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Michael O. Longley v. 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 : Reply Brief

Utah Court of Appeals

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Richard C. Skeen; Bryon J. Benevento; Thomas W. Clawson; Van Cott, Bagley, Cornwall & McCarthy; Attorneys for Leucadia Financial Corp; Gary G. Kuhlmann; Attorney for City of St. George; Michael M. Quealy; John H. Mabey, Jr.; Assistant Attorneys General; Attorney for State Engineer.

J. Craig Smith; David B. Hartvigsen; Annette F. Sorensen; Nielsen & Senior; Attorneys for Michael Longley.

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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.

APPELLANT'S REPLY BRIEF

Appellate Case No. 97-0152-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

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, UT 84145
Attorneys for Leucadia Financial Corp.

Gary G. Kuhlmann
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 State Engineer

J. Craig Smith, 4143
David B. Hartvigsen, 5390
Scott M. Ellsworth, 7514
Daniel J. McDonald, 7935
NIELSEN & SENIOR, P.C.
1100 Eagle Gate Tower
60 E. South Temple, Suite 1100
Salt Lake City, UT 84111
Attorneys for Michael Longley

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BRIEF**

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50 South Main Street, Suite 1600
P.O. Box 45340
Salt Lake City, UT 84145
Attorneys for Leucadia Financial Corp.

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St. George, UT 84770
Attorney for City of St. George

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Assistant Attorneys General
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Salt Lake City, UT 84114-0855
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NIELSEN & SENIOR, P.C.
1100 Eagle Gate Tower
60 E. South Temple, Suite 1100
Salt Lake City, UT 84111
Attorneys for Michael Longley

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ARGUMENT

I. AN UNLAWFUL EXTENSION OF TIME TO APPROPRIATE WATER CAN INJURE OR ADVERSELY AFFECT OTHER WATER USERS' CONSTITUTIONALLY PROTECTED WATER RIGHTS.

The Defendants rest their entire defense of the summary judgment on one leg, and one leg only: the water rights of other users from the same water source cannot conceivably be harmed by any decision or proceeding of the State Engineer "under any scenario advanced," (Br. of Appellees at 21 n.5), including extension request proceedings. The Defendants assert this position no less than 38 times in a 43-page brief. Defendants summarily proclaim, "The statutes and policies of this State, which are based on the prior appropriation doctrine, demonstrate that the water rights of other persons are not at risk or adversely affected in an extension request proceeding." (Br. of Appellees at 15.) Defendants are wrong. They are wrong in theory. And they are particularly wrong under the facts of this case. If this Court were to follow Defendants' argument to its logical conclusion, the legislature could constitutionally dispense with even the minimal notice by newspaper publication of any State Engineer proceeding and deny water users the right to protest with constitutional impunity.

A. This Court Must Assume That Mr. Longley's Water Rights Were Adversely Affected by the State Engineer's Unlawful Approval of Leucadia's Belated Fifth Extension Request.

Upon review of a summary judgment, which "is generally considered a drastic remedy," Timm v. Dewsnap, 851 P.2d 1178, 1181 (Utah 1993), the Court must view the facts in a light most favorable to finding a material issue of fact that would preclude summary judgment, Jackson v. Righter, 891 P.2d 1387 (Utah 1995). Under this standard, this Court

must assume that Mr. Longley's water rights were, in fact, adversely affected by the extension approval. Mr. Longley repeatedly alleged that his water rights were adversely affected by the State Engineer's decision. (R. 159, 172.) Mr. Longley asserted in an affidavit attached to his Memorandum in Opposition to Defendant Leucadia's Motion for Summary Judgment that his property rights were adversely affected by being excluded from the subject proceeding. (R. 353.) Counsel for Mr. Longley again asserted at the hearing that Longley's water rights were adversely affected by being shut out of the extension proceeding.¹ None of the Defendants ever contested before the trial court that Mr. Longley's water rights were, in fact, adversely affected by his inability to participate in and oppose the untimely Fifth Extension Request and the State Engineer's subsequent unlawful approval of it. Therefore, this Court must assume, for purposes of summary judgment that Mr. Longley's water rights were, in fact, adversely affected by the unlawful extension approval.

¹ THE COURT: All right. Mr. Smith, you're the responding party and you say there are justiciable issues of fact.

MR. SMITH: Well, more than that, Your Honor, there's important constitutional issues that they want you to brush aside and ignore. This is a property interest. We are going to be affected in a property interest if we're not allowed to be heard before the State Engineer.

* * *

[O]ur property interest is being affected and I can read you all the cases. (R. 564.)

