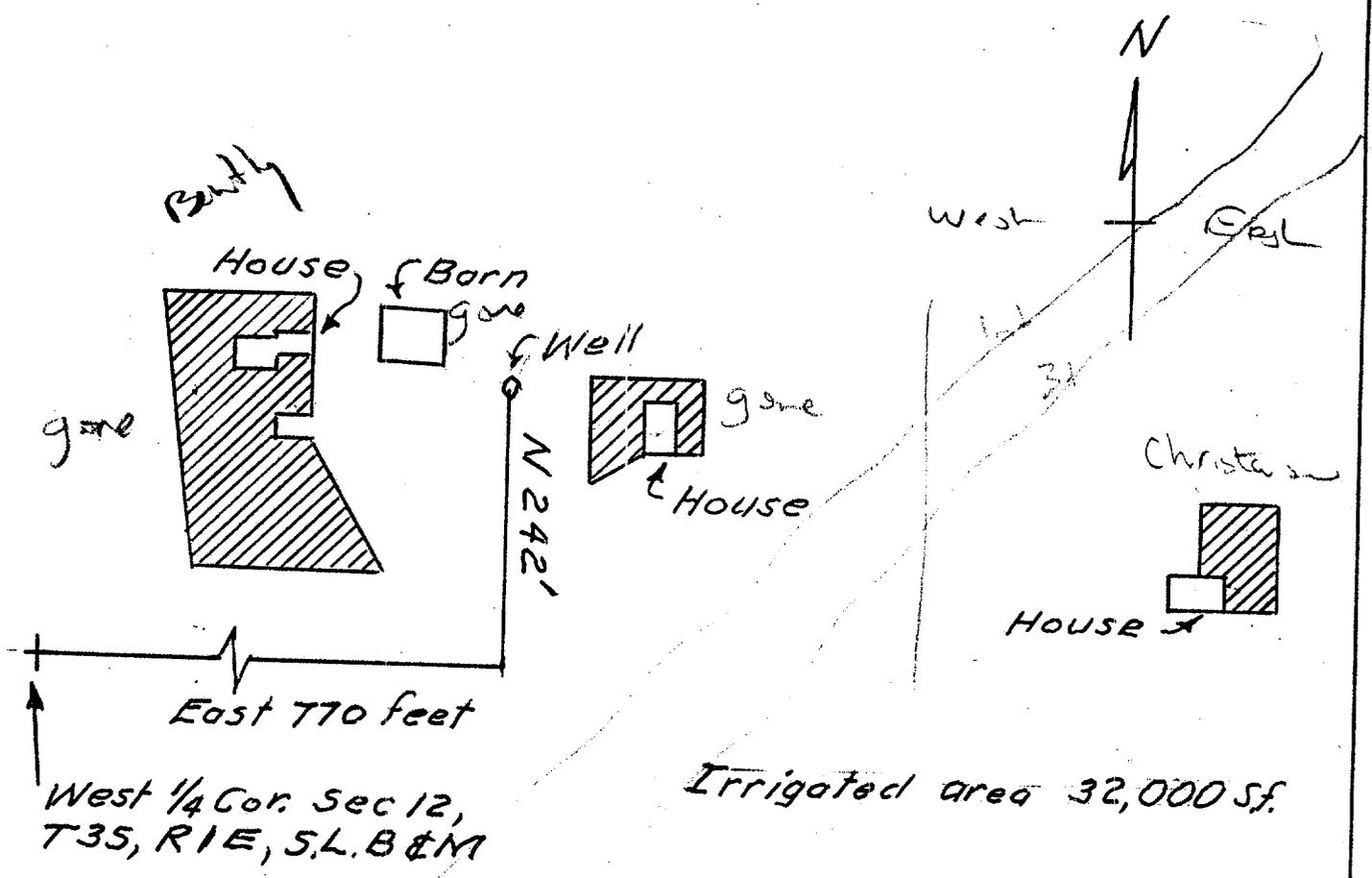
EXACTIC 101-103

... buildings, fixtures and improvements thereon and all water rights, rights of... and easements

B

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Each cabin became lot.



West 1/4 Cor. Sec 12,  
T35, R1E, S.L.B & M

Irrigated area 32,000 sf.

PROOF OF PERMANENT CHANGE  
OF POINT OF DIVERSION  
Change Application No. D-4178  
For Harold W. Bentley  
Salt Lake County, Utah

Scale 1" = 150'  
July 21, 1970

G.K. Borg  
Prof. Eng. & L.S. No. 903

Sheet 1 of 1 Sheets

1970  
MADE IN U.S.A.  
1281 L. L. 1100  
\*  
1100

C

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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. 3 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

EXHIBIT "A"

EXPI

P91055

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. Despain

Annie Butler Despain

Alva J. Butler

Anna Laura Butler

George F. Despain

Prudence B. Despain

De Bart Despain

Bertha K. Despain

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.

Pg 3 of 5

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

Pg 5 of 5

# **EXHIBIT 18**

BEFORE THE STATE ENGINEER OF THE STATE OF UTAH

IN THE MATTER OF CHANGE APPLICATION )  
 )  
NUMBER 57-10009 (a16839) )

MEMORANDUM DECISION

Change Application Number 57-10009 (a16839), in the name of Salt Lake City Corporation, was filed on June 24, 1992, to change the point of diversion and place of use of 1.326 acre-feet of water. Heretofore, the water has been diverted from Little Cottonwood Creek at the following locations: Tanner Ditch, South 234 feet and East 102 feet from the W $\frac{1}{4}$  Corner of Section 28, T2S, R1E, SLB&M; Cahoon and Maxfield Ditch, North 77 feet and West 663 feet from the E $\frac{1}{4}$  Corner of Section 29, T2S, R1E, SLB&M; Walker Ditch, North 1363 feet and West 1143 feet from the E $\frac{1}{4}$  Corner of Section 29, T2S, R1E, SLB&M; Richards Ditch, South 1800 feet and East 707 feet from the N $\frac{1}{4}$  Corner of Section 34, T2S, R1E, SLB&M; Little Cottonwood Creek Diversion Dam, North 2309 feet and West 743 feet from the E $\frac{1}{4}$  Corner of Section 11, T3S, R1E, SLB&M; and Murray City Power Plant Diversion Dam, South 838 feet and East 4512 feet from the W $\frac{1}{4}$  Corner of Section 7, T3S, R2E, SLB&M. The water has been used for municipal purposes in Salt Lake City.

Hereafter, it is proposed to divert 1.326 acre-feet of water from three spring areas, located: West 1700 feet from the SE Corner of Section 32, T2S, R3E, SLB&M; South 1500 feet and East 500 feet from the NW Corner of Section 11, T3S, R2E, SLB&M; and South 550 feet and West 700 feet from the NE Corner of Section 9, T3S, R3E, SLB&M. It is proposed to use the water for the same purpose as heretofore in the NW $\frac{1}{4}$  of Section 11, T3S, R2E, SLB&M; the E $\frac{1}{2}$ NW $\frac{1}{4}$  of Section 5; and the NE $\frac{1}{4}$  of Section 9, both in T3S, R3E, SLB&M. The application further states that this change is filed so that the Forest Service can divert up to 0.442 acre-foot of water from each of the three spring sources (for a total of 1.326 acre-feet) in Little Cottonwood Canyon for recreational and incidental purposes.

The application was advertised in the Deseret News from April 15, 1993, to April 29, 1993, and was protested by Cahoon and Maxfield Irrigation Company, Robert J. Murdock et al, Salt Lake County, Harvey Stauffer, and the US Forest Service. In the protests it is stated that the approval of the change application will impair the rights of the protestants, a surplus sales contract does not guarantee that water will be available for the people who are using the water, the water from the sources has already been placed to beneficial use by the Forest Service, and the Forest Service requires that all uses by special use permittees be in the name of the United States - the applicant does not have authority to file such a change application.

A hearing was held on August 28, 1996, in Salt Lake City, Utah. At the hearing the applicant explained the history of the underlying water rights and the nature of the contracts by which the change is based. The protestants in attendance reiterated their protests.

The State Engineer has reviewed the change application, the underlying water rights, the protests, the information submitted at the hearing, and other associated water rights and has noted and the following:

- A. It appears that the applicant, by virtue of the exchange agreements, is entitled to the use of water and has the right to file the change application.

**MEMORANDUM DECISION**  
**CHANGE APPLICATION NUMBER**  
**57-10009 (a16839)**  
**PAGE -2-**

- B. The question of surplus water contract with county residents is not within the purview of the State Engineer. Should those residents or entities deem that those contracts are not sufficient for their needs, they can obtain other water rights and file the appropriate change applications for the proposed uses.
- C. The Forest Service filed a letter dated October 22, 1993, wherein they informed the State Engineer that they no longer object to the change application.
- D. The State Engineer is of the opinion that certain conditions will have to be imposed to ensure that the rights of the others are not impaired by this change application. The exchange agreements between the irrigation companies and Salt Lake City for replacement water from Utah Lake will lessen the likelihood of any such impairment. The total flow of all change applications filed by the applicant in Little Cottonwood Canyon and the diversions by Salt Lake City at the mouth of the canyon cannot exceed the total of the water rights owned by the city.
- E. The applicant has stated in the application that the historic uses are municipal. It appears that the underlying water rights held by the irrigation companies and utilized by exchange agreement by the applicant are for irrigation. This change application converts the nature of use from irrigation to municipal for 1.326 acre-feet only as addressed in this change. The balance of Salt Lake City's water right under this decreed award would remain under the historical purposes. Should the city wish to convert these uses to municipal, submission of other change applications is necessary.

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, rather to provide sufficient definition of the rights to assure that other vested rights are not impaired by the change and no enlargement occurs. If, in a subsequent action, the court adjudicates that this right is entitled to either more or less water, the State Engineer will adjust the figures accordingly.

It is, therefore, **ORDERED** and Change Application Number 57-10009 (a16839) is hereby **APPROVED** subject to prior rights and the following conditions:

1. The applicant shall install permanent measuring devices to measure both the instantaneous flow rate and the total volume of water diverted. Records shall be kept at least monthly of all water diverted. These measuring devices and the records shall be made available to the State Engineer at all reasonable times to regulate this change.
2. The applicant shall submit on an annual basis by January 31 of each year for the prior calendar year a summary of all water diverted from each source in Little Cottonwood Canyon.
3. Upon submittal of proof of change, the applicant shall provide information on how much water by use has been diverted from each source along with evidence that the total of all water rights in Little Cottonwood Canyon

**MEMORANDUM DECISION**  
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under the applicant's control have not been exceeded.

4. The historic water diversion would have irrigated 0.265 acre. About 50% of the water would have been consumed and 50% would have returned to the system. To prevent enlargement, annual depletion under this change application cannot exceed 0.663 acre-foot.

This Decision is subject to the provisions of Rule R655-6-17 of the Division of Water Rights and to Sections 63-46b-13 and 73-3-14 of the Utah Code Annotated, 1953, 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 Decision. 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 Decision, 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 17th day of January, 1997.

  
Robert L. Morgan, P.E., State Engineer

RLM:JER:et

Mailed a copy of the foregoing Memorandum Decision this 17th day of January, 1997, to:

Salt Lake City Corporation  
Department of Public Utilities  
1530 South West Temple  
Salt Lake City, UT 84115

US Forest Service  
Intermountain Region  
324 25th Street  
Ogden, UT 84401

Cahoon and Maxfield Irrigation Company  
c/o Anton P. Rezac  
5668 South Bullion  
Murray, UT 84123

Harvey Stauffer  
#8 Stauffer Lane  
Murray, UT 84107

Murdock, Robert J., et al  
2964 East 3135 South  
Salt Lake City, UT 84109

Salt Lake County  
c/o David E. Yocom  
2001 South State Street, #S3600  
Salt Lake City, UT 84190-1200

BY:   
Eileen Tooke, Secretary

# **EXHIBIT 19**

BEFORE THE STATE ENGINEER OF THE STATE OF UTAH

IN THE MATTER OF CHANGE APPLICATION )  
 )  
NUMBER 57-10011 (a16842) )

MEMORANDUM DECISION

Change Application Number 57-10011 (a16842), in the name of Salt Lake City Corporation, was filed on June 24, 1992, to change the point of diversion and place of use of 0.442 acre-foot of water. Heretofore, the water has been diverted from Little Cottonwood Creek at the following locations: Tanner Ditch, South 234 feet and East 102 feet from the W $\frac{1}{4}$  Corner of Section 28, T2S, R1E, SLB&M; Cahoon and Maxfield Ditch North 77 feet and West 663 feet from the E $\frac{1}{4}$  Corner of Section 29, T2S, R1E, SLB&M; Walker Ditch North 1363 feet and West 1143 feet from the E $\frac{1}{4}$  Corner of Section 29, T2S, R1E, SLB&M; Richards Ditch, South 1800 feet and East 707 feet from the N $\frac{1}{4}$  Corner of Section 34, T2S, R1E, SLB&M; Little Cottonwood Creek diversion Dam, North 2309 feet and West 743 feet from the E $\frac{1}{4}$  Corner of Section 11, T3S, R1E, SLB&M; and Murray City Power Plant Diversion Dam, South 838 feet and East 4512 feet from the W $\frac{1}{4}$  Corner of Section 7, T3S, R2E, SLB&M. The water has been used for municipal purposes in Salt Lake City.

Hereafter, it is proposed to divert 0.442 acre-foot of water from an unnamed spring, located South 222 feet and East 301 feet from the W $\frac{1}{4}$  Corner of Section 12, T3S, R2E, SLB&M. It is proposed to use the water for same purposes as heretofore in the NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 12, T3S, R1E, SLB&M. It is stated in the application that a contract has been made between Salt Lake City Corporation and Charlotte Sturdy for her to divert 0.442 acre-feet of water annually for domestic requirements only, for use in a duplex.

The application was advertised in the Deseret News from April 15, 1993, to April 29, 1993, and was protested by Cahoon and Maxfield Irrigation Company, Robert J. Murdock et al, Salt Lake County, and Harry Stauffer. In the protests it is stated that the approval of the change application will impair the rights of the protestants and a surplus sales contract does not guarantee that water will be available for the people who are using the water.

A hearing was held on August 28, 1996, in Salt Lake City, Utah. At the hearing the applicant explained the history of the underlying water rights and the nature of the contracts by which the change is based. The protestants in attendance reiterated their protests.

The State Engineer has reviewed the change application, the underlying water rights, the protests, the information submitted at the hearing, and other associated water rights and has noted and the following:

- A. It appears that the applicant, by virtue of the exchange agreements, is entitled to the use of water and has the right to file the change application.
- B. The question of surplus water contracts with county residents is not within the purview of the State Engineer. Should those residents or entities deem that those contracts are not sufficient for their needs, they can obtain other water rights and file the appropriate change applications for the proposed uses.
- C. The State Engineer is of the opinion that certain conditions will have to

**MEMORANDUM DECISION**  
**CHANGE APPLICATION NUMBER**  
**57-10011 (a16842)**  
**PAGE -2-**

be imposed to ensure that the rights of the others are not impaired by this change application. The exchange agreements between the irrigation companies and Salt Lake City for replacement water from Utah Lake will lessen the likelihood of any such impairment. The total flow of all change applications filed by the applicant in Little Cottonwood Canyon and the diversions by Salt Lake City at the mouth of the canyon cannot exceed the total of the water rights owned by the city.

- D. The applicant has stated in the application that the historic uses are municipal. It appears that the underlying water rights held by the irrigation companies and utilized by exchange agreement by the applicant are for irrigation. This change application converts the nature of use from irrigation to municipal for 0.442 acre foot only as addressed in this change. The balance of Salt Lake City's water right under this decreed award would remain under the historical purposes. Should the city wish to convert these uses to municipal, submission of other change application is necessary.

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, rather to provide sufficient definition of the rights to assure that other vested rights are not impaired by the change and no enlargement occurs. If, in a subsequent action, the court adjudicates that this right is entitled to either more or less water, the State Engineer will adjust the figures accordingly.

It is, therefore, **ORDERED** and Change Application Number 57-10011 (a16842) is hereby **APPROVED** subject to prior rights and the following conditions:

1. The applicant shall install permanent measuring devices to measure both the instantaneous flow rate and the total volume of water diverted. Records shall be kept at least monthly of all water diverted. These measuring devices and the records shall be made available to the State Engineer at all reasonable times to regulate this change.
2. The applicant shall submit on an annual basis by January 31 of each year for the prior calendar year a summary of all water diverted from each source in Little Cottonwood Canyon.
3. Upon submittal of proof of change, the applicant shall provide information on how much water by use has been diverted from each source along with evidence that the total of all water rights in Little Cottonwood Canyon under the applicants control have not been exceeded.
4. The historic water diversion would have irrigated 0.088 acre. About 50% of the water would have been consumed and 50% would have returned to the system. To prevent enlargement, annual depletion under this change application cannot exceed 0.221 acre-foot.

This Decision is subject to the provisions of Rule R655-6-17 of the Division of Water Rights and to Sections 63-46b-13 and 73-3-14 of the Utah Code Annotated, 1953, which provide for filing either a Request for Reconsideration with the State Engineer or an appeal with the appropriate District Court. A Request for

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**CHANGE APPLICATION NUMBER**  
**57-10011 (a16842)**  
**PAGE -3-**

Reconsideration must be filed with the State Engineer within 20 days of the date of this Decision. 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 Decision, 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 17th day of January, 1997.

  
Robert L. Morgan, P.E., State Engineer

RLM:JER:et

Mailed a copy of the foregoing Memorandum Decision this 17th day of January, 1997, to:

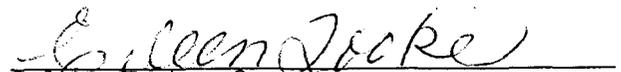
Salt Lake City Corporation  
Department of Public Utilities  
1530 South West Temple  
Salt Lake City, UT 84115

Cahoon and Maxfield Irrigation Company  
c/o Anton P. Rezac  
5668 South Bullion  
Murray, UT 84123

Murdock, Robert J., et al  
2964 East 3135 South  
Salt Lake City, UT 84109

Salt Lake County  
c/o David E. Yocom  
2001 South State Street, #S3600  
Salt Lake City, UT 84190-1200

Harry Stauffer  
#8 Stauffer Lane  
Murray, UT 84107

BY:   
Eileen Tooke, Secretary

# **EXHIBIT 20**

BEFORE THE STATE ENGINEER OF THE STATE OF UTAH

IN THE MATTER OF CHANGE APPLICATION )  
 )  
NUMBER 57-10014 (a16845) )

MEMORANDUM DECISION

Change Application Number 57-10014 (a16845), in the name of Salt Lake City Corporation, was filed on June 24, 1992, to change the point of diversion and place of use of 0.221 acre-foot of water. Heretofore, the water has been diverted from Little Cottonwood Creek at the following locations: (Tanner Ditch) South 234 feet and East 102 feet from the W $\frac{1}{4}$  Corner of Section 28, T2S, R1E, SLB&M; (Cahoon and Maxfield Ditch) North 77 feet and West 663 feet from the E $\frac{1}{4}$  Corner of Section 29, T2S, R1E, SLB&M; (Walker Ditch) North 1363 feet and West 1143 feet from the E $\frac{1}{4}$  Corner of Section 29, T2S, R1E, SLB&M; (Richards Ditch) South 1800 feet and East 707 feet from the N $\frac{1}{4}$  Corner of Section 34, T2S, R1E, SLB&M; (Little Cottonwood Creek Diversion Dam) North 2309 feet and West 743 feet from the E $\frac{1}{4}$  Corner of Section 11, T3S, R1E, SLB&M; and (Murray City Power Plant Diversion Dam) South 838 feet and East 4512 feet from the W $\frac{1}{4}$  Corner of Section 7, T3S, R2E, SLB&M. The water has been used for municipal purposes in Salt Lake City.

