

LERDY W. HOOTON, JR.  
DIRECTOR

# SALT LAKE CITY CORPORATION

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

DEEDEE CORRADINI  
MAYOR

July 15, 1997

RECEIVED  
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WATER RIGHTS  
SALT LAKE

Robert Morgan P.E. State Engineer  
State of Utah  
Department of Natural Resources  
Division of Water Rights  
1594 West North Temple  
Salt Lake City, Utah 84114-6300

Re: Water Commissioner For Millcreek, Big Cottonwood Creek and Little Cottonwood Creek.

Dear Mr. Morgan:

Salt Lake City appreciates this opportunity to respond to the questions you raised during the June 26, 1997 public hearing regarding the appointment of a Commissioner for the above-referenced creeks. We are hopeful that the information provided to you herein will assist you in making a smooth transition between Mr. Higbee and the new water Commissioner.

At the outset, we should state that our comments will be limited to Millcreek, Big Cottonwood Creek and Little Cottonwood Creek. We do not believe it is necessary to appoint a Commissioner for Parley's Creek. The exchange agreements entered into in 1888 between Salt Lake City and the various Parley's Creek water users, provide for a three-person committee to resolve any disputes arising from the implementation of the exchange contracts. This arrangement has worked well for the last 109 years. Salt Lake City will continue to collect streamflow and water use data, and make this information available to the State Engineer and any other interested parties. If your office happens to receive any requests for a Commissioner on Parley's Creek, we would like the opportunity to respond before a final decision is made.

Regarding the Commissioner for the balance of the creeks, we would like to preface our comments by putting Salt Lake City's legal interest in the water in context.

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Salt Lake City is the major water user and holder of water rights on all of the referenced creeks. Salt Lake City's percentage interest in the primary flow<sup>1</sup> from each of the creeks is set forth below:

Millcreek	76%
Big Cottonwood Creek	99%
Little Cottonwood Creek	61%

Salt Lake City's rights are based partly on direct appropriations and purchases, and partly on exchange agreements with approximately 40 ditch companies, dating back to the early as 1900's. Generally, these exchange agreements provide for a transfer of creek water rights to the City, in exchange for irrigation water delivered to the ditch companies from unspecified sources throughout the irrigation season. The following is representative conveyance language found in the exchange agreements:

"The company hereby grants, sells, conveys and transfers to the city and the city buys and accepts all the waters and water rights owned by the company in said . . . stream . . . That all of the rights of the company and its shareholders to the waters of [name of stream] . . . are hereby vested in the city perpetually, subject only to the terms and conditions herein specified."<sup>2</sup>

Salt Lake City has been advised over the years by its attorneys that such language vests in the City all right, title and interest to the water conveyed, subject only to a reversionary interest in the grantor. Pursuant to this conveyance, Salt Lake City becomes the legal owner of the water rights. For all practical and legal purpose, the City steps into the shoes of the grantor. The City files change applications on its own behalf; the City protests adverse water claims and change applications; and the City otherwise conducts itself as the true legal owner of the stream water. The grantor, on the other hand, gives up his rights to the stream water, and accepts by exchange a contractual right to receive irrigation water.

This point is made here simply to illustrate that the ownership percentages set forth above are not illusory or contrived. They represent to true scope of the City's legal ownership interest in the water from these drainages.

Salt Lake City's foresight and wise water stewardship has allowed the City to provide the water necessary to support the growth and development of large portions of

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<sup>1</sup> These percentages change somewhat as secondary and tertiary rights are considered.

<sup>2</sup> Source: Lower East Millcreek Exchange Agreement.

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the Salt Lake Valley. Water from the above-referenced streams currently supports over 400,000 residents within Salt Lake City's water service area. It is vitally important to these water users that Salt Lake City's water rights be protected and maintained, and that the stability and continuity provided by the City be preserved.

