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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, 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 IN UTAH.)) PRE-TRIAL ORDER AND) CONFIRMATION OF WATER RIGHTS) EMIGRATION CREEK) SALT LAKE COUNTY EAST DIVISION) Civil No. 57298) Judge Timothy R. Hanson
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On August 10, 1988, pursuant to notice, the Honorable Timothy R. Hanson conducted pre-trial proceedings in this matter. The Court reviewed the protests filed against the State Engineer's Proposed Determination of water rights in the Utah Lake and Jordan River Drainage Area, Salt Lake County East Division, Emigration Creek Subdivision (State Engineer's no. 57, book no. 1). The Court approved and confirmed certain water rights, heard the protests, dismissed certain protests, and discussed the scheduling of trials on other protests.

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ATTORNEY GENERAL
NATURAL RESOURCE AGENCIES

I. COUNSEL AND PARTIES

Counsel of record in this part of the adjudication:

R. DOUGLAS CREDILLE
JOHN H. MABEY, JR.
Assistant Attorneys General
1636 West North Temple, Suite 300
Salt Lake City, Utah 84116
For the State Engineer

JEFFREY W. APPEL
175 South Main, 10th Floor
Salt Lake City, Utah 84111
For Pinecrest Pipeline Operating Company

JEFFREY L. SILVESTRINI (Subsequently withdrew, and by his
525 East 100 South request and by the Court's order,
P.O. Box 11008 he is removed from mailing list)
Salt Lake City, Utah 84147
For Roger and Sheila Van Frank

JOHN WALSH
3865 South Wasatch Blvd.
Suite 202, Cove Point Plaza
Salt Lake City, Utah 84109
For Butler, Crockett and Walsh Development Corporation, and
The Pinecrest Water Company

E. CRAIG SMAY
505 East 200 South, Suite 400
Salt Lake City, Utah 84111
For Protestants Brest van Kempen, et al.

ROSEMARY J. BELESS
215 South State, 12th Floor
Salt Lake City, Utah 84111-2309
For Mt. Olivet Cemetery

PACE & PARSONS
350 South 400 East, Suite 101
Salt Lake City, Utah 84111
For Bertagnole Investment Co. and Gerald Bertagnole, et al.

DONALD F. DALTON
411 East 100 South
Salt Lake City, Utah 84111
For City Development, Inc.

Protestants not represented by counsel:

1. PHIL M. DAVIS
7800 Emigration Canyon
Salt Lake City, Utah 84108
2. DAVID GIBSON
8820 Emigration Canyon
Salt Lake City, Utah 84108
3. TOM JOHNSON
9600 Emigration Canyon
Salt Lake City, Utah 84108
4. LISA M. NEUHOF
8888 Emigration Canyon
Salt Lake City, Utah 84108
5. JOHN WOLFER
8800 Emigration Canyon
Salt Lake City, Utah 84108

Respondents or others thought to be interested in this proceeding:

1. BERTAGNOLE INVESTMENT CO. LEO BERTAGNOLE
350 South 400 East, Suite 100 616 East 4075 South
Salt Lake City, Utah 84111 Salt Lake City, Utah 84107
2. WALLACE GROVES WATER ASSOCIATION
c/o Melvin K. Thompson
2164 Lakeline Drive
Salt Lake City, Utah 84109
3. CROSSLAND SAVINGS
c/o Kevin Hadlock
41 East 100 South, 3rd Floor
Salt Lake City, Utah 84111

4. CHRIS & LAURIE VONDERAHE
5161 Emigration Canyon
Salt Lake City, Utah 84108
5. B. MERRILL and INEZ S. MURDOCK
3765 Emigration Canyon
Salt Lake City, Utah 84108
6. BROOKS PACE
1030 Orchard
Dammeron Valley, Utah 84722
7. THE BOYER COMPANY
c/o John W. Anderson
Attorney at Law
77 West 200 South, #200
Salt Lake City, Utah 84101
8. SALT LAKE CITY CORPORATION
c/o Ray L. Montgomery
Assistant City Attorney
324 South State, 5th Floor
Salt Lake City, Utah 84111

II. AUTHORITY, JURISDICTION AND VENUE

Under Section 73-4-1 et seq., the general adjudication shall determine the rights to use all of the water (surface and underground waters) within the drainage area of the Utah Lake and Jordan River and their tributaries in Utah. The instant proceeding and this Order pertain only to part of the general adjudication, to wit: the water rights in and to Emigration Creek and its tributaries (both surface and underground).

