

1997

Michael O. Longley v. Leucadia Financial Corporation dab and fka Terracor; the City of St. George, and Robert L. Morgan, State Engineer of the State of Utah : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MICHAEL O. LONGLEY,

Plaintiff and Appellant,

vs.

LEUCADIA FINANCIAL CORPORATION,
dba and fka TERRACOR;
the CITY OF ST. GEORGE,
a municipal corporation; and
ROBERT L. MORGAN, State Engineer of
the State of Utah,

Defendants and Appellees.

BRIEF OF APPELLANT

97-0152-CA

Appellate Case No. 97-0512-CA

Civil No. 95-0501270 CV

Priority Category No. 15

APPEAL FROM SUMMARY JUDGMENT
FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH
JUDGE JAMES L. SHUMATE

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**UTAH COURT OF APPEALS
BRIEF**

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JURISDICTION

The Utah Supreme Court had jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j), as a final order of a court of record over which the Utah Court of Appeals did not have original jurisdiction. On March 3, 1997, the Clerk of the Utah Supreme Court gave notice that this appeal had been transferred to the Utah Court of Appeals. The Utah Supreme Court has discretion to make such transfers under Utah Code Ann. § 78-2-2(4). Thus, the Utah Court of Appeals has jurisdiction to hear this appeal.

ISSUES PRESENTED FOR REVIEW

1. Should the trial court's holding that Plaintiff/Appellant Michael O. Longley lacked standing to contest water right extension applications be reversed for denial of due process of law guaranteed to Mr. Longley by the Fourteenth Amendment to the United States Constitution and Article 1, Section 7, of the Utah Constitution, when the failure to obtain standing by timely protesting the extension applications was caused by the State Engineer's refusal to give Mr. Longley actual notice of the administrative proceeding after Mr. Longley--and *only* Mr. Longley--had specifically requested such notice and provided his name and address.

2. Should the trial court's holding that Mr. Longley did not have standing to protest extension applications be reversed when the failure to obtain standing by timely protesting the extension applications was caused by Appellees' failure to sufficiently describe new points of diversion of water and the diligence claimed in the published notice of the administrative proceeding as required by statute.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment for correctness, without deference to the trial court's legal conclusions. Summary judgment "is generally considered a drastic remedy."

Timm v. Dewsnup, 851 P.2d 1178, 1181 (Utah 1993), and the appellate court "views all inferences therefrom in a light most favorable to finding a material issue of fact. Jackson v. Richter, 891 P.2d 1387 (Utah 1995); Beach v. University of Utah, 726 P.2d 413, 414 (Utah 1986). This Court "review[s] the trial court's legal conclusions, including its conclusion that the material facts are not disputed, for correctness." Kunz & Co. v. State, 913 P.2d 765, 768 (Utah Ct. App. 1996). This standard allows the Court to make its own conclusions and does not obligate the Court to defer to the trial court. Id. (citing State v. Pena, 869 P.2d 932, 936 (Utah 1994)); Brown v. Weis, 871 P.2d 552, 559 (Utah Ct. App. 1994).

DETERMINATIVE STATUTES, RULES AND REGULATIONS

UNITED STATES CONSTITUTION, AMENDMENT V [Due process of law clause]:

No person shall . . . be deprived of life, liberty, or property, without due process of law . . . nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION, AMENDMENT XIV, Section 1. [Due process of law.]:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . deny to any person within its jurisdiction the equal protection of the laws.

UTAH CONSTITUTION, Article 1, Sec. 7. [Due process of law.]:

No person shall be deprived of life, liberty or property, without due process of law.

UTAH CODE ANNOTATED, § 73-3-12(1):

(e)(i) The state engineer shall publish notice once each week for three successive weeks in a newspaper of general circulation in the county in which the source of supply is located.

(e)(ii) The notice shall contain information that will inform the public of the diligence claimed and the reason for the request.

UTAH ADMINISTRATIVE CODE, R655-6-17:

B. Action on the Request [for Reconsideration]. Upon the filing of a Request for reconsideration, the Division shall review the Request and may within 20 days do any or all of the following:

1. issue any preliminary order;
2. summarily deny the Request, in whole or in part;
3. summarily grant the request, in whole or in part;
4. set a time for a re-hearing.

C. If the Division does not issue an order within 20 days, the Request shall be considered to be denied.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition Below.

This action has its origin in Change Application No. a-6393 ("Change Application") filed in 1970 with the State Engineer by Defendant/Appellee Leucadia Financial Corporation, dba and fka Terracor ("Leucadia") on two of its water rights. (Record on Appeal ("R.") at 161-62, 271-72.) The Change Application to move the point of diversion on those two water rights to six proposed new wells was approved by the State Engineer. Under Utah law, Leucadia had three years in which to make the changes approved under the Change Application and to file proof of completion of said changes with the State Engineer. (R. 161-62, 271-72.) Leucadia sought and properly obtained four extensions of this deadline from the State Engineer. (R. 161-62, 271-72.) The fourth extension, granted in 1985, was expressly conditioned upon it being the last extension and set November 30, 1989 as the final deadline for filing the required proof. (R. 40, 162.) The State Engineer's written decision clearly warned Leucadia that if such proof was not filed by

November 30, 1989, the Change Application would lapse. (R. 40.) On November 30, 1989, the very day of the deadline, Leucadia filed a false and unsigned Proof of Permanent Change ("Proof"). (R. 163.) In a Memorandum Decision issued on July 10, 1992, the State Engineer found that the facilities identified in the Proof did not exist and declared the Change Application to be lapsed. (R. 49-50.)

Leucadia filed a request for reconsideration of the lapsing of the Change Application but the State Engineer did not act on that request within the statutory time of 20 days allowed and the request for reconsideration was automatically denied on August 19, 1992 under Utah Code Ann. § 63-46b-13.¹ (R. 52, 54, 164.) On August 20, 1992, the State Engineer purported to grant the request for reconsideration. (R. 54, 164.) The illegal grant of reconsideration was based on a statutorily defective fifth Extension Request filed 10 months after the November 30, 1989 deadline for such a request. Upon reconsideration on January 31, 1994, the State Engineer reinstated the Change Application and asked Leucadia to submit a properly completed fifth Extension. This occurred over four years after the November 30, 1989 final deadline on the Change Application. (R. 58-59, 165.) The State Engineer published notice of this fifth Extension Request in February of 1994, then republished in April of 1994 to correct some errors, but such re-published notice was still defective and inadequate. (R. 61, 165-66, 290.)

In 1989, Mr. Longley contacted the State Engineer's Office seeking to intervene in the matter to protest the extension approvals to protect his water rights. (R. 330-31, 353-54, 365, 515, 530, 556-57, 562-63, 565-67.) He specifically requested actual notice of any further action by the State Engineer. (R. 330-31, 353-54, 365, 515, 530, 556-57, 562-63, 565-67.) Subsequent

¹ All section references are to the Utah Code Annotated unless otherwise indicated. References to Title 63 are to the 1993 edition and references to Title 73 are to the 1989 edition.

to this request, Mr. Longley learned that the Change Application had lapsed. However, despite his request for actual notice and the intervening lapsing of the Change Application, the State Engineer's Office gave no actual notice to Mr. Longley of any subsequent action. (R. 330-31, 353-54, 365, 515, 530, 556-57, 562-63, 565-67.) Instead the State Engineer merely published notice of the Fifth Extension request in the local newspaper legal notices. (R. 61, 165-66, 290.) The deadline to timely file a protest to the fifth Extension Request was April 19, 1994.

Mr. Longley first learned of the reinstated Change Application and the fifth Extension Request thereon approximately one year later and immediately prepared and mailed a protest letter dated April 3, 1995. (R. 328.) The State Engineer *thereafter* granted the fifth Extension Request by a Memorandum Decision dated June 19, 1995. (R. 328.) While Mr. Longley was unable to timely file a protest due to lack of notice, he filed a timely request for reconsideration of that decision, but that request was denied by the State Engineer on the grounds that his initial protest was not timely. (R. 100-08, 109-12, 167.) Mr. Longley then sought judicial review by the District Court of the State Engineer's June 19, 1995 Memorandum Decision approving the fifth Extension Application. (R. 157-176.) The trial court granted Summary Judgment in favor of the Defendants, finding that because Mr. Longley did not participate in the administrative proceedings noticed only in the newspaper by timely filing a protest, he did not have standing to appeal the approval of the fifth Extension Request to the district court. (R. 534-38.)

B. Statement of Material Facts

1. This action relates to a water rights change application, Change Application No. a-6393, filed with the State Engineer by Leucadia in 1970 on two water rights in the Atkinville area south of the Virgin River. After this Change Application was approved, Leucadia had three years in which to make the proposed changes and file proof thereof with the State Engineer.

Leucadia thereafter sought and obtained from the State Engineer four extensions of this deadline.
(R. 161-62, 271-72.)

2. The fourth Extension Request was granted by a Memorandum Decision dated December 30, 1985, upon the express condition that "this shall be the last request granted and proof of appropriation shall be submitted on or before [November 30, 1989] or the application will be lapsed. Requests for further extension of time will be denied." (R. 40, 162.) (A copy of this Memorandum Decision is attached as Exhibit A in the Appendix.)

3. Mr. Longley contacted the State Engineer's Office in October or November of 1989 to ascertain the status of the Change Application and to see if he could intervene in any way at that point in time. Importantly, he also requested to be given notice of any further action on the matter. The State Engineer's office advised Mr. Longley, "a concerned developer in [the] Hurricane area," that the terms of the last Extension Request were contained in the December 30, 1985 Memorandum Decision. Mr. Longley provided the Office of the State Engineer with his name and address at that time. (R. 330-31, 353-54, 365, 515, 530, 556-57, 562-63, 565-67.) (A copy of the internal memorandum documenting Longley's request is attached as Exhibit B in the Appendix.)

4. On November 30, 1989, Leucadia filed a patently false and un-notarized Proof of Permanent Change (attached hereto as Exhibit C in the Appendix) stating that six wells with totalizing meters, 24,000 feet of conveyance lines, booster pumps, a pressure reduction box, a metering station, and a connection to St. George City's Quail Creek transmission line had been constructed. (R. 42-47, 163.)

5. On July 11, 1990, representatives of the State Engineer inspected the alleged facilities and found, *inter alia*, that there were "no wells equipped, no totalizing meters, no

pipeline. and no connection into the St. George-Quail Creek pipeline as stated in the proof. There is no evidence that water had been placed to beneficial use." (R. 49-50, 163.) (A copy of this report is attached hereto as Exhibit D in the Appendix.)

6. In a letter received September 21, 1990, Leucadia requested that the proof of appropriation previously submitted be withdrawn and that the State Engineer "consider [another] reinstatement and extension of time." A fifth Extension Request form allegedly accompanied that letter. (R. 56, 164.)

7. On July 10, 1992, the State Engineer issued a Memorandum Decision (Exh. D) ordering that the proof of appropriation be rejected and that the Change Application be lapsed for failure to comply with statutory requirements and to place the water to beneficial use. (R. 49-50.) This Memorandum Decision also contained a notice concerning appeal procedures and stated that when a request for reconsideration is filed, the "Request for Reconsideration is considered denied when no action is taken 20 days after the Request is filed." (R. 49-50.) This is in accordance with Subsection C. of Utah Admin. Code § R655-6-17. (R. 163.)

8. Subsection B. of Utah Admin. Code § R655-6-17 sets forth the scope of the State Engineer's authority when a request for reconsideration is filed and limits such authority to action taken within 20 days of the filing of the request for reconsideration. (R. 164.)

9. On July 30, 1992, Leucadia filed a request for reconsideration of the State Engineer's July 10, 1992 Memorandum Decision. (R. 164.)

10. The State Engineer's office sent Leucadia a letter (attached hereto as Exhibit E in the Appendix) on August 3, 1992 stating that request for reconsideration was received on July 30, 1992 and that "[i]f no action is taken within 20 days of the date the request was received in our office, the request is considered denied." (R. 52, 164.)

11. The State Engineer took no action on the request for reconsideration within 20 days of its filing. (R. 164.)

12. On August 20, 1992, the 21st day after the filing of the request for reconsideration and following a faxed communication for Leucadia's counsel urging action before the expiration of the 20 day period, the State Engineer belatedly issued a letter purporting to grant the already denied request for reconsideration. (R. 54, 164.)

13. On January 31, 1994, the State Engineer's Office returned the fifth Extension Request application form allegedly filed on September 21, 1990 to Leucadia as incomplete because the affidavit was not notarized. The transmittal letter (attached hereto as Exhibit F in the Appendix) notified Leucadia that it had 10 days "to return the extension request properly completed or the application will lapse." (R. 56, 164.)

14. However, without receipt of a properly completed extension request, the State Engineer issued an Amended Memorandum Decision on that same day, January 31, 1994, stating that because the proof had been withdrawn and an extension request had been received, that the July 10, 1992 Memorandum was rescinded and the Change Application was reinstated with a September 21, 1990 filing date and that the fifth Extension Request be processed anew. (R. 58-59, 165.) (A copy of the Amended Memorandum Decision is attached hereto as Exhibit G in the Appendix.)

15. Without any actual notice to Mr. Longley, the State Engineer had the fifth Extension Request prepared for publication beginning on February 3, 1994, also without even having a properly completed extension request on file. (R. 61.) Defects in that notice resulting in the notice being re-published in April, 1994. Protests were required to be filed by April 19, 1994. However, the second notice was also defective on several counts. The second notice failed

to state the diligence claimed by the applicant in developing the water and in placing it to beneficial use and it failed to state the reasons for the requested extension, both as expressly required by Utah Code Ann. § 73-3-12(1)(e)(ii). Furthermore, the legal descriptions of the proposed new diversion points were completely inadequate to give anyone notice of their location. The April 1994 published notice (attached hereto as Exhibit H in the Appendix) listed the "hereafter" diversion points as follows:

- (1) S 50 W 2531,
- (2) S 23+3 E 253 from NW Cor, Sec 25,
- (3) S 50 E 50 from NW Cor,
- (4) S 50 W 66,
- (5) S 23+3 W 50 from NE Cor,
- (6) S 23+3 E 297 from NW Cor, Sec 25, T42S, R14W

The legal description for diversion point numbers (1) and (4) have no reference to any monument or corner. There is no reference to a section number for diversion point numbers (1), (3), (4) and (5). Only diversion point number (6) references a township and range. Furthermore, a baseline reference, an essential element of any legal description, is not identified for any of the diversion points. (R. 165-66, 290.)

16. The fifth Extension Request form (attached hereto as Exhibit I in the Appendix) was re-filed on February 3, 1994 with the completed affidavit required by statute. This form shows on its face that the last proof due date was November 30, 1989 and that the form was first stamped received by the State Engineer's Office on February 3, 1994. (R. 166.)