Yet, there is currently tremendous pressure to develop the canyons and use water in ways which may be at odds with the greater public interest. As the primary water owner, Salt Lake City is increasingly involved in disputes with those whose interests do not necessarily coincide with the interests of the established users of the water from the canyon streams.

It is largely for this reason that Salt Lake City sees great merit in the appointment of an independent, impartial Commissioner who will administer the distribution of water according to established legal rights, and without regard to politics or special interests.

With that background, we address below each of the questions you have raised:

1. ***What does your system need and expect from the Division of Water Rights?***

We think the role of the Division of Water Rights is fairly well set forth in Sections 73-5-1 et seq. of the Utah Code. The Code provides that the State Engineer shall:

- (a) determine whether a water commissioner is necessary;
- (b) appoint a commissioner after consulting with the water users;
- (c) establish a payment schedule based upon the pro rata share of established rights;
- (d) remove a commissioner for cause; and
- (e) carry into effect the judgments of the courts in relation to the division, distribution or use of water .

Above all, we see the Division's primary responsibility as that of overseeing the proper distribution of water, according to the court decrees. There are many issues which arise from time to time which have nothing to do with the distribution of water. We feel that the first and last line of inquiry should be: "Is everyone getting the water to which they are entitled under the decrees?"

Beyond the directives of the statute, we feel anything your office can do to ease tensions and facilitate trust in the process will be of tremendous benefit. For example,

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you office may decide to act as a central repository of water measurement records. The volume and complexity of the data will remain the same, but if the perception of accessibility may improve, we are in favor of such a system.

We do not, however, see your office as the final arbiter of disputes, or the interpreter of private contracts, such as the exchange agreements. Those arguments should continue to be a matter of private concern between the parties, interpreted as necessary by the courts.

Your office has expressed an interest in setting up a committee of water users to assist, among other things, in the appointment of a commissioner. We understand that this has been your practice in other water systems, and that the effort has generally been productive. In our opinion, however, a water users committee for any of the creeks in question here would not be constructive, and may in fact become a source for increased tension and hostility.

These systems are unique in that they are beneficially used overwhelmingly by a single water user. While there are certainly other water users on all three systems, their numbers are relatively small, and their interests can be fully protected, and their concerns addressed, in a public hearing similar to the one held in this case, followed when necessary by written comments. It is very unlikely that a committee will reach consensus on issues such as the scope of the Commissioner's duties, the amount of his salary or the allocation of costs among water users. It is likely that your office will be open to comment from the broader group of water users anyway, and will not feel bound by the decisions of the committee. Just what purpose the committee would serve, therefore, is unclear.

If a committee is created, you are aware of our concerns about the potential dominance of the committee by minority interests. Unless your office is willing to recognize weighted representation based on proportionate water interests, we don't see how this concern can be addressed. While the goal of receiving input from the entire group is a laudable one, it creates the fundamental unfairness of giving minority water users greater influence than they are entitled to legally. On the other hand, to the extent you view the decisions and recommendations of such a committee as non-binding, this may create false expectations among those who hope to increase their influence by participating on a committee. As a potential compromise position, we would suggest that irrigation companies which have assigned their rights to Salt Lake City be represented on the committee by Salt Lake City. A potential reversionary interest in the water from the system is too tenuous a connection to justify full representation as a water user.

In addition, the definition of "water user" should be carefully considered. We feel that only those with recognized legal rights in the water should be entitled to representation. Rights under water sales agreements should be disregarded; otherwise,

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Salt Lake City's thousands of customers should be entitled to representation. Where legal rights are the subject of litigation, the claimants should not be entitled to representation until the claims are resolved. The chore of sorting through such claims and legal issues is one of the principal reasons that a public hearing process makes more sense here than a water users committee.

Finally, if a committee is formed, we would recommend that an employee from your office be appointed to sit on the committee, and supervise meetings.