The Court has jurisdiction over the subject matter of this action and venue lies in this district.

III. DEFINITIONS

For purposes of this Order:

1. "Proposed Determination" means the State Engineer's determination, under Utah Code Section 73-4-11, of all water rights in the Emigration Creek drainage area, within the Utah Lake and Jordan River general adjudication. It is the State Engineer's report and recommendation to the Court.
2. "Protest" means the written objection to the Proposed Determination under Utah Code Section 73-4-11.
3. "Protestant" means one who has made a protest.
4. "WUC" means the Water User's Claim referred to in Utah Code Sections 73-4-5 through -9, and -14.

IV. CONFIRMATION OF RIGHTS

Under Sections 73-4-1 et seq., the State Engineer has published the Proposed Determination and served it on each water user of record. A copy is also on file with the Court.

NOW, THEREFORE, BY THIS ORDER the Court approves and confirms the water rights found in the Proposed Determination, as modified herein by section V ("Additions and Corrections to the Proposed Determination"), and subject to the Court's disposition of issues to be litigated under this Order. Water rights or water user's claims that, on the date of this Order, are still in issue (see sections VI and VII herein) shall be confirmed, denied

or modified upon the Court's disposition of those matters or issues, and shall be included in a subsequent Order.

The water rights approved and confirmed by this Order are hereby decreed to be valid existing water rights. The Court is aware that these water rights may be or may have been the subject of conveyances or Change Applications not reflected in the Proposed Determination. These water rights are therefore approved and confirmed subject to valid conveyances and approved Change Applications.

By this Order, the Court or the State Engineer may, without further judicial proceedings, correct typographical errors found in the Proposed Determination, and the water rights are approved and confirmed subject to such changes.

V. ADDITIONS AND CORRECTIONS TO THE
PROPOSED DETERMINATION

A. WUC 57-3030. By stipulation between the State Engineer and Protestant Brest van Kempen, the Proposed Determination is amended so that the owner of WUC 57-3030 is listed as "Brest van Kempen, Woodie Ann." To the extent of this stipulation, the Brest van Kempen protest is settled and dismissed.

B. The following water rights, which inadvertently were not published in the Proposed Determination, are hereby confirmed.

1. WUC 57-8449, B. Merrill and Inez S. Murdock.

2. WUC 57-8349, John Wolfer, David and Nancy Gibson, and Lisa Neuhof, in accordance with certificate no. a1723. To the extent of this correction, the protests of the respective Protestants are settled and dismissed.

VI. PROTESTS

1. Protest of Brest van Kempen, et al. E. Craig Smay appeared for the Protestants. Rosemary J. Beless appeared for Mt. Olivet Cemetery. The Attorney General's Office appeared for the State Engineer.

The Protest's paragraphs 1 and 4 by their own assertion are only general information for the Court, and do not raise actionable issues. The matter raised in paragraph 2 was settled and dismissed (see above, section V.A.).

Paragraph 3 of the Protest asserts issues (i.e., interference with Protestants' water rights, and issues relating to a change application filed by Mt. Olivet Cemetery's successor-in-interest) that arose after the Proposed Determination was distributed and that otherwise fall outside the scope of this general adjudication (although they may be made the subject of separate litigation). Paragraph 3 of the Protest is therefore dismissed and WUC 57-69, shown in the Proposed Determination under the ownership of Mt. Olivet Cemetery, is hereby confirmed.

Paragraph 5 of the Protest raises the issue of whether or not various stockwatering rights have been forfeited by non-use. The WUCs in question and their apparent owners are:

WUCs 57-3904; -7471 through -7479; -7485; -7486; -7693; and -7694. Owners: City Development, Inc., and The Boyer Company, with a security interest owned by CrossLand Savings.

WUCs 57-7696; and -8066. Owner: Brooks Pace, with a security interest owned by CrossLand Savings.

WUCs 57-7465; -7467 through -7470; -7480 through -7484; -7687; -7695; -8138; and -8168. Owners: Bertagnole Investment Company--Limited Partnership (1/2 interest); Gerald Bertagnole (1/10th); William T. Bertagnole (1/10th); Shirley A. Collingwood (1/10th); Joyce Carolyn Meyer (1/10th); and Nancy M. Eckert (1/10th).