Hereafter, it is proposed to divert 0.221 acre-foot of water from Little Cottonwood Creek at a point located South 400 feet and East 750 feet from the NW Corner of Section 4, T3S, R3E, SLB&M. It is proposed to use the water for same purposes as heretofore in the E $\frac{1}{2}$ NW $\frac{1}{4}$  of Section 4, T3N, R3E, SLB&M. In the application it is stated that a contract has been made between the Salt Lake City Corporation and John D. Cahill for him to divert 0.221 acre-foot of water annually for domestic requirements of one family.

The application was advertised in the Deseret News from April 15, 1993, to April 29, 1993, and was protested by Cahoon and Maxfield Irrigation Company, Robert J. Murdock et al, Salt Lake County, and Harvey Stauffer. In the protests it is stated that the approval of the change application will impair the rights of the protestants and a surplus sales contract does not guarantee that water will be available for the people who are using the water.

A hearing was held on August 28, 1996, in Salt Lake City, Utah. At the hearing the applicant explained the history of the underlying water rights and the nature of the contracts by which the change is based. The protestants in attendance reiterated their protests.

The State Engineer has reviewed the change application, the underlying water rights, the protests, the information submitted at the hearing, and other associated water rights and has noted and the following:

- A. It appears that the applicant, by virtue of the exchange agreements, is entitled to the use of water and has the right to file the change application.
- B. The question of surplus water contracts with county residents is not within the purview of the State Engineer. Should those residents or entities deem that those contracts are not sufficient for their needs, they can obtain other water rights and file the appropriate change applications for the proposed uses.

**MEMORANDUM DECISION**  
**CHANGE APPLICATION NUMBER**  
**57-10014 (a16845)**  
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- C. The State Engineer is of the opinion that certain conditions will have to be imposed to ensure that the rights of the others are not impaired by this change application. The exchange agreements between the irrigation companies and Salt Lake City for replacement water from Utah Lake will lessen the likelihood of any such impairment. The total flow of all change applications filed by the applicant in Little Cottonwood Canyon and the diversions by Salt Lake City at the mouth of the canyon cannot exceed the total of the water rights owned by the city.
- D. The applicant has stated in the application that the historic uses are municipal. It appears that the underlying water rights held by the irrigation companies and utilized by exchange agreement by the applicant are for irrigation. This change application converts the nature of use from irrigation to municipal for 0.221 acre-foot only as addressed in this change. The balance of Salt Lake City's water right under this decreed award would remain under the historical purposes. Should the city wish to convert these uses to municipal, submission of other change applications is necessary.

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, rather to provide sufficient definition of the rights to assure that other vested rights are not impaired by the change and no enlargement occurs. If, in a subsequent action, the court adjudicates that this right is entitled to either more or less water, the State Engineer will adjust the figures accordingly.

It is, therefore, **ORDERED** and Change Application Number 57-10014 (a16845) is hereby **APPROVED** subject to prior rights and the following conditions:

1. The applicant shall install permanent measuring devices to measure both the instantaneous flow rate and the total volume of water diverted. Records shall be kept at least monthly of all water diverted. These measuring devices and the records shall be made available to the State Engineer at all reasonable times to regulate this change.
2. The applicant shall submit on an annual basis by January 31 of each year for the prior calendar year a summary of all water diverted from each source in Little Cottonwood Canyon.
3. Upon submittal of proof of change, the applicant shall provide information on how much water by use has been diverted from each source along with evidence that the total of all water rights in Little Cottonwood Canyon under the applicants control have not been exceeded.
4. The historic water diversion would have irrigated 0.044 acre. About 50% of the water would have been consumed and 50% would have returned to the system. To prevent enlargement, annual depletion under this change application cannot exceed 0.11 acre-foot.

This Decision is subject to the provisions of Rule R655-6-17 of the Division of Water Rights and to Sections 63-46b-13 and 73-3-14 of the Utah Code Annotated, 1953, which provide for filing either a Request for Reconsideration with the

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**57-10014 (a16845)**  
**PAGE -3-**

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 Decision. 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 Decision, 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 17th day of January, 1997.

  
Robert L. Morgan, P.E., State Engineer

RLM:JER:et

Mailed a copy of the foregoing Memorandum Decision this 17th day of January, 1997, to:

Salt Lake City Corporation  
Department of Public Utilities  
1530 South West Temple  
Salt Lake City, UT 84115

Cahoon and Maxfield Irrigation Company  
c/o Anton P. Rezac  
5668 South Bullion  
Murray, UT 84123

Murdock, Robert J., et al  
2964 East 3135 South  
Salt Lake City, UT 84109

Salt Lake County  
c/o David E. Yocom  
2001 South State Street, #S3600  
Salt Lake City, UT 84190-1200

Harvey Stauffer  
#8 Stauffer Lane  
Murray, UT 84107

BY:   
Eileen Tooke, Secretary

# **EXHIBIT 21**

BEFORE THE STATE ENGINEER OF THE STATE OF UTAH

IN THE MATTER OF CHANGE APPLICATION )  
 )  
NUMBER 57-10015 (a16846) )

MEMORANDUM DECISION

Change Application Number 57-10015 (a16846), in the name of Salt Lake City Corporation, was filed on June 24, 1992, to change the point of diversion and place of use of 15.75 acre-feet of water. Heretofore, the water has been diverted from Little Cottonwood Creek at the following locations: Tanner Ditch at South 234 feet and East 102 feet from the W $\frac{1}{4}$  Corner of Section 28, T2S, R1E, SLB&M; Cahoon and Maxfield Ditch at North 77 feet and West 663 feet from the E1/4 Corner of Section 29, T2S, R1E, SLB&M; Walker Ditch at North 1363 feet and West 1143 feet from the E $\frac{1}{4}$  Corner of Section 29, T2S, R1E, SLB&M; Richards Ditch at South 1800 feet and East 707 feet from the N $\frac{1}{4}$  Corner of Section 34, T2S, R1E, SLB&M; Little Cottonwood Creek Diversion Dam at North 2309 feet and West 743 feet from the E $\frac{1}{4}$  Corner of Section 11, T3S, R1E, SLB&M; and Murray City Power Plant Diversion Dam at South 838 feet and East 4512 feet from the W $\frac{1}{4}$  Corner of Section 7, T3S, R2E, SLB&M. The water has been used for municipal purposes in Salt Lake City.

Hereafter, it is proposed to divert 15.75 acre-feet of water from a spring and Mine Tunnel, located: (1) South 230 feet and West 900 feet; and (2) North 412 feet and West 833 feet both from the NE Corner of Section 9, T3S, R3E, SLB&M. It is proposed to use the water for same purposes as heretofore in the N $\frac{1}{2}$ NE $\frac{1}{4}$ , and the SE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 9, T3S, R3E, SLB&M. It is further stated in the application that a contract has been made between the Little Cottonwood Water Company and Canyonlands Inc., for the Canyonlands to divert up to 15.75 acre-feet of water annually for only domestic requirement for 35 homes in the Albion Basin Subdivision.

The application was advertised in the Deseret News from April 15, 1993, to April 29, 1993, and was protested by Cahoon and Maxfield Irrigation Company, Robert J. Murdock et al, Salt Lake County, and Harvey Stauffer. In the protests it is stated that the approval of the change application will impair the rights of the protestants and a surplus sales contract does not guarantee that water will be available for the people who are using the water.

A hearing was held on August 28, 1996, in Salt Lake City, Utah. At the hearing the applicant explained the history of the underlying water rights and the nature of the contracts by which the change is based. The protestants in attendance reiterated their protests.

The State Engineer has reviewed the change application, the underlying water rights, the protests, the information submitted at the hearing, and other associated water rights and has noted and the following:

- A. It appears that the applicant, by virtue of the exchange agreements, is entitled to the use of water and has the right to file the change application.
- B. The question of water contracts with county residents is not within the purview of the State Engineer. Should those residents or entities deem that those contracts are not substantial to satisfy their needs, they can obtain other water rights and file the appropriate change applications for

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**CHANGE APPLICATION NUMBER**  
**57-10015 (a16846)**  
**PAGE -2-**

the proposed uses.

- C. The State Engineer is of the opinion that certain conditions will have to be imposed to ensure that the rights of the others are not impaired by this change application. The exchange agreements between the irrigation companies and Salt Lake City for replacement water from Utah Lake will lessen the likelihood of any such impairment. The total flow of all change applications filed by the applicant in Little Cottonwood Canyon and the diversions by Salt Lake City at the mouth of the canyon cannot exceed the total of the water rights owned by the city.
- D. The applicant has stated in the application that the historic uses are municipal. It appears that the underlying water rights held by the irrigation companies and utilized by exchange agreement by the applicant are for irrigation. This change application converts the nature of use from irrigation to municipal for 15.75 acre-feet only as addressed in this change.

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, rather to provide sufficient definition of the rights to assure that other vested rights are not impaired by the change and no enlargement occurs. If, in a subsequent action, the court adjudicates that this right is entitled to either more or less water, the State Engineer will adjust the figures accordingly.

It is, therefore, **ORDERED** and Application Number 57-10015 (a16846) is hereby **APPROVED** subject to prior rights and the following conditions:

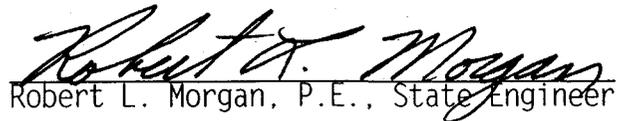
1. The applicant shall install permanent measuring devices to measure both the instantaneous flow rate and the total volume of water diverted. Records shall be kept at least monthly of all water diverted. These measuring devices and the records shall be made available to the State Engineer at all reasonable times to regulate this change.
2. The applicant shall submit on an annual basis by January 31 of each year for the prior calendar year a summary of all water diverted from each source in Little Cottonwood Canyon.
3. Upon submittal of proof of change, the applicant shall provide information on how much water by use has been diverted from each source along with evidence that the total of all water rights in Little Cottonwood Canyon under the applicants control have not been exceeded.
4. The historic water diversion would have irrigated 3.15 acres. About 50% of the wter would have been consumed and 50% would have returned to the system. To prevent enlargement, depletion under this change cannot exceed 7.875 acre-feet of water.

This Decision is subject to the provisions of Rule R655-6-17 of the Division of Water Rights and to Sections 63-46b-13 and 73-3-14 of the Utah Code Annotated, 1953, which provide for filing either a Request for Reconsideration with the State Engineer or an appeal with the appropriate District Court. A Request for

**MEMORANDUM DECISION**  
**CHANGE APPLICATION NUMBER**  
**57-10015 (a16846)**  
**PAGE -3-**

Reconsideration must be filed with the State Engineer within 20 days of the date of this Decision. 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 Decision, 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 15th day of January, 1997.

  
Robert L. Morgan, P.E., State Engineer

RLM:JER:et

Mailed a copy of the foregoing Memorandum Decision this 15th day of January, 1997, to:

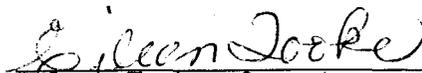
Salt Lake City Corporation  
Department of Public Utilities  
1530 South West Temple  
Salt Lake City, UT 84115

Cahoon and Maxfield Irrigation Company  
c/o Anton P. Rezac  
5668 South Bullion  
Murray, UT 84123

Murdock, Robert J., et al  
2964 East 3135 South  
Salt Lake City, UT 84109

Salt Lake County  
c/o David E. Yocom  
2001 South State Street, #S3600  
Salt Lake City, UT 84190-1200

Harvey Stauffer  
#8 Stauffer Lane  
Murray, UT 84107

BY:   
Eileen Tooke, Secretary

# **EXHIBIT 22**



**SALT LAKE CITY  
WATERSHED  
MANAGEMENT  
PLAN**

**FINAL DRAFT  
MARCH, 1999**

Salt Lake City  
Department of  
Public Utilities

Prepared by  
the Bear West  
Consulting Team

Little Cottonwood Creek peaks late in the spring, June 4 on the average, mainly because of the heavy snow pack in the higher elevations. Throughout the year the stream flow radically fluctuates due to the steep side slopes and impervious rock surfaces that make up much of the canyon. The average annual yield for the stream is 46,149 acre-feet, the second largest yield in the plan area.

**Canyon Uses:** Uses in Little Cottonwood Canyon are characterized by heavy developed and dispersed recreational use, destination lodging and transportation. All uses in the canyon have increased during the past decade. Downhill skiing is the most intensely developed recreation use in the canyon at Alta and Snowbird ski resorts. The most accurate measure of growth in the canyon is average daily traffic. In 1987, the average daily traffic was 12,865. In 1996, the average daily traffic had increased to 16,540, an increase of 29 percent. With the exception of Parleys Canyon, this is the highest average daily traffic in the plan area. The average daily traffic from 1987 to 1996 is reported in Appendix G.

Developed campsites are maintained by the Forest Service at Tanner Flat and Albion Basin. Tanner Flat has been closed due to an environmental remediation project. Use at these sites has varied from year to year. The two campgrounds have a capacity of 465 persons. While weekend and holiday use is high, weekend and weekday use combined falls below capacity.

## **WATER QUALITY**

### **BACKGROUND**

Salt Lake City obtains a significant portion of its culinary water supply from canyon streams originating in the Wasatch Mountains. These canyons include City Creek, Emigration, Parleys, Mill Creek, Big Cottonwood, and Little Cottonwood. Water from City Creek, Parleys, Big Cottonwood, and Little Cottonwood is treated in treatment plants and distributed to residents of Salt Lake City and Salt Lake County. Reliance on these water sources is such that the Salt Lake City Department of Public Utilities must closely monitor and regulate any activities that may threaten water quality. Though recreation activity in these canyons has increased, water from these canyons has historically been of high quality. Recent mean annual total coliform counts have raised concerns that canyon water quality may be deteriorating.

### **Data Contaminant Indicators, Sources, and Fate**

# **EXHIBIT 23**

AUG 12 1976

APPROVED AS TO FORM  
Salt Lake City Attorney's Office  
Date 8/12/76  
By R.L. ...

*Dildred V. Higham*  
CITY RECORDER

INTERGOVERNMENTAL AGREEMENT

WATER SUPPLY AGREEMENT SALT LAKE CITY TO ALTA CITY

THIS AGREEMENT made and entered into as of the 12th day of August, 1976, by and between SALT LAKE CITY CORPORATION, a municipal corporation of the State of Utah, hereinafter CITY, and ~~of ALTA CITY~~, a municipal corporation of the State of Utah, hereinafter ALTA.

WITNESSETH:

WHEREAS, Alta is a body corporate and politic of the State of Utah situated in Little Cottonwood Canyon, Salt Lake County, Utah established pursuant to the laws of the State of Utah for the purposes of furnishing municipal services, to the residents and developments within the boundaries of Alta City; and

WHEREAS, Alta represents that it is presently in compliance with the ordinances, rules and regulations of the Salt Lake City-County Health department and State and Federal regulatory agencies concerning sanitation water use and treatment, sewage disposal incident to the uses and developments and rules and regulations within the Salt Lake City watershed area; and

WHEREAS, City owns and/or controls the major portion of the primary waters of Little Cottonwood Canyon for the use and benefit of Salt Lake City residents, some of which, at this time, can be made available to Alta; and

WHEREAS, City and Alta desire to enter into an agreement for the supply of water to Alta in accordance herewith.

NOW, THEREFORE, in consideration of the premises, the parties agree as follows:

1. City agrees to make available to Alta for its use, as hereinafter described, the normal flow of raw, untreated water, not to exceed 265,000 gallons per day, emanating from either of the following locations, to-wit:

Entrance to Bay City Mine

1500 feet more or less West, and 400 feet more or less South from the South East Corner Section 32 T.2S., R.3E., S.L.B.& M.

The vector of the tunnel is in a Northeasterly direction.

Alternate Point of Diversion above the Snake Pit on Little Cottonwood Creek.

200 feet more or less East and 2950 feet more or less South from the Southeast Corner Section 32, T.2S., R.3E., S.L.B.& M.

2. If the Agreement between City and Alta Peruvian Lodge and others, dated May 20, 1976, is not terminated within one year from the date on which Alta first begins using water hereunder, the maximum amount of water to which Alta is entitled under Article 1 hereof, shall be reduced thereafter by 150,000 gallons per day.

3. Alta agrees to construct or have constructed, from said water sources and diversion points to the various users of water intended to be served within the city limits, all necessary pipelines, facilities, fixtures and appurtenances thereof, all of which shall be acquired or constructed at the sole cost of Alta, and Alta shall maintain and repair the same together with any tanks, pumps or other equipment and facilities necessary or incidental to the movement and/or treatment of the water from said points of diversion to the various users within Alta's city limits.

4. City shall have no obligation whatsoever to Alta or any of its users, lessees, assigns or grantees with regard to the construction, maintenance or repair of said facilities, and Alta agrees that the same will, at all times, be so maintained and policed as to prevent loss or waste of water from the distribution system.

5. Alta will install at its sole cost and to City specifications, all necessary meters and shut off valves so that City can measure and control the amount of water used by Alta and agrees not to use or allow the use of any water through said system without said metering devices attached. Alta agrees to convey to City said valves and facilities from the source to said shut off valves and meters, and thereafter

6. City will at all times be provided with complete access to said facilities, valves and meters, and Alta agrees to obtain and deed to City all rights-of-way and easements deemed necessary for such access by City.

7. City shall, from time to time, read said meters and compute the amount of water used by Alta, which will be billed once each month at the then prevailing City water rates for water served inside City's limits as provided by the then current City ordinance. Alta agrees to pay said charge within 15 days after a statement is forwarded by City.

8. It is expressly understood and agreed that said pipelines shall not be extended to or supply water to any properties or facilities not within the present city limits of Alta without the prior written consent of City.

9. The uses of the water supplied hereunder shall be limited solely to domestic and commercial culinary purposes and uses incidental thereto, and it shall not be used for agricultural irrigation or sprinkling of any type.

10. Alta agrees to receive the water furnished hereunder by City "as is", with no representations by City as to quality or purity. City shall be under no obligation whatsoever to render said water fit or suitable for human consumption.

11. It is understood and agreed that City has prior statutory and contractual obligations to deliver water to its inhabitants, and its surplus water to firms and corporations in the canyon and elsewhere, and this Agreement is made only as to surplus waters in excess of City's needs and obligations, and if at any time and for any reason, in City's sole judgment, it is unable to furnish the water provided for by this agreement, it may reduce the amount of water allowed hereunder or cancel and terminate this Agreement upon 30 days written notice by personally serving or mailing by certified or registered, written notice thereof to Alta City, at Alta, Utah, provided however, that the foregoing shall in no way prohibit City from assigning or transferring its obligations hereunder to another supplier or from making other arrangements for

12. Alta recognizes City's need to protect its watershed and specifically agrees to be bound by and comply with all City water ordinances, applicable County ordinances, Salt Lake City-County Board of Health regulations and applicable State law. It is understood and agreed that City may immediately or after notice terminate this Agreement, without any liability whatsoever, for Alta's violation of any of the terms and conditions hereunder, or for Alta's failure or refusal within five (5) days after written notice to correct any Alta controlled or controllable condition violating, or to enforce violation against others within its city limits of, then in force City and/or County watershed ordinances or any sanitary regulation of the Salt Lake City-County Board of Health or State law.

13. Alta agrees that until the EPA 208 Study is complete there will be no additional users of water added to the system beyond those now in existence to whom water service is presently contemplated.

14. Neither this Agreement nor the benefits nor obligations hereunder are assignable by Alta without the prior written consent of City.