17. The fifth Extension Request was protested by Hurricane City and Washington County Water Conservancy District prior to the protest deadline and by Winding Rivers Associates and Mr. Longley after the protest deadline, both claiming defective notice and that the Change Application had lapsed long ago. Mr. Longley's protest was sent on April 3, 1995 and

again requested notice of any further action. (The protest is attached as Exhibit J in the Appendix.) Mr. Longley's protest was also based on his belief that approval of the fifth Extension Request would impair his vested water rights. The Conservancy District's protest was withdrawn after a settlement agreement between the Conservancy District and Leucadia was signed. (R. 166.)

18. On June 19, 1995, the State Engineer issued a Memorandum Decision granting the fifth Extension Request. This Memorandum Decision recognized the two timely protests and the "late" protest of Winding River Associates but not the "late" protest of Mr. Longley. The Memorandum Decision did not expressly address any of the protests or the objections raised therein, including the jurisdictional, procedural, and notice defects or the substantive claims of impairment of existing water rights. The Memorandum Decision (attached hereto as Exhibit K in the Appendix) recites the statement in the 1985 Memorandum decision that any subsequent request for extension of time will be denied. (R. 85-87, 166.)

19. The sole basis cited for granting the fifth Extension Request was that the City of St. George had allegedly entered into an agreement to purchase the subject water rights if the Extension Request is approved. The Memorandum Decision specifically ordered that "This extension is approved only for use by the City of St. George to be used to meet the city's reasonable future needs and the right must be conveyed to the city, prior to November 30, 1996," the new proof due-date. (R. 85-87, 167.)

20. On or about July 5, 1995, a group of 34 individuals, a ranch, and Hurricane Valley Mutual Water Company filed a request for reconsideration of the June 19, 1995 Memorandum Decision. (R. 89-108, 167.)

21. On July 10, 1995, the State Engineer received Mr. Longley's request for reconsideration dated July 7, 1995 concerning the June 19, 1995 Memorandum Decision. (R. 100-108, 167.)

22. On July 19, 1995, the State Engineer sent out letters to those requesting reconsideration, stating in each case that they were not "aggrieved parties" because they had not been a party to the administrative proceedings. (R. 109-12, 167.)

23. Mr. Longley initiated this action on August 18, 1995 seeking judicial review of the State Engineer's action in this matter. (R. 167.)

24. The State Engineer's Office lost the entire file relating to the subject water rights, change application, extension requests, and protests thereto for a significant period of time in 1995. The State Engineer has admitted that it may not be possible to verify that the file, as recovered, was complete. (R. 333-37.)

SUMMARY OF ARGUMENT

Mr. Longley has been denied the opportunity to protect his water rights by contesting the illegal fifth Extension Request of Leucadia's water rights application on the grounds that he did not timely participate in the administrative proceeding before the State Engineer. In other words, by failing to respond to the newspaper notice within the prescribed time, the trial court held that Mr. Longley lacked standing to appeal in the District Court. However, Mr. Longley did not file a timely protest simply because he was not given constitutionally or statutorily adequate notice that he needed to file one.

Because of the State Engineer's July 10, 1992 decision lapsing the Change Application and the automatic denial of Leucadia's request for reconsideration thereof, coupled with the fact that Mr. Longley--and only Mr. Longley--had given the State Engineer his name and address with

the request that he be contacted in the event of any action on the Change Application, the subsequent notice solely by newspaper publication of the fifth Extension Request was not constitutionally adequate under the due process clauses of both the United States and the Utah Constitutions. The published notice itself was also constitutionally and statutorily defective.

ARGUMENT

I. THE STATE ENGINEER'S FAILURE TO GIVE MR. LONGLEY ADEQUATE NOTICE OF THE FIFTH EXTENSION REQUEST VIOLATED CONSTITUTIONAL PRINCIPLES OF DUE PROCESS.

Mr. Longley's federal and state constitutional challenges initially turn on whether he had a protected property interest being adversely affected by state action in the aforementioned administrative proceedings.² Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985) (citing Board of Regents v. Roth, 408 U.S. 564, 576-578 (1972)). If he did, then the State Engineer was required to afford him due process. Id. See also Morrissey v. Brewer, 408 U.S. 471, 481 (1972). What process was due will be discussed in section I.B., while section I.A. will focus upon the nature of Mr. Longley's property interests.

A. Mr. Longley Has Protected Property Interests and is Therefore Entitled to Due Process.

"Property interests are not created by the Constitution." Id. Rather, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Roth, 408 U.S. at 577. A property interest is therefore "more than an abstract need or desire" for something. Id. Instead, to have a protected property interest, a person must "have a legitimate claim of entitlement to it." Id.

Cases subsequent to Roth have broadly defined the concept of constitutionally protected property interests or entitlements. Thus, in Tulsa Professional Collection Serv., Inc. v. Pope, 485

² "Utah's constitutional guarantee of due process is substantially the same as the due process guarantees contained in the Fifth and Fourteenth Amendments to the United States Constitution." In re Worthen, 926 P.2d 853, 876 (Utah 1996). Therefore, the remainder of this brief will analyze the due process issues under both state and federal constitutional law.

U.S. 478, 485 (1988), the United States Supreme Court held that an unsecured claim--a potential cause of action against a decedent's estate--was a protected property interest and stated that "[l]ittle doubt remains that such an *intangible interest is property* protected by the Fourteenth Amendment." See also Matter of Estate of Anderson, 821 P.2d 1169 (Utah 1991). And in Logan v. Zimmerman Brush Co., 455 U.S. 422, 428, 429-31 (1982), the Court held that a cause of action under Illinois' Fair Employment Practices Act was a protected property interest, reaffirming the holding in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950), "that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." Zimmerman Brush, 455 U.S. at 428.³

Since the United States Supreme Court has been willing to define unsecured claims and potential causes of action as protected property interests, it cannot seriously be doubted that Mr. Longley's vested water rights, and his asserted claims in this case are protected property interests for purposes of the federal and state constitutions. Nonetheless, a brief discussion of the independent sources and understandings from which those rights and claims spring is justified if only to further cement the fact that Mr. Longley has protected property interests and to point out that those interests will inevitably be affected by changes in Leucadia's water uses. As the following discussion illustrates, water rights and claims thereon are particularly fragile property interests clearly deserving of at least minimal constitutional protection.

³ See also Martinez v. California, 444 U.S. 277, 281-282 (1980) (noting that state tort claims are arguably a "species of 'property' protected by the Due Process Clause"); Boddie v. Connecticut, 401 U.S. 371, 380 (1971) (interpreting the Due Process Clause as preventing States from denying potential litigants access to adjudicatory procedures when it would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]").

The right to use water has long been recognized by Utah courts as a property right for which the water user is entitled to compensation if taken. See Moyle v. Salt Lake City, 176 P.2d 882 (Utah 1947); Sigurd City v. State, 142 P.2d 154 (Utah 1943).⁴ There can be no doubt, then, that Mr. Longley's water rights and his cause of action to defend those rights are recognized and protected property interests. As one distinguished commentator has said, speaking of water rights, " 'While the law gives absolute and unqualified certainty to few property interests and may ascribe different degrees of security to different interests in or uses of a resource, it generally follows a strong policy of encouraging enterprise and development with a system of property rights that will give some assurance that the activity will not be subjected to premature termination without compensation.' "⁵

⁴ "Under the modern form of the appropriation doctrine, a water right may be described as a state administrative grant that allows the use of a specific quantity of water for a specific beneficial purpose, if water is available in the source free from the claims of others with earlier appropriations." George A. Gould & Douglas L. Grant, Cases and Materials on Water Law 6 (5th ed. 1995). It is well-recognized that " '[w]ater uses may add substantially to the value of land, and most require a substantial investment in facilities for withdrawing and using it.' " Id. at 10 n.1 (quoting Frank J. Trelease, Federal-State Relations in Water Law, National Water Comm'n, Legal Study No. 5, at 5-6 (1971)). " 'The purpose behind much of water law is to insure that water users will receive a future water supply that will enable them to continue their uses, plan for the future and realize their expectations.' " Id.

⁵ Id. Another commentator has said:

The function of this system of law was to ration a scarce resource and to promote economic development. The rationing principle adopted--first come, first served--is a familiar, if unsophisticated, means of allocating the use of a scarce resource. . . .

* * *

[But] [t]his favor bestowed upon the appropriation system in the West cannot be explained solely by the necessity of adopting an elementary rule in a frontier society. . . . It seems, rather, that the reason for the endurance of the appropriation system is found in the economic goals that the system serves. The system promotes investment *by giving security of use*. Prior appropriation said in effect: Come West, take up land and water, and they shall be yours.

Furthermore, the Utah legislature obviously recognizes the property aspects of water rights and the omnipresent potential for interference with those rights. It has designed a water rights system which requires notice of applications to change or acquire a particular use, presupposing that the approval, rejection, or change of one water right or use can affect the vested rights of other water users. For example, permanent or temporary changes in points of diversion, place of use, or purpose of use "may not be made if it impairs any vested right without just compensation." Utah Code Ann. § 73-3-3(2)(b) (1996 Supp.). See also Badger v. Brooklyn Canal Co., 922 P.2d 745, 750 (Utah 1996). Temporary changes that impair the water rights of others require the State Engineer to "give notice of the [change] application to any person whose rights may be affected by the change." Utah Code Ann. § 73-3-3(6)(c) (1996 Supp.). And applications to appropriate or permanently change even small amounts of water require notice. See Utah Code Ann. § 73-3-5.6(2)(b) (1996 Supp.). Also, the State Engineer *must* consider

George A. Gould & Douglas L. Grant, Cases and Materials on Water Law 9 (5th ed. 1995) (quoting Charles J. Meyers, A Historical and Functional Analysis of the Appropriation System, National Water Commission, Legal Study No. 5, at 3-6 (1971)) (emphasis added).

For these, and other policy reasons, courts throughout the West have long recognized that water rights are constitutionally protected property rights. See, e.g., State of Washington Dept. of Ecology v. Grimes, 852 P.2d 1044, 1054-55 (Wash. 1993) (citing Department of Ecology v. Adsit, 694 P.2d 1065 (Wash. 1985)) ("A vested water right is a type of private property that is subject to the Fifth Amendment prohibition on takings without just compensation."); Farmers Irrigation Co. v. Colorado Game & Fish Comm'n, 369 P.2d 557, 559-60 (Colo. 1962) ("A priority to the use of water . . . is a property right and as such is fully protected by the constitutional guaranties relating to property in general."); In re Chumstick Creek Drainage Basin, 694 P.2d 1065, 1069 (Wash. 1985) (state has "recognized that water rights must receive due process protection" since 1907). Though Utah Courts have not had occasion to squarely recognize the constitutional dimensions of water rights, they have long held that they are interests in real property. In re Bear River Drainage Area, 2 Utah 2d 208, 211, 271 P.2d 846, 848 (1954). See also Salt Lake City Corp. v. Cahoon & Maxfield Irrigation Co., 879 P.2d 248, 251-52 (Utah 1994) (holding stock in mutual irrigation corporation is an interest in property); Jensen v. Morgan, 844 P.2d 287, 289 (Utah 1992) (recognizing the need to provide notice to water users whose rights will be affected in a general adjudication).

existing rights before approving or rejecting an application, Utah Code Ann. § 73-3-8(1)(b) (1989), and can only approve an application for change that conflicts with existing rights upon the condition that conflicting rights are acquired, Utah Code Ann. § 73-3-3(7)(b) (1996 Supp.).

These statutory requirements of notice to interested persons and State Engineer review of the impact change or approval will have on other water rights--even small changes--explicitly recognize two fundamental realities of Western water law. First, water is a scarce, and therefore valuable, resource.⁶ Second, water rights do not exist in a vacuum and, consequently, can never be viewed in isolation from the water rights of others. To borrow from popular parlance, "We all live downstream." This latter principle is well recognized in the water law literature and by courts of this state. For example, it is almost axiomatic that the rights of a junior appropriator begin at the limits of the rights of the senior. See Gould & Grant, supra at 69 n.1. Also, an "appropriator is entitled to have the stream conditions maintained substantially as they existed at the time he made his appropriation," East Bench Irrigation Co. v. Desert Irrigation Co., 2 Utah 2d 170, 271 P.2d 449, 454 (1954) (citations omitted), and "has a vested right . . . insist that such conditions be not changed to the detriment of his own right." id. See also Farmers Highline Canal & Reservoir Co. v. City of Golden, 272 P.2d 629, 631-32 (Colo. 1954) ("Equally well established ... is the principle that junior appropriators have vested rights in the continuation of stream conditions as they existed at the time of their respective appropriations, and that subsequent to such appropriations they may successfully resist all proposed changes in points of diversion and use of water from that source which in any way materially injures or adversely affects their rights."). The Utah Supreme Court recently recognized that a change in use by one

⁶ See supra notes 4 & 5.

water user likely affects well users in the same general region. See Badger, 922 P.2d at 747-48, 751. In that case, plaintiffs claiming water rights in private wells protested changes in an irrigation company's artesian well water rights, claiming that the changes would "lower the water table in the region of their wells, thus impairing their rights." Id. at 748. According to the Supreme Court, those plaintiffs had "articulated claims which, if valid, would clearly *entitle* them to the full benefits of [Utah Code Ann. § 73-3-8(1)]," id. at 751 (emphasis added), which requires the State Engineer to evaluate the effect a proposed change of use will have on "existing rights."

Mr. Longley, like the plaintiffs in Badger, has articulated claims that clearly entitle him to protest the current applications. (R. 157-176, 326-509.) Clearly Mr. Longley's water rights are a valuable private property interest. Likewise, it is certain that approval of the subject Extension Requests can or will adversely affect Mr. Longley's water rights. (R. 157-176.) Obviously, Mr. Longley has not had the opportunity to demonstrate on the merits just how this might happen and will not have such an opportunity to be heard unless he has standing to participate in a judicial review proceeding. Unlike the plaintiffs in Badger, who may have waived their protest rights by failing to inform the state engineer of their vested rights in a proceeding before him,⁷ Mr. Longley has been denied, by the statutory and constitutional inadequacy of the State Engineer's notice, (R. 61, 290), the opportunity to take advantage of his constitutional right to protest state action that would affect his vested property rights.⁸

⁷ The private well plaintiffs apparently appeared before the State Engineer since the Supreme Court notes that "[t]he proceedings before the State Engineer were preserved on a tape recording, but that recording contains gaps and appears to be otherwise incomplete in some respects." Badger, 922 P.2d at 751-52.