The Protest, the State Engineer's Answer to the Protest (which addressed this issue), and notice of the Pre-trial Conference and related documents (including the proposed "Pre-trial Order and Confirmation of Water Rights," which had inadvertently omitted the stockwatering-rights issue) were mailed to Bertagnole Investment Company, via Leo Bertagnole, who failed to respond. Those documents and notice were also mailed to "Pace, Brooks, c/o CrossLand Savings, 41 East 100 South, Salt Lake City, Utah 84111," in accordance with the best information known to the State Engineer. Neither Pace nor CrossLand responded.

Before the Court's Pre-trial Conference, Gerald Bertagnole, William Bertagnole, Shirley Collingwood, Joyce Carolyn Meyer, and Nancy M. Eckert were not given notice or copies of the just-mentioned documents. City Development, Inc., The Boyer Company, and CrossLand Savings also were not given notice and copies of those documents.

To assure full notice, the Court ordered the Attorney General's Office to write to the apparent owners of the stockwatering rights, to notify them that the Protest asserts a forfeiture of their water rights, and that the Protest would be granted against them upon their failure to give timely, written notice of their intent to defend against the Protest.

By the Court's Order, they were to have 10 days to mail to the Attorney General's Office written notice of their intent to defend. If they failed to give timely notice, they would be in default, the Protest would be granted against their particular interests, and by virtue of this Order (and without further notice) their particular stockwatering rights would be deemed forfeited. Upon notice of intent to defend, the forfeiture issue would be set for trial (see section VII below).

The Attorney General has now given those parties notice in accordance with the Court's Order. The following have responded that they will participate in this adjudication: Bertagnole Investment Company; Gerald Bertagnole, William Bertagnole,

Shirley Collingwood, Joyce Carolyn Meyer, and Nancy M. Eckert; City Development, Inc.; and Brooks Pace. CrossLand Savings and The Boyer Company have responded that they would not participate in this adjudication.

The parties who will participate in the trial of this Protest (i.e., the Protest's paragraph 5) are: The Protestants, the State Engineer, and the apparent owners of stockwatering rights as indicated in the immediately preceding paragraph.

2. Protests of Butler, Crockett & Walsh Development Corp. and Pinecrest Pipeline Operating Company. John Walsh appeared for Butler, Crockett & Walsh Development Corporation. Jeffrey Appel appeared for Pinecrest Pipeline Operating Co. The Attorney General's Office appeared for the State Engineer.

Pinecrest protested the omission from the Proposed Determination of its WUC 57-8492. In answering Pinecrest's protest, the State Engineer admitted that Pinecrest's WUC 57-8492 should be included in the Proposed Determination.

Butler, Crockett & Walsh Development Corp. protested the existence of Pinecrest's water right under WUC 57-8492, alleging that Pinecrest's claim is improperly based on adverse possession of Salt Lake City Corporation's water rights. In response to Butler, Crockett's protest, Pinecrest asserted that Butler, Crockett lacks standing and that Butler, Crockett has forfeited

its water right (WUC 57-3442) by non-use.

On October 26, 1988, the Court conducted a special hearing for these two protests, to determine and clarify the issues to be tried. Those issues are now set forth at pp. 15-16, below. By the parties' stipulation, in which the Court concurs, the parties shall not pursue their respective arguments against each other's standing.

Under similar stipulation, by this Order the water title portion of another action between these real parties in interest, Butler, Crockett & Walsh Development Corporation, et al., v. James Carter, et al., Salt Lake County Civil No. C86-9542, pending before Judge Wilkinson, is hereby severed from that action and removed to this Court for determination within this general adjudication. The Pinecrest Water Company is a plaintiff in the other action (C86-9542), and is hereby included in the instant action.

The parties who will participate in the litigation of these Protests are Butler, Crockett & Walsh Development Corporation; The Pinecrest Water Company; Pinecrest Pipeline Operating Company; and the State Engineer. (After the Attorney General's Office advised Salt Lake City Corporation of the dispute, the City responded that it does not claim an interest in the water rights being protested here and that it does not wish to participate in this proceeding.)

3. Protest of Phil M. Davis. The Protest challenged the Proposed Determination as to the quantity and period of use of the Protestant's certificated water right (WUC 57-3276; cert. 8225). The Protestant was given notice but failed to appear at the Pre-trial Conference. The Protest is dismissed and the Proposed Determination is confirmed as to WUC 57-3276.