15. Alta agrees to indemnify, save harmless and defend City, its agents and employees, from and against any and all suits, legal proceedings, claims, mechanics liens, demands, costs and attorney's fees arising out of or by reason of Alta's construction, replacement and maintenance of said water lines and attendant facilities and use of said water obtained hereunder. Alta further agrees to maintain in force at its own expense during the life of this Agreement, a comprehensive general liability insurance policy with additional coverage for contractual, completed operations and products liability in the minimum amounts of \$100,000/\$300,000 for bodily injury and \$50,000 for property damage, and naming City as an additional named insured for all risks involved hereunder.

IN WITNESS WHEREOF, the parties have caused this Agreement to

be executed as of the day and year first above written.

SALT LAKE CITY CORPORATION

By Ted L. Wilson  
MAYOR

ATTEST:

Mildred V. Higham  
CITY RECORDER

Town: of ALTA CITY

By William H. Faust  
MAYOR

ATTEST:

[Signature]  
CITY RECORDER  
Acting Town Clerk

STATE OF UTAH )  
                  : ss.  
County of Salt Lake)

On the 12<sup>th</sup> day of August, 1976, personally appeared before me TED L. WILSON and MILDRED V. HIGHAM, who being by me duly sworn, did say that they are the MAYOR and CITY RECORDER, respectively, of SALT LAKE CITY CORPORATION, and that said instrument was signed in behalf of said corporation by authority of a motion of its Board of Commissioners passed on the 12<sup>th</sup> day of August, 1976; and said persons acknowledged to me that said corporation executed the same.

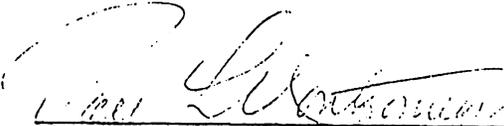
[Signature]  
NOTARY PUBLIC, residing in  
Salt Lake City, Utah

My Commission Expires:

1-8-79

STATE OF UTAH )  
 : ss.  
 County of Salt Lake)

On the 11th day of August, 1976, personally appeared before me William H. Hewitt and Jeffery L. Anderson, who being by me duly sworn, did say that they are the MAYOR and <sup>Acting Mayor</sup> CITY RECORDER, respectively, of ALTA CITY, and that said instrument was signed in behalf of said corporation by authority of a motion of its Board of Commissioners passed on the 14th day of March, 1976; and said persons acknowledged to me that said corporation executed the same.

  
NOTARY PUBLIC, residing in  
Salt Lake City, Utah

RAY L. MONTGOMERY  
NOTARY PUBLIC  
My Commission Expires  
10/31/77  
SALT LAKE CITY, UTAH

AMENDMENT OF INTERGOVERNMENTAL  
SALT LAKE CITY TO ALTA CITY WATER SUPPLY AGREEMENT

06

THIS AGREEMENT is made and entered into as of the 1st  
day of April, 1980, by and between SALT LAKE CITY  
CORPORATION, a municipal corporation of the State of Utah,  
hereinafter CITY, and the TOWN OF ALTA, a municipal corporation  
of the State of Utah, hereinafter ALTA.

WITNESSETH:

WHEREAS, on or about the 12th day of August, 1976, the City  
and Alta entered into an Intergovernmental Agreement for sale of  
water from Salt Lake City to Alta; and

WHEREAS, the parties are now desirous of amending paragraph  
7 of said Agreement.

NOW, THEREFORE, in consideration of the premises, the  
parties agree to amend paragraph 7 of said agreement which shall  
read from inception of the Agreement as follows:

7. City shall, from time to time, read said meters and  
compute the amount of water used by Alta, which will be billed  
once each month at initially 12¢ per 100 cubic feet, which amount  
shall be reviewed once each year during the term hereof and  
may be raised or lowered at that time at the option of City by  
notifying Alta of said rate change in writing. Alta agrees to  
pay said water bill within 30 days after a statement is forwarded  
by City. Failure to pay said bill within said 30 days shall be  
grounds for cancellation of this agreement, and Alta agrees to  
pay City a reasonable attorney's fee and all costs and expenses  
for collection of any such outstanding bill.

Except as modified by the foregoing, said Agreement between  
the parties dated August 12, 1976, shall remain in full force and  
effect.

IN WITNESS WHEREOF, the parties have caused this Agreement

to be executed as of the day and year first above written.

SALT LAKE CITY CORPORATION

By [Signature]  
MAYOR

ATTEST:

Mildred V. Higham  
CITY RECORDER

TOWN OF ALTA

By [Signature]  
MAYOR

ATTEST:

\_\_\_\_\_

STATE OF UTAH )  
                  ) ss.  
County of Salt Lake)

On the 1st day of April, 1980, personally appeared before me TED L. WILSON and MILDRED V. HIGHAM, who being by me duly sworn, did say that they are the MAYOR and CITY RECORDER, respectfully, of SALT LAKE CITY CORPORATION, and said persons acknowledged to me that said corporation executed the same.

Katherine L. Barnick  
NOTARY PUBLIC, residing in  
Salt Lake City, Utah

My Commission Expires:

1-8-83

STATE OF UTAH )  
: ss.  
County of Salt Lake)

On the 19<sup>th</sup> day of March, 1980, personally  
appeared before me WILLIAM H. LEAVITT and \_\_\_\_\_,  
who being by me duly sworn, did say that they are the MAYOR  
and \_\_\_\_\_, respectively, of ALTA CITY, and said persons  
acknowledged to me that said City executed the same.

William H. Leavitt  
NOTARY PUBLIC, residing in  
Salt Lake City, Utah

My Commission Expires:

January 23, 1984

# **EXHIBIT 24**



## Water Use Information for Water Right Applications

Revised: June 24, 2003

The diversion figure in water right applications is the quantity of water expressed as a flow rate in cfs (cubic feet per second) and/or as a volume in acre-feet to be taken from a well, river, spring, etc. for the required purpose. The depletion figure is the quantity of water consumed which will be lost to the hydrologic system through said use. Depleted water does not return to the surface water sources or underground aquifers via seepage, drainage, etc. but is consumed in the growth of plants and animals, evaporation, and transmission away from the area. The following figures are used for general quantification. As new data is available, these figures may change. If applicants provide specific figures based on design criteria, testing data, monitored measurements, etc. which differ from these amounts, such information will be reviewed and considered. One cubic-foot per second equals about 450 gallons per minute. One acre-foot of water equals 325,851 gallons.

**DOMESTIC (inside use only):** Water diversion for a fulltime (permanent residence) use is evaluated at 0.45 acre-foot per family. Parttime (seasonal or recreational) use is equated at 0.25 acre-foot per family. Depletion is generally 20% if using a septic tank or drain field system. It varies if the residence is connected to a community sewage system depending on the treatment method used and its distance away from the diverted source.

**IRRIGATION (any outside watering):** This purpose includes watering of crops, lawns, gardens, orchards, and landscaping. The [diversion amount \(irrigation duty\)](#) ranges from 2 acre-feet per acre in cool, mountain meadow areas to 6 acre-feet per acre in low, hot southern areas of the state. Higher, cooler valleys are generally 3 acre-feet per acre, and lower moderate areas 4 or 5 acre-feet per acre. If land is subirrigated or supplemented by other rights or supplies, the diversion rate may be less than average for the area. Generally the irrigation season is described as April 1 to October 31 and/or the general frostfree period in the area. Some court decrees and early rights authorize differing periods. Depletion varies considerably due to differing soils, temperatures, wind factors, etc. and can range from about 40% to about 70%. Figures are taken from available studies (particularly "Consumptive Use of Irrigated Crops in Utah", Research Report 145, [tables from which are accessible on the internet](#)).

**STOCKWATERING:** The diversion figures for this purpose are based on year-round watering. Stock operations for lesser or intermittent periods would need adjustment accordingly. Water diverted for this use is generally considered to be 100% depleted by the animal, evaporation, phreatophytes, and/or waste water collection.

cow or horse	0.028	acre-foot
sheep, goat, swine, moose, or elk	0.0056	acre-foot
ostrich or emu	0.0036	acre-foot
llama	0.0022	acre-foot
deer, antelope, bighorn sheep, or mt. goat	0.0014	acre-foot
chicken, turkey, chukar, sagehen, or pheasant	0.00084	acre-foot
mink or fox (caged)	0.00005	acre-foot

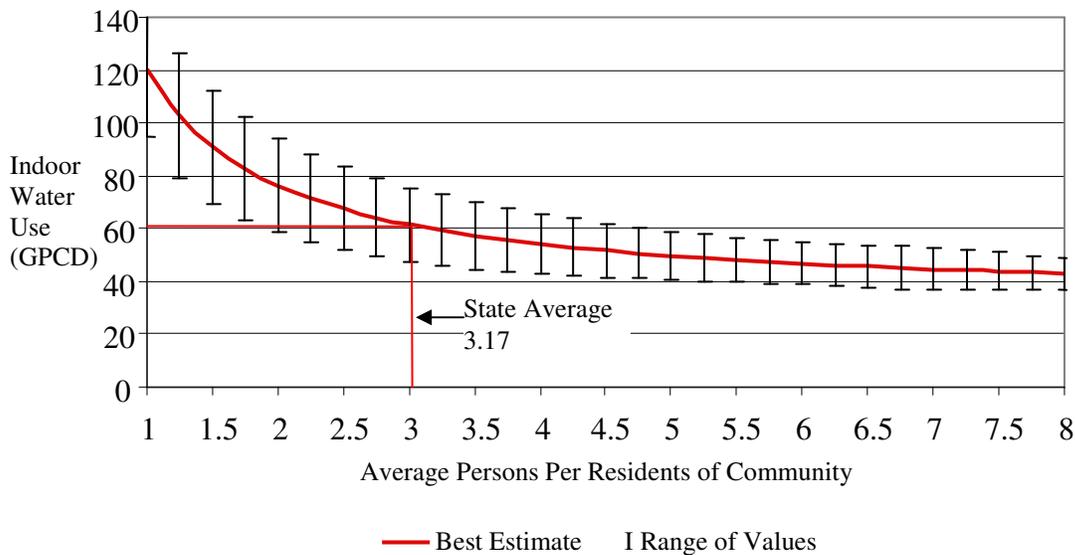
**INDUSTRIAL, COMMERCIAL, RECREATIONAL, COMMUNITY AND MINING:** Projects are evaluated on an individual basis. Parameters include method of processing or manufacturing, number of employees, length of workshift and period of operation, type of waste processing and/or discharge, and types of employee and/or public facilities (showers, food preparation, etc.). The [Utah State Administrative Rules for Public Drinking Water Systems](#) are guidelines for such estimates.

# **EXHIBIT 25**



In 2010, DWRe published a report entitled *Residential Water Use Study*, which contains results of a detailed residential water use survey conducted in 2009. One of the most useful findings from this study is the correlation between residential indoor water use and the number of persons in a household. As Figure 6 shows indoor per capita use is a function of persons per household (PPH). The statewide average PPH is 3.17, which corresponds to 60 gpcd. This is down from a 2001 DWRe study that showed residential indoor use at 70 gpcd with a statewide average pph at 3.13.

### Statewide Average Indoor GPCD



**Figure 6 Residential Indoor Water Use**

Source: DWRe, *Residential Water Use, 2010*

With these studies, DWRe has been able to better quantify indoor and outdoor residential water use from the 2005 Statewide Water Use Public Community Systems study. Currently, about 65% of Utah’s residential water is used outdoors and 35% indoors. In terms of total public community system use, 60% is used outside and 40% indoors.

# **EXHIBIT 26**

# THE WATER - ENERGY NEXUS IN UTAH



2012

Meeting the Water and Energy Challenge

September 2012

Utah Division of Water Resources  
1594 West North Temple, Suite  
310 P.O. Box 14201  
Salt Lake City, Utah 84114



2000 per capita water use by at least 25% the year 2050. Additional strategies will likely include new surface water development projects, conversion of agricultural water to municipal and industrial uses, water reuse, conjunctive use, and additional groundwater development. Some of these approaches to meeting future water demand could require pumping water over longer distances and from greater depths. The newly developed resources could also require more rigorous treatment to reach potable drinking water standards before being delivered to customers. Sewage water will need to be treated to higher discharge standards, or to an even higher standard for water reuse. This reclaimed water will likely need additional infrastructure to deliver it to its new point of use. All of these non-conservation oriented development approaches have some commonalities. They will cost more than water projects of the past since much of Utah's less expensive water sources have now been developed and they will be more energy intensive.

Why should this be of concern for water planners, managers and consumers alike? Water is an extremely heavy molecule. It takes a substantial amount of energy to do the work of raising even one acre-foot (ac-ft) of water to an elevation of 100 feet, and the greater the flow-rate and elevation, the greater the energy requirement. To give an example, California's State Water Project (SWP) is the state's largest energy consumer; using an average of 5 billion kilowatt-hours (kWh) each year to pump water over the Tehachapi Mountains. Southern California's other major source of imported water, the Colorado River, requires 2,000 kWh per ac-ft of water delivered.<sup>1</sup> No water system in Utah is quite so large, but local water utilities still use large amounts of energy to move and treat water. Pumping water is usually a utility's largest operational cost, followed by water treatment. In some rural areas of Utah, pumping groundwater for irrigation is one of the largest costs for farming and agricultural communities.

The phenomenon of limited water availability and greater costs in Utah is juxtaposed with an abundance of energy resources, primarily in the form of traditional and non-traditional fossil fuels. Coal combustion, natural gas, hydropower, and petroleum all contribute to the low cost of energy in the state of Utah, enabling a high standard of living for its residents and contributing to the state's overall prosperity. However, each energy source has a requisite water demand that also draws on a limited water supply. Renewable energy resources, such as geothermal, solar power, bio-fuels and wind, also have a "water footprint" that can either exacerbate or facilitate water supply issues (Figure 2).

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<sup>1</sup> Wolff, G. "Energy Down the Drain: The Hidden Costs of California's Water Supply." *Natural Resources Defense Council, Pacific Institute, Oakland Ca.*

# **EXHIBIT 27**



2002	03/03/2003	370	0	365	1
2001	03/06/2002	370		365	1
2000	02/02/2001	407		365	0
1999	01/27/2000	407		365	0
1998	02/10/1999	407		365	0
1997	03/19/1998	397	0	365	0
1996	01/29/1997	397	0	365	0
1995	03/04/1996	397	0	365	0
1994	02/08/1995	397	0	365	0
1993	03/22/1994	397	0	365	0
1992	03/19/1993	397	0	365	0
1991	01/31/1992	397	0	365	0
1990	03/13/1991	400	0	365	0
1987	05/03/1988	450		375	0
1986	03/23/1987	0		375	0
1983	02/09/1984	300		375	0

**Annual Connection Info**

Year	Domestic	Commercial	Industrial	Institutnl	Stock	Wholesale	Other	Unmetered	Total
2012	64	21	0	0	0	0	0	0	85
2011	63	20	0	0	0	0	0	0	83
2010	63	20	0	0	0	0	0	0	83
2009	63	20	0	0	0	0	0	0	83
2008	63	20	0	0	0	0	0	0	83
2007	63	20	0	0	0	0	0	0	83
2006	63	20	0	0	0	0	0	0	83
2005	63	20	0	0	0	0	0	0	83
2004	64	20	0	0	0	0	0	0	84
2003	63	20	0	0	0	0	0	0	80
2002	63	20	0	0	0	0	0	0	83
2001	63	20	0	0	0	0	0	0	83
2000	63	20	0	0	0	0	0	0	83
1999	54	20	0	0	0	0	0	0	74
1998	54	20	0	0	0	0	0	0	74
1997	47	20	0	0	0	0	0	0	67
1996	45	20	0	0	0	0	0	0	65
1995	43	17	0	0	0	0	0	0	60
1994	42	17	0	0	0	0	0	0	59
1993	42	16	0	0	0	0	0	0	58
1992	40	16	0	0	0	0	0	0	56
1991	37	16	0	0	0	0	0	0	53
1990	25	13	0	0	0	0	0	0	38
1987	0	0	0	0	0	0	0	0	42
1986	0	0	0	0	0	0	0	0	0
1983	0	0	0	0	0	0	0	0	40

**Annual Use Info (Acft)**

Year	Domestic	Commercial	Industrial	Institutnl	Stock	Wholesale	Other	Unmetered	Total
2012	15.00	47.51	0.00	0.00	0.00	0.00	0.00	0.00	62.51
2011	20.42	81.72	0.00	0.00	0.00	0.00	0.00	0.00	102.14
2010	13.54	61.68	0.00	0.00	0.00	0.00	0.00	0.00	75.22
2009	11.98	58.44	0.00	0.00	0.00	0.00	0.00	0.00	70.42
2008	13.92	67.96	0.00	0.00	0.00	0.00	0.00	0.00	81.88
2007	16.90	82.47	0.00	0.00	0.00	0.00	0.00	0.00	99.37
2006	21.59	105.39	0.00	0.00	0.00	0.00	0.00	0.00	126.98
2005	103.30	12.77	0.00	0.00	0.00	0.00	0.00	0.00	116.07
2004	128.58	0.00	0.00	0.00	0.00	0.00	0.00	0.00	128.58
2003	22.90	111.82	0.00	0.00	0.00	0.00	0.00	0.00	134.73
2002	21.02	102.62	0.00	0.00	0.00	0.00	0.00	0.00	123.63
2001	21.86	106.71	0.00	0.00	0.00	0.00	0.00	0.00	128.57
2000	17.51	128.38	0.00	0.00	0.00	0.00	0.00	0.00	145.88
1999	17.27	139.75	0.00	0.00	0.00	0.00	0.00	0.00	157.03
1998	16.16	140.79	0.00	0.00	0.00	0.00	0.00	0.00	156.95
1997	17.31	154.11	0.00	0.00	0.00	0.00	0.00	0.00	171.42
1996	22.86	111.13	0.00	0.00	0.00	0.00	0.00	0.00	134.00
1995	25.80	103.18	0.00	0.00	0.00	0.00	0.00	0.00	128.98
1994	23.09	92.35	0.00	0.00	0.00	0.00	0.00	0.00	115.44
1993	13.72	100.65	0.00	0.00	0.00	0.00	0.00	0.00	114.37
1992	10.64	90.49	0.00	0.00	0.00	0.00	0.00	0.00	101.13
1991	9.93	89.31	0.00	0.00	0.00	0.00	0.00	0.00	99.24
1990	9.21	81.86	0.00	0.00	0.00	0.00	0.00	0.00	91.07
1987	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	77.88
1986	16.33	65.31	0.00	0.00	0.00	0.00	0.00	0.00	81.64
1983	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	87.21

**Source Summary**

Source Name: Bay City Tunnel  
 PLS Location: S 1601 ft W 1355 ft from NE Cor Section 05 T3S R3E SLB&M  
 Source Type: Tunnel  
 Primary Use: Water Supplier  
 Diversion Type: Withdrawal

Hydrologic Unit Code: 16020204  
 DEHN Source Code: 18049-01  
 Saline Water: N

Water Right Numbers: [57-7129](#)

Source Comments:

\*\*\*\* 2006 \*\*\*\* Bay City Tunnel \*\*\*\*  
 \*\*\*\* 2007 \*\*\*\* Bay City Tunnel \*\*\*\*  
 \*\*\*\* 2009 \*\*\*\* Bay City Tunnel \*\*\*\*  
 \*\*\*\* 2010 \*\*\*\* Bay City Tunnel \*\*\*\*  
 \*\*\*\* 2010 \*\*\*\* Bay City Tunnel \*\*\*\*  
 \*\*\*\* 2010 \*\*\*\* Bay City Tunnel \*\*\*\*  
 \*\*\*\* 2011 \*\*\*\* Bay City Tunnel \*\*\*\*  
 \*\*\*\* 2012 \*\*\*\* Bay City Tunnel \*\*\*\*

Source Record (ACFT)