* * *

I don't think there's anything that's a more valuable property in this state than water. Location is everything. How close their wells are to your wells, that's everything. And whether there's going to be interference with your property or not. (R. 565.)

B. Defendants are Wrong in Theory -- The Statutes and Policies of Utah Demonstrate That the Water Rights of Other Persons Are at Risk or Adversely Affected in an Extension Request Proceeding.

The Defendants are forced to take the drastic position that no matter what the facts, Mr. Longley's property interests cannot be adversely affected by a decision of the State Engineer. Thus, to avoid a disputed issue of material fact, Defendants attempt to have this Court resolve, as a matter of law, the issue of whether a constitutional deprivation could have taken place by making the broad assertion that the water rights of users from the same water source cannot conceivably be harmed by any decision of the State Engineer "under any scenario advanced." (Br. of Appellees at 21 n.5.) However, adoption of Defendants' position by this Court would have disastrous consequences, drastically altering well-settled principles of constitutional law and water law. The statutes and court-adopted policies of this state, based on the prior appropriation doctrine, demonstrate that the water rights of other persons are at risk or may be adversely affected in an extension request proceeding.

1. The legislature has recognized that the water rights of other persons are at risk or can be adversely affected in an extension request proceeding.

Defendants' broad assertion that the water rights of other persons are not at risk or adversely affected in an extension request proceeding has superficial appeal but leaves a number of troubling and unanswered questions. **First**, if there truly is "zero risk" of deprivation in an extension request proceeding, (Br. of Appellees at 18), then why has the legislature required published notice of the

application and proceeding? **Second**, if notice by publication is truly designed only to solicit input from the general public, (Br. of Appellees at 26), then why is the scope of publication limited to the county in which the water source is located; shouldn't it be published basin-wide, or even state-wide, if notice by publication is a mere public input or public relations gesture? **Third**, if only the applicant's water rights are at risk of deprivation in an extension request proceeding, (Br. of Appellees at 13), then why has the legislature given water users the right to protest an extension application? **Fourth**, if no other person's water rights are or can be adversely affected by an extension request proceeding, then why has the legislature explicitly recognized that extension request protestants can be "aggrieved by an order of the state engineer" and provided a process whereby extension request protestants "may obtain judicial review by following the procedures and requirements of [the Utah Administrative Procedures Act]"? Utah Code Ann. § 73-3-14(1)(a) (1989) (emphasis added). (See also Br. of Appellee's Part I.)

In light of the canons of statutory construction that any interpretation rendering parts of a statute superfluous be avoided, State v. Hunt, 906 P.2d 311, 312 (Utah 1995), and that statutory provisions are presumed to have been used advisedly, Carlie v. Morgan, 922 P.2d 1, 4 (Utah 1996), Defendants failed to answer these questions.

First, the legislature requires published notice of the application and proceeding to satisfy the demands of due process. The core goal of due process is fairness. See Nelson v. Jacobsen, 669 P.2d 1207, 1211 (Utah 1983). But Defendants' argument that notice by publication is designed only to solicit public input, when taken to its

logical end, means that the State Engineer could dispense with such notice without offending that constitutional objective. If this Court follows Defendants' reasoning, the legislature could, with this Court's pre-approval, rewrite the state's water code to eliminate any notice requirements whatsoever. However, notice is not merely a "feel-good" public relations ploy but is the "*minimum* constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party." Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983) (emphasis added). The legislature infused the water code with notice requirements because it recognized that the State Engineer's decisions can adversely affect others' property interests.

Second, notice by publication is not designed solely to solicit input from the "general public" because the scope of publication is limited to a newspaper in the county in which the water source is located and the right to protest an extension application is limited to water users. See Utah Code Ann. § 73-3-12(2)(g) (1997 Supp.). Not only has the legislature historically recognized that the water rights of other persons are at risk of being adversely affected by an extension request proceeding, it has most recently recognized that the water rights of other persons taking water from the same source of supply are the *only* rights at risk of being adversely affected.² Non water users may not protest an extension application. Utah Code Ann. § 73-3-12(2)(g) (1997 Supp.). Accordingly, in order to inform this

² Compare Utah Code Ann. § 73-3-12(2)(g) (1997 Supp.) (limiting the right to protest an extension to water users from the same water source) with Utah Code Ann. § 73-3-12(1)(f) (1989) (any person may protest the extension).

select group of water rights holders, notice of an extension request is required to be published only "in a newspaper of general circulation in the county in which the source of supply is located and where the water is to be used." Utah Code Ann. § 73-3-12(2)(f)(I)(A) (1997 Supp.) (emphasis added).³ By giving only water users from the same water supply notice of and the right to protest an extension, the legislature has explicitly debunked Defendants' claims that the statutory notice requirements are merely designed to encourage input from the public.