4. Protests of David Gibson, Thomas Johnson, Lisa Neuhof, and John Wolfer. Protestants Gibson and Wolfer appeared at the Pre-trial Conference for themselves. Gibson represented that he had acquired Protestant Johnson's water right and that Johnson therefore has no further interest in this Protest and that Johnson would not participate in these proceedings. Johnson did not appear, nor did Ms. Neuhof.

The Protests challenged Wallace Groves Water Association's WUC 57-7883, with respect to both period of use and amount of water, on the allegation that Wallace Groves has forfeited its water right because it has not been used during winter months. At the Pre-trial Conference, Gibson and Wolfer stipulated to dismiss their Protests against Wallace Groves Water Association. The Court then dismissed the Protests of Gibson, Johnson and Wolfer.

Mr. Gibson represented that he had discussed this matter with Protestant Lisa Neuhof and that she also intended her Protest against Wallace Groves be dismissed.

The Court ordered the Attorney General's Office to give Ms. Neuhof written notice that her Protest against Wallace Groves would be dismissed upon her failure to give timely, written notice of her intent to continue her Protest. By the Court's Order, she would have 10 days to mail to the Attorney General's Office her written notice of intent. If she failed to give timely notice, her Protest would be dismissed, and by virtue of this Order (and without further notice) the Proposed Determination would be deemed confirmed as to Wallace Groves Water Association's WUC 57-7883. Upon timely notice of intent to continue her Protest, the issue of forfeiture of WUC 57-7883 would be set for trial.

The Attorney General now has given Ms. Neuhof notice in accordance with the Court's order, and she has elected to dismiss her Protest. The Court therefore dismisses the Protest and confirms the Proposed Determination as to WUC 57-7883.

5. Protest of Roger and Sheila Van Frank. Before the Pre-trial Conference, Protestants' counsel filed on their behalf a "Disclaimer of Interest and Withdrawal of Counsel," and no one appeared at the Pre-trial Conference for the Protestants. The Court therefore dismisses this Protest (which concerned the Protestants' own WUC 57-7592).

The Protestants' successors-in-interest, Chris and Laurie Vonderahe, had been mailed copies of all relevant pleadings and

the notice of the Pre-trial Conference. They did not appear at the Pre-trial Conference, and have otherwise failed to file a protest. The Court hereby confirms the Proposed Determination, as to WUC 57-7592, without protest.

VII. TRIAL

The Court will contact counsel to schedule trials for the issues remaining under the protest of Brest van Kempen, et al., and the respective cross-protests of Butler, Crockett & Walsh Development Corporation, and Pinecrest Pipeline Operating Company.

The Court desires to schedule the trials within a short time of each other. The judgment in each case will then be incorporated into one document as the final Order in this part of the general adjudication.

The trials shall be conducted in this Court (240 East 400 South, Salt Lake City, Courtroom 302) as follows:

1. BREST VAN KEMPEN, ET AL. v. BERTAGNOLE INVESTMENT COMPANY; CITY DEVELOPMENT, INC.; BROOKS PACE; GERALD BERTAGNOLE; WILLIAM T. BERTAGNOLE; SHIRLEY A. COLLINGWOOD; JOYCE CAROLYN MEYER; and NANCY M. ECKERT: _____, 1989, at _____
____.m.

Contentions. Brest van Kempen, et al. (the Protestants) contend that certain stockwatering rights owned variously by

Bertagnole Investment Company, et al., have been forfeited under Section 73-1-4 because they have not been used for more than five years. (The water rights in dispute are identified in this Order, above.) *plz*

The responding water rights owners deny the allegation and assert they have used those water rights within the past five years.

Issue. Whether under Section 73-1-4 those stockwatering rights have been forfeited by non-use.

2. BUTLER, CROCKETT & WALSH DEVELOPMENT CORPORATION, and THE PINECREST WATER COMPANY v. PINECREST PIPELINE OPERATING COMPANY: _____, 1989, at _____ .m.

Contentions. Each of Butler, Crockett & Walsh Development Corporation, and The Pinecrest Water Company, and Pinecrest Pipeline Operating Company claims to own the water right under WUC 57-8492. Butler, Crockett & Walsh Development Corp. and The Pinecrest Water Company contend that Pinecrest Pipeline Operating Company is not a valid Utah corporation, does not have a valid water right under that WUC, or has forfeited its water right for non-use. Pinecrest Pipeline Operating Company denies those allegations.

Issues. A. Whether Pinecrest Pipeline Operating Company is a valid Utah corporation.