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Ann	Measuring Method
2012	7.5	9.1	9.1	3.7	3.5	3.6	4.5	4.1	3.2	8.6	4.4	2.2	63.5	meter
2011	13.6	11.3	12.8	10.8	7.7	8.8	14.0	4.5	0.9	3.3	7.0	7.3	102.2	meter
2010	8.4	9.5	10.4	4.8	5.0	3.7	4.1	3.7	4.1	3.7	14.3	3.6	75.2	meter
2009	10.6	7.1	10.6	4.9	3.3	4.3	2.9	4.9	3.5	3.0	6.9	8.4	70.4	meter
2008	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	
2007	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	
2006	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	
2005	15.1	13.6	15.0	8.9	7.1	7.5	7.6	17.9	0.0	0.0	23.3	0.0	116.1	Master Meter
2004	15.8	15.5	14.8	9.9	8.1	8.1	8.2	9.5	6.7	5.9	11.3	14.8	128.6	Master Meter
2003	14.7	15.1	15.9	8.2	6.5	9.9	9.3	8.9	8.8	9.2	11.9	16.5	134.7	Master Meter
2002	12.6	13.5	15.6	7.9	6.0	8.9	9.5	9.1	7.5	6.5	13.2	13.2	123.6	Master Meter
2001	15.6	15.3	14.9	10.7	6.7	7.2	9.7	8.1	7.8	5.8	12.8	14.1	128.6	Master Meter
2000	14.5	15.4	17.1	10.3	8.4	10.4	12.6	9.1	8.1	13.2	13.1	13.6	145.9	Master Meter
1999	15.0	17.0	17.8	10.4	11.3	9.0	13.5	9.7	8.3	7.0	24.0	13.9	157.0	Master Meter
1998	15.6	16.1	21.9	6.6	9.0	8.9	11.0	8.7	10.5	8.5	23.3	17.0	157.0	Master Meter
1997	15.0	13.9	22.4	9.3	11.9	13.6	11.9	11.7	9.7	10.6	21.7	19.8	171.4	Master Meter
1996	14.4	16.0	20.5	12.1	6.8	6.1	8.2	7.9	6.7	5.6	15.0	14.7	134.0	Master Meter
1995	13.3	12.5	13.4	9.0	5.5	8.8	7.4	24.1	0.0	17.9	0.0	17.0	129.0	
1994	12.0	11.3	13.2	7.4	6.3	6.3	8.1	7.9	7.0	8.1	14.5	13.4	115.6	
1993	9.8	12.4	12.5	7.6	4.5	4.5	8.1	8.4	8.4	5.8	17.0	15.4	114.4	
1992	14.6	9.5	12.3	6.5	4.3	5.0	5.1	4.9	4.7	4.5	13.0	16.8	101.1	
1991	13.8	12.4	12.9	5.6	4.5	5.0	7.2	5.4	5.0	7.9	9.2	10.3	99.2	
1990	10.5	9.2	11.3	7.5	3.5	4.2	4.0	4.5	4.9	6.2	13.0	12.3	91.1	
1987	8.2	10.0	11.9	6.2	2.6	4.5	4.0	5.0	5.8	3.7	6.0	10.0	77.9	
1986	8.3	10.8	12.5	6.6	2.7	5.7	5.9	4.0	4.2	3.0	5.6	12.3	81.6	
1983	10.8	6.5	13.1	12.0	7.7	7.7	7.7	6.1	3.0	3.0	3.5	6.2	87.2	Master Meter

# **EXHIBIT 28**

June 22, 1992

BEFORE THE UTAH DIVISION OF WATER RIGHTS  
 In Re: Temporary Permit Nos. 92-57-19 and 92-57-20  
 Before Hearing Officer Bob Morgan  
 June 22, 1992

1 be consumed, will generally be used in, for irrigation  
 2 4-1 through 10-15, domestic and municipal purposes  
 3 year-round, and other uses year-round, mainly confined  
 4 in Little Cottonwood Canyon through the Snowbird area.  
 5 Have I sufficiently confused everyone on that one?  
 6 The second application is for 114.375 cfs,  
 7 that is the total demand, and that has been used within  
 8 Salt Lake City and its service area that they are  
 9 seeking to change of that total flow 500 acre feet from  
 10 Little Cottonwood Creek, to be diverted from Tunnel  
 11 Springs in Little Cottonwood Creek, and the years at  
 12 Alta. The application was advertised?

13 **UNIDENTIFIED SPEAKER:** Yes.

14 **THE HEARING OFFICER:** Advertised and was  
 15 protested by Cahoon & Maxfield Irrigation Company,  
 16 Richards Irrigation Company, Little Cottonwood Tanner  
 17 Ditch Company, Walker Ditch Company. And, Mr. Skeen,  
 18 you represent all four of those irrigation companies?

19 **MR. SKEEN:** That's right.

20 **THE HEARING OFFICER:** We have here today Salt  
 21 Lake City represented by Mr. Hooten and counsel,  
 22 Mr. Novak?

23 **UNIDENTIFIED SPEAKER:** That's correct.

24 **THE HEARING OFFICER:** We would first turn to  
 25 the -- any questions on the applications, first? First

Page 3

1 **PROCEEDINGS**

2  
 3 **THE HEARING OFFICER:** We are on record. It is  
 4 a hearing before the State Engineer concerning two  
 5 temporary change applications. They are numbered and  
 6 are both in the 57 area, applications 92-57-19 and  
 7 92-57-20. The first one is, both of them have been  
 8 filed by Salt Lake Department of Public Utilities. The  
 9 first application heretofore 114.375 cubic feet per  
 10 second, or, and given the reference to paragraph 4, it  
 11 looks like 2,000 acre feet.

12 Source water heretofore has been Little  
 13 Cottonwood Creek in Salt Lake County. It is now  
 14 proposed, well it has been used within Salt Lake City  
 15 and its service areas in Salt Lake County, and the place  
 16 of use is also within the City and within its service  
 17 area in Salt Lake County.

18 The following changes are proposed: 500 acre  
 19 feet from Little Cottonwood Creek --

20 **UNIDENTIFIED SPEAKER:** One is 500 and one is  
 21 2,000.

22 **THE HEARING OFFICER:** Okay. This one is  
 23 2,000. Let the record stand that 92-57-19 is for 2,000  
 24 acre feet. Will be diverted the same as heretofore from  
 25 the tunnel in Little Cottonwood Creek, and it will all

Page 2

1 turn to Salt Lake City to explain the merits of the  
 2 temporary change applications, and then we would turn to  
 3 the applicant for their statement, or if they have any  
 4 questions of the applicant first, and then we will have  
 5 a statement from the protestants.

6 **MR. NOVAK:** Thank you, Mr. Morgan. It is Salt  
 7 Lake City's position that the water rights sought to be  
 8 changed under the two temporary change applications are  
 9 evidenced by four exchange agreements, one with each of  
 10 the protesting companies, and copies of those exchange  
 11 agreements are a matter of record on file in the State  
 12 Engineer's Office, and a part of the four exchange  
 13 applications, E29192021, 22 and the 57 area that were  
 14 filed in the State Engineer's Office on March 30, 1992.

15 It is the basic position of Salt Lake City  
 16 that Salt Lake City has absolute ownership and title to  
 17 the water rights awarded to the Cahoon & Maxfield  
 18 Irrigation Company, Little Cottonwood Tanner Ditch  
 19 Company, Richards Irrigation Company and Walker Ditch or  
 20 Irrigation Company under the Morse decree, and Salt Lake  
 21 City's ownership is vested in Salt Lake City by virtue  
 22 of the four exchange agreements.

23 There are basically three Utah Supreme Court  
 24 cases that I want to call the engineer's attention to,  
 25 and I have made copies of those cases and have

Page 4

1 (Pages 1 to 4)

June 22, 1992

1 their combined use is approximately a quarter of a  
2 second foot, which is very difficult to even measure  
3 when that water is in the stream.

4 So with your permission I would like to call  
5 Mr. Higbee.

6 **THE HEARING OFFICER:** Okay, Mr. Higbee.

7 **MR. HIGBEE:** Give me a second to pin this up  
8 on the board here. Maybe you can see what we have got.  
9 Here at the top --

10 ED HIGBEE,

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

13 EXAMINATION

14 **BY MR. NOVAK:**

15 Q. First, Mr. Higbee, for the record, state your  
16 name and what your position is relative to distribution  
17 of waters in Little Cottonwood Creek.

18 A. I have been appointed as the Court  
19 Commissioner on Little Cottonwood Creek in regards to  
20 the irrigation court decree, Union and East Jordan  
21 Irrigation Company vs. Richards Ditch Irrigation  
22 Company, et al., case No. 4802, and it was dated in  
23 1910.

24 Q. How long have you served as commissioner on  
25 Little Cottonwood Creek?

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1 that have gone into effect since the decree was in  
2 effect.

3 Q. Is there any provision in the decree that  
4 directs you to provide the, whatever distribution is  
5 required consistent with the decree to provide for  
6 greater efficiency or beneficial use of water?

7 A. There is a paragraph in the decree that does  
8 indicate that very specifically, and it's part of the --  
9 I think it is the 39th paragraph in the court decree  
10 under conclusions of law, and I will read it in full.  
11 It is only a short one. "The commissioner provided for  
12 herein may divide and distribute the water by hours or  
13 days or by constant streams or in any other manner as in  
14 his judgment seems best so as to secure the greatest  
15 efficiency for the water. All of the above, however, is  
16 subject to the supervision and control of this court."  
17 That's the entire paragraph 39.

18 Q. Okay, Mr. Higbee, if you will just move that  
19 chair off to the side so that back doesn't block, would  
20 you explain to the engineer just very briefly and very  
21 generally how the waters of Little Cottonwood Creek are  
22 distributed pursuant to the decree and the exchange  
23 agreements?

24 A. In operating the decree at present, to try to  
25 come up with spot readings, later on I get a more

Page 19

1 A. I was made commissioner on the 26th day of  
2 June, 1979.

3 Q. And I take it that you administer and  
4 distribute the waters of Little Cottonwood Creek under  
5 the supervision of the court in accordance with the 1910  
6 Morse decrees?

7 A. That's correct, that's the way the decree  
8 works under the supervision of the court.

9 Q. Who pays your salary or wages?

10 A. The court decree orders that the users should  
11 pay for it. At present Salt Lake City, because of the  
12 exchange agreements, the ditch companies reverted that  
13 responsibility to Salt Lake City, on these four ditch  
14 companies, that Salt Lake City now pays the court fees  
15 for these four ditch companies. The others, I collect  
16 from other entities. Sandy City is the same kind of  
17 situation with Union and Jordan, and the others are  
18 smaller ditch users and so on. But those -- between  
19 Sandy City and Salt Lake City all the secondary primary  
20 ditches are tied up under contract.

21 Q. And so you administer those contracts or those  
22 exchange agreements along with the provision of the  
23 decree; is that correct?

24 A. That's correct. I try to follow the decree's  
25 instructions and any subsequent contracts and agreements

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1 efficient method of measuring, I have to come up with  
2 the total flow of the creek. If I were doing it the way  
3 the decree originally said it would be measured at each  
4 ditch, all the ditches would be totaled up, and that  
5 would be the stream.

6 But since there is cutoff savings rights of  
7 the Little Cottonwood Water Company taking into effect  
8 here that saves some water. The City's savings of  
9 rights in here, because of the -- going up the stream in  
10 here and the stop line, because of those I have to take  
11 into account a little differently. So now the way I  
12 figure the total flow of the creek, if I take a flow, an  
13 estimated flow for the sewer, each month we get that and  
14 get an exact, correct amount of how much they were using  
15 through the sewer line.

16 Q. The sewer goes where?

17 A. It goes right on up the canyon and feeds clear  
18 from Alta City on down and picks up water from Alta,  
19 Snowbird and other users of water. I count that as part  
20 of total stream flow. Nobody gets to use it but the  
21 sewer plant, and I wouldn't let anybody use it if I  
22 could help it.

23 Okay, Murray City takes out water here. I  
24 measure the water as it comes through the power plant.  
25 So here is two parts of the total to come up with the

Page 20

5 (Pages 17 to 20)

June 22, 1992

1 total flow, I have the sewer flow and the power plant  
2 flow.

3 Then I pick up the 15-foot Parshall, which is  
4 right here on Wasatch Boulevard, right close to Wasatch  
5 Boulevard, and I have got three ditches up above here  
6 that use water. So I have to add them. I have to add  
7 the South DeSpain, the South DeSpain extension, and the  
8 North DeSpain.

9 So to get my total flow of the creek I take  
10 these ditches, the sewer plant, the power plant flow and  
11 the stream flow at Wasatch Boulevard. The users of them  
12 now, Alta and Snowbird, through their contracts, are  
13 using water, and the only way I can account for the  
14 water they use in my figures is by what the sewer  
15 outflow is. This is water that would if all of this in  
16 Little Cottonwood were gone, all the businesses, all the  
17 users would close, no skiing, no nothing, that water  
18 would come down the stream, so I figure it is part of  
19 the stream flow.

20 Okay, I add these into it. I also add in two  
21 wells, Sandy ditch -- or Sandy City has two wells  
22 drilled right near where the South DeSpain, South  
23 DeSpain extension are. They are above the Wasatch  
24 Boulevard. They are above, and the water that they take  
25 is counted as part of the water of the canyon. So I add

Page 21

1 titches. But I can use the -- in coming up with these  
2 figures I know exactly what each of the ditches are  
3 entitled to.

4 Q. Mr. Higbee, you show the East Jordan canal, an  
5 extension canal, Jordan/Salt Lake City canal in red near  
6 the bottom?

7 A. Can you see this down here or is it too low?  
8 It's low for the rest of you. I am going to raise it.  
9 Alta and Snowbird, do you know where they are? They  
10 haven't changed. Go up a bit, and we will be able to  
11 see those.

12 Okay, the East Jordan canal comes in on 9th  
13 East just south of Ft. Union. I think Ft. Union  
14 Boulevard or Drive is right in there. But it comes in  
15 there, crosses over and heads over towards 13th East.  
16 It crosses 13th East right about in this area here.  
17 That's where 13th East is.

18 But as water comes down here we can deliver  
19 water, there is a section of the Tanner ditch here that  
20 they cannot get canal water with gravity flow. That  
21 section of water, we deliver, I always keep enough water  
22 in there, right at present there is no way to provide  
23 water, canal water, to the Richards ditch, so they get  
24 their entire amount from the creek. That means I don't  
25 have to add that extra second foot to their amount,

Page 23

1 that in. So here is the waters that I use to come up  
2 with the total flow of the creek. I use those totals,  
3 that total to come up with the amount that the ditches  
4 are entitled to.

5 Now in the case of the four ditch companies  
6 that are involved here, the Cahoon & Maxfield in their  
7 schedule with Salt Lake City have 7 (inaudible), and  
8 that's all, I don't have to figure their percentage of  
9 the stream, because they have a set amount that they are  
10 entitled to if they can use it.

11 The Richards ditch, the Tanner ditch and the  
12 Walker ditch are all based on stream flow. For the  
13 first three months of the year or first three months of  
14 the water season, April, May and June, they are entitled  
15 to the creek share of water, with no addeds or anything.  
16 If you get into the July, August and September, and that  
17 half a month of October, those three ditches are  
18 entitled to the amount that they are -- that the  
19 decree -- the decree gives them plus 1 second foot for  
20 the Walker and the Richards, 2 second feet for the  
21 Tanner, if that amounts being -- if Salt Lake City is  
22 taking that amount of water through the treatment plant,  
23 if they are taking all the water these ditch companies  
24 are entitled to then they would have to give that  
25 additional 1 second foot and 2 second feet to these

Page 22

1 because there is no exchange taking place. They are  
2 getting the water right out of the creek through this  
3 cutoff savings and through their pipeline system.

4 The Tanner ditch has a short section here that  
5 has users. They have to have water from the creek.  
6 After it gets beyond the East Jordan canal they have two  
7 delivery points that come into the Tanner ditch system  
8 that feeds their water.

9 Okay, the Union and Jordan, that's the one  
10 that's owned by Sandy City, they bought out that ditch  
11 entirely, they have to have a small amount for their  
12 ditch until it crosses the East Jordan canal. Now, they  
13 cross at below 9th East, so they are not on the East  
14 Jordan extension. This is not to scale, as anybody can  
15 guess.

16 But the Cahoon & Maxfield has a section  
17 through here that they used to have one or two users on.  
18 They now have no users between the creek and the East  
19 Jordan canal that are actively consuming any water in  
20 the Cahoon & Maxfield ditch. Then it goes down and  
21 crosses the Jordan and Salt Lake City canal. We have,  
22 the City has diversions for both of those stations, the  
23 Cahoon & Maxfield and the East Jordan canal, extension  
24 canal, and the Jordan/Salt Lake City canal.

25 The Walker ditch has a diversion from the

Page 24

6 (Pages 21 to 24)

June 22, 1992

1 The Supreme Court has held that the transfer  
2 by -- of a water right must be by deed. It says  
3 "shall," and it's a mandatory provision of the law, and  
4 after filing a change application in 1931 and making  
5 numerous requests for extensions of time, naming  
6 themselves as agent only, they now come up and say that  
7 they owned the water rights. Even if they owned the  
8 water rights there is no change application filed on the  
9 water for use in Snowbird and Alta, and no change of the  
10 water rights for use outside of Salt Lake City.

11 The section or the application Bob mentioned a  
12 few minutes ago, A746, which was filed as I remember  
13 somewhere around 1921 or '22, that states in the  
14 application itself that the use of the water shall be in  
15 Salt Lake City. And the City has, by signing all these  
16 documents, plainly indicated the intent to treat that as  
17 merely an exchange of water and not the transfer of  
18 water rights themselves. That legal question is being  
19 litigated at present. The City must take it fairly  
20 seriously, because this is -- this is one of the  
21 pleadings filed by Salt Lake City in the case.

22 **MR. NOVAK:** I will stipulate that Salt Lake  
23 City takes this case very seriously, Mr. Skeen.

24 **MR. SKEEN:** I am sure they take it seriously.  
25 I am just showing how serious they take it to file a

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1 **MR. SKEEN:** I think in one of the memoranda  
2 that Salt Lake City has contended that those change  
3 applications were really exchanges. They were filed in  
4 1921 and 1931. And I happen to recall, I have looked it  
5 up to verify it, that there was no blank change  
6 application form in the State Engineer's Office until  
7 1937 or 1938, and I prepared the form while I was  
8 counsel for the State Engineer. And that is stated in  
9 the State Engineer's biannual report for the years '36  
10 to '38. I think I have got the page number. They  
11 weren't exchanges and wouldn't be proper exchanges, they  
12 were simply change applications.

13 In the State Engineer's biannual report for  
14 1936 to '38, page 41, it states, quote, "Not until the  
15 current biennium, however, were blanks prepared and made  
16 available for specific use in making exchange  
17 applications."

18 We will, subject to our right to review the  
19 records and make a further statement in writing, we will  
20 submit the matter.

21 **THE HEARING OFFICER:** Okay. Anyone else of  
22 your group want to make a statement?

23 **MR. WITTERBERG:** I would like to make a  
24 couple, please.

25 **THE HEARING OFFICER:** Okay, identify yourself,

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1 pleading this thick.

2 Anyway, I feel very strongly that we are right  
3 on the question of law, and I have got a case before the  
4 Supreme Court right now involving the question as to  
5 whether the State Engineer can for any purpose determine  
6 ownership of water rights. That's pending right now. I  
7 think there is a lot of support for our position on  
8 that, and I intend to pursue it.

9 I think if we handle it in an orderly way we  
10 ought to await the decision of the court in this case to  
11 determine the meaning of that contract and not start  
12 making temporary, a temporary change in three cases  
13 about 60 years after the proposed -- or the change they  
14 relied on was made and the other 70 years.

15 I know and you no doubt are aware they also  
16 filed four exchange applications, and they were filed 60  
17 and 70 years late, and for some reason they have done  
18 all of this to cover up for what they didn't do 60 or 70  
19 years ago. I am personally convinced that Salt Lake  
20 City does not own any of these water rights, and that it  
21 is subterfuge to argue the contrary.