Third and fourth, the legislature has given water users the right to protest an extension application and appeal approval of the application as an "aggrieved party" because, as set forth below, extensions can adversely affect other water users from the same source of supply and, therefore, those water users have the right to be heard. The Utah legislature has explicitly recognized that extension request protestants can be "aggrieved by an order of the state engineer" and has provided a process whereby extension request protestants "may obtain judicial review by following the procedures and requirements of [the Utah Administrative Procedures Act]"? Utah Code Ann. § 73-3-14(1)(a) (1989). Defendants concede this (Br. of Appellees at 10-11), but then argue that the water rights of other users from the same water source cannot conceivably be harmed by any decision of the State Engineer "under any scenario advanced," (Br. of Appellees at 21 n.5).

³ This was true under the pre-1997 version of the statute, as well. See Utah Code Ann. § 73-3-12(1)(e)(i) (1989) (emphasis added) ("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.")

Defendants' inconsistent position is that a person can be adversely affected or aggrieved by a decision of the State Engineer only if he files a timely protest and becomes a party, (Br. of Appellees Part I); but if, for some reason, the state fails to provide adequate notice of a proceeding, thereby causing a water user's failure to protest, (R. 353-54), that water user will not be adversely affected or aggrieved by the State Engineer's decision, (Br. of Appellees Part II). Such gainsaying should not eclipse the legislative recognition that the State Engineer's decisions can leave a person "aggrieved" and in need of an appeal. Utah Code Ann. §73-3-14(1)(a).⁴

⁴ Defendants' argument is severely flawed and disingenuous for other reasons. For example, Defendants assert that Mr. Longley's right to protest and subsequent cause of action to appeal a decision of the State Engineer are not within the bundle of protected property interests of a water user. (Br. of Appellees at 22.) Defendants argue, "Not just any cause of action is a protected property interest." "In order to be a protected property interest," they continue, "the cause of action must be the means by which a claim for a protected property interest is asserted or otherwise protected from deprivation." (Br. of Appellees at 22 (emphasis added).) And yet the entire premise of Part I of Defendants' response brief is that filing a protest before the State Engineer is the only means of legitimately preserving a cause of action to protect one's water rights. "By failing to file his protest with the State Engineer in a timely manner, Longley did not comply with the statutes and regulations governing administrative proceedings before the State Engineer. Participation in the administrative proceedings before the State Engineer is a condition precedent to seeking judicial review of the State Engineer's orders." (Br. of Appellees at 12 (emphasis added).)

Thus Defendants represent in one breath that Mr. Longley should be denied standing because his failure to file a timely protest extinguished the only legitimate means he had to preserve his interests but in the other breath assert that Longley's right to protest and subsequent right of appeal are not within the bundle of constitutionally protected property interests of water users. This, despite their recognition that "the means by which a claim for a protected property interest is asserted or otherwise protected from deprivation," is constitutionally protected. (Br. of Appellees at 22.)

Of course, Defendants self-contradict even this point by

Finally, Defendants' argument that the right to protest is merely some sort of public relations or public input device, (Br. of Appellees at 26), means the State Engineer could arbitrarily strip individuals of the right to protest or disregard protests with impunity. The State Engineer could, under Defendants' reasoning, approve new applications that over-appropriate a stream or approve change applications that alter use from a 70% return flow to a 100% consumptive use without extending the right to protest to downstream or senior water users.

The fact remains that the right to protest is the Utah legislature's recognition of the constitutional right to be heard. Just as the right to be heard is meaningless without first receiving proper notice; proper notice without a subsequent opportunity to be heard is also meaningless. "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking" Fuentes v. Shevin, 407 U.S. 67, 80 (1972), reh'g denied, 409 U.S. 902 (Oct. 10, 1972). "The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment--to minimize substantively unfair or mistaken deprivations" Id. at 80-81. "There [is] no longer any doubt that the right to be heard . . . is . . . essential to due process." Rock v. Arkansas, 483 U.S. 44, 51, n.8 (1987). This Court

asserting that "Longley is not without a remedy to protect his water rights should the need arise," because Longley can bring a cause of action in district court "[i]f the actual diversion and use of water by a junior appropriator interferes with [his] water rights." (Br. of Appellees at 22 n.6.) However, "The claim of denial of due process of law is not foreclosed by the availability of either administrative or state remedial measures." Nelson v. Belle Fourche Irrigation Dist., 845 F. Supp. 1361, 1364 (D.S.D. 1994).

must reject Defendants' spurious contention that