B. Whether Pinecrest Pipeline Operating Company has a valid water claim.

C. Whether Pinecrest Pipeline Operating Company has forfeited its water right, if any, by non-use.

D. Which of those three parties owns WUC 57-8492.

3. PINECREST PIPELINE OPERATING COMPANY v. BUTLER, CROCKETT & WALSH DEVELOPMENT CORPORATION and THE PINECREST WATER COMPANY:

_____, 1989, at _____.m.

Contentions. Pinecrest (the Protestant) contends that under Section 73-1-4 Butler, Crockett (the claimant under WUC 57-3442) has forfeited its water right because of more than five years' non-use. Butler, Crockett denies the allegation.

Issue. Whether under Section 73-1-4 Butler, Crockett's water right (WUC 57-3442) has been forfeited by non-use.

* * * * *

Discovery in each case shall end 15 days before the trial date. No later than 15 days before trial, each party to a case shall serve the other parties with written notice of the names and addresses of its witnesses (except rebuttal witnesses whose testimony cannot reasonably be anticipated before trial).

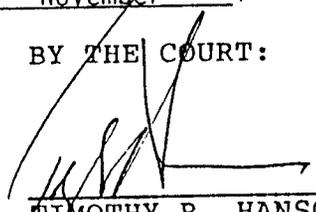
Any brief on pertinent questions of law must be filed with the clerk and copies mailed to opposing counsel and the Attorney

General's Office at least one week before the trial date. A copy should be submitted for the Court's personal use at least two days before the trial date.

The foregoing issues having been framed and stipulated to by the parties in this litigation, THIS PRE-TRIAL ORDER shall supplement the pleadings and govern the proceedings in this action until modified by the Court.

DATED this 14 day of November, 1988.

BY THE COURT:



TIMOTHY R. HANSON
District Judge

APPROVED AS TO FORM:

Jeffrey W. Appel
JEFFREY W. APPEL
for Pinecrest Pipeline Operating Co.

Doug Credille
R. DOUGLAS CRÉDILLE
for the State Engineer

Don Dalton
DONALD F. DALTON
for City Development, Inc.

Don Pace
PACE & PARSONS
for Bertagnole Investment Co., and Gerald Bertagnole, et al.

Brooks Pace (by Doug Credille)
BROOKS PACE
Pro Se

E. Craig Smay (by Doug Credille)
E. CRAIG SMAY
for Brest van Kempen, et al.

JOHN WALSH
for Butler, Crockett & Walsh Dev. Co.

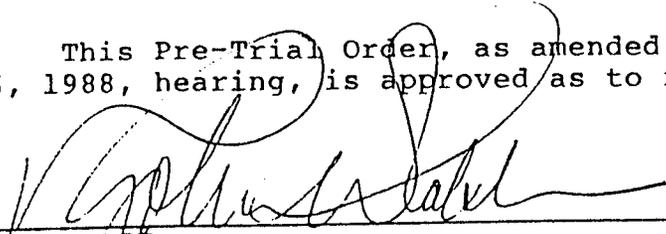
CERTIFICATE OF SERVICE

I hereby certify that on this 19~~th~~ day of September, 1988, prior to its submission to the Court, a true and correct copy of the foregoing Pre-Trial Order and Confirmation of Water Rights was served by mailing the same, first-class postage prepaid, to the parties and counsel listed in section I.



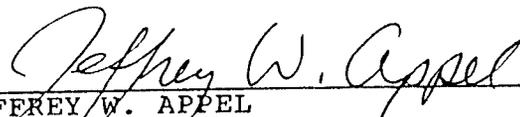
R. DOUGLAS CREDILLE
Assistant Attorney General

This Pre-Trial Order, as amended after the Court's October 26, 1988, hearing, is approved as to form:



JOHN WALSH

For Butler, Crockett & Walsh Development Corp. and the Pinecrest Water Co.



JEFFREY W. APPEL

For Pinecrest Pipeline Operating Co.



R. DOUGLAS CREDILLE

For the State Engineer

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November, 1988, prior to its submission to the Court, a true and correct copy of the foregoing "Pre-Trial Order and Confirmation of Water Rights" (as amended after the Court's October 26, 1988, hearing) was hand-delivered to the following:

JOHN WALSH
3865 South Wasatch Blvd.
Suite 202, Cove Point Plaza
SALT LAKE CITY UT 84109

JEFFREY W. APPEL
175 South Main, 10th Floor
SALT LAKE CITY UT 84111



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