22 With the State's Engineer's permission I will  
23 submit a brief statement distinguishing these cases  
24 Counsel has cited.

25 **THE HEARING OFFICER:** Okay.

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1 please.

2 **MR. WITTERBERG:** Marv Witterberg, Richards  
3 Irrigation. In reference to Mr. Novak stating cases and  
4 where there had been no default with Salt Lake City I  
5 would say that the fact that they have taken a portion  
6 of that water that Alta and Snowbird is in fact to  
7 default. They have taken that which is a tributary to  
8 the creek and sold it to Alta and Snowbird, then at the  
9 bottom of the canyon measure that sewage and add it back  
10 in to the total flow of the stream. That portion that  
11 they have already taken up there should have been a  
12 portion of the stream usable. So I submit, Mr. Novak,  
13 that you have defaulted in the fact that you have taken  
14 that water.

15 Then I would argue with you also, I find no  
16 place in my agreement that gives you one year to correct  
17 the situation. It says 48 hours, not one year. I have  
18 reviewed this several times, gone through it just now,  
19 and it is not one year.

20 I think in the matter of as far as wasting  
21 more time I will conclude with that. But I would just  
22 like to put that point in, the fact that they have  
23 defaulted where they have taken our water, and our  
24 agreement states that they should protect our water  
25 rights at all times, and they have not done that by

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18 (Pages 69 to 72)

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HEARING

<p>1 taking that water up there.</p> <p>2 <b>UNIDENTIFIED SPEAKER:</b> I would like to make</p> <p>3 one additional comment. The temporary change</p> <p>4 application lists currently the places of use, and it</p> <p>5 refers to an attachment 3, which is a map that shows all</p> <p>6 of Salt Lake City and other areas within Salt Lake</p> <p>7 County. As of right now the exchange application is</p> <p>8 simply an advertisement to make that legal. They are by</p> <p>9 this change application asking a change on something</p> <p>10 that is not yet legally approved by the State Engineer's</p> <p>11 Office, and I think on -- I don't know a point of law,</p> <p>12 but on a technicality it seems like getting the cart</p> <p>13 before the horse.</p> <p>14 <b>THE HEARING OFFICER:</b> Questions of the</p> <p>15 protestants?</p> <p>16 <b>MR. NOVAK:</b> No questions. I just want to make</p> <p>17 a very, very short response to what has been presented.</p> <p>18 <b>THE HEARING OFFICER:</b> Okay. Do we want to go</p> <p>19 into summation?</p> <p>20 <b>MR. SKEEN:</b> I think we will submit it. Do you</p> <p>21 have any questions? Do you, Tony?</p> <p>22 <b>THE HEARING OFFICER:</b> Go ahead, Mr. Novak.</p> <p>23 <b>MR. NOVAK:</b> Mr. Witterberg, if you look at</p> <p>24 paragraph 4 of your exchange agreement that covers the</p> <p>25 default provision.</p> <p style="text-align: right;">Page 73</p>	<p style="text-align: center;">C E R T I F I C A T E</p> <p>I, BRAD J. YOUNG, hereby certify that I personally appeared at the Utah Division of Water Rights, Department of Natural Resources, in their office, on December 23, 2011, and there transcribed the electronic recording from tapes on file in their office of the proceedings dated June 22, 1992, in the above-entitled and numbered matter, and that the foregoing is a true and correct transcription, except where it is indicated that the recording was inaudible, to the best of my understanding, skill and ability on said date.</p> <p style="text-align: right;">Dated at Salt Lake City, Utah, this 9th day of January, 2012.</p> <p style="text-align: right;">_____ BRAD YOUNG COURT REPORTER</p> <p style="text-align: right;">Page 75</p>
<p>1 I just want to comment, Mr. Morgan, that the</p> <p>2 Salt Lake City has demonstrated that it is entitled to</p> <p>3 the use of water to meet the requirement of 73-3-3 for</p> <p>4 the purpose of making this change. There has been</p> <p>5 absolutely no evidence to show that making the exchange</p> <p>6 will impair any existing rights, either the rights of</p> <p>7 the protestants or anyone else on the system. In fact,</p> <p>8 the evidence conclusively shows that there will be no</p> <p>9 impairment.</p> <p>10 Under the law, and I am sure Mr. Quinney</p> <p>11 advised you on it, all the State Engineer is required to</p> <p>12 do is to find reason to believe that the temporary</p> <p>13 change can be approved without impairing existing</p> <p>14 rights. And I think the record is replete with that</p> <p>15 sort of evidence, and we think after Mr. Skeen responds</p> <p>16 that the temporary changes must be approved.</p> <p>17 <b>THE HEARING OFFICER:</b> Okay. Change of heart,</p> <p>18 Mr. Skeen?</p> <p>19 <b>MR. SKEEN:</b> I will submit the matter.</p> <p>20 <b>THE HEARING OFFICER:</b> Okay. Thank you. No</p> <p>21 other statements, we will conclude the hearing at this</p> <p>22 time, again reminding you that the record will stay open</p> <p>23 for written comments until 5:00 p.m. 1st of July, 1992.</p> <p>24 Thank you, gentlemen.</p> <p>25 (End of side A of tape 2.)</p> <p style="text-align: right;">Page 74</p>	<p style="text-align: right;">19 (Pages 73 to 75)</p>

# **EXHIBIT 29**



GARY R. HERBERT  
Governor  
GREG BELL  
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 3 2013

**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 0.0565 cubic feet per second (cfs) or 0.92 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 0.01 acre from April 1 to October 31, the domestic use of one family from January 1 to December 31, and the stockwatering requirements of 15 head of cattle or equivalent livestock (ELU) from January 1 to December 31. The water was used in all or portion(s) of Section 12, T3S, R1E, SLB&M.

Hereafter, it is proposed to divert 0.0565 cfs or 0.92 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.

In the written protests and testimony presented at the hearing the protestants expressed concern with the impact this change application would have on existing rights and whether the application meets statutory criteria for approval. Specific concerns were expressed by each protestant as follows:

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 applicants have not demonstrated they have a 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 thus 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. 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. SLC is concerned about all aspects of the proposed change application and believes the application does not meet the statutory criteria that must be considered by the State Engineer on deciding whether 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 that must be considered 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 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 the 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, historical Little Cottonwood Decree information, and 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.

- 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 1856.<sup>1</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

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<sup>1</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).

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 in 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 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 but 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.
- D. Title documents were submitted to the Division to update ownership of the certificated right on the records of this office. 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. 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.
- F. Additional title documents were submitted to the Division in 2003 to update ownership of the right on the records of this office. Portions of the water right were segregated to Water Right Numbers 57-10315, 10316, 10317, 10318, and 10319 leaving uses of 0.01 acre of irrigation, 15 ELU, and a domestic use 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. While protesting parties maintain questions about ownership of the water right as reflected by the records of the Division, 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.

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). The 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 conditions intended to provide compensation for 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 the fundamental public policy the State Engineer implements - making public waters available for beneficial use. Nothing in the State Engineer's statutory authority allow 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 governmental entities 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 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 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 1856.<sup>2</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, this change application has a priority of December 18, 2003, and is junior to the 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 allotted for diversion 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%.<sup>3</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

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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).

<sup>3</sup> The domestic use associated with the underlying water right is for a home 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.

Valley is evaluated at 5.0 acre-feet per acre diversion with a 42.4% depletion rate.<sup>4</sup> Based on these values, this application historically could have diverted, from the well indicated on the Certificate, a maximum of 0.92 acre-foot annually with an associated depletion of 0.53 acre-foot. Based on this analysis, using the water for the proposed domestic needs of one family and consuming 0.45 acre-foot for that purpose would not enlarge the depletion associated with the uses certificated for this underlying water right, provided the conditions listed below are met.

This right is a primary decree right; however, information has been submitted that indicates this right is subject to a prior contractual agreement during the 'winter or non-irrigation' season (October 1 to April 1). The State Engineer is not a party to the contract and has no authority to interpret contracts between other parties, but notes language of the contract appears to convey an interest in the water right from which this change application is based. Utah Code Section 73-1-10 directs that updating title with the State Engineer on a water right is accomplished by the filing of a Report of Water Right Conveyance (ROC). The State Engineer has no such pending ROC at this time. However, it is obvious that a prior agreement exists potentially affecting the amount of water available from October 1 to April 1 and any action on this application remains subject to ownership claims that may arise from the prior agreement.<sup>5</sup>

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 can 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

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<sup>4</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.

<sup>5</sup> If a completed ROC is accepted by the State Engineer confirming an ownership interest that affects this right, the State Engineer in regard to this change application and underlying water right shall make the appropriate adjustments.

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. 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 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 assuage 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 0.53 acre-foot of water to be used for the indoor domestic use of one family and fire protection solely from the well source, subject to the prior contractual obligation during the winter or non-irrigation season that is associated with this right.
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 N¼ 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 driller 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 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 to any losses to water rights for the generation of power, as such may be stipulated among the parties or decreed by a court of competent jurisdiction.
6. Inasmuch as this change application leaves the historical well without a valid water right, the historical well must be permanently abandoned and sealed according to the requirements of R655-4-12 of The Administrative Rules for Water Well Drillers.
7. 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** and the extension of time request filed August 8, 2012, on a24463 is also considered **WITHDRAWN**.
8. To accommodate the approval of this permanent change application, the use of 0.0565 cfs or 0.92 acre-foot of water for the irrigation of 0.01 acre, the domestic use of one family, and the stockwatering requirements of 15 head of livestock (in cattle or horses or equivalent species) at the historic points of diversion and place of use must cease.

If historical resources such as human remains (skeletons), prehistoric arrowheads/spear points, waste flakes from stone tool production, pottery, ancient fire pits, historical building foundations/remains, artifacts (glass, ceramic, metal, etc.) are found during construction, call the Utah Division of State History at 801-533-3555.

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.

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.

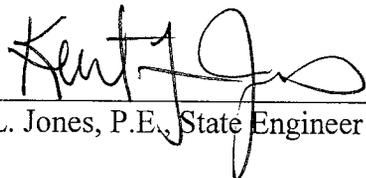
Failure on your part to comply with the requirements of the applicable statutes may result in the lapsing of this permanent change application.

**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 3<sup>rd</sup> day of January, 2013.

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

Mailed a copy of the foregoing Order this 3<sup>rd</sup> day of January 2013 to:

Kevin Tolton  
585 Lofty Lane  
North Salt Lake, UT 84054

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

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

Alta Energy LLC  
c/o Bill Lennon  
PO Box 8101  
Alta, UT 84092-8101

Friends of Alta  
c/o Patrick A. Shea  
201 South Main Street, Suite 600  
Salt Lake City, UT 84111

Little Cottonwood Creek Distribution  
Committee  
c/o Sam Moore  
7973 Willow Circle  
Sandy, UT 84093

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 Jeffery W. Appel  
PO Box 45385  
Salt Lake City, UT 84145-0385

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

Little Cottonwood Creek Distribution  
Committee  
c/o Jeff Niermeyer  
1530 South West Temple  
Salt Lake City, UT 84115

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

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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 30**



GARY R. HERBERT  
Governor

GREG BELL  
Lieutenant Governor

# State of Utah

DEPARTMENT OF NATURAL RESOURCES

MICHAEL R. STYLER  
Executive Director

Division of Water Rights

KENT L. JONES  
State Engineer/Division Director

January 30, 2013

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

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

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

RE: Reconsideration of Application Number 57-7800 (a28548)

Dear Interested Party:

A request has been received by our office regarding the above numbered application. Review of the request for reconsideration of the action taken by the State Engineer regarding this application has been made. The request is hereby **GRANTED**. Please be advised that current interpretation of the Utah Administrative Procedures Act (UAPA) indicates that granting of a request for reconsideration sets aside the administrative decision to (approve/reject) the referenced application in its entirety. Therefore, this application has reverted to its status prior to the Order of the State Engineer (unapproved) until resolution of the reconsideration.

If you have any questions, please contact our office.

Sincerely,

Kent L. Jones, P.E.  
State Engineer

KLJ:sn



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Subject: Reconsideration of 57-7800 (a28548)

cc: Regional Office

Kevin Tolton  
585 Lofty Lane  
North Salt Lake, UT 84054

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

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

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

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

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c/o Patrick R. Casaday  
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# **EXHIBIT 31**



October 28, 2013 \* 2:33 p.m.

TRANSCRIPT OF ELECTRONIC RECORDING

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Reporter: Kelly Fine-Jensen, RPR  
Notary Public in and for the State of Utah

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P R O C E E D I N G S

1  
2  
3 THE COURT: It's always nice to have this  
4 case on the calendar. The presence of competent and  
5 experienced and revered counsel just raises the --  
6 the whole quality of the operation here. We welcome  
7 you.

8 Let's have your appearances, please.

9 MR. SULLIVAN: Good afternoon, your Honor.

10 THE COURT: Good afternoon.

11 MR. SULLIVAN: Alan Sullivan and Amber  
12 Mettler here on behalf of the plaintiff, the Estate  
13 of Joanne L. Shrontz.

14 MR. DRANEY: Shawn Draney and Scott Martin  
15 on behalf of Salt Lake City Public Utilities, your  
16 Honor.

17 MR. MOXLEY: Your Honor, Paul Moxley on  
18 behalf of Alta.

19 We look forward to many more gleeful  
20 occasions like this with the Court and our  
21 colleagues.

22 THE COURT: All right. Good.

23 Now, Max Wheeler is not here?

24 MR. DRANEY: No. He's not here, your  
25 Honor.

1 THE COURT: Do we know where he is today?  
2 Is he missed or is he replaced today by somebody  
3 else?

4 MR. DRANEY: I'll be handling it, your  
5 Honor.

6 THE COURT: Okay. Great.  
7 All right. We'll give him our regards as  
8 well.

9 So it's set for a scheduling conference,  
10 which means that we're apparently ready to set it for  
11 trial. Is that what everybody feels?

12 MR. SULLIVAN: Yes, your Honor. The -- we  
13 are -- we are ready to set a trial date and also the  
14 pretrial dates that go in -- that precede the trial  
15 date.

16 THE COURT: Sure.

17 MR. SULLIVAN: So maybe we can start with  
18 the trial date.

19 THE COURT: Well, okay. We can do that.  
20 What -- yes?

21 MR. DRANEY: Your Honor, it sort of -- it  
22 occurs to me that I'd be remiss if not mentioning one  
23 thing. And that is that we've just finished our part  
24 of the briefing of the related appeal, but we're  
25 still waiting on their reply brief. And one of the

1 issues there, of course, is the Shrontz Estate claims  
2 the right to file a change application.

3 We say that under the contract -- the '75  
4 contract, they don't have that right. And, in fact,  
5 we've briefed the issue that filing that change  
6 application was a material breach.

7 So I just raise, in terms of judicial  
8 economy, the notion that that other case may or may  
9 not have a big impact on this one. I'm not  
10 suggesting that we necessarily delay for that, but  
11 certainly we may end up in a situation where what  
12 they decide there moots anything we might do here  
13 potentially.

14 And perhaps not. The other side's taken  
15 the position that the Court shouldn't get into those  
16 issues in that appeal.

17 So just to sort of raise that issue to let  
18 you know that's out there.

19 MR. SULLIVAN: May I address that, your  
20 Honor?

21 THE COURT: Yes.

22 MR. SULLIVAN: I -- this Court -- this  
23 Court has already held, as of last August, that the  
24 filing of a change application by the estate did not  
25 constitute a violation of the 1975 agreement. And I

1 don't see how the outcome of that appeal will affect  
2 that issue in this case, and I'm not sure what other  
3 issues it will affect.

4 We are in a situation, your Honor, where  
5 this case has been pending for more than four years,  
6 I believe. I mean, it was filed in 2009.

7 THE COURT: Yeah. We're into the fourth  
8 year, that's for sure.

9 MR. SULLIVAN: And we -- for example,  
10 we -- we have a situation where we have expert  
11 reports that were prepared and exchanged between the  
12 parties in the second half of 2011 and we're in a  
13 situation now where we need to update those in  
14 advance of trial. And that's one of the requests I  
15 was going to make.

16 And the point I would like to make, your  
17 Honor, is that it's time for this case to go to  
18 trial. It's -- you know, we -- it's been pending for  
19 a long time and I don't think there should be any  
20 further delay.

21 THE COURT: All right. And help me to  
22 understand what's happened with respect to mediation  
23 or some other resolution of this thing.

24 MR. SULLIVAN: It's failed. We --

25 THE COURT: But how long ago did that

1 fail?

2 MR. SULLIVAN: Mediation occurred --

3 MS. METTLER: November 2011.

4 MR. MOXLEY: It was two years ago.

5 MS. METTLER: November 2011.

6 MR. SULLIVAN: November 2011.

7 THE COURT: Two years ago?

8 MR. SULLIVAN: Two years ago.

9 MR. MOXLEY: That's my memory.

10 MS. METTLER: That's right.

11 THE COURT: So do you think that it would  
12 be just a waste of time to even think about doing it  
13 again or doing more?

14 MR. SULLIVAN: Your Honor, we'd be happy  
15 to -- to take another crack at mediating the case.  
16 The mediator we used was extremely competent and  
17 tried pretty hard. Since the end of the mediation  
18 we've tried a couple of times to revive some  
19 discussions, and that hasn't succeeded.

20 And so we -- we'd be happy to do that. We  
21 don't think it should delay trial, but we -- we'd be  
22 happy to make another -- take another crack at  
23 mediation.

24 MR. DRANEY: I -- I do think it would be a  
25 waste of time, your Honor. We -- we're pretty much

1 where we're going to be in terms of the city's  
2 position. And we believe any kind of resolution here  
3 will likely have some pretty substantial collateral  
4 effects. And we approached the mediation in that  
5 regard and would again as well, your Honor. So our  
6 position hasn't changed, nor is it likely to.

7 THE COURT: Uh-huh (affirmative).

8 MR. MOXLEY: Your Honor, I agree that  
9 mediation would -- further mediation would not be  
10 successful.

11 What I -- what I would add on behalf of  
12 Alta, which is sort of the -- the unattractive sister  
13 to this event, which is challenged by lack of monies  
14 and the like, is if we were to get into a situation  
15 where we've gone through extensive pretrials on  
16 different issues and then be facing a trial with some  
17 direction from the Supreme Court on this other issue,  
18 it would work a real hardship on Alta.

19 THE COURT: That's why it seems to me that  
20 mediation would be a good idea.

21 MR. MOXLEY: We -- we --

22 THE COURT: You haven't been through a  
23 trial recently with me, I don't think. And I'll tell  
24 you, it isn't easy.

25 Are we -- we're not going to have a jury

1 in this, or are we?

2 MR. SULLIVAN: We do have a jury in this.

3 THE COURT: We do have a jury.

4 MR. SULLIVAN: Yes.

5 THE COURT: Well, I mean, it's going to be  
6 even worse then. I mean, I just -- I could give you  
7 some names of some lawyers to talk to that we've just  
8 kind of gone through this with, and my -- here's --  
9 let me just paint the picture for you. What I'm  
10 going to do is I'm going to require the parties to  
11 submit their voir dire questions and -- knowing that  
12 I'm going to toss anything that argues your case as  
13 opposed to asks a meaningful question. And then I'm  
14 going to -- at the same time, you're going to have to  
15 submit to me your jury instructions.

16 And your jury instructions in this kind of  
17 a case are going to be very complicated. They're  
18 going to be a lot of original creation, I think,  
19 other than the -- the standard stock ones that we'd  
20 have any kind of a case. But the substantive jury  
21 instructions are going to be very difficult. I'm  
22 going to have you cite your authorities for them, and  
23 then we're going to come in and go through them one  
24 by one on the record. And we'll get through maybe --  
25 whatever the number is, say it's 125 instructions,

1 and there will be a lot of things and changes that  
2 I'm going to want to make. I will make the changes.  
3 I will e-mail them back to you. You will go through  
4 them again. We will come back here again. We will  
5 go through them again.