⁸ This case is thus squarely distinguishable from S&G Inc. v. Morgan, 797 P.2d 1085, 1088 (Utah 1990), where the Supreme Court held that a plaintiff's purposeful failure to appear before the State Engineer in an administrative proceeding precluded him from raising any claims on de novo review before the district court. The S&G court held that "persons aggrieved by decisions

B. What Process is Due⁹

"[S]tate action affecting property must generally be accompanied by notification of that action." Tulsa Professional Collection Serv., Inc. v. Pope, 485 U.S. 478, 484 (1988). It is a fundamental requirement of due process that the "notice [be] reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).¹⁰ Since "[t]his right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest," the form of notice chosen "must be such as one desirous of actually informing [the interested party] might reasonably adopt to accomplish it." Id. "The reasonableness and hence the constitutional validity of any chosen method may be defended on

of administrative agencies 'may not, by refusing or neglecting to submit issues of fact to such agencies, by-pass them, and call upon the courts to determine . . . matters properly determinable originally by such agencies.' " Id. at 1087 (quoting People v. Keith Ry. Equip. Co., 161 P.2d 244, 249 (1945)). This is not a case where Mr. Longley refused or neglected to protest. Rather, this is a case where Mr. Longley did not participate because the State failed in its constitutional duty to adequately inform Mr. Longley of the proceeding.

⁹ It should be noted at the onset that what process is due is "a matter of federal law" and is "not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse [state] action." Vitek v. Jones, 445 U.S. 480, 491 (1980). Thus, whether the State Engineer complied with Utah's statutory requirements is irrelevant for purposes of federal constitutional analysis. Assuming, *arguendo*, the notice in this case complied with statutory requirements this court must independently analyze whether the notice was constitutionally adequate. Id. See also Loudermill, 470 U.S. at 541.

¹⁰ The standard enunciated in Mullane is the same standard Utah courts have applied to determine whether notice is adequate under article I, section 7, of the Utah Constitution, the language of which is identical to the federal constitution. See Nelson v. Jacobsen, 669 P.2d 1207, 1212 (Utah 1983) (quoting Mullane standard); State v. Rawlings, 893 P.2d 1063, 1069 (Utah Ct. App. 1995) (same). Accordingly, the arguments in this section apply to both the state and federal constitutional claims of Mr. Longley.

the ground that it is in itself reasonably certain to inform those affected." Id. However, "[i]t would be idle to pretend that publication alone . . . is a reliable means of acquainting interested parties of the fact that their rights are before the courts" since "[c]hance alone brings to the attention of . . . a local resident an advertisement in small type inserted in the back pages of a newspaper." Id. In short, "process which is a mere gesture is not due process." Id. Therefore, notice by publication is generally disfavored. New York v. New York, N.H. & H.R. Co., 344 U.S. 293, 296 (1953) ("Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best.").

Appellees thus cannot hide behind the long ago disregarded notion that notice by newspaper is generally constitutionally adequate. Instead, the "reasonably calculated" standard of Mullane makes due process analysis a flexible, case-by-case inquiry which requires that notice and the opportunity to be heard are "appropriate to the nature of the case." Mullane, 339 U.S. at 313. As the Utah Supreme Court has noted, "'due process' is not a technical concept with a fixed content unrelated to time, place and circumstances which can be imprisoned within the treacherous limits of any formula." Rupp v. Grantsville City, 610 P.2d 338, 341 (Utah 1980); Worthen, 926 P.2d at 876. Rather, to determine the appropriateness or reasonableness of notice, the Court usually balances the individual interests alleged to be adversely affected against the government interests sought to be advanced by its procedures or actions. See, e.g., Tulsa, 485 U.S. at 489-490; Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 543-44 (1985); Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976); Zimmerman Brush, 455 U.S. at 430 n.5 ("having made access to the courts ... a necessity, the State may not deprive someone of that access unless the balance of state and private interests favors the government scheme"); Anderson v. Public Service Commission, 839 P.2d 822, 825 (Utah 1992) ("To determine whether the agency has acted

reasonably in choosing a method of notice, we balance the interest sought to be protected against the interest of the agency.").¹¹

Thus while cases have held that when state action affects "all persons in the state claiming a right to water" publication of notice by newspaper is likely adequate. See In re Chumstick Creek Drainage Basin, 694 P.2d at 1069. However, when state action affects relatively few foreseeable individuals or entities, whose names and addresses are known or reasonably ascertainable, publication only by newspaper is clearly inadequate. For example, in Menonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983), the United States Supreme Court held that "actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." See also Department of Ecology v. Acquavella, 674 P.2d 160, 163, 165 (Wash. 1983) (noting that "[i]f a moderate number of water users was involved . . . we might find notice by mail or personal service was required" and that "an adjudication of a smaller scale . . . might require service of process upon all individual water users who receive their water from distributing entities"). Additionally, even when a state action or proceeding affects relatively large numbers of individuals, individual service of process may still be required if the proceeding is sure to affect the rights of those individuals. Cf., e.g., Rupp v. Grantsville City, 610 P.2d 338 (Utah 1980) (entire city notified by mail); Department of Ecology v. Acquavella, 674 P.2d 160, 162 (Wash. 1983) (serving 4.289

¹¹ However, it should be noted that "the cost of protecting a constitutional right cannot justify its total denial," Bounds v. Smith, 430 U.S. 817 (1977), and "procedural due process is not intended to promote efficiency," Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972). To the contrary, the due process clause was "designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency . . . that may characterize praiseworthy government officials." Stanley v. Illinois, 405 U.S. 645, 656 (1972).

defendants individually in a general adjudication of water rights). Finally, when the whereabouts of an interested party is known even notice by certified mail is constitutionally inadequate if not reasonably calculated to apprise that party of the pending proceeding. See Robinson v. Hanrahan, 409 U.S. 38 (1972) (holding notice by certified mail of automobile forfeiture proceedings inadequate where state knew owner was in jail).

In considering the balance of interests, it is impermissible for this Court to consider actions that Mr. Longley could have taken to apprise himself of the subject proceedings since "a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation" to provide adequate notice. Mennonite Bd. of Missions, 462 U.S. at 799. Nor can the fact that other parties received notice of the subject proceedings be imputed to Mr. Longley and relieve the State of its constitutional burden since due process analysis is a peculiarly individualized inquiry. For example, "particularly extensive efforts to provide notice may often be required when the State is aware of a party's inexperience." Id.

It is clear, from the foregoing principles and precedents that the notice by publication utilized in this case, (R. 61, 290), was not constitutionally appropriate under the facts and circumstances. This is true because the State Engineer's July 10, 1992 Memorandum Decision lapsing the Change Application (R. 49-50), and the automatic denial of the Request for Reconsideration of that decision (R. 164), triggered a greater duty on the part of the State Engineer to countermand, through adequate notice, the practical effect of these decisions; particularly where Mr. Longley requested individual actual notice (R. 330-31, 353-54, 365, 515, 530, 556-57, 562-63, 565-67) which would not be unduly burdensome to provide in this case; and because the proffered notice itself, (R. 61, 290), was too vague and uncertain to apprise Mr. Longley that his rights would be affected.

I. More notice than mere publication was required to countermand the effects of the State Engineer's prior July 10, 1992 Memorandum Decision.

By virtue of the State Engineer's July 10, 1992 Memorandum Decision, the subject Change Application lapsed. The Change Application, originally filed in 1970, was extended *via* four separate Extension Requests. (R. 161-62, 271-72.) The fourth Extension Request, granted in 1985, was granted with the express condition that it would be the last extension and set November 30, 1989, as the absolute final deadline for filing the required proof. (R. 40, 162; Ex. A.) The State Engineer warned Leucadia that if proof was not filed by Nov. 30, 1989, the Change Application would lapse. (R. 40; Ex. A.) On Nov. 30, 1989, Leucadia filed a false and unsigned Proof of Permanent Change. (R. 163) Thus, after a field inspection where the State Engineer found that the facilities identified in the Proof did not exist, the State Engineer declared the Change Application to be lapsed in its July 10, 1992 Memorandum Decision. (R. 49-50.) The State Engineer made this declaration even though Leucadia had filed a fifth Extension Request in 1990, ten months after the November 30, 1989, deadline. (R. 49-50, 327-28.) Of course, pursuant to Utah Code Ann. § 63-46b-13, Leucadia filed a request for reconsideration of the July 10, 1992 order lapsing the Change Application. (R. 52, 164.) But the State Engineer did not timely act on that request (R. 164) and by virtue of § 63-46b-13(3)(b) the request was therefore denied.¹²

For all intents and purposes then, the public record at the State Engineer's Office, of which Mr. Longley had learned, told the world that the issue was dead. (R. 352-55.) Obviously,

¹² Utah Code Ann. § 63-46b-13(3)(b) states: "If the agency . . . does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied." *Cf. Judkins v. Fronk*, 120 Utah 359, 234 P.2d 849 (1951) (conditional permit void by its own terms when those conditions failed to occur).

it would be reasonable for the general public, including Mr. Longley, to rely upon those records. Accordingly, the degree to which the State Engineer could expect the public to peruse the newspapers for notification of action on this matter--a matter thought to be dead--was severely diminished, if not completely obliterated by the July 10, 1992 Decision. Thus the strong presumption that publication by notice is ineffective, as expressed in Mullane and its progeny, becomes even stronger when a state has taken previous action that would discourage interested parties from actively seeking out the published notice. (R. 352-55.) This fact cannot be ignored since the adequacy of notice is viewed under the totality of circumstances of each case. Rupp, 610 P.2d at 341. As the form of notice chosen "must be such as one desirous of actually informing [the interested parties] might reasonably adopt to accomplish it," Mullane, 339 U.S. at 314, the State Engineer was required to take more than the usual step of mere publication to countermand the effect of his July 1992 Memorandum Decision. At the very least, if the State Engineer was desirous of actually informing interested parties he should have mailed notice to those individuals actually known to be interested in the proceedings.

2. *More notice than publication was required because Mr. Longley requested actual notice and his name and address were known.*

Although Mr. Longley had requested actual notice, (R. 330-31, 353-54, 365, 515, 530, 556-57, 562-63, 565-67) and provided the State Engineer with his name and address, the State Engineer nonetheless brushed that request aside pretending that the small print in the back pages of a newspaper would provide the constitutionally mandated notice. As the Supreme Court of South Dakota recognized in In re Application of Union Carbide Corp., 308 N.W.2d 753 (S.D. 1981), the director of a state agency abuses his discretion when he opts to give minimum public

notice of proceedings which results in an untimely protest when that director or the agency in his charge knows of a potential protestant's interest in the proceeding. This blatant disregard for Mr. Longley's rights demonstrates that the means chosen by the State Engineer were not those of "one desirous of actually informing [the interested parties]" as required by the Constitution. Mullane, 339 U.S. at 314. Instead, the State Engineer--and, subsequently, the trial court--blatantly rode roughshod over Mr. Longley's constitutional rights.

Mr. Longley did not then, nor does he now, request of the State Engineer the impossible or impracticable. As the Supreme Court stated in Mullane, "[a] construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified." Mullane, 339 U.S. at 313-14. Mr. Longley did not ask, and is not asking now, that the State Engineer personally notify "all ultimate water users in [a] basin" any time their interests may be adversely affected by a proceeding as this "would be an impractical obstacle." Department of Ecology v. Acquavella, 674 P.2d 160, 163 (Wash. 1983). Mr. Longley simply asked, and continues to ask, that the State Engineer and this Court recognize that which is clearly required, at a bare minimum, by the United States Constitution: that those who request specific notice of a specific action, and provide their name and address, become a reasonably identifiable class of persons and therefore must receive actual notice. Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983). "[A]ctual notice is a *minimum* constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party . . . if its name and address are reasonably ascertainable." Id. (emphasis added).

Providing notice to those who actually request it is not an onerous burden. In fact, even states more populous than Utah, such as Colorado, impose statutory requirements that the state give notice of changes or applications affecting water rights to those it "has reason to believe

would be affected or *who [have] requested* the same by submitting his name and address to the water clerk." Colo. Rev. Stat. § 37-92-302(3)(b), (c) (1990); Save Our Dunes v. Alabama Dept. of Env'tl. Management, 834 F.2d 984, 989-90 (11th Cir. 1987) (noting state agency's practice to notify "anyone who specifically requests to receive direct written notice of final agency action as to a specific application" and that this practice satisfied constitutional mandates); Jones v. District of Columbia, 323 F.2d 306, 308 (D.C. 1963) (noting that government mailed notice to 300 organizations that had requested it). Cf. In re Silicone Gel Breast Implant Prod. Liab. Litig., 1994 W.L. 114580 (N.D. Ala. 1994) (approving class action notice plan that provided, in part, a nationwide toll-free information line to provide notice to those who request it). Other Utah administrative agencies who have similar kinds of hearings, including those within the same Department as the State Engineer such as the Division of Oil, Gas & Mining, make it a practice to provide actual notice to those who request it.¹³ If the burden of providing notice to those

¹³ See e.g.: Utah Admin. Code R315-3-21(d)(2) (If no modification of the second phase of a plan approval for land treatment demonstrations is necessary, the Department of Environmental Quality will give notice of a final decision "to each person who requested notice of final decision on the second phase of the plan approval."); Utah Admin. Code R317-8-611(1) (After the close of the public comment period under the permit process for a UPDES permit, the Division of Water Quality must notify each person who has requested notice of that decision.); Utah Admin. Code R317-8-8.8(6) (Where submission requesting POTW pretreatment program approval does not comply with proper requirements, the Division of Water Quality will provide notice in writing to each person who has requested individual notice.); Utah Admin. Code R317-8-8.9(3) (In approving or denying requests for approval of POTW pretreatment programs and applications for removal credit authorization, the Division of Water Quality must notify each person who has requested individual notice of his decision.); Utah Admin. Code R645-301-800-830.421 (In filing and maintaining bonds and insurance for coal mining and reclamation operations, the Division of Oil, Gas and Mining must "[n]otify any person with a property interest in collateral who has requested notification of any proposed adjustment to the bond amount ... "); Utah Admin. Code R645-301-800-880.220 (The Division of Oil, Gas and Mining must notify those persons with an interest in bond collateral who have requested notice, of its decision regarding all or part of a performance bond.); Utah Admin. Code R649-3-1-15.3.3 (The Division of Oil, Gas and Mining must notify those persons with an interest in bond collateral who requested notice, of its decision to release or not release a bond.); Utah Admin. Code R652-90-600(3) (Upon completion of site-

who request it is not too onerous for more populous states and other Utah agencies, it is difficult to see why it is too onerous for the State Engineer.¹⁴

However, this Court need not decide that every party with a property interest at stake who requests notice is constitutionally entitled to receive it. Rather this Court can and should reach an even narrower holding because there is no indication in the record that anyone *but* Mr. Longley asked the State Engineer for individual notice. (See R. 330-31, 353-54, 365, 515, 530, 556-57, 562-63, 565-67.) If the record indicated that dozens or hundreds of people had requested notice of the subject applications, it might not be practicable to require as a general rule that the State Engineer provide individualized notice to that many people. See Dodson v. Parham, 427 F. Supp. 97 (N.D. Ga. 1977). However, the record in this case indicates that only Mr. Longley requested such notice. It is therefore difficult to see how the cost of one sheet of paper, one envelope, and one stamp can outweigh Mr. Longley's constitutional right to receive adequate notice under the circumstances of this case.¹⁵

specific planning, the Division of Forestry, Fire and State Lands must provide those persons requesting notice, a summary of the final division action.); Utah Admin. Code R746-405-2(D)(7) (When a utility makes a tariff filing with the Public Service Commission, the utility must provide to interested parties which requested information, a copy of the advice letter and copies of each related tariff sheet.); Utah Admin. Code R850-100-300(1)(b)(ii) (The School and Institutional Trust Lands Administration, in providing for public input into the development of the statewide management plan, must notify any parties who have requested notice, prior to conducting public meetings.).