2. ***What is the role of the commissioner?***

The Commissioner should serve in an overseeing, supervisory capacity. The primary role should be to ensure that all legal water rights holders receive their equitable share of water. The commissioner should administer the court decrees, and monitor usage and any wasting of water.

With respect to record keeping, Salt Lake City has maintained streamflow records and diversion records on all the creeks for almost 100 years, and will continue to do so. The start of these records predate the State Engineer's office and the various court decrees. Under the terms of our exchange agreements, Salt Lake City will continue to measure, maintain and compile these readings. The measuring stations and recording devices will continue to be owned and maintained by Salt Lake City. It make no sense to have this effort duplicated. Salt Lake City certainly will not want to finance such a duplication. However, the City is willing to continue to make this data available to the State and to water users. The Commissioner is welcome to provide any oversight , monitoring, verification or other services to improve water measurements and data compilation, organization and presentation. The City is willing to cooperate in an open and sincere effort to make this information accurate, timely and available.

3. ***Who should maintain the diversion points and measuring devices?***

The ownership, maintenance and repair of the diversion points should continue to be the responsibility of the various water users.

The measuring devices installed by Salt Lake City and required for our exchange agreements will continue to be owned and maintained by us. If for any reason a redundant set of measuring devices are installed, the cost and maintenance therefor should rest with the group requesting those measurements.

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**4. *Who is accountable for the operation and delivery of water through the diversion headgates.***

We believe that operation of all head gates should be the responsibility of the individual ditch masters. Neither the State Engineer nor the Commissioner should assume the potential legal liability associated with maintaining and operating headgates. The Commissioner should be responsible for any oversight to ensure equitable distribution of water based on water rights, but should not operate headgates. Nor should the Commissioner be involved in selecting the methods or means by which Salt Lake City satisfies its obligations under its exchange agreements.

**5. *How many commissioners are needed?***

Based on extensive experience, we believe that one part-time Commissioner should be able to handle all three streams. Again, the role should be one of oversight.

**6. *How should the system be financed?***

The cost of the system should be allocated pro rata among the users of water from the creek systems. The schedule of proportionate share should be based on the established rights of each water users. In the past, Salt Lake City has borne more than its share of the cost. Only if costs are shared proportionately will there be adequate incentive on the part of water users to keep those costs low.

Finally, we would like to address the issue of impartiality. We recognize that some water users have perceived a conflict of interest with Mr. Higbee's dual role as Commissioner and Salt Lake City employee. While the potential for abuse certainly existed, Salt Lake City was extremely careful in maintaining a wall between these two roles. Salt Lake City was careful to both act on Mr. Higbee's directions as Commissioner, and avoid directing his activities and decisions as Commissioner. This arrangement was sanctioned by the court, and resulted in relatively few, if any, actual problems with equitable water distribution.

Nevertheless the City, despite its overwhelming majority interest in the water, is willing to accept an independent Commissioner to oversee the system. This should go a long way toward quieting the complaints, however unfounded, that the system has not been administered fairly. However, if the Commissioner is to be independent from the City, he or she should also be independent from the other interested water users. If Salt Lake City, as the majority water user, is unable to direct the appointment of the Commissioner, certainly the minority water users, either singly or in concert, should be precluded from doing so. The Commissioner should truly be independent, answerable solely to the State Engineer. If it ever becomes impossible to find a person who possesses all of the qualities of competence, knowledge of the system, impartiality and

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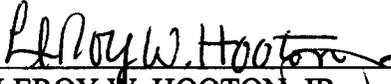
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willingness to service, we should not preclude the appointment of an interested person who may have a conflict, as long as there are no objections from the other water users.

We hope the foregoing will prove helpful in your decision making process. If you would like any further information, or clarification of any of these comments, please feel free to contact me or Jeff Niermeyer at any time.

Sincerely,

  
LERoy W. HOOTON, JR.

JN/jn

CC Roger Black  
Brain Hatch  
City Council  
Chris Bramhall  
Tim O'hara