6 The last case I had, I think we had four  
7 times that we came back on jury instructions and  
8 spent two or three hours each time. So that's --  
9 that's what we're going to have on jury instructions.  
10 A little less time on the voir dire because those  
11 things usually are easier to resolve.

12 So I'm also going to have the plaintiffs  
13 prepare the exhibit books in this case, and you're  
14 going to have to exchange exhibits and witness lists  
15 early on.

16 And then I'll set a deadline for motions  
17 in limine. And I tell everybody up front that I  
18 don't like motions in limine. And if you want to  
19 file them, I'm going to have you file them -- I don't  
20 know what the phrase would be, probably motions in  
21 via, not off the -- not at the doorstep, but out on  
22 the street. I want them way early because I don't  
23 like them in front of trial. I think they're  
24 sometimes used as a tactic. So I get them done early  
25 and get them out of the way. And then we go down to

1 the other hearings before trial, witness issues, and  
2 so forth. And then we're -- we're ready to go to  
3 trial.

4 So it's going to be a very long, tedious,  
5 difficult road to get to it, just -- just so you  
6 know. So if you're thinking you're going to save  
7 money by going to trial as opposed to mediating a  
8 solution, I think you're wrong. That's all I'm  
9 telling you.

10 So, I mean, maybe you're -- maybe the --  
11 I've heard Mr. Wheeler make arguments here where he  
12 thinks that the whole world is going to turn in a  
13 different direction depending on the outcome of this  
14 case. I -- maybe that's true, but that's all the  
15 more reason to have a mediated -- confidential,  
16 mediated resolution of the case as opposed to a  
17 public trial with an Appellate Court decision saying  
18 this is what is going to turn the world in a  
19 different direction.

20 So I throw that out to you as something  
21 for you all to think about seriously.

22 But I still think mediation is a voluntary  
23 process. And if you don't want to do it and you've  
24 already done it once, I'm not going to order you to  
25 do it again. So I'll leave it up to your good

1 judgment to think about that.

2 So we have this other case. Why isn't  
3 that case consolidated with this case, or is it?

4 MR. DRANEY: No, your Honor. Just to lay  
5 the -- the procedural foundation for that other case,  
6 during the pendency of this case, the plaintiff filed  
7 a change application --

8 THE COURT: Yeah.

9 MR. DRANEY: -- on a Salt Lake City water  
10 right. And what we had was the original water right  
11 was a decreed right for agricultural uses below the  
12 mouth of the canyon. We had, in 1996, I believe --  
13 don't hold me to that date -- filed an application  
14 for -- a change application that had been approved to  
15 move the point of diversion/place of use up the  
16 canyon.

17 Then they filed -- and that was pending  
18 non-certificated. So it was an approved,  
19 uncertificated change application, which is given its  
20 own water right number.

21 Then they unilaterally, contrary to the  
22 city's ordinances, which are a part of the contract,  
23 incorporated by reference in the contract, they  
24 unilaterally filed a change application on that.

25 What Salt Lake City did was to withdraw

1 the earlier change application. Boom. So it no  
2 longer existed. That mooted the issue of their  
3 change on our change.

4 They appealed that issue to the District  
5 Court, Judge Toomey. There, the state engineer and  
6 Salt Lake City were in alignment that there was no  
7 act of the supreme -- or I mean, the state engineer  
8 from which an appeal could be taken, that we had a  
9 perfect right to withdraw the underlying change  
10 application. She ruled in our favor. And now that's  
11 been appealed up to the Court of Appeals originally,  
12 now it's gotten bumped to the Supreme Court.

13 And they base their right -- they say they  
14 have a constitutional right to due process that was  
15 violated because they had some kind of property  
16 interest in the underlying water right. And they  
17 traced all that to the 1975, '76 contracts.

18 And we say, no. And, in fact, you  
19 breached materially those contracts. By filing the  
20 change application, that resolves all the issues.

21 And then we go on with some additional  
22 arguments as well.

23 So that's why I mentioned the possibility  
24 from our perspective -- I know Alan doesn't share  
25 it -- that that case could, in fact, be dispositive

1 of anything here.

2 But that is pending. We filed our  
3 responsive brief. And they've been given an  
4 extension to file a reply. So it's moving along  
5 timely in terms of briefing, your Honor.

6 MR. SULLIVAN: Well, it's not dispositive  
7 of anything in this case, and that's why the cases  
8 were not consolidated. It involves another party,  
9 including the state engineer.

10 The issue in that case -- here's the  
11 background, your Honor, very briefly. We asked the  
12 city repeatedly to change the change -- its change  
13 application, which had been pending for decades,  
14 concerning the nineteen -- the water that was to be  
15 appropriated to us under the 1975 water agreement.  
16 We asked it to change it so that the water could be  
17 used on the Patsy Marley Hill property, taken from  
18 the Quincy Mine up to the Patsy Marley Hill property,  
19 because that omission was inexplicable because the  
20 Patsy Marley Hill property was the only place that  
21 water could be used because we were the only  
22 beneficiary remaining under the 1975 water supply  
23 agreement. The city refused to do that.

24 So under the authority of the Big Ditch  
25 case, issued by the Supreme Court a few years ago, we

1 filed our own application to the -- after having  
2 asked the city numerous times to do what we thought  
3 it had an obligation to do, we filed our own change  
4 application to use that water on the Patsy Marley  
5 Hill property.

6 Without giving us any notification, then  
7 the city withdrew the underlying change application,  
8 and took the position that it didn't have to notify  
9 us at all.

10 The state engineer issued an order  
11 granting the withdrawal of the change application,  
12 again, without giving us notice.

13 And we raised the point in the lawsuit  
14 that was assigned to Judge Toomey that that was a  
15 violation of our rights, because we have an interest  
16 in the change application, we have an interest in the  
17 water under the 1975 agreement.

18 Judge Toomey disagreed with us. Said that  
19 it was a ministerial act, that it was -- there was no  
20 jurisdiction in the court under the Administrative  
21 Procedures Act. And that issue is on appeal to the  
22 Utah Supreme Court now.

23 MR. DRANEY: Not to be argumentative, your  
24 Honor, but just to set it in context, we have, in  
25 fact, taken the position that your Honor's ruling on

1 the validity of the '75 contract is right. They've  
2 based their right to file a change application on the  
3 notion that they have this '75 contract. That's what  
4 the Big Ditch was sort of about. But that raises two  
5 issues. One is, do you, in fact, still have a  
6 contract? And this ruling, from this Court, is a  
7 matter of law on summary judgment, which is not  
8 binding on the Supreme Court, and we've said you can  
9 take that up. And we've talked about that, because  
10 it's -- it's the factual premise for their claimed  
11 right to file a change application and their claimed  
12 property interest which they say was -- gave them a  
13 due process right.

14 Moreover, your Honor, one of our most  
15 important arguments -- and it's consistent with the  
16 Big Ditch case -- is you cannot file a change  
17 application that is inconsistent with the water right  
18 you claim gives you the right to file a change  
19 application. The '75 contract limits the source to  
20 the Patsy Marley -- I mean, to the -- the -- to the  
21 one mine that's crafted in the -- in the agreement.  
22 The change application does more than just say, we're  
23 going to use water from the Quincy up at Patsy Marley  
24 property. It adds wells, it adds springs, it adds  
25 the town of Alta system, at least the mine that they

1 reply upon. We think that is in, a variety of ways,  
2 as a matter of law, inconsistent with the city's  
3 ordinances. And we've said to the Court, you're not  
4 bound by the Third District's ruling over here with  
5 Judge Kennedy on issues of law. And to the extent  
6 those issues of law are relevant to your decision  
7 here, you can take them up, and we think you should.

8 So we do have a difference of opinion  
9 about how the Court ought to approach it. But just  
10 so you understand what our position is.

11 THE COURT: So --

12 MR. SULLIVAN: Your Honor, may --

13 THE COURT: -- Judge Toomey says it's a  
14 ministerial -- it is a ministerial act, and that's  
15 what her decision goes off on?

16 MR. DRANEY: Two things. She also went on  
17 to say that the Shrontz Estate does not have a  
18 property interest in the underlying change  
19 application.

20 But keep in mind, those are two rulings as  
21 a matter of law. She granted summary judgment.

22 And so on appeal, of course, the standard  
23 is the Court may affirm on other grounds. They don't  
24 have to take up if it's -- they give no deference to  
25 the decision of the trial court. They might find the

1 trial court did the right thing but for the wrong --  
2 for a different reason, they might take up other  
3 reasons why it's the right thing but the trial court  
4 decided the wrong reason. And that's -- that's the  
5 standard clearly on -- on appeal, is they can -- they  
6 can take up whatever issues of law address that  
7 particular topic. And we've attacked their  
8 underlying premise, which is, they have a contract  
9 and they have a right under that contract to file a  
10 change application. And they have the right to file  
11 the change application they did, which included some  
12 things that were --

13 THE COURT: And there's no factual  
14 questions associated with whether there was a  
15 contract, whether there was a breach of the contract?

16 MR. DRANEY: I don't believe so, your  
17 Honor.

18 MR. SULLIVAN: Well, your Honor, we moved  
19 to stay Judge -- the case before Judge Toomey, while  
20 it was before Judge Toomey, pending the outcome of  
21 this litigation. The city opposed that stay and the  
22 Court agreed with -- again, Judge Toomey agreed with  
23 the city that the case would proceed.

24 The -- the thing I want to emphasize is  
25 that the issue before the Supreme Court now and the

1 issue before Judge Toomey was really a procedural  
2 issue. And that is, whether the state engineer had  
3 to give us our due process rights as a predicate to  
4 ruling that the underlying water rights change  
5 application could be withdrawn without no -- without  
6 any notice to us. Because the -- Judge Toomey ruled  
7 that it -- that she did not have subject matter  
8 jurisdiction because we had not appropriately invoked  
9 the Administrative Procedures Act because there was  
10 no ruling under the Administrative Procedures Act,  
11 even though the order issued by the state engineer  
12 was styled an order and purported to order the  
13 withdrawal.

14 So as far as, you know, Mr. Draney argues  
15 that we had no right under the agreement -- under  
16 the 1975 agreement, to file a change application,  
17 this Court has already held that we did, that there  
18 was nothing in the 1975 agreement that precluded us  
19 from filing a change application, even as to a source  
20 of supply, your Honor.

21 It is true that in the alternative to  
22 moving the water from Quincy Mine up to the Patsy  
23 Marley Hill property, we asked for approval of a well  
24 that would change the source of supply. Mr. Draney  
25 would have to concede that the nineteen -- that

1 the 1993, whatever it is, watershed ordinance -- Salt  
2 Lake City's watershed ordinance, specifically allows  
3 grandfathered surplus water agreements to be modified  
4 as to changes in the source of supply.

5 And so there was no violation of the  
6 watershed ordinance. There was certainly no  
7 violation of the 1975 agreement.

8 And in any event, the issue before Judge  
9 Toomey, and now before the Supreme Court, is a  
10 procedural one about whether we have rights to be  
11 notified of a pending administrative proceeding that  
12 affects our rights. We believe that we do. And we  
13 don't see that there is any reason to delay a trial  
14 in this case because of the pendency of that case.

15 THE COURT: Well, what -- has the question  
16 been presented to the Supreme Court as to what  
17 they're going to decide here? And if so, what's the  
18 question?

19 MR. SULLIVAN: The question is, whether  
20 Judge Toomey had jurisdiction under the -- under the  
21 Administrative Procedures Act. And the corollary  
22 question is, whether the state engineer's decision  
23 was a ministerial one that didn't give rise to a  
24 claim under the -- an appeal under the Administrative  
25 Procedures Act.

1 THE COURT: So if that's decided against  
2 you, where is the case?

3 MR. SULLIVAN: If that's decided against  
4 us, then the under -- the underlying water right will  
5 have been -- will have been removed. But we also  
6 have our pending application before the state  
7 engineers for our own change application that is  
8 based upon the initial -- the underlying water right  
9 at the base of the canyon. We -- it will affect our  
10 case because we don't -- I'm not sure how it will  
11 affect our case, your Honor. I don't believe it  
12 will. We certainly have our remedies under the 1975  
13 agreement against the city, under the 1976 agreement  
14 against the city, and the 1977 agreements against the  
15 Town of Alta, and those will not be affected.

16 MR. DRANEY: Your Honor, just let me  
17 clarify. You asked a question that I'd like to  
18 address if I may.

19 One of the issues we have briefed -- and  
20 it's an issue that's jurisdictional and can be raised  
21 at any time, and that is, what is the standing of the  
22 Shrontz Estate to complain about whatever the city  
23 and the state engineer did?

24 They have two complaints. They said, you  
25 shouldn't have withdrawn -- let them withdraw the

1 underlying change application because we had an  
2 interest in that underlying change application, and  
3 we had a property interest in that such that we had a  
4 due process right to be heard before you allowed the  
5 withdraw of the underlying change application.

6 We've said, you can't raise those issues  
7 unless you have standing. You only have standing if  
8 you, in fact, have a contract that allows you to do  
9 what it is you claim to be able to do. Because if  
10 you don't, you have no standing to complain. You  
11 have no interest in the change application.

12 And we've said to the Supreme Court -- and  
13 this ought to be really obvious --

14 THE COURT: What did Judge Toomey say  
15 about that standing argument?

16 MR. DRANEY: She -- she said -- she went  
17 on to say -- Alan's exactly correct -- Mr. Sullivan's  
18 exactly correct on one point that she ruled on, which  
19 was this is a ministerial act. It was not an  
20 administrative, adjudicated act. Therefore, that's  
21 the only thing under the Utah APA that you can appeal  
22 from. It wasn't discretionary. The state engineer  
23 had nothing to do. Yes, he issued an order, but it  
24 acknowledged the withdrawal, it didn't rule on the  
25 withdrawal.

1           But then she went on in her decision to  
2 say, as to your due process right, you don't have a  
3 property interest in the underlying -- the underlying  
4 change application or water right that would give you  
5 a due process right to be heard.

6           And we're taking that up and we're saying,  
7 quite logically, yes, Judge Kennedy has ruled on the  
8 validity of the '75 contract and whether or not the  
9 change application filed by the estate breached that  
10 contract. But those were rulings of law, which are  
11 relevant here, and the judge's decision in the Third  
12 District certainly is not binding on the Supreme  
13 Court. That ought to be very obvious. It's not  
14 binding.

15           So while it's true the Shrontz Estate has  
16 cast the question this way, we've cast it a very  
17 different way. And neither Mr. Sullivan nor I get to  
18 decide how the Supreme Court's going to approach  
19 that. And definitely it's legitimate for them to ask  
20 the question, what is the Shrontz Estate's standing?  
21 What is their property interest that they're  
22 complaining about? And definitely they have the  
23 right to say we're not bound by what Judge Kennedy  
24 said. We disagree.

25           That's all I'm trying to say.

1 THE COURT: And when was the Toomey case  
2 filed?

3 MR. SULLIVAN: 2011, your Honor.

4 THE COURT: So after we had made certain  
5 rulings in this case.

6 And who filed that case?

7 MR. SULLIVAN: It was filed by us, your  
8 Honor, in order to obtain a reversal of the judicial  
9 review of the state engineer's decision.

10 THE COURT: And when was that done?

11 MR. SULLIVAN: That was done in 2011.

12 THE COURT: No. Is that when the state  
13 engineer's decision was made?

14 MR. SULLIVAN: Yes. Uh-huh (affirmative).  
15 Yes, your Honor.

16 And we -- we amended our --

17 THE COURT: So his decision was made after  
18 we had made decisions in this case --

19 MR. SULLIVAN: Yes.

20 THE COURT: -- as well?

21 MR. DRANEY: No. I don't believe so.

22 MR. SULLIVAN: Yes. I mean, it was.

23 THE COURT: There were some constitutional  
24 issues raised early on in this case, as I recall?

25 MR. DRANEY: Yes, there were, your Honor.

1                   And, again, after the contract rulings  
2 were -- were decided, your Honor ruled that the  
3 constitutional issue aren't ripe. And so that's one  
4 of the points of confusion I'd like to address  
5 briefly.

6                   THE COURT: Constitutional issues are not  
7 ripe?

8                   MR. DRANEY: That's what your ruling was  
9 at the last ruling, as I understand it.

10                  MR. SULLIVAN: Your Honor, I -- I didn't  
11 do a good job of answering the question that your  
12 Honor posed a moment ago, and that, is how the  
13 outcome of the nineteen -- of the current appeal  
14 before the Utah Supreme Court will affect this case.  
15 And I -- I -- I said that I didn't think it would  
16 affect it, and let me just explain why.

17                  If we prevail on the question whether we  
18 have a right to connect to the Town of Alta water  
19 system as a third-party beneficiary under the 1976  
20 intergovernmental agreement, or under the 1977  
21 agreement with the Town of Alta, then there will be  
22 absolutely no impact of the appeal from Judge  
23 Toomey's decision by the Utah Supreme Court. We will  
24 be able to obtain relief under the 1976 agreement and  
25 relief under the 1977 agreement, including an order,

1 we hope, that we're entitled to connect to the Town  
2 of Alta water system.

3 We will also be able to obtain an order of  
4 damages, to the extent that we were entitled to them,  
5 under the 1977 agreement from the Town of Alta and  
6 under the 1976 agreement from Salt Lake City.

7 Our second cause of action also addresses  
8 the 1975 agreement. And I think the whole sorry saga  
9 of what's gone on in the Judge Toomey case and the  
10 facts underlying the Judge Toomey case is indicative  
11 of the roadblocks that Salt Lake City has put in our  
12 place in order to realize the benefits of our  
13 contract right under the 1975 agreement.

14 Salt Lake City professed at the beginning  
15 of this case that we had a right to water from the  
16 Quincy Mine, and all we had to do was to connect that  
17 water supply to the nineteen -- to the Patsy Marley  
18 Hill property.

19 It then took steps in 2011, unilaterally,  
20 to withdraw the change application to --

21 THE COURT: Why -- why did the city  
22 withdraw the change application in 2011?

23 MR. DRANEY: Your Honor, we cannot  
24 tolerate it. We have hundreds of folks having  
25 surplus water contracts up the canyon. We have

1 hundreds of thousands, literally, in the valley  
2 itself.

3 The city -- it's literally an existential  
4 threat to our ability to manage our water supplies to  
5 have somebody who says they've got a contract file a  
6 unilateral change application, particularly one  
7 that's inconsistent with the change application.

8 The city ordinance says unequivocally,  
9 "Any change application" --

10 THE COURT: Why would the city withdraw  
11 its plan in 2011?

12 MR. DRANEY: What plan in 2011?

13 THE COURT: It withdrew its change  
14 application in 2011.

15 MR. DRANEY: Our change application didn't  
16 address the Patsy Marley Hill.

17 THE COURT: Why did it withdraw it  
18 in 2011?

19 MR. DRANEY: Because they filed a change  
20 application on it that was inconsistent, and we  
21 weren't going to spend the time fighting about it  
22 when we had the perfect right to file --

23 THE COURT: So you're going to take --  
24 you're going to take the rug out from under them by  
25 withdrawing the application?

1                   MR. DRANEY: No. It didn't take any right  
2 out from under them. The place of use -- every water  
3 right, your Honor, to change the place of use, the  
4 point of diversion, or the nature of use without  
5 first getting an approved change application is not  
6 only illegal, it's a misdemeanor. The underlying  
7 change application did not include use on the Patsy  
8 Marley Hill. It was not something that benefitted  
9 the Patsy Marley Hill, nor was it something they had  
10 any property interest in.