¹⁴ Even the trial court in this case recognized at oral argument that all the State Engineer's Office would "have to do is put it in the computer's database, touch the button and it will print out the notices for everybody and they'll have the hearing." (R. at 566.)

¹⁵ Therefore Appellees' inevitable "floodgate" argument is a rather hollow and desperate attempt to stamp out Mr. Longley's constitutional rights and to present this Court with broader issues not properly before it. There should be no concern with holding notice is required for the one individual who requested it in this case, since the narrow issue before this court does not mandate a holding that it will always be a requirement to provide notice to anyone who requests it in any case. That is not the issue before this court.

Even assuming, *arguendo*, that the cost of one sheet of paper, one envelope, and one stamp is an onerous burden, the state could have easily remedied that burden by requiring those who request such notice to pay a reasonable fee. For example, Louisiana requires that notice be given when requested but imposes a ten dollar fee for doing so in order "to defray the cost of providing the notice." Mid-State Homes, Inc. v. Portis, 652 F. Supp. 640, 642 n.3 (W.D. La. 1987) (citing La. Rev. Stat. 13:3886); La. Rev. Stat. 13:3886(B)(1) (1997). In fact, the United States Supreme Court acknowledged a similar Indiana statute in Mennonite Bd. of Missions that provides for notice by certified mail if the interested party "has annually requested such notice and has agreed to pay a fee, not to exceed \$10, to cover the cost of sending notice." Mennonite Bd. of Missions, 462 U.S. at 793 n.2. Therefore, the cost of notifying Mr. Longley did not even have to be that of one sheet of paper, one envelope, and one stamp as these "onerous" costs could have been defrayed by requiring Mr. Longley to pay for them.

3. *The published notice itself was constitutionally defective.*

In this case the trial court found that the "State Engineer's notice of publication of Leucadia's Extension Request was sufficient to comply with Utah law." (R. 536), but apparently made--or attempted to make--no decision with respect to the adequacy of notice for purposes of the federal and state constitutions. Indeed, in announcing his decision from the bench, the trial judge stated:

[I]f there is any substance in this area of the law that appears to be clear, it is the requirement for notice to parties. However, courts are uncomfortable, as you might well suspect, in--at the trial level--creating or enunciating constitutional rights. I think as a trial court I am bound by the statutes. I am bound by the administrative procedures and the portions of the administrative code of the State of Utah in making my decisions. Should the Supreme Court decide that the scope of my work should be greater, that's the Supreme Court's decision and this trial judge's. Accordingly, the Motion for Summary Judgment is granted. It is clear to the Court that this was an untimely protest, outside the 30 days. That is not in

dispute. And while I am concerned about notice requirements and the constitutional basis for notice requirements, a higher court than this one will have to make that decision.

(R. 574.) The court's written order made no reference to the constitutional adequacy of notice.

(R. 534-38.) However, in granting the motion the trial court ruled, *sub silentio*, that the notice was constitutionally adequate, a decision this Court should accord no deference; a decision this court should reverse.

The published notice in this case is constitutionally inadequate because the legal description for diversion point numbers (1) and (4) therein have no reference to any monument or corner but merely recite courses and distances, (R. 290; Ex. I), which have long been recognized "to be among the most unreliable calls." 12 Am. Jur. 2d Boundaries § 73 (1964). There is also no reference to a land Section number for diversion point numbers (1), (3), (4) and (5). (R. 290; Ex. I.) And only diversion point number (6) references a township and range. (R. 290; Ex. I.) Furthermore, a baseline reference is not identified for any of the diversion points. (R. 290; Ex. I.) Of course, Appellees conveniently attribute Section 25 diversion points to (1) and (2) and Section 26 to diversion points (3)-to-(5). (R. 513-14.) However, such attribution is not at all intuitive given the punctuation--or lack thereof--utilized in the notice. (R. 290; Ex. I.) If Section 25 is to be properly attributed to diversion point (1) then a semi-colon should have been inserted after "Section 25" and before "(3)" to indicate that Section 25 belonged to that phrase or sentence.¹⁶ Otherwise, the newspaper description reads as one incoherent run-on

¹⁶ The diversion points were listed as follows:

- (1) S 50 W 2531,
- (2) S 2343 E 253 from NW Cor, Sec 25,
- (3) S 50 E 50 from NW Cor,
- (4) S 50 W 66,

sentence with no indication of which Sections should be attributed to which courses and distances. When viewing the notice, a member of the public could have thought that diversion point (1) was in Section 26 or even another Section that was omitted, perhaps, by error. Since a Section is approximately 640 square acres or 1 square mile, Olin L. Browder et al., Basic Property Law 765 (5th ed. 1989), it is not unreasonable to request a more precise description of where a 16 inch well might be placed within one of two Sections.

In Eldorado at Santa Fe, Inc. v. Cook, 822 P.2d 672 (N.M. Ct. App. 1991), the New Mexico Court of Appeals faced a case nearly identical to this case. In Eldorado, the New Mexico State Engineer published notice of a water well change application, received no protests thereunder, and issued a permit to change the location of a well. Id. at 674. There were no protests to the change application, presumably because the published notice included an improper land grant description. Id. During construction of the new well, several parties moved the state engineer to set aside the change permit because of the defective notice. Id. The state engineer denied the motion for lack of jurisdiction. Id. Several years later the movants sought a writ of certiorari, apparently requiring remand for republication of notice and reconsideration. Id. The New Mexico Court of Appeals granted that writ, reasoning that the protestants, like Mr. Longley in this case, had lost their right to appeal the state engineer's decision "[d]ue to the error in the publication notice." Id. at 675. Because the published notice did not adequately describe the location of the well the protestants, like Mr. Longley in this case, "failed to receive notice of the application" for the change. Id. The court reasoned that its decision was "mandated by constitutional due process requirements" and rejected the same technical argument Appellees

(5) S 2343 W 50 from NE Cor,

(6) S 2343 E 297 from NW Cor, Sec 25, T42S, R14W.

assert in this case: "that petitioners were not a party to the state engineer's proceedings" and therefore had no standing to protest the change application after the passing of the appropriate cut off date. Id. The court affirmed a district court determination that the state engineer lacked jurisdiction to grant the change application and "remanded the case for *new* rather than additional proceedings," the very result Mr. Longley seeks in this case.¹⁷

In this case, the incomplete legal description in the published notice renders the description uncertain. Obviously, the pennies it would cost to add Section, Range, and Township numbers to each course and distance would result in a description substantially more likely to notify interested parties.¹⁸ A discrepancy in a township is a thirty-six-square-mile discrepancy. Basic Property Law 763. A discrepancy in a Section is a 640-acre discrepancy. Id. at 765. When the location of a 16-inch well is disputed, that is a huge discrepancy, particularly when the

¹⁷ Id. at 676 (emphasis added). At any rate, though it should do so, this Court need not decide that the notice as published in this case was constitutionally deficient on its face. Rather, since the "reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that ... the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes," Mullane, 339 U.S. at 314, the notice actually published in this case is constitutionally defective if there was another "feasible and customary" means of providing notice substantially more likely to give adequate notice. Appellees have already conceded that there is a more adequate means of giving notice by virtue of their chart on page 4 of their REPLY MEMORANDUM (MOTION FOR SUMMARY JUDGMENT), (R. 510, 513), which conveniently attributes to the course and distance calls Section numbers, Ranges, and Townships, (R. 513), items which they managed to attach to courses and distances in other, much longer and more costly, published notices. (See, e.g., R. 367 (Ex. D to Mr. Longley's MEMORANDUM IN OPPOSITION TO DEFENDANT LEUCADIA'S MOTION FOR SUMMARY JUDGMENT).)

¹⁸ As the trial court recognized at oral argument on the motion for summary judgment:

Well, Counsel, there was a publication that occurred in April of 1994, and the publication was somewhat cryptic as to the description of the wells. I will grant you that. *It could have been done better* and printer's ink is a whole lot cheaper than litigation, as all the parties well know.

(R. at 564.)

New Mexico Court of Appeals seems to suggest that an error in identifying the proper Section is a "substantive error." Eldorado, 822 P.2d at 674. The error-filled notice was therefore constitutionally infirm as discussed above. The notice was statutorily inadequate for the additional reasons outlined in Part II below and incorporated herein by reference.

C. Mr. Longley Was Denied Due Process of Law.

A trial court's determination of the constitutional adequacy of notice is never given deference since the adequacy of notice is a question of law. Patrick v. Rice, 814 P.2d 463, 467 (N.M. Ct. App. 1991), cert. denied, 815 P.2d 161 (N.M. 1991). Indeed whether proper notice has been given is not a question of fact but is a question of law where the determination depends on the interpretation of the written content of the published notice. New Pueblo Const., Inc. v. State of Arizona, 696 P.2d 203, 211 (Ariz. Ct. App. 1984), vacated on other grounds, 696 P.2d 185 (Ariz. 1985). "It is axiomatic that the order of an administrative body issued without notice to affected individuals is violative of due process." Wagner v. Salt Lake City, 29 Utah 2d 42, 504 P.2d 1007, 1013 (1972) (citing Morris v. Public Service Commission, 7 Utah 2d 167, 321 P.2d 644 (1958)). Likewise, as the foregoing discussion demonstrates, it is axiomatic that action taken by an administrative body without notice to affected individuals is violative of due process. Denying Mr. Longley the opportunity to protest under the circumstances of this case is simply unfair. The core goal of due process is fairness. See Nelson v. Jacobsen, 669 P.2d 1207, 1211 (Utah 1983). This has been recognized by courts of this jurisdiction since before statehood. Commenting upon the meaning of the phrase "due process of law" Justice Judd, writing for the Utah Supreme Court more than 100 years ago, stated, "Many definitions have been attempted, but it is believed that they all come to this citation, which means that a party shall have his day

in court." Jensen v. Union Pacific Ry. Co., 21 P. 994, 995 (Utah 1889). This Court should therefore reverse the decision of the trial court and give Mr. Longley his day in court.

II. THE NOTICE OF THE FIFTH EXTENSION REQUEST DID NOT COMPORT WITH STATUTORY REQUIREMENTS AND WAS THEREFORE STATUTORILY DEFECTIVE.

The aforementioned constitutional difficulties can be avoided by proper interpretation of Utah statutes requiring notice be given to water users. This Court "[has] a duty to construe statutes to avoid constitutional conflicts." Provo City Corp. v. State, 795 P.2d 1120, 1125 (Utah 1990), and "to avoid constitutional infirmities whenever possible." State v. Lindquist, 674 P.2d 1234, 1237 (Utah 1983). If the statutes in question only require the notice that was actually given in this case then those statutes would clearly be unconstitutional as applied. However, this Court is "constrained to construe statutory terms to avoid an unconstitutional application of [a] statute" whenever possible. Utah State Road Commission v. Friberg, 687 P.2d 821, 831 (Utah 1984). A construction of the relevant notice statutes in this case that would avoid constitutional difficulties is possible under this Court's and the Utah Supreme Court's prior precedents requiring notice statutes be strictly construed to require adequate notice to parties with affected property interests.

A. Strict Compliance With the Notice Statute Is Required.

This Court has held that strict statutory compliance is required whenever failure to adhere to statutory requirements will affect the substantive rights of a party. See Badger v. Madsen, 896 P.2d 20, 23 (Utah Ct. App. 1995), cert. denied, 910 P.2d 425 (Utah 1996); W&G Co. v. Redevelopment Agency, 802 P.2d 755, 760-61 (Utah Ct. App. 1990). If full protection under the relevant statute would not be enjoyed by the party the statute seeks to protect, then substantial compliance with that statute is wholly inadequate and strict compliance will be required. Id.

Obviously the relevant notice statute at bar, Utah Code Ann. § 73-3-12(1)(e), was designed to protect the public and other water users from unwarranted and unnotified deprivations of their property interests. And, as Part I.A. supra illustrates, Mr. Longley will not be able to enjoy full protection of those rights absent strict compliance. Just as "[a] shareholder who has voting rights but is not put on [adequate] notice . . . of a meeting . . . may decide that his or her presence at the meeting is not important," Madsen, 896 P.2d at 23, Mr. Longley, who has water rights but is not put on adequate notice of a proceeding, may decide that his presence at the proceeding is not important. (Cf. R. 352-55.) And just as "the shareholder's substantive rights may well be irrevocably prejudiced" by the corporation's selling of its property and assets, Id., Mr. Longley's substantive rights may well be irrevocably prejudiced by the State Engineer's approval of the subject extension. (R. 157-176.) Strict compliance with § 73-3-12(1)(e) is therefore obviously required.¹⁹

Furthermore, Utah courts have required strict construction of notice statutes or statutes affecting interests in property for the very purpose of avoiding constitutional due process problems. For example, in W&G Co. v. Redevelopment Agency, 802 P.2d 755, 760-61. (Utah Ct. App. 1990), this Court avoided reaching the merits of the constitutional question decided at the trial court by strictly construing notice provisions of the Utah Neighborhood Development Act, Utah Code Ann. § 11-19-1 et seq., to require detailed notice of the impending governmental action. See id. at 761-63 (recognizing the requirements of due process but deciding the case based upon an interpretation of the statute). This Court appropriately held that where statutory

¹⁹ Substantial compliance with the statute is inadequate because of the constitutional dimensions of this case. Also the policy of the statute--to give notice to water users in a manner that comports with due process--can only be satisfied through strict compliance. See Part I, supra; Madsen, 896 P.2d at 23.

notice requirements are not met, the underlying "proceedings are void and those not properly notified are not bound by the proceedings because the giving of such notice is jurisdictional." Id. at 765 (citing Salt Lake County v. Murray City Redevelopment, 598 P.2d 1339, 1344 (Utah 1979); Cate v. Archon Oil Co., 695 P.2d 1352, 1356 (Okla. 1985)). Accord, Madsen, 896 P.2d at 23-24.

Accordingly, the statute of limitations in that case, which required that any interested person affected by the redevelopment plan protest it within 30 days after enactment or forever be barred from contesting its validity, was never triggered. W&G Co., 802 P.2d at 761 & n.4, 765. The statute of limitations in that case is indistinguishable from Utah Code Ann. § 73-3-7(1) (1989), which provides, in pertinent part that "[a]ny person interested may, at any time within 30 days after notice is published, file a protest with the state engineer." Like the plaintiff in W&G, who missed the statutory 30-day cut-off period by nearly 10 years, Mr. Longley missed by approximately 10 months, (R. 276-78), the 30-day cut off under § 73-3-7(1) that Defendants and the trial court relied upon to deny Mr. Longley standing. (R. 276-78; 534-38.) Therefore, if the notice triggering the 30-day statute of limitations, then the approval of extensions and the denial of Mr. Longley's right to protest are void with respect to Mr. Longley. W&G, 802 P.2d at 765. As the following discussion illustrates, the notice Mr. Longley received was clearly defective.

B. The Published Notice Did Not Strictly Comply With Statutory Requirements.

Leucadia acknowledges that extension applications must be published in compliance with § 73-3-12(1)(e), which requires:

- (i) The state engineer shall publish notice once each week for three consecutive weeks in a newspaper of general circulation in the county in which the source of supply is located.

- (ii) The notice shall contain information that will inform the public of the **diligence claimed and the reason for the request.**

(emphasis added.) (R. 510-22.) In granting summary judgment, the trial court held, "The State Engineer's notice of publication of Leucadia's Extension Request was sufficient to comply with Utah law." (R. at 536.) Yet, a review of that notice reveals that it was blatantly insufficient in light of the requirements of the statute, which must be strictly complied with in the circumstances of this case. Leucadia claimed that the notice of the fifth Extension Request published in February and April of 1994 was adequate primarily because it was published three times in February and three times in April. (R. 273; 280-81.) The statute specifically requires in addition to the number of times notice is to be published that the notice contain information to inform the public of the diligence claimed and the reason for the request. The published notice at bar contained neither. Additionally, the notice itself was ambiguous and confusing.

1. *The April published notice did not inform the public of the diligence claimed.*

As mentioned, § 73-3-12(1)(e)(ii) requires all published notices not just to "contain information . . . of the diligence claimed" but to "contain information that *will inform the public* of the diligence claimed." Utah Code Ann. § 73-3-12(1)(e)(ii) (emphasis added). See also Carlie v. Morgan, 922 P.2d 1 (Utah 1996) (court must assume that each term in statute was used advisedly). Section 73-3-12 casts "diligence" in terms of actual work done to complete an appropriation. Therefore, a claim of diligence requires evidence of "construction of the works and the application of water to beneficial use." Utah Code Ann. § 73-3-12(1)(a). And the applicant must "affirmatively show that he has exercised or is exercising reasonable and due diligence in working towards completion of the appropriation" of water before an extension of time can be granted. Utah Code Ann. § 73-3-12(1)(g). For example, Leucadia's 1979 notice for

the third Extension Request gave the statutorily required notice of due diligence by stating that "three test holes have been enlarged and drilled [and] [a]pproximately \$100,000 has been expended to date" on constructing the facilities. (R. 372.)

In this case, however, Leucadia disingenuously refers to the addition of six "new" wells as the requisite evidence of due diligence. (R. 290.) But those six "new" wells are the same six proposed wells that were the subject of the original underlying 1970 Change Application. (R. at 340.) It is therefore patently insufficient and circular logic to assert that the *proposing* of six "new" wells mentioned in the April 1994 notice will act as evidence of due diligence in constructing the wells and putting the water to beneficial use. The notice at issue does not say that six new wells had been installed, that test pumping was under way, or that any other activities had occurred. The notice merely recites the locations of the six "new" proposed wells, the same as was done in the notice of the Change Application some 24 years earlier. (R. 340.) In short, Appellees assert that merely mentioning a *proposal* for "new" wells--the same proposal for new wells first introduced in a Change Application nearly a quarter century ago--is sufficient to inform the public of Appellees' diligence. However, statements of actions that are clearly not adequate to constitute diligence are certainly not sufficient to inform the public of the diligence claimed. The notice of fifth Extension Request is devoid of any reference to the due diligence of Leucadia, contrary to the express requirement of § 78-3-12(1)(e)(ii). The notice is therefore statutorily deficient and the trial court's ruling must be reversed.

2. *The April published notice did not inform the public of the reason for the request.*

Utah law also requires that the notice published for an Extension Request inform the public of the reason for the delay. Utah Code Ann. § 73-3-12(1)(e)(ii). The notice published

in this case provides no information whatsoever explaining any reason for the delay. (R. 290; Ex. I.) In the court below, Leucadia claimed that the boiler-plate introductory language at the top of every notice provides the statutorily required reason for the request, i.e., "that additional time is needed to place the water to beneficial use." (R. 512-14.) However, this merely states the obvious and impermissibly renders § 73-3-12(1)(e)(ii) a nullity and an absurdity. See Millett v. Clark Clinic Corp., 609 P.2d 934 (Utah 1980) (court should avoid interpretations rendering a provision nonsensical or absurd). The application form for such a request is entitled "[A]pplication requesting an extension of time within which to submit proof of beneficial use." (See R. 341, 508.) Leucadia seeks to have this Court hold that a notice gives the required "reason for the request," when it states "the applicant needs an extension of time within which to submit proof of beneficial use."

The primary rule of statutory interpretation is to give effect to the intent of the legislature in light of the purpose the statute was meant to achieve. Beaver County v. Utah State Tax Commission, 916 P.2d 344, 358 (Utah 1996). From its plain language, the obvious purpose of § 73-3-12(1)(e)(ii) is to require more than a conclusory assertion that a party seeking an extension needs more time. Instead, the plain language of § 73-3-12(1)(e)(ii) requires the published notice to contain a short statement informing the public of the grounds or the reason more time is needed. Otherwise, an interested person would not know whether it is worth the time or effort to file a protest, or if he had grounds to file a protest. Absent a short justification for delay in the published notice, an interested water user may assume that he has no grounds to protest and "decide that his or her presence at the [proceeding] is not important," Madsen, 896 P.2d at 23, or that the cost and expense of filing a protest are not justified. Conversely, to construe the statute as Leucadia suggests might encourage every water user in a region to protest every

application because from the notice given in the newspaper those potential protestants could not even vaguely discern whether there were legitimate grounds for the Extension Request. Therefore, Leucadia's proffered reading creates the incentive to file frivolous protests "just in case" there are no grounds for the extensions sought. Such a reading clearly defeats the general purposes of fair and efficient water administration embodied in Utah's water law statutes.

Leucadia's claim that "the reason for the request" requirement referenced in the statute is satisfied by a statement that more time is needed simply begs the question and renders the express statutory requirement for notice of the *reason* for the request meaningless. Since a court should not presume that a legislative body used language idly and with no intent that meaning should be given to its language, Colorado Ground Water Comm'n v. Eagle Peak Frams, Ltd., 919 P.2d 212, 218 (Colo. 1996), this court should interpret "reason", as used in § 73-3-12(1)(e) to require a brief justification or explanation of why the applicant needs more time. To do so avoids an absurdity not intended by the legislature, effectuates the plain language and obvious purpose of the statute, and gives meaning to text that Leucadia would render meaningless.

Furthermore, comparison of the April 1994 notice with an earlier notice, i.e., the 1982 notice on the fourth Extension Request, reveals that strict compliance with the notice statute is not unduly burdensome or impracticable. The 1982 notice states the reason for the extension was that Leucadia was in bankruptcy and was working out a reorganization. (R. 341, 369-70.) When § 73-3-12(1)(j), which speaks in terms of justified or unjustified delay and requires that an applicant have justifiable reason for the need to seek an extension of time, and § 73-3-12(1)(e) are read together it becomes obvious that the 1982 notice is the type of published reason for delay that the statute contemplated. See Utah Bankers Ass'n v. American First Credit Union, 912

P.2d 988, 993 (Utah 1996) (provisions of a statute must be read as a whole not in an isolated piecemeal fashion).

In sum, the notice on the fifth Extension Request did not strictly comply with § 73-3-12(1)(e), and therefore, entry of summary judgement was reversible error. Without notice of the reason for the delay, the notice of the fifth Extension Request is statutorily defective as claimed by Mr. Longley in both his protest letter and his subsequent request for reconsideration. Notice which is statutorily defective is ineffective and void. Madsen, 896 P.2d at 23-24.

3. *The property descriptions in the published notice were statutorily defective and inadequate.*

The notice was also defective and void because, as discussed in part I above and incorporated herein by reference, it provided confusing and inadequate notice of the location of the wells at issue. (See R. 331-33.) The inadequacy of the notice was cited in every protest of the fifth Extension request. (R. 333.) Therefore, Mr. Longley cannot be denied standing based on a failure to file a protest before the deadline set forth in the defective notice. It is impossible to know, but must be assumed, that if an adequate notice had been published, Mr. Longley would have recognized the adverse impact on his water rights and would have timely protested the Extension Request. Mr. Longley certainly protested the fifth Extension Request promptly upon learning of it. (R. 333.)²⁰

²⁰ Leucadia has claimed that Mr. Longley did not file a protest by the May 14, 1994 deadline set forth in the April 1994 newspaper notice, and, therefore, Mr. Longley was not a "party" to the proceedings and accordingly was without standing to bring a judicial appeal of the State Engineer's decision. However, until there is proper notice, Mr. Longley cannot be required to enter a timely protest. Leucadia further claims that even if the notice was inadequate, that Mr. Longley failed to file a protest once he had actual knowledge. Leucadia's Motion must fail because: (a) the notice lacked elements expressly required by statute and contained incomplete and confusing legal descriptions; (b) Mr. Longley did file a protest promptly upon obtaining actual knowledge; and (c) Mr. Longley is both an aggrieved "person"

and an aggrieved "party" entitled to obtain judicial review of the State Engineer's decision.

In granting summary judgment, the trial court held, "Plaintiff lacks standing to seek judicial review of the State Engineer's decision approving Leucadia's Extension Request because he did not file a timely protest, and therefore, failed to exhaust his administrative remedies as required by Utah Code Ann. § 63-46b-14 (1993)." Yet, based upon the facts set forth in the Affidavit of Mr. Longley, he did need to file a timely protest. These issues of fact alone were sufficient to avoid entry of summary judgment.

It should be noted that due to the lost file in the State Engineer's Office and the fact that when the file was found, Mr. Longley's protest was missing, a disputed material fact exists. Mr. Longley's Affidavit set forth ample evidence that the April 3, 1995 protest letter was mailed and received by the State Engineer's Office. There is a well established and long standing presumption that an item which is properly addressed with postage prepaid that is placed in the mail and not subsequently returned to the sender was delivered to the addressee. See e.g., Campbell v. Gowans, 100 P. 397 (Utah 1909); Hagner v. United States, 285 U.S. 427 (1932); and Employment Security Commission v. Young, 713 P.2d 198 (Wyo. 1986). However, in this case, Mr. Longley need not rely on just that presumption. Utah law goes one step further in the case of documents mailed to governmental agencies such as the State Engineer, and deems the document to have been received and places the burden on the governmental agency to request a duplicate thereof upon learning that it was not received. The Utah "mailbox" statute, § 63-37-1, states in pertinent part that:

Any ... claim, ... statement or other document ... required or authorized to be filed or made to the state of Utah, or to any political subdivision thereof, which is ... (2) Mailed but not received by the state or political subdivision ... shall be deemed filed or made and received on the date it was mailed if the sender establishes by competent evidence that the ... document ... was deposited in the United States mail on or before the date for filing or paying; and in cases of such none receipt ..., the sender files with the state or political subdivision a duplicate within thirty days after written notification is given to the sender by the state or political subdivision of its nonreceipt

Mr. Longley's affidavit provides competent evidence that he deposited the April 3, 1995 protest letter in a properly addressed, postage prepaid envelope in the US mail. The State Engineer's Office has never specifically given written notice that the April 3, 1995 letter was not received or that Mr. Longley had thirty days in which to provide a duplicate thereof. That notwithstanding, Mr. Longley has provided a duplicate of the protest letter to the State Engineer as an attachment to the Complaint. Therefore, the April 3, 1995 protest letter is not only presumed, but deemed as a matter of law, to have been filed with the State Engineer's Office.

C. The State Engineer Did Not Comply with the Strict Requirements of § 73-3-12(1)(e), Therefore, any Action Taken on Leucadia's Extension Application is Void.

Because the published notice in this case is statutorily defective in a number of ways this court should reaffirm its core holding in W&G Co. v. Redevelopment Agency, 802 P.2d 755, which the trial court ignored. That case appropriately held that where statutory notice requirements are not met, the underlying "proceedings are void and those not properly notified are not bound by the proceedings because the giving of such notice is jurisdictional." Id. at 765 (citing Salt Lake County v. Murray City Redevelopment, 598 P.2d 1339, 1344 (Utah 1979)). For the reasons mentioned above, the outcome in this case ought not be different. Like the plaintiff in W&G, who missed the 30-day statute of limitation by nearly 10 years, Mr. Longley missed by approximately 10 months, the 30-day protest period under § 73-3-7(1) that Appellees and the trial court relied upon to deny Mr. Longley standing. (R. 534-38.) Therefore, since the notice triggering the 30-day cut off was defective in this case, as it was in W&G, then the approval of Leucadia's extensions and the denial of Mr. Longley's right to protest are void. W&G, 802 P.2d at 765.²¹

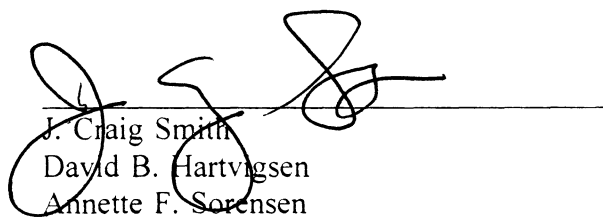
²¹ Leucadia will likely argue that because Mr. Longley did not see the notice, he cannot now complain about its inadequacy. However, such an argument begs the question of why he did not see the notice. Utah courts have addressed this issue by holding that the public cannot be charged with knowledge of the contents of a defective notice. W&G, 802 P.2d at 765.

CONCLUSION

It is truly ironic that Leucadia and the State Engineer seek to prevent Mr. Longley from having his day in court based on a lack of standing for allegedly failing to file a timely protest. Indeed, the whole matter would be moot if Leucadia and the State Engineer were to hold themselves to the same standard they seek to impose on Mr. Longley. Leucadia was ten months to over four years late in filing its fifth Extension Request (which the State Engineer said he would not even accept). Similarly, the State Engineer was late in acting on the Request for Reconsideration, which was automatically denied by operation of law prior to the date on which the State Engineer purported to grant it.

The State Engineer failed to give Mr. Longley the constitutionally and statutorily required notice or the actual notice as Mr. Longley specifically requested. The notice that was given was inadequate and confusing. Finally, Mr. Longley's due process rights have been violated. Therefore, this Court should declare the notice ineffectual and invalid and remand this case for trial on the merits.

DATED this 12th day of May, 1997.



J. Craig Smith
David B. Hartvigsen
Annette F. Sorensen
Attorneys for Plaintiff/Appellant
Michael O. Longley

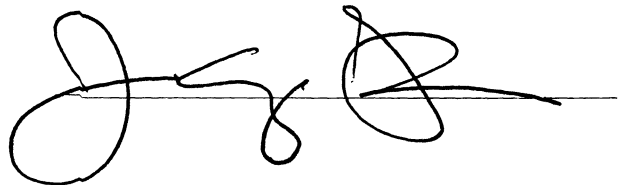
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the BRIEF OF APPELLANT was mailed,
first-class, postage prepaid, this 12th day of May, 1997 to:

Richard C. Skeen
Bryon J. Benevento
Thomas W. Clawson
VAN COTT, BAGLEY, CORNWALL & McCARTHY
50 South Main Street, Suite 1600
P.O. Box 45340
Salt Lake City, Utah 84145
Attorneys for Leucadia Financial Corp.

Gary G. Kuhlmann
City Attorney
City of St. George
175 East 200 North
St. George, UT 84770
Attorney for City of St. George

Michael M. Quealy
John H. Mabey, Jr.
Assistant Attorneys General
1594 West North Temple, Suite 300
Salt Lake City, UT 84114-0855
Attorneys for the State Engineer

A handwritten signature in black ink, appearing to be "J. G. B.", written over a horizontal line.

APPENDIX

Tab A

BEFORE THE STATE ENGINEER OF THE STATE OF UTAH

IN THE MATTER OF APPLICATION

NUMBER 81-670 (A36857)

)
)
)

MEMORANDUM DECISION

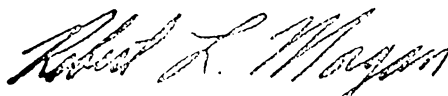
Application No. 81-670 (A36857) now owned by Terracor, was filed to appropriate 6.0 cfs. of water for the irrigation of 350 acres of land, sole supply, and stock water for 200 cattle and domestic use of four families. The application was approved September 10, 1965, and the application has been extended several times to the last proof due date of November 30, 1982. The applicant has filed another request for extension of time, and they stated the company had filed a petition in the U.S. Bankruptcy Court to allow them time to reorganize the company. The request was advertised in the Washington County News from December 9 to 23, 1982, and was not protested.

This application is one of several applications owned by the applicant for use in developing residential areas near St. George. The application has been approved for over twenty years, and when the State Engineer last extended the application, he did so with understanding further extensions would be critically reviewed and may be denied. The State Engineer has discussed the problems with the applicant on several occasions to determine what action should be taken on the current extension of time requests. As a result, several applications will be lapsed by the State Engineer. It is the opinion of the State Engineer that this particular application may be extended; however, it is also his opinion that there has been sufficient time to develop a project of this nature.

It is, therefore, ORDERED and the request for extension of time on Application No. 81-670 (A36857) is hereby GRANTED to and including November 30, 1989, with the condition that this shall be the last request granted and proof of appropriation shall be submitted on or before that date or the application will be lapsed. Requests for further extension of time will be denied.

This decision is subject to the provisions of Section 73-3-14, Utah code Annotated 1953, which provides for plenary review by the filing of a civil action in the appropriate district court within sixty days from the date hereof.

Dated this 30th day of December 1985.



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

By: Earl M. Staker, Deputy State Engineer

RLM:GWS:eg

Tab B

OFFICE OF
THE ATTORNEY GENERAL



STATE OF UTAH

R. PAUL VAN DAM - ATTORNEY GENERAL

1636 WEST NORTH TEMPLE #300 • SALT LAKE CITY, UTAH 84116 • TELEPHONE 801 538 7227 • FAX NO. 801 538 7315

JOSEPH E. IFSCH
CHIEF DEPUTY ATTORNEY GENERAL

MEMORANDUM

TO: GERALD STOKER
Area Engineer

FROM: JOHN H. MABEY, JR. *JHM*
Assistant Attorney General

DATE: November 16, 1989

RE: Terracor (Leucadia Corp.) Extension of Time,
Application No. 81-670 (A36857)

RECEIVED

NOV 20 1989

TELETYPE
DATE

Pursuant to our telephone conversation, I have reviewed the Attorney General's files and the State Engineer's files. There was no court appeal. The terms of the last extension granted are set out in the December 30, 1985 Memorandum Decision, attached.

When I get back with Michael Longley, a concerned developer in Hurricane area, I will tell him that there was no court action and that you have a copy of the Memo Decision.

Best regards.

JHM/ac

Attachment

cc: Robert L. Morgan
Kent Jones

Tab C

Utah form

PROOF OF PERMANENT
CHANGE OF WATER
STATE OF UTAH

RECEIVED
NOV 30 1989

For the purpose of proving that diverting works are completed and that water is being applied to a beneficial use, proof of permanent change of water is hereby submitted to the State Engineer in accordance with Section 16 of the Utah Code Annotated 1953, as amended.

WATER RIGHT NO. 316
SALT LAKE

WATER RIGHT NO. 81 — 670

CHANGE APPL. NO. a 6393

Nature of Change: ☒ Point of Diversion ☒ Period of Use
☒ Place of Use ☒ Nature of Use

Right(s) upon which change is based: _____

1. OWNER INFORMATION

Name: Terracor, Inc. Interest: _____ %
Address: 529 East South Temple St.
City: Salt Lake City State: Utah Zipcode: 84102

2. QUANTITY OF WATER: 6.027 cfs and/or 2150 ac-ft

3. SOURCE: Underground Water * DRAINAGE: _____

which is tributary to _____
which is tributary to _____

POINT(S) OF DIVERSION: _____ COUNTY: Washington

Description of Diverting Works and Carrying Works: One 12" well and five 8" wells, 600 ft. deep, 24,000 ft. of 18", 14" and 12" pipe line, booster pumps and pressure reduction and meter station connecting to the St. George City 36" dia. Quail Creek culinary transmission line.

4. POINT(S) OF REDIVERSION

The water is rediverted from _____ at a point: _____

Description of Diverting Works and Carrying Works: _____

5. 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 is returned to the natural stream/source at a point(s): _____

6. 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): Water is stored in St. George City steel, domestic water tanks. The three tanks located in the Bloomington area are as follows: NW1/4NW1/4, Sec. 8 and NW1/4NE1/4, Sec. 17 all in T43S, R15W and NW1/4NW1/4, Sec. 12, T43S, R16W, SLB&M.

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

CALENDAR
CONFIRMED
INDEXED
Change Proof

7. The water is used supplementally to the following rights: The culinary rights of
St. George City

8. NATURE AND PERIOD OF USE

Irrigation:	From	<u>Mar. 1st.</u>	to	<u>Nov. 30th</u>
Stockwatering:	From	<u>Jan. 1st.</u>	to	<u>Dec. 31st.</u>
Domestic:	From	<u>Jan. 1st.</u>	to	<u>Dec. 31st.</u>
Municipal:	From	<u>Jan. 1st.</u>	to	<u>Dec. 31st.</u>
Mining:	From		to	
Power:	From		to	
Other: Industrial & Recreational	From	<u>Jan. 1st.</u>	to	<u>Dec. 31st.</u>

9. PURPOSE AND EXTENT OF USE

Irrigation: _____ acres. Sole supply of 350 acres
Stockwatering (number and kind): 250 cattle, 10 horses, 50 swine, 100 poultry
Domestic: _____ Families and/or _____ Persons
Municipal (name): St. George City
Mining: _____ Mining District in the _____ Mine
Ores mined: _____
Power: Plant name: _____ Type: _____ Capacity: _____
Other (describe): _____

10. PLACE OF USE

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

11. WATER MEASUREMENT

Water measured by (name): James N. Ward
Date: November 30, _____, 19 89
Method of measurement: _____
(Give sufficient data in "EXPLANATORY" to enable the State Engineer to check the water measurement.)

12. EXPLANATORY (Use additional pages of same size if necessary)

Measurements have been made at various well sites by meters. The intent is to have controlled pumping not to exceed 6 cfs. However, some wells vary from 450 gpm to 900 gpm in capacity. All wells are equipped with total flow measuring devices to record accurate, annual productions.

(Fill in blank spaces but do not sign until proof has been submitted to the State Engineer and accepted as sufficient.)

CERTIFICATE OF APPLICANT

STATE OF UTAH _____) ss.
COUNTY OF Salt Lake)

C. Bruce Miller being first duly sworn, certify that I am the person, assignee or agent of the person who filed in the State Engineer's office Application No. a 6393; that I, as appropriator, employed James N. Ward to compile information for the purpose of completion of proof of permanent change and that I hereby accept and submit this written proof together with tracings consisting of sheet Nos. 1 to 1 incl.; that said facts and tracings are hereby submitted, and that each and all items contained herein are true to the best of my knowledge and belief.

Applicant or His Agent

Subscribed and sworn to before me this _____ day of _____, 19_____
My commission expires _____, 19_____

Notary Public

CERTIFICATE OF PROOF ENGINEER

STATE OF UTAH) ss.
COUNTY OF Salt Lake)

James N. Ward being first duly sworn, certify that I was employed to prepare proof of permanent change under Application No. a 6393; that the accompanying tracings were prepared from field notes of a survey made by me between the 30th and -- days of November, 19 89; that these tracings, labeled as sheet Nos. 1 to 1 incl., when combined with the written proof fully describe the method and extent of beneficial use of the water and that each and all of the items contained herein are true to the best of my knowledge.

Proof Engineer: 3170
License No.

Address:

Subscribed and sworn to before me this day of , 19

(Seal of Notary)

(Seal of Proof Engineer)

My commission expires , 19

Notary Public

STATE ENGINEER'S ENDORSEMENTS

Dates

Application received in State Eng. office; Approved
Proof of Permanent Change due in State Engineer's office
11-30-89 Written proof and maps received in State Eng. office by
Written proof and maps returned for correction by
Field checked by
Corrected written proof and maps examined and certificate written by
Certificate of Permanent Change issued (No.)
Maps, profiles, and drawings are filed Renewith Hanger 55 Page 41

This written proof and the maps, profiles, and drawings pertaining thereto, are found to comply with the requirements of the Laws of Utah, and the same are hereby approved.

19 State Engineer

Proof of Appropriation
on Change Application No. a

INSTRUCTIONS FOR COMPLETING AND SUBMITTING
PROOF OF PERMANENT CHANGE

Proofs of Permanent Change of water must be prepared by a registered engineer or licensed land surveyor. Each proof shall consist of two parts: (a) a written proof and (b) a sheet or sheets of maps, and drawings. The proof must indicate that the water sought to be changed has been applied to beneficial use, as provided in the Change Application. Any amendments necessary must be made and the proof returned to the office within the time allowed by the State Engineer.

10. PLACE OF USE

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

Primary Service Area:

T43S, R15W, Section 5	340 acres
T43S, R15W, Section 6	320 acres
T43S, R15W, Section 7	160 acres
T43S, R15W, Section 8	450 acres
T43S, R16W, Section 11	320 acres
T43S, R16W, Section 12	640 acres
T43S, R16W, Section 13	345 acres
T43S, R16W, Section 14	350 acres
T43S, R16W, Section 15	15 acres
T43S, R16W, Section 22	230 acres
T43S, R16W, Section 23	320 acres

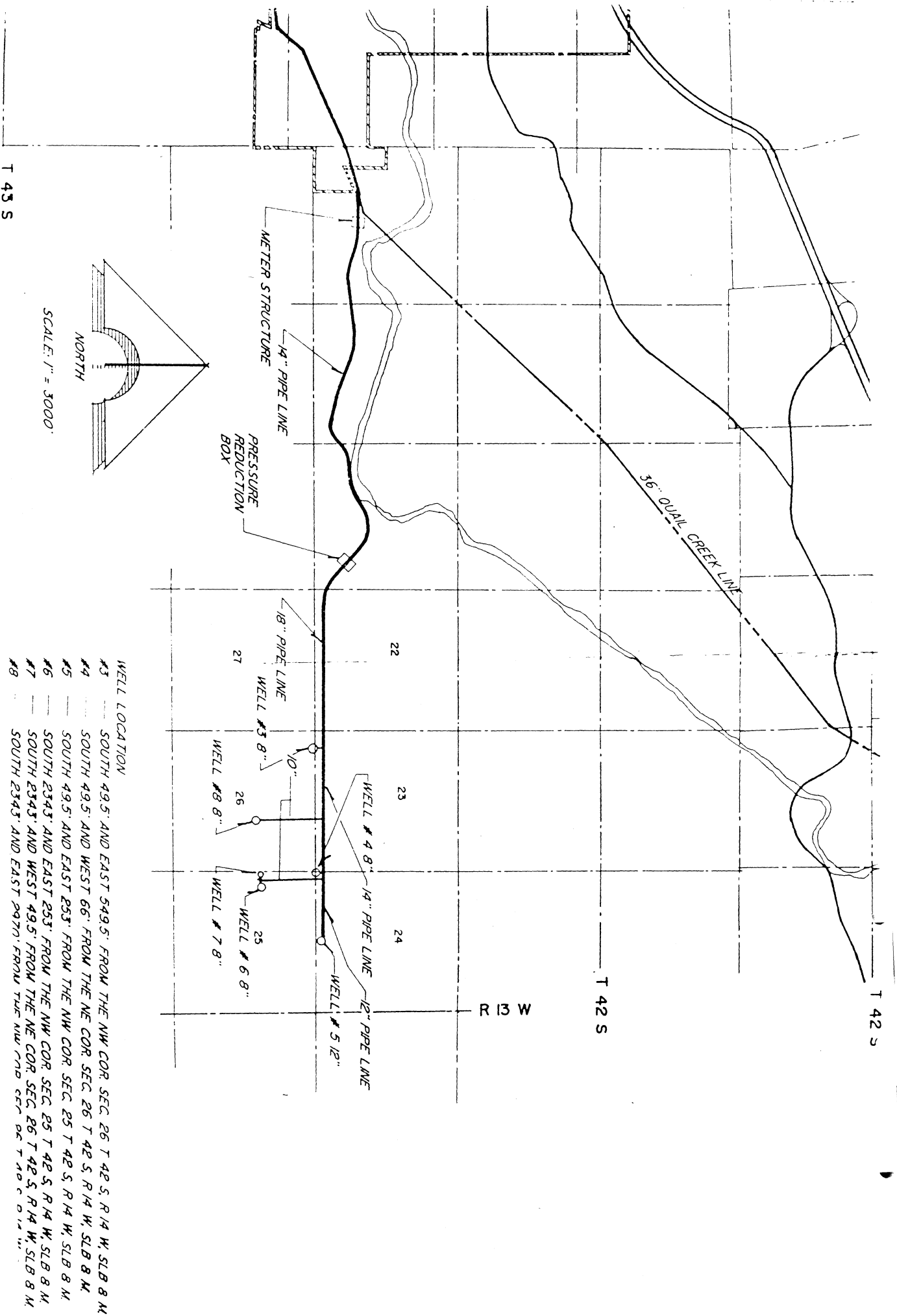
TOTAL PROJECT AREA: 3490 acres

And supplemental to the entire St. George City distribution system.

PROOF MAP

APPLICATION NO. 81-670 (A36857)
CHANGE APPLICATION a-6393

JAMES N. WARD
PROOF ENGINEER
LICENSE NO. 3170



Tab D

BEFORE THE STATE ENGINEER OF THE STATE OF UTAH

IN THE MATTER OF CHANGE APPLICATION

NUMBER 81-670 (a6393)

)
)
)

MEMORANDUM DECISION

Change Application Number 81-670 (a6393) was filed by TERRACOR to permanently change the point of diversion, place of use and nature of use of 6.027 cfs of water from underground water wells. The water right is evidenced by 81-669 (A36856 Certificate Number 8627) and 81-670 (A36857 pending approval). The change application was approved August 6, 1971, under memorandum decision with the condition that "proof of appropriation shall be submitted on or before the proof due date or the application will be lapsed". The subject water rights were granted extensions of time to and including November 30, 1989. On November 30, 1989, a proof of permanent change was filed by James N. Ward, P.E., for TERRACOR.

On July 11, 1990, representatives of the State Engineer completed a field examination of the proof of permanent change (also to include a proof of appropriation on 81-670 A36857). The descriptions on the subject proof are not correct, nor do they accurately describe field conditions. There were no wells equipped, no totalizing meters, no pipeline, and no connection into the St. George-Quail Creek pipeline as stated in the proof. There is no evidence that the water had been placed to beneficial use.

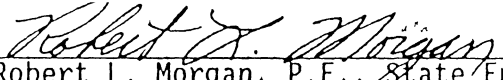
It is the opinion of the State Engineer that the applicant and proof engineer have not complied with rules and regulations governing the filing of proofs of appropriation and permanent changes and that this documentation must be rejected. Further, that the applications are lapsed for failure to meet the requirements under Section 73-3-16 Utah Code Annotated, 1953.

It is, therefore, ORDERED and the Proof of Permanent Change submitted under 81-670 (a6393) which included certificated Water Right Number 81-669 (A36856 Certificate Number 8627) and Application to Appropriate Number 81-670 (A36857) is hereby REJECTED and Change Application Number 81-670 (a6393) and Application to Appropriate Number 81-670 (A36857) are hereby LASED for failure to comply with statutory requirements and place the water to beneficial use.

This Decision is subject to the provisions of Rule R655-6-17 (1992 Utah Administrative Code, formerly R625) 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.

MEMORANDUM DECISION
CHANGE APPLICATION NUMBER
81-669 and 81-670
PAGE, 2

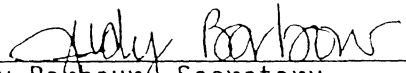
Dated this 10th day of July, 1992.


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

RLM:GWS:jb

Mailed a copy of the foregoing Memorandum Decision on this 10th day of July, 1992, to:

TERRACOR
529 East South Temple Street
Salt Lake City, UT 84102


Judy Barbour, Secretary

Tab E



Norman H. Bangerter
Governor
Dee C. Hansen
Executive Director
Robert L. Morgan
State Engineer

State of Utah

DEPARTMENT OF NATURAL RESOURCES
DIVISION OF WATER RIGHTS

1636 West North Temple, Suite 220
Salt Lake City, Utah 84116-3156
801-538-7240

August 3, 1992

TERRACOR
529 East South Temple Street
Salt Lake City UT 84102

Dear Applicant: RE: Reconsideration of Rejected/Lapsed Application
Number 81-670 (a6393)

A request for reconsideration has been received by our office on July 30, 1992. We will review the request and keep you informed of further action regarding this application. If no action is taken within 20 days of the date the request was received in our office, the request is considered denied.

If you have questions, please contact our office.

Sincerely,

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

KLJ:jb

cc: Regional Office

James N Ward and Associates
ATTN James N Ward
555 East South Temple Street
Salt Lake City UT 84102

Tab F



State of Utah
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF WATER RIGHTS

Michael O. Leavitt
Governor

Ted Stewart
Executive Director

Robert L. Morgan
State Engineer

1636 West North Temple, Suite 220

Salt Lake City, Utah 84116-3156

801-538-7240

801-538-7315 (Fax)

January 31, 1994

LEUCADIA FINANCIAL CORPORATION
529 EAST SOUTH TEMPLE STREET
SALT LAKE CITY UT 84102

RE: Application No. 81-670 (a6393)

Dear Applicant:

This is to acknowledge receipt of your request for an extension of time; however, it is hereby returned to you because of one or more of the following reasons:

You did not have your signature properly notarized

You have until your proof-due date, or if your proof-due date has passed, you have ten additional days from the date of this letter to return the extension request properly completed or the application shall lapse.

If you have any questions, feel free to contact us here at the Division.

Yours very truly,


Dana Dredge
Extension Secretary

Enclosure

Tab G

BEFORE THE STATE ENGINEER OF THE STATE OF UTAH

~~Application for~~
~~Permanent Change~~

IN THE MATTER OF APPLICATION
NUMBER 81-670 (A36857) AND CHANGE
APPLICATION NUMBER 81-670 (a6393)

AMENDED
MEMORANDUM DECISION

Application Number 81-670 (a6393) was filed by TERRACOR to permanently change the point of diversion, place of use and nature of use of 6.027 cfs of water from underground water wells. The water right is evidenced by 81-669 (A36856 Certificate 8627) and 81-670 (A36857 pending-approved). Application Number 81-670 (A36857) was approved September 10, 1965, and Change Application Number a6393 was approved August 6, 1971, under memorandum decision. The subject water rights were approved by the State Engineer and granted extensions of time to and including November 30, 1989, under Memorandum Decision, which is substantially beyond the 14 year period. The last extension of time was granted with a condition that "this shall be the last request [for extension] granted and proof of appropriation shall be submitted on or before that date [November 30, 1989] or the application will be lapsed. Requests for further extension of time will be denied." On November 30, 1989, a proof of appropriation and permanent change was filed by James N. Ward, J.P.E., for TERRACOR (aka Leucadia Financial Corporation).

On July 11, 1990, representatives of the State Engineer completed a field examination of the proof of permanent change (also to include a proof of appropriation on 81-670 (A36857)). The descriptions on the subject proof are not correct, nor do they accurately describe field conditions. There were no wells equipped, no totalizing meters, no pipeline, and no connection into the St. George-Quail Creek pipeline as stated in the proof. There is no evidence that the water had been placed to beneficial use.

It was the opinion of the State Engineer that the applicant and proof engineer had not complied with rules and regulations governing the filing of proofs of appropriation and permanent changes and that this documentation must be rejected. The State Engineer rejected the proof of change by memorandum decision dated July 10, 1992, and lapsed Water Right Number 81-670. However, previous to the rejection, on September 21, 1990, a request was received by the State Engineer from C. Bruce Miller, President of Leucadia Financial Corporation, to withdraw the proof of appropriation and proof of permanent change. A request for an extension of time, beyond the 14 year period, was also received on September 21, 1990, in which the applicant states, "Causes for delay are financial considerations due to lack of sufficient testing to determine the reliability of the water aquifer. Time is required to complete the testing and affirm its value for full development as intended."

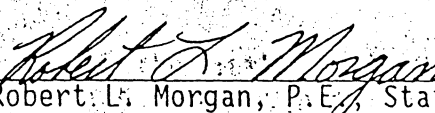
The State Engineer also received a request for reconsideration of the July 10, 1992, Memorandum Decision and on August 20, 1992, granted that request for reconsideration and took the application under review. After reviewing the information before him, the State Engineer is of the opinion that rejecting the proof and lapsing the applications for failure to comply with statutory requirements may have been inappropriate since the proof upon which the action was being taken had been requested to be withdrawn. The State Engineer is further of the opinion that the application should be reinstated and the extension request filed on September 21, 1990, should be advertised and processed according to statutory requirements.

AMENDED MEMORANDUM DECISION
Application Number 81-670 (A36857)
and Change Number 18-670 (a6393)
Page 2

It is therefore, ORDERED and the rejection of the proof for Change Application Number 18-670 (a6393) which included Application to Appropriate Number 18-670 (A36857) and Certificated Water right Number 81-669 (A36856) and the lapsing of Change Application Number 81-670 (a6393) and Application to Appropriate Number 81-670 (A36857) according to the July 10, 1992, Memorandum Decision are hereby RESCINDED and the applications are REINSTATED. The priority of the applications has been adjusted to reflect the filing date of the extension of time request filed September 21, 1990, and the extension request will be processed according to statutory requirements.

This Decision is subject to the provisions of Rule R655-6-18 of the Division of Water Rights and to Sections 63-46b-14 and 73-3-14 of the Utah Code which provide for the filing of an appeal with the appropriate District Court. A court appeal shall be filed within 30 days after the date of this Decision.

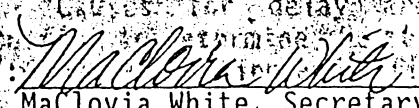
Dated this 31st day of January, 1994.


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

RLM:KLJ:GWS:mw

Mailed a copy of the foregoing Memorandum Decision this 31st day of January, 1994, to:

Leucadia Financial Corporation, Engineer that the applicant and proof of 529 East South Temple Str., Salt Lake City, UT 84102. The State Engineer has granted that request for reconsideration and that the application shall be reinstated. After reviewing the application before him, the State Engineer has an opinion that supporting the proof and lapsing of the application for failure to comply with statutory requirements will have been appropriate. The proof under which the application was being taken had been requested by the applicant. The State Engineer is further of the opinion that the application shall be reinstated and the extension request filed September 21, 1990, shall be advertised and processed according to statutory requirements.

for full development as intended. BY: 
Maclovio White, Secretary

Tab H

THE DAILY Spectrum

275 East St. George Blvd. P.O. Box 39
St. George, Utah 84770 Phone (801) 673-1111

415 S. Main St. P.O. Box 1948
Cedar City, Utah 84720 Phone (801) 586-7647

190 N. Main St. P.O. Box 39
Richfield, Utah 84701 Phone (801) 896-8431

NOTICE TO WATER USERS

The following applications requesting an EXTENSION OF TIME WITHIN WHICH TO SUBMIT PROOF OF BENEFICIAL USE have been filed with the State Engineer. It is represented that additional time is needed to place the water to beneficial use in Washington County. Persons objecting to an application must file a Protest stating the reasons for the protest. To have Cont. on next column

a hearing before the State Engineer, persons must request a hearing in the Protest. Protest must be filed in duplicate with the State Engineer, 1636 West North Temple, Salt Lake City, Utah 84116, (801-538-7240) on or before May 14, 1994. (PROTESTS MUST BE LEGIBLE WITH A RETURN ADDRESS). These are formal proceedings as per Rule R655-6-2 of the Division of Water Rights. (LEGEND: Point(s) of Diversion = POD; Place of Use = POU; Nature of Use = USE)

81-670(a6393): Terracor (Leucadia Financial Corp.) proposes to change the POD of water as evidenced by 81-670 (A36857) & 81-669 (A36856). HERETOFORE: QUANTITY: 6.027 cfs. SOURCE: Underground Water Well. POD: (1) S 100 W 1100 from E1/4 Cor. Sec 22, 8 in. well 45 ft. deep (2) N 1491 E 155 from W1/4 Cor. Sec 23, T43S, R16W, 16 in. well 55 ft. deep. USE: Irrigation: from Mar 1 to Nov 30, total acreage 400.00 acs. sole supply 350.00 acs; Stockwatering: 273 head of livestock; Domestic: 5 families. POU: Secs 5, 6, 7, 8, T43S, R15W; Secs 11, 12, 13, 14, 15, E1/2 Sec 22; N1/2, SW1/4 Sec 23, T43S, R16W. HEREAFTER: QUANTITY: 6.027 cfs SOURCE: Underground Water Wells. POD: Same as Heretofore, but adding the following 16 in. wells 0 to 800 ft. deep: (1) S 50 E 2531, (2) S 2343 E 253 from NW Cor. Sec 25, (3) S 50 E 50 from NW Cor. (4) S 50 W 66, (5) S 2343 W 50 from NE Cor. (6) S 2343 E 2970 from NW Cor. Sec 26, T42S, R14W. USE: Same as Heretofore but adding domestic, municipal, recreational & industrial. Existing uses will diminish as new uses are developed. POU: Same as Heretofore.

Robert L. Morgan, P.E.
STATE ENGINEER

Pub#L2837, published
April 1, 7 & 14, 1994.
The Daily Spectrum

PROOF OF PUBLICATION

STATE OF UTAH SS:
COUNTY OF WASHINGTON

Becky Myers, being duly sworn, deposes & says that she is the Classified Bookkeeper of the daily newspaper published at St. George Washington County, State of Utah and that the Notice:

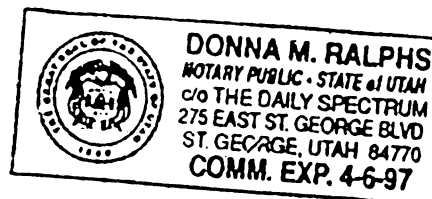
L2837
a true copy of which is hereto attached, was published in said newspaper in its issue dated the 6 day of APRIL 1994 and was published again in the issues of said newspaper dated: APRIL 7+14, 1994

for a total of 3 insertion(s).

Becky Myers

Subscribed and sworn before me this 7th day of May 1994.

Donna M. Ralphs
Notary Public
residing at
Washington County



ATTACHMENT "B"

030329

JD

Tab I



RECEIVED

FEB 03 1994

IN THE OFFICE OF THE STATE ENGINEER OF THE STATE OF UTAH
REQUEST FOR REINSTATEMENT AND EXTENSION OF TIME
(After Fourteen Years)

WATER RIGHTS
SALT LAKE

APPLICATION NO. 81-670 (a6393)

Applicant's present address
Leucadia Financial Corporation
529 East South Temple St.
Salt Lake City, UT 84102

STATE OF UTAH

COUNTY OF Washington

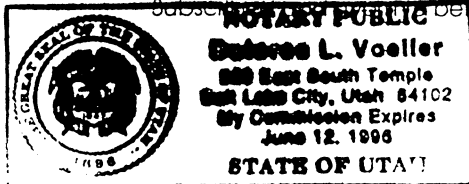
_____, being first duly sworn that he is the (agent of the) owner of the above numbered application; that the information given is true and correct to the best of his knowledge.

Describe briefly the type and extent of construction completed to date, and cause for delay.

Causes for delay are financial considerations due to lack of sufficient testing to determine the reliability of the water aquifer. Time is required to complete the testing and affirm its value for full development as intended (see enclosure)

Pursuant to Section 73-3-12, *Utah Code Annotated 1953* (as amended), request is made for reinstatement and extension of time for filing proof from November 30, 19 89 to November 30, 19 ____.

[Signature] Vice President
APPLICANT (If a corporation, give title of officer signing.)



Subscribed and sworn to before me this 2nd day of February, 1994

Dolores L. Voeller
NOTARY PUBLIC

FOR OFFICE USE ONLY

REQUEST RECEIVED 9/24/90 ADV. FEE \$50 RECD. \$50.00 BY LZ

RECEIPT NO. 29315 NOTICE PUBLISHED WEEKLY IN _____

BEGINNING _____ AND ENDING _____

PROOF DUE DATE 11/30/89 14 YEAR PERIOD ENDS 9/10/79

PROTESTED BY _____

REMARKS _____

RECOMMENDED DISPOSITION _____

☒ CALENDAR
☐ COMPUTER
☐ INDEXED

Tab J

Hurricane Valley Mutual Water Co.
c/o Michael O. Longley
P.O. Box 51
Hurricane, UT 84737

April 3, 1995

Mr. Robert L. Morgan, State Engineer
Division of Water Rights
1636 West North Temple, Suite 220
Salt Lake City, UT 84116-3156

Re: Water Right No. (a6393) 81-670, 81-669

Dear Mr. Morgan:

I am a real estate developer in Washington County south of Hurricane. In connection with my real estate development I own several water rights and am affiliated with the Hurricane Valley Mutual Water Company that provides water service to this area. Hurricane Valley Mutual Water Company also owns a fairly substantial number of water rights in this area. The only culinary quality well associated with my water rights and Hurricane Valley Mutual Water Company's water rights is located in the Sand Mountain area approximately one mile east from the general area in which the points of diversion authorized in change application a6393 are located.

During the past months The Spectrum, a local newspaper in the St. George area, reported an agreement between the City of St. George, Leucadia Corporation and the Washington County Water Conservancy District regarding the Leucadia water rights in this area. This agreement is of particular concern to me and I am sure other owners of waters in the Sand Mountain area. I was surprised at these reports because my understanding was that the Leucadia water rights had been lapsed. To revisit these applications with the potential of reviving them will prejudice my water rights and Hurricane Valley Mutual Water Company's water rights. Further I have serious concerns with the procedural history of this water right.

These water rights were filed in April 1965 and approved in September the same year. Water Right No. 81-670 contemplated a diversion of 6.0 cfs for the beneficial uses of irrigating 400 acres, stockwatering 200 cattle and domestic use of 4 families. Water Right No. 81-669 was certificated for the domestic use of one family and stockwatering 73 cattle.

These water rights were acquired by Terracor for use in their Bloomington project. In 1970 Terracor filed change application a6393 to change the point of diversion from sections 22 and 23 in T43S, R16W, SLB&M at Atkinville, south of the Virgin River, to multiple points of diversion in the Sand Mountain area, approximately 12 miles east of the original points of diversion. This change application was approved over the protest of the BLM. It is questionable whether this change if submitted today would be approved because of criteria developed by your office in considering the approval of change applications.

Proof of appropriation on change application a6393 was first due November 30, 1973. In approving additional time in which to submit proof on this water right, then State Engineer, Dee C. Hansen states, "It is questioned by the State Engineer whether the applicant has complied with

the provisions of 73-3-12, Utah Code Annotated, 1953, which allows the State Engineer to grant extensions of time to applicants 'on proper showing of diligence or reasonable cause for delay.' However, we feel that notice of our policy and intentions must be given to each applicant before a request for an extension of time can be denied."

In approving an additional extension of time in 1977, Mr. Hansen states, "Further requests for extension will be seriously questioned."

The request for extension of time granted in 1980 was conditioned on the "understanding that requests for further extension of time will be critically reviewed and may be denied unless there is sufficient evidence supporting due diligence or reasonable cause for delay." [Emphasis in original.]

You granted an additional extension of time in 1985 with the following language:

It is the opinion of the State Engineer that this particular application may be extended; however, it is also his opinion that there has been sufficient time to develop a project of this nature.

...

It is ... ORDERED and the request for extension of time ...is ... hereby granted ... with the condition that this shall be the last request granted and proof of appropriation shall be submitted on or before the date or the application will be lapsed. Requests for further extension of time will be denied."

On November 30, 1989, the proof due date, the applicant submitted proof of appropriation for these water rights. However, according to your Memorandum Decision dated July 10, 1992, on field examination of the proof, representatives of the state engineer found:

The descriptions on the subject proof are not correct, nor do they accurately describe field conditions. There were no wells equipped, no totalizing meters, no pipeline, and no connection into the St. George-Quail Creek pipeline as stated in the proof. There is no evidence that the water had been placed to beneficial use.

As a result of these findings, in your Memorandum Decision dated July 10, 1992, you ordered the proof rejected and the water rights lapsed for failure to comply with statutory requirements.

A request for reconsideration of this memorandum decision was filed on July 30, 1992. The letter from Kent Jones dated August 3, 1992 acknowledges receipt of the Request for Reconsideration on July 30 and states, "If no action is taken within 20 days of the date the request was received in our office, the request is considered denied." The statutory basis for reconsideration and the period of time within which to file a request for reconsideration is § 63-46b-13 (b) UTAH CODE ANNOTATED 1953, as amended which states:

If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied.

Twenty days from July 30, 1992, is August 19, 1992 because July has 31 days. However, you granted the Request for Reconsideration on August 20, 1992, which was beyond the 20 day period allowed under § 63-46b-13 (b) UTAH CODE ANNOTATED 1953, as amended. Rule 6 (a) of Utah Rules of Civil Procedure states regarding the computation of time within which action must be taken:

In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which even the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday.

According to this provision, the date you received the Request for Reconsideration, July 30, is not counted in the twenty day computation period. However, the last day of the twenty day period, August 19, is counted. August 19, 1992 was a Wednesday; it was not a Saturday, a Sunday, or a legal holiday. As a result there was no reason to extend the time in which you were required to act in granting the Request for Reconsideration. Your action granting reconsideration on the 21st day after receipt of the Request was not within the scope of your authority and is void. As a result the Memorandum Decision dated July 10, 1992, lapsing the water right became final agency action because the applicant did not appeal the denial of your request for reconsideration to the District Court within 30 days as required by §63-46b-14. Your later Amended Memorandum Decision dated January 31, 1994, was also without authority because the applications were lapsed by the July 10, 1992 Memorandum Decision which became final agency action.

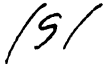
Even if these procedural defects are disregarded, the public notice regarding the extension of time within which to submit proof that you authorized under the January 31, 1994 Amended Memorandum Decision is inconsistent, faulty, inadequate, confusing and erroneous for the following reasons: the "heretofore" quantity of water is 6.0 cfs while the "hereafter" quantity is 6.027 cfs; the hereafter point of diversion designated "(1)" contains no reference to the subdivision monument, section, township or range in which it is located; the "hereafter" point of diversion designated "(2)" contains no reference to the township or range in which the point of diversion is located; the "hereafter" point of diversion designated "(3)" contains no reference to the township and range in which the point of diversion is located; the "hereafter" point of diversion designated "(4)" contains no reference to a subdivision monument, township or range in which the point of diversion is located; and the "hereafter" point of diversion designated "(5)" contains no reference to the section, township or range in which the point of diversion is located. Based upon these publication defects, a republication should be made to apprise the public of the actual changes.

In summary sufficient time has been allowed to develop this water right and the applicant has failed to place the waters to beneficial use. The procedural and publication defects associated with these water rights indicate first that these water rights have lapsed as a matter of law. Second

Mr. Robert L. Morgan
April 3, 1995
Page 4

in the event some procedural defect prevents the lapsing of the water rights, the publication associated with the latest request for extension of time is inadequate and should be republished. I request that you cease any additional activities regarding these water rights until you address these defects. Please contact and inform me of all actions and hearings regarding these applications.

Very truly yours,



Michael O. Longley

LONG108.LET

Tab K

IN THE MATTER OF CHANGE APPLICATION)

NUMBER 81-670 (a6393))

MEMORANDUM DECISION

Change Application Number 81-670 (a6393) was filed by Terracor to permanently change the point of diversion, place of use and nature of use of 6.027 cfs of water from wells. The hereafter of the change allows for 8 points of diversion located in Section 23, T43S, R16S, SLB&M, and Sections 25 and 26, T42S, R14W, SLB&M. The water right is evidenced by 81-669 (A36856, Certificate Number 8627) and 81-670 (A36857 pending - approved). The change application was approved August 6, 1971, and extension requests were filed and granted to November 30, 1989. Proof of Appropriation of water was filed on November 30, 1989, and was later withdrawn. A new extension request was filed on September 21, 1990, the same day the proof was withdrawn. By Memorandum Decision dated July 10, 1992, the State Engineer rejected the proof and lapsed the change application and the application right under 81-670. Because the proof had been requested to be withdrawn, and the new extension filed, the State Engineer reinstated the file by memorandum decision dated January 31, 1994, and processed the extension request.

The extension request was advertised in The Daily Spectrum from February 3 to February 17, 1995, and readvertised from April 1 to April 19, 1995, and was protested by Hurricane City, Washington County Water Conservancy District and a late protest was filed by Winding River Associates. The Washington County Water Conservancy District protest was later withdrawn. A hearing was not held.

The extension request indicates that financial considerations have delayed the project and more time is needed to complete the testing and to put the water to beneficial use. The underlying application on Water Right Number 81-670 was approved September 10, 1965. Since that time, limited efforts have been made to develop the right and use the water. Change Application Number 81-670 (a6393) was approved August 6, 1971, to allow for the uses of irrigation, stockwatering, domestic, municipal, recreation and industrial.

The water rights upon which the change was based had as their limit of use the irrigation at 400 acres, limited to the sole irrigation supply of 350 acres with 50 acres used supplementally, stockwatering of 273 cattle or equivalent, and the domestic purposes of 5 families. This would equate to the annual diversion of 2259.89 acre-feet and would be the maximum allowable diversion under both rights.

Under the last extension granted in the December 30, 1985, memorandum decision, the applicant was put on notice that proof of appropriation had to be submitted by November 30, 1989, and requests "for further extension of time will be denied". This action was based on the requirements under section 73-3-12, Utah Code, annotated, 1953, that the State Engineer "can grant extensions of time only "on proper showing of diligence or reasonable cause for delay". The State Engineer was of the opinion, based on a review of the information available, that the applicant may not be complying with the statutory criteria as evidenced by the amount of water that had been put to beneficial use.

Since the extension request was filed, the City of St. George has entered into a purchase agreement with Acadia Financial Corporation, the current owner of the water rights, and has indicated that upon approval of the extension they will complete the transaction to purchase this water right. The City further indicated that they need this water to meet the anticipated future requirements of the public which constitutes reasonable and due diligence as required by the

MEMORANDUM DECISION
CHANGE APPLICATION NUMBER
81-670 (a6393)
PAGE 2

statute. The State Engineer is of the opinion, that if the right is conveyed to St. George City, as evidenced by the agreement in place, the extension can be granted.

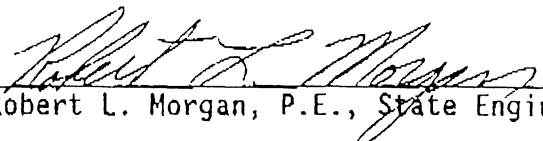
It is, therefore, **ORDERED** and Extension of time within which to submit proof is **GRANTED** on Application Number 81-670 (A36857) and Change Application Number 81-670 (a6393) to and including November 30, 1996, with the following conditions:

1. The application is limited to the annual diversion of 2259.89 acre-feet for the proposed uses.
2. This extension is approved only for use by the City of St. George to be used to meet the city's reasonable future needs and the right must be conveyed to the city, prior to November 30, 1996.

This extension is granted in accordance with the law which states: "The construction of the works and the application of water to beneficial use shall be diligently prosecuted to completion within the time fixed by the State Engineer. Extensions of time ... may be granted by the State Engineer on proper showing of diligence or reasonable cause for delay ... In the consideration of an application to extend the time in which to place the water to beneficial use under an approved application, ... the State Engineer shall deny such extension and declare the application lapsed, unless the applicant affirmatively shows that he has exercised or is exercising reasonable and due diligence in working toward completion of the appropriation."

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 19th day of June, 1995.


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

RLM:KLJ:mw

Mailed a copy of the foregoing Memorandum Decision this 19th day of June, 1995, to:

Terracor/Leucadia
529 East South Temple
Salt Lake City, UT 84103

MEMORANDUM DECISION
CHANGE APPLICATION NUMBER
81-670 (a6393)
PAGE 3

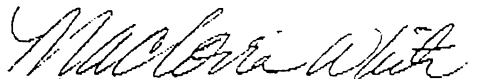
Hurricane City
c/o Clark R. Fowcett
58 North 200 East
Hurricane, UT 84737

Washington County Water Conservancy District
136 North 100 East, Suite 1
St. George, UT 84770

Winding River Associates
c/o Jeffrey N. Starkey, Attorney
P.O. Box 400
St. George, UT 84771-0400

Dallin W. Jensen
c/o Parsons, Behle & Latimer
201 South Main
P.O. Box 11898
Salt Lake City, UT 84147

City of St. George
Attn: Wayne McArthur
175 East 200 North
St. George, UT 84770

BY: 
MaClovia White, Secretary