11                   And that's the way it was. And so --

12                   THE COURT: Contrary to what they assert.  
13 Why did you do it in 2011?

14                   MR. DRANEY: We did it immediately after  
15 they filed a change on our change, your Honor. We  
16 did it immediately afterwards because we cannot -- we  
17 cannot have literally hundreds, if not thousands, of  
18 people trying to --

19                   THE COURT: Well, did anybody -- did  
20 anybody try to do it?

21                   You said, "hundreds of thousands of people  
22 trying to" --

23                   MR. DRANEY: Yes. This is not the only  
24 time.

25                   THE COURT: Who else -- who else tried to

1 jump on the bandwagon?

2 MR. DRANEY: Big Ditch. The case has set  
3 some parameters on that that will at least address  
4 that. And other people are waiting to see what will  
5 happen in this case.

6 THE COURT: So it hasn't happened?

7 MR. DRANEY: Oh, yeah. It's happened the  
8 two times.

9 THE COURT: Who -- who were the two times?

10 MR. DRANEY: Big Ditch Irrigation Company  
11 and the Shrontz Estate. And the Big Ditch case is  
12 fairly new, your Honor.

13 THE COURT: And that's been resolved?

14 MR. DRANEY: No. It has not been resolved  
15 in terms of the change application that Big Ditch  
16 filed after that decision. They withdrew it saying  
17 they're going to file another one. They haven't done  
18 that yet.

19 There are an awful lot of people watching  
20 what's happening here to see if they can go do the  
21 same thing that Shrontz Estate has done, which is  
22 file, unilaterally, a change application. That's the  
23 question.

24 We talked about earlier a mention that  
25 there are some very collateral -- very important

1 collateral issues that come out of this case when --

2 THE COURT: Well, and the Shrontz Estate  
3 has cited a whole bunch of other examples of where  
4 this has already been done, and there hasn't --

5 MR. DRANEY: No.

6 THE COURT: Well, I thought they did.  
7 Maybe I'm wrong.

8 MR. SULLIVAN: Your Honor, we filed a  
9 change application because the Big Ditch case said we  
10 could.

11 THE COURT: Yeah.

12 MR. SULLIVAN: Because the -- and the  
13 water user in that case was allowed to do exactly  
14 that.

15 THE COURT: And you've cited also some  
16 "they're like us" cases --

17 MR. SULLIVAN: Yes. Yes. We did, your  
18 Honor.

19 THE COURT: -- that advise us of a number  
20 of situations where similar actions have taken place.  
21 And that's why I said what I said before.

22 MR. DRANEY: No. If --

23 THE COURT: If you're really worried about  
24 there's going to be hundreds of thousands, then  
25 you're better off not having a Supreme Court decision

1 saying, "Yeah. You can do that."

2 MR. DRANEY: No, because we'll have people  
3 filing until the Supreme Court says you may not.

4 And two things are true: They have not  
5 pointed to other contractors with the city that have  
6 filed change applications unilaterally.

7 If that's what you're meaning that  
8 Mr. Sullivan has presented anywhere that there are  
9 lots of those that have happened, that's not true.  
10 That's not correct.

11 The other thing that the Big Ditch case --

12 THE COURT: And what makes a unilateral  
13 application versus a bilateral or multilateral?

14 MR. DRANEY: Well, the correct change  
15 application would have the city's signature on it,  
16 your Honor, just like the watershed ordinance says.  
17 The watershed ordinance says, "If any changes are  
18 necessary for a permit" -- which is what this is, a  
19 surplus sales contract -- "then they have to be  
20 approved by and signed by the city."

21 And in the Big Ditch case, Alan says this  
22 answers all the questions --

23 THE COURT: Don't they say that that was  
24 done in '75, '76 and '77?

25 MR. DRANEY: I'm sorry?

1 THE COURT: Doesn't Shrontz Estate argue  
2 that that was done?

3 MR. DRANEY: That what was done, that  
4 people --

5 THE COURT: That the city approved --

6 MR. DRANEY: -- filed change applications  
7 without city approval?

8 THE COURT: The city approved them?

9 MR. DRANEY: No. That change application  
10 was just created in 2011. How could it have been  
11 approved at that time?

12 MR. SULLIVAN: Your Honor, what --

13 MR. DRANEY: The city has never approved  
14 the sources that it reflected under that change  
15 application, your Honor.

16 MR. SULLIVAN: Your Honor, what happened  
17 in the years after 1976 and 1977 was that the city  
18 repeatedly allowed other users of water in the  
19 canyons to change the -- enlarge the surface area, to  
20 change the sources of supply. And then when we go to  
21 them to get a change that -- to use the Patsy Marley  
22 Hill -- to use the Quincy Mine water on the Patsy  
23 Marley Hill property, as everyone had anticipated  
24 would be the case, where we were the only beneficiary  
25 under the 1975 agreement --

1 THE COURT: Including the city.

2 MR. SULLIVAN: -- they said, "No. We  
3 won't do that."

4 And then when we tried to do it, they  
5 pulled the rug out from under us and withdrew the  
6 underlying change application.

7 THE COURT: And filed -- and then -- and  
8 had -- and then end up with the state engineer  
9 entering an order --

10 MR. SULLIVAN: Yeah.

11 THE COURT: -- to that affect.

12 MR. DRANEY: Your Honor, we dispute  
13 completely the notion that anybody's enlarged the  
14 surface area. We've done the discovery. We've  
15 briefed that as part of the constitutional claim.  
16 They made a claim that they were being treated  
17 differently, that we violated their equal protection  
18 rights. Your Honor has ruled that that issue is not  
19 ripe.

20 But we very much disagree on his  
21 characterization. We think it's very much the other  
22 way.

23 And so he's trying his case here in front  
24 of your Honor, but just know that every point he just  
25 made is one that is disputed factually very much.

1 MR. SULLIVAN: Your Honor, what we --

2 THE COURT: So there are facts in dispute?

3 MR. DRANEY: Here. Yes, your Honor.

4 THE COURT: "Here," meaning in this court,

5 or --

6 MR. DRANEY: In this court, your Honor.

7 THE COURT: But not in Judge Toomey's

8 court?

9 MR. DRANEY: No. Because it was a ruling  
10 as a matter of law on summary judgment. So it -- it  
11 gets reviewed for correctness. And so these are all  
12 legal issues.

13 And, of course, the Court could decide  
14 just what you decided, which is the validity of  
15 the '75 contract is a legal issue. And they can  
16 decide differently than your Honor did.

17 MR. SULLIVAN: Your Honor, if these folks  
18 believe that our trial should be delayed pending the  
19 case before the Utah Supreme Court, they should have  
20 filed a motion on that. We've been here before this  
21 Court for four years. We believe that we are  
22 entitled to a trial on the issues before the Court.

23 MR. DRANEY: I'm not asking for a delay,  
24 your Honor. I'm just telling you exactly what the  
25 lay of the land is with the other case.

1                   THE COURT: Well, I don't know. It -- it  
2 just -- I'd have to kind of study this carefully.  
3 But the impression I get is that the city is not  
4 happy with the way this case was going and then goes  
5 to the state engineer and says, "We need to have this  
6 whole thing withdrawn. And let them come at us in  
7 that setting. Maybe we'll get a different judge."

8                   And so it's kind of a backdoor  
9 judge-shopping approach.

10                  MR. DRANEY: That's -- that's absolutely  
11 not correct.

12                  THE COURT: Okay.

13                  MR. DRANEY: Before your Honor -- they  
14 filed a change application, which we already told  
15 them we objected to. Before your Honor ruled on the  
16 contract claims, which were pending before you in  
17 summary judgment -- cross-motion summary judgments,  
18 before that ruling, they decide they're going to take  
19 matters into their own hands instead of waiting for  
20 you to rule on that, they file a change application,  
21 which is inconsistent with the contract, overtly,  
22 patently, and it's inconsistent with the city  
23 ordinances, overtly, patently, and just like Judge  
24 Toomey said, we had a perfect right to withdraw the  
25 underlying change application. When they prevail, if

1 they ever do, we have a perfect ability to file  
2 another change application to provide the water.

3 This particular change application was not  
4 unique in any stretch of the imagination. There are  
5 a dozen other change applications up in the canyons  
6 that are approved that could be modified, just like  
7 this one. We did not deny their only opportunity.

8 But what needs to happen, your Honor, is  
9 they need to get through this case, get this all  
10 resolved, so we know -- one thing that the state  
11 engineer and the state water coach says, "You cannot  
12 file -- you should not file a speculative change."  
13 So we should deal with the change application when we  
14 know this is all settled.

15 If they're going to hook onto the -- to  
16 the Town of Alta system, we already have another  
17 change that allows the Town of Alta system to  
18 function. And all you have to do is modify that  
19 change to add their place of use.

20 If it -- if it's determined they have no  
21 contract right, that they breached it when we go up  
22 on appeal after this is all done, then they have no  
23 change application to file.

24 If, ultimately, they prevail on appeal,  
25 that they have a right under the '75 contract and

1 only from the Quincy, there are plenty of other  
2 change applications that can be filed to make that  
3 happen.

4           There was nothing unique about this one.  
5 They think it was unique because it listed as the  
6 source the Quincy Mine. They think it was unique  
7 because the explanatory discussed the '75 contract.  
8 But the fact of the matter is, there are a number of  
9 other city-approved change applications that could be  
10 modified, just like this one was, to serve them once  
11 there's a resolution.

12           So it wasn't the city that took matters  
13 into their own hands, it was the Shrontz Estate. And  
14 they knew -- they knew our reaction would have to be  
15 what it was, because we've told them before, "We will  
16 not tolerate unilateral change applications on the  
17 city's underlying water rights. That's an  
18 existential threat to the city being able to manage  
19 its water rights."

20           And one of the things that we want to get  
21 addressed is this: the Big Ditch case was very clear  
22 that what they were looking at was a change  
23 application filed by Big Ditch that was exactly  
24 consistent with the underlying contract. We think  
25 that that case holds that you can't go filing a

1 change application that's inconsistent with the  
2 underlying contract. And that's a big difference,  
3 your Honor. There's a big difference between the  
4 change application that Big Ditch filed -- keep in  
5 mind that their contract is perpetual. And the Court  
6 in earlier cases on who can file change applications  
7 has rejected someone with a non-perpetual contract  
8 right filing a change application on somebody else's  
9 water right.

10 The case of Crisby (ph), the other Court  
11 said that was a case -- that was a contract that was  
12 terminable. And so the contractor, that contracted  
13 with the folks who owned the water right, didn't have  
14 the ability to file a change application. You can't  
15 do it.

16 And in this case, it's a terminable  
17 contract. It's not a permanent contract. In Big  
18 Ditch, it was a permanent contract.

19 And that's one of the issues we need to  
20 get resolved in front of the Supreme Court.

21 One of the beauties of the Toomey case,  
22 quite frankly, is it gives us an opportunity to talk  
23 about Big Ditch to the Supreme Court much faster than  
24 we expected to. And, frankly, that's a benefit to  
25 the city. We want to get some issues resolved that

1 are well beyond the scope of this one and much more  
2 important than the scope of whether they get to build  
3 seven homes up the canyon or they don't, whether they  
4 hook onto the Quincy Mine or they hook onto the town  
5 of Alta system. They have raised issues which are  
6 literally, in the public utilities director's view --  
7 and I share that view -- existential to the ability  
8 of the city to reasonably manage its natural  
9 resources. This is a critical natural resource --

10 THE COURT: So if you're wrong, which you  
11 don't think you are, obviously, but if you are wrong,  
12 then what happens?

13 MR. DRANEY: We'll make adjustments, in  
14 our city ordinance in particular.

15 THE COURT: But it's existential, you say?'

16 MR. DRANEY: It is.

17 THE COURT: So --

18 MR. DRANEY: It is.

19 THE COURT: -- how do you make adjustments  
20 when it's an existential problem?

21 MR. DRANEY: Well, I -- I can map that all  
22 out for you if you want the details, but it -- it  
23 certainly -- we have the ability to adjust it out.  
24 We need an answer, quite frankly. We can't --

25 THE COURT: So it's not existential?

1 MR. DRANEY: It -- it's very much  
2 existential, your Honor. And that's why --

3 THE COURT: Well, your definition of what  
4 existential is is very different from mine.

5 MR. DRANEY: That's -- that's exactly why  
6 we went through the underlying change so it wouldn't  
7 go any further. And it hasn't gone any further.

8 THE COURT: So what -- that's my point.  
9 That's why you need to mediate this, because if it is  
10 existential, you're out. If it isn't existential,  
11 then -- then you can negotiate anyway.

12 So I --

13 MR. DRANEY: No. Because a mediated  
14 settlement won't be binding on other people out there  
15 to do the same thing again. If we settle this case,  
16 the message will be, file a change application and  
17 you'll get a settlement with Salt Lake City. That's  
18 going to encourage that kind of behavior, not  
19 discourage that kind of behavior, your Honor.

20 A ruling from the Supreme Court ultimately  
21 on all this in the city's favor will discourage that  
22 kind of behavior.

23 THE COURT: If it --

24 MR. DRANEY: But a settlement, short of  
25 that, will not.

1 THE COURT: If it's against the city,  
2 what's going to happen?

3 MR. DRANEY: Then we'll make adjustments  
4 in the ordinance, et cetera.

5 THE COURT: Yeah. So --

6 MR. DRANEY: And we -- we know what those  
7 are going to be. We know what that's --

8 THE COURT: Oh, okay. All right.

9 MR. DRANEY: We thought about this a long  
10 time.

11 THE COURT: Okay. Well, I guess so.

12 So how many days of trial are you talking  
13 about, Mr. Sullivan?

14 MR. SULLIVAN: Your Honor, I think between  
15 two and three weeks of trial.

16 THE COURT: So 12 days?

17 MR. SULLIVAN: I think 12 days would be  
18 ample, your Honor.

19 THE COURT: Okay.

20 What do you think?

21 MR. DRANEY: Well, it sort of depends on  
22 the scope of what we're talking about, your Honor.

23 THE COURT: Well, let's assume it goes bad  
24 for you. What's the outside -- what are we talking  
25 about?

1 MR. DRANEY: I'm sorry? I think it's at  
2 least three weeks, if these guys put --

3 THE COURT: So you're saying 15 days.

4 MR. DRANEY: I do, your Honor.

5 THE COURT: Okay.

6 What do you think, Mr. Moxley?

7 MR. MOXLEY: Three weeks.

8 THE COURT: Three weeks?

9 MR. MOXLEY: Yeah.

10 THE COURT: Okay. All right.

11 How many witnesses are you going to call,  
12 Mr. Sullivan?

13 MR. SULLIVAN: We have -- we have 14  
14 witnesses on our current may -- will-call list. And  
15 we have another 10 on our may-call list.

16 THE COURT: And what determines whether  
17 you're going to may or not may?

18 MR. SULLIVAN: We -- I guess we want to  
19 think about it a little bit more.

20 THE COURT: Okay. I'm not going to give  
21 you time to think about it. What I'm going to do is  
22 I'm going to set an early date for exchanging  
23 witnesses. And I only want will-call witnesses.

24 MR. SULLIVAN: All right.

25 THE COURT: And if you decide you're not

1 going to call a witness, you're going to have to give  
2 ample notice to the other side. They don't have to  
3 add that witness to their list, but they'll be able  
4 to call that witness. And you're going to be  
5 responsible for having any may-call that's converted  
6 into a will-call witness present at trial.

7 MR. SULLIVAN: I understand.

8 THE COURT: All right. So how many  
9 witnesses are you looking at?

10 MR. DRANEY: Well, I haven't seen their  
11 list yet because it was in flux after the last  
12 ruling.

13 THE COURT: How many witnesses are you  
14 going to call?

15 MR. DRANEY: Fourteen or so.

16 THE COURT: All right. And how many for  
17 the town?

18 MR. MOXLEY: Well, it depends, of course.  
19 It's been awhile since I've looked at the list, but I  
20 would think at least six.

21 THE COURT: All right. So we're looking  
22 at a possible 45 witnesses. And you think you're  
23 going to get them in in 15 days?

24 MR. SULLIVAN: I think 15 days we can do  
25 it. Yeah.

1 THE COURT: Do you agree?

2 MR. DRANEY: It's going to be tight, but  
3 we'll do our best.

4 MR. MOXLEY: I think that's optimistic.

5 THE COURT: So you want to have more days  
6 than 15?

7 MR. DRANEY: The thing I always worry  
8 about when you're the defendant, plaintiff always  
9 takes more time than they think. It's always --

10 THE COURT: They're not going to have more  
11 time. I'm going to divide the time. I'll tell you  
12 how I'm going to divide it, and that will be the way  
13 it will be done. And we're not going to -- you know,  
14 I'm not going to change it. I'm not going to give  
15 you more time to try the case. That's my point.  
16 That's why I want to know.

17 MR. DRANEY: Seventeen days, your Honor.

18 THE COURT: Okay. All right.

19 So when can we do a 17-day trial?

20 THE CLERK: We can start February 10th.

21 There is a holiday in -- on the 17th, which is  
22 Monday. That would take it through March 5th.

23 THE COURT: And we're clear on that?

24 THE CLERK: Yes.

25 THE COURT: All right.

1 All right. I'm going to have you exchange  
2 your exhibits on the 25th of November. And  
3 Mr. Sullivan will be responsible for the exhibit  
4 books that will be prepared shortly before trial. We  
5 don't need them until maybe the week before trial.  
6 And the exhibit books will be numbered -- the  
7 exhibits will be numbered consecutively.

8 If you want to put in some identifying  
9 letter to indicate that it's a -- an estate or a city  
10 or a town exhibit, you can do that. But when I refer  
11 to exhibits, I'll generally just refer to them by  
12 their number and not by P-such and such. It'll be  
13 number 10 or number 28 or whatever it is.

14 So the exhibit books, we'll need a set for  
15 the plaintiff, we'll need a set for the city, a set  
16 for the town, a set for the witness, the official set  
17 for the clerk, and a set for the Court. So we'll  
18 need six sets of the books.

19 I would want you to, on the same date,  
20 exchange your witnesses. And that'll include all of  
21 your expert witnesses or any -- anybody like that.

22 MR. DRANEY: Your Honor, may I just  
23 interrupt and ask a quick question about experts?  
24 There was something that Alan said earlier in terms  
25 of damages.

1                   When we were before your Honor last time  
2                   on oral argument as to the constitutional claims, one  
3                   of the things -- and part of that hearing was whether  
4                   or not to continue the stay on the first cause of  
5                   action. We said that if this is a damages case, a  
6                   lot of the evidence we would try in the first cause  
7                   of action will be tried in this case because it has a  
8                   lot to do with what they can and cannot do with the  
9                   property if they're seeking to be compensated for the  
10                  value of the property. Which I understood to be a  
11                  regulatory takings claim. And that, your Honor, as  
12                  opposed to a contract claim, a regulatory takings  
13                  claim is one your Honor said was not ripe.

14                  And I remember Mr. Sullivan indicating  
15                  that he was really focused on specific performance  
16                  and mandatory injunctive relief as opposed to  
17                  damages.

18                  Then today I hear that he's talking about  
19                  changing up the damage theories in terms of expert  
20                  reports.

21                  MR. SULLIVAN: No. We're not -- we're not  
22                  going to change our damages theories. We -- it is  
23                  true that we have a portion of our damages expert  
24                  claim that relates to the constitutional claims. But  
25                  the bulk of his report has to do with our damages for

1 breach of contract.

2 And Mr. Draney will remember that our  
3 damages report is in two segments: One, if we're  
4 allowed to develop the property and utilize the water  
5 to which we're entitled; and, secondly, that the  
6 amount of damages that we're entitled to if we can't  
7 use the water. And that doesn't have anything to do  
8 with a constitutional claim. It's a contract action.

9 And we have always intended to seek both  
10 injunctive and damages relief, and Mr. Draney knows  
11 that, because it's been in all of our pleadings. And  
12 it was in our damages report.

13 And the one thing that we would like to  
14 do, your Honor, is have a separate date for the  
15 updating of -- of all of our expert reports. Because  
16 time has changed since 2011 when these expert reports  
17 were -- were exchanged. And we think that if the  
18 Court would set a deadline within 30 or 60 days from  
19 now when we can both exchange updated data -- updated  
20 expert reports, that would be good not only for  
21 damages, but for the other expert aspects as well.

22 MR. DRANEY: And just so you know, your  
23 Honor, I didn't want to catch you by surprise, if  
24 that's the damage theory that he's going to try, this  
25 is what we would have made had we been allowed to

1 develop the property, the question is, what approvals  
2 would you get from the town? What approvals couldn't  
3 you get from the town?

4 So we're going to be trying the case of  
5 what they can and cannot do under town ordinances,  
6 which is exactly the fact scenario of the first cause  
7 of action. And I'm okay with that. I just want to  
8 make sure you understand that that overlaps that  
9 much. And so we will be -- will be addressing those  
10 issues.

11 THE COURT: Exchange your reports by the  
12 same date, November 25th.

13 All right. So I would like to have all  
14 the motions in limine submitted by the 9th of  
15 December. And any other dispositive motions the same  
16 date.

17 MR. DRANEY: Your Honor, in terms of their  
18 expert reports, in order to react to them, we need to  
19 see them first. If --

20 THE COURT: You're going to get them on  
21 the 25th of November.

22 MR. DRANEY: But -- but -- then we -- we  
23 give them our -- our updated expert reports when?

24 THE COURT: Same date.

25 MR. DRANEY: But we need to be able to

1 react to them. They're the plaintiff. If they have  
2 a new --

3 THE COURT: Why -- why do we need separate  
4 dates? I mean, your experts are going to say what  
5 they're going to say; aren't they? Just --

6 MR. DRANEY: Well, they also need to  
7 address what their experts say in rebuttal, in terms  
8 of what their expert's going to say.

9 So unless --

10 THE COURT: So you want them to have a  
11 surrebuttal our reply to -- to your experts too? Or  
12 what -- I don't get what you're --

13 MR. DRANEY: No. I'm just used to having  
14 plaintiff's experts be -- reports be given 60 days  
15 or 30 days before the defendants to give reports.  
16 That's typical --

17 THE COURT: No. Let's just do them  
18 simultaneously. You both have had each other's  
19 reports. They're going to update them. Just let's  
20 have them all on the -- on the 25th.

21 The 9th, motions in limine and dispositive  
22 motions.

23 And let's have your voir dire and jury  
24 instructions on the 20th of December.

25 The jury instructions will also contain a

1 special verdict form, so include that as one of your  
2 instructions.

3 The most difficult instruction is always  
4 what the case is all about, the position of the  
5 parties. And I have yet to see anybody do a really  
6 good job in doing that. So I'm depending on you,  
7 because you're better than other lawyers, to do a  
8 really good job on that.

9 Now, you don't have to -- if you look at  
10 my bench book, you'll see a bunch of stock  
11 instructions that I give about the nature of  
12 instructions and what you do when you're on recess  
13 and all those kinds of things. There's probably 25  
14 or so questions, the burden of proof, things like  
15 that. Those you don't need to duplicate. Just --  
16 you can refer to them, if you wish, and just say, you  
17 know, we -- we incorporate, you know, stock  
18 instructions one through whatever the Court has.

19 But -- and next, if -- if you use any of  
20 the Supreme Court's stock instructions, sometimes  
21 they call them MUJI, but I'm not sure that's a  
22 correct reference, you can just use the CV number, CV  
23 2415, or whatever it is. And if it's -- as a  
24 reference to authority for it. Most of the time even  
25 the CV standard instructions require a little

1       tweaking to get the party numbers right, or whatever  
2       it might, so you're welcome to submit those. But use  
3       the CV reference as the authority for it.

4                   Anything else that you're going to come up  
5       with in your creative geniuses, I want the case  
6       citations for them.

7                   MR. SULLIVAN: Your Honor, may I ask a  
8       question about that?

9                   THE COURT: Yeah.

10                  MR. SULLIVAN: Does the Court want an  
11       agreed set of instructions by December --

12                  THE COURT: Yeah. If you can agree to  
13       anything, you don't need authority. I mean, if you  
14       agree to something, that's fine.

15                  Usually what I get is, you know, my stock  
16       instructions, the Supreme Court stock instructions,  
17       agreed instructions, and there are stipulated  
18       instructions, and then plaintiff's instructions, and  
19       then defendant's, or whoever, instructions. And you  
20       can do it that way. That's fine. And then just for  
21       plaintiff's and defendant's, that's the only ones I  
22       would need authority on.

23                  MR. SULLIVAN: All right.

24                  THE COURT: So that can save you some  
25       time.

1                   Is anybody asking for punitive damages  
2 here? I can't remember.

3                   MR. SULLIVAN: No. No, your Honor.

4                   THE COURT: All right. Good. Good. That  
5 makes it a little easier.

6                   MR. DRANEY: It certainly sounds like it  
7 when he makes his argument about how bad we are, your  
8 Honor.. We'll address that --

9                   THE COURT: Well, maybe -- maybe I should  
10 let him amend the pleadings.

11                   Do you want to amend your pleadings to --

12                   MR. SULLIVAN: No, your Honor. There's no  
13 reason to do that.

14                   THE COURT: All right.

15                   MR. DRANEY: We'll address that in the  
16 motion in limine, because I do think that's a problem  
17 for us.

18                   Counsel wants to make us out to be bad  
19 guys because we're waiting on an appeal on directly  
20 your Honor's rulings on the -- the validity of the  
21 contract. We have the right to do that. No one  
22 would perform a contract that they were going to  
23 appeal on matters of law, and yet that's going to be  
24 the theme here is we're bad guys because we're  
25 insisting on our right to appeal. And we'll address

1 that in our motion in limine, your Honor.

2 THE COURT: All right. That's fine.

3 And I'll tell you right now that they're  
4 not favored. And same thing for the plaintiffs. If  
5 they try to file motions in limine, it's -- they're  
6 going to be very carefully scrutinized.

7 You know, usually the best thing that can  
8 happen with a motion in limine is I'll delay ruling  
9 on it until trial, I mean, from the litigant's  
10 perspective. Very rarely do they get granted. I  
11 mean, they're just hard to rule on in a vacuum.

12 Let's set a date in early January for a  
13 conference on instructions.

14 THE CLERK: Do you want to go Friday  
15 the 3rd at 1:00?

16 THE COURT: Let's put it another week or  
17 so out.

18 THE CLERK: (Inaudible).

19 THE COURT: Yeah.

20 THE CLERK: (Inaudible). How about  
21 the 13th, and we can start it at 1:00?

22 THE COURT: Okay.

23 THE CLERK: That's a Monday.

24 THE COURT: All right.

25 MR. DRANEY: I'm sorry. What time?

1 THE CLERK: Monday, at 1:00 p.m.

2 MR. DRANEY: Thank you.

3 THE COURT: We'll undoubtedly have several  
4 of those conferences. And if we have to do them on  
5 Saturdays, I'll schedule them on Saturdays, because  
6 we'll have to do them before the trial.

7 I will want in this case, I think, also a  
8 pretrial memo about the first of February. Let's  
9 see, let's make it January 31st. That's a Friday. I  
10 don't want it more than, oh, seven or eight pages  
11 long, maximum. And that's everything, including your  
12 signature. Okay?

13 All right. Once we start the trial, the  
14 first day we'll meet at 8:30. So on the 10th of  
15 February, 8:30.

16 We'll bring in the jury. I don't like  
17 jury questionnaires and won't use them. I would --  
18 probably the only case where I think they would be  
19 helpful would be a murder case or something. So what  
20 we'll do is we'll go through the standard questions  
21 to the jury to determine their qualifications, and  
22 then we'll ask other questions regarding potential  
23 biases. And that's where I would want you to weigh  
24 in to try to figure out if somebody has a potential  
25 bias. Have you ever been in a lawsuit with the city?

1 Or, you know, have you ever handled an estate? Or  
2 whatever the -- whatever you want to ask, questions  
3 like that.

4 So it usually takes all morning and  
5 usually into the afternoon a little bit, like, 1:00  
6 or 1:30, to get through the panel and decide who's  
7 going to be serving on the jury.

8 So when we're through with that selection,  
9 I will read some instructions and -- and we'll then  
10 start with evidence.

11 Plaintiff going first, can expect probably  
12 to have his first witness -- or their first witness  
13 around 2:30, somewhere in that time frame. Most days  
14 we'll go to somewhere between 4:30 and 5:00 before we  
15 end. Some days we may go a little longer. Some  
16 days -- probably not shorter, but depending on the  
17 flow of witnesses. If you have witnesses that you  
18 need to call out of order, I think you can work that  
19 out usually with the other side. But, you know, I'm  
20 flexible in that regard.

21 Now, in this case, what I would do  
22 probably with the number of days of trial is probably  
23 have a couple of alternates. So I would allow three  
24 preemptory challenges to each table, and then two  
25 more preemptory challenges to each table. So you'd

1 have five each side.

2 MR. DRANEY: For each side?

3 THE COURT: Each side. Each table.

4 MR. DRANEY: So the -- we're not each  
5 side, but there are two different defendants, so we'd  
6 each -- we'd share them, or we'd --

7 THE COURT: You'd share them, yeah.

8 So what I do is I'll put you on the  
9 backside of the table, or the front side, depending  
10 on how you look at it, and you would be looking out  
11 at the congregation. We'd seat them starting on the  
12 bench right behind you and going back into the --  
13 into the audience. And we would go through all of  
14 the voir dire questions, noting areas where we would  
15 want to follow up. I'll do that. You'll do that.

16 And then after we've gone through the  
17 group, we can probably excuse some people. You know,  
18 the eight-and-a-half-month pregnant lady, we'd  
19 probably let her go. And there may be some others  
20 that would have legitimate problems in terms of  
21 hardship. So if we can excuse people, we would  
22 usually do it at that point.

23 And then what I would do is, looking at  
24 the follow-up questions that we want to ask, we would  
25 call in jurors one at a time. We'll excuse the group

1 to go out into the hall, use the restrooms, et  
2 cetera. In the meantime, we would call in jurors one  
3 at a time and have them respond to the questions.  
4 I'll ask the questions. When I think I've covered  
5 the ground, I will then turn to the plaintiff and  
6 say, "Do you want to follow up on any questions?"  
7 Plaintiff would have an opportunity to ask direct  
8 questions to the person. If I think they're  
9 wandering -- if the plaintiff is wandering or  
10 bringing up inappropriate things, I'll stop them, cut  
11 them off. Then I'll have the defense side. And that  
12 would include both counsel would have an opportunity  
13 to question the -- the juror -- prospective juror.

14 After all of that was done, after we've  
15 covered all of those issues, then I would allow the  
16 jury group, the -- the whole collection of them to  
17 come back in. Then we would hand out the -- the blue  
18 sheets, and you would then begin striking. You'd  
19 strike one, you'd strike one. You'd strike two, two.  
20 So forth. Until you used up all your -- all your  
21 preemptory challenges.

22 And at that point, I would go back and I  
23 would take the first eight people as the jury panel,  
24 and the next two that were remaining as alternates.  
25 I don't tell them they're alternates until the end of

1 the trial. And at that point, I tell them, and  
2 they're always upset, because they've been here for,  
3 by that point, what did we say, 17 days and they're  
4 going to be very unhappy that they're going home  
5 without being able to weigh in on this. But that's  
6 how it works. And it wouldn't work probably without  
7 it being able to handle that.

8 So that happens at the end -- at the end  
9 of the trial and before the jury goes out, I will  
10 identify who the -- the two alternates are. And they  
11 will be instructed not to talk about the case.

12 We've never had a situation where we've  
13 had to test this law, but -- to invite someone on  
14 the -- on the deliberating group becomes ill or has  
15 to be disqualified for some reason, the question is,  
16 can you bring in one of the alternates still at that  
17 point? I think you can if they -- again, their  
18 deliberations are new, which is hard to do, but I  
19 think they can do it. And -- so that's how I would  
20 do it if I were required to do it. As I said, I've  
21 never had to do that yet, but you never know.

22 So that's generally how it works.

23 Any questions about any of that?

24 MR. SULLIVAN: Can we get a date for a  
25 final -- does the Court have final pretrial

1 conference?

2 THE COURT: Yeah. It'll be sometime  
3 between the 13th of January and the 31st of January.

4 MR. SULLIVAN: Okay.

5 THE COURT: And we'll have a number of  
6 conferences through there. So I would block some  
7 time. You know, several days where you have  
8 significant periods of time. "Significant," meaning  
9 two, three hours.

10 And I will be e-mailing you revised  
11 versions of this process, so you'll have a lot of --  
12 there will be a lot of work to do.

13 I don't know how lawyers do it, except in  
14 firms, they're -- you know, you can call on the  
15 Ambers of the world to -- to say, "Okay. Amber,  
16 figure out what the judge did to us on this one."

17 I don't know, I assume the city has a few  
18 people.

19 I don't know what the -- you'll have to  
20 figure that out, Mr. Moxley.

21 MR. MOXLEY: We'll do the best we can.

22 THE COURT: I know.

23 Now, did I see that you had affiliated  
24 with a firm recently?

25 MR. MOXLEY: Yes.

1 THE COURT: Okay. Maybe that'll help you.

2 MR. MOXLEY: Yeah.

3 THE COURT: Yeah.

4 MR. SULLIVAN: Your Honor, may I just  
5 confer with my client just for one second?

6 THE COURT: Sure.

7 MR. SULLIVAN: Thank you.

8 (Brief pause.)

9 MR. SULLIVAN: Thank you, your Honor.

10 THE CLERK: (Inaudible)?

11 THE COURT: I think we probably should  
12 start with maybe 45.

13 MR. DRANEY: Judge, you indicated you were  
14 going to tell each of us how much time we were going  
15 to have in the 17 days?

16 THE COURT: Yeah.

17 MR. DRANEY: Do we do that later or today  
18 or --

19 THE COURT: Well, I think -- normally what  
20 I would do is just say I'll give you each half, like  
21 that. There may be a reason to change that if we  
22 have a heavier weight of -- of evidence on one side  
23 than on the other, for example.

24 As I look at the number of witnesses that  
25 you're going to have, it sounds like you're going to

1 have the same number of witnesses. So on your side,  
2 you're looking at roughly 20, 22. Same on that side,  
3 roughly 22, as I see it.

4 MR. SULLIVAN: Judge, I -- I'm just  
5 thinking that we're going to have a lot of  
6 duplicates, and --

7 THE COURT: Maybe.

8 MR. SULLIVAN: -- and I'd like to know how  
9 the Court feels about a rule that, as a general  
10 matter, we don't call witnesses back a second time,  
11 that we take care of them once and once only.

12 THE COURT: I think generally we could do  
13 that. There may be reasons not to do it.

14 This is my secret weapon to make sure that  
15 one side gets all the time that the other side gets.  
16 So that's -- that's how I do it generally.

17 So, you know, I -- I will allow time for  
18 closing arguments, opening statements, those kinds of  
19 things. I try to divide that as equitably as I can.  
20 And, you know, it's never precisely perfect, but I  
21 think it's reasonably perfect. And I have never had  
22 anybody complain that it wasn't done so that they  
23 felt they weren't given an opportunity to present  
24 their story.

25 Okay?

1 MR. SULLIVAN: I think we're good.

2 THE COURT: All right. There's plenty of  
3 time to get lots of sleep between now and then, so...

4 Any questions?

5 Oh, look at my bench book. I list a few  
6 idiosyncrasies that I have. You probably are aware  
7 of some of them already. One of them is I don't  
8 allow you to use the phrase, "with all due respect"  
9 in this room. Because I think it's a very uncivil,  
10 no respect phrase. So don't use that. It's a  
11 probably a good idea to think about whether you  
12 should use it anywhere, really.

13 Secondly, I don't allow lawyers to -- who  
14 are sitting -- to object to an interrogating lawyer's  
15 question as beyond -- as nonresponsive, or to the  
16 answer that it's nonresponsive. That's the -- the  
17 interrogating lawyer's objection, not the other  
18 lawyer's objection. You can come up with a different  
19 one. I mean, narrative, irrelevant, whatever it  
20 might be, you know. But not his answer's  
21 nonresponsive. Because only the interrogating lawyer  
22 can use that.

23 Another one that I don't like, or phrasing  
24 that I don't like is, "Is it fair to say?" You hear  
25 it on the news broadcasts, you hear it -- even the

1 President says it. But in court, I don't think it  
2 means anything. It may not mean anything in the  
3 other context either. Whether it's fair to say  
4 doesn't matter. Whether it's accurate or correct,  
5 that's what matters.

6 So don't say to the witness, trying to get  
7 him off guard maybe, "Is it fair to say that," you  
8 know, or, "Is it safe to say this?" You know, those  
9 questions don't mean anything. Ask the question, "Is  
10 it correct to say?" or "Is it accurate to say?"

11 So if you inadvertently fall into a habit  
12 that some people do in depositions, for example, and  
13 you're carrying that over into trial, I will stop you  
14 and I will say, "Please rephrase the question." And  
15 if you don't and you don't get my message, I'll take  
16 it one step further and tell you how to ask the  
17 question. Okay?

18 That's just an idiosyncrasy that I have.  
19 And I think it helps -- I think it helps the jury  
20 understand better. And I think it calls to the  
21 attention of the witness, also, the importance of the  
22 answer. It's safe to say you can kind of slide into  
23 things and you can, you know, "Can I suggest this to  
24 you," you know? So be careful when you're asking  
25 your questions, phrase them right.

1                   And I think I have a few other  
2 idiosyncrasies like that. I hope you'll forgive me  
3 for them, but that's just the way I am.

4                   I like -- I like hearsay rules to be  
5 followed. So if you're objecting to something that  
6 isn't being offered for the truth of the matter  
7 asserted and you're objecting as hearsay, it isn't.  
8 So, you know, things -- things like that. You may  
9 want to clarify, "Now, I just want to make sure, your  
10 Honor, that this question is not for the truth of the  
11 matter asserted, that it's for some other reason."  
12 You can do that. But careful.

13                   Any questions about any of that?

14                   As I say, be -- be patient with me. Going  
15 through these -- I'm sure it's going to be a  
16 nightmare to go through these instructions. I can  
17 just see it now. This is a very complex matter. And  
18 there's a lot of emotion, I think, here by the  
19 lawyers, in addition to the parties.

20                   So I would say, you know, take a deep  
21 breath and try to deal with the issues as opposed to  
22 the emotion, if you can. And let's see what we can  
23 do.

24                   Okay. Thanks for being here.

25                   MR. SULLIVAN: Thanks, your Honor.

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THE COURT: Let's have you, Mr. Sullivan,  
prepare the order this time.

MR. SULLIVAN: We will, your Honor.

THE COURT: Thank you.

(Court adjourned at 3:47 p.m.)

REPORTER'S CERTIFICATE

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STATE OF UTAH                    )  
  ) ss.  
COUNTY OF SALT LAKE            )

I, Kelly-Fine Jensen, Registered Professional Reporter, do hereby certify:

That on December 11th, 2013, I produced a transcript from electronic media at the request of Alan L. Sullivan;

That the testimony of all speakers was reported in stenotype and thereafter transcribed, and that a full, true, and correct transcription of said testimony is set forth in the preceding pages, according to my ability to hear and understand the tape provided;

That the original transcript was sealed and delivered to Alan L. Sullivan for safekeeping.

I further certify that I am not kin or otherwise associated with any of the parties to said cause of action and that I am not interested in the outcome thereof.

CERTIFIED this 13th day of December, 2013.

\_\_\_\_\_  
Kelly Fine-Jensen, RPR  
Notary Public  
Residing in Salt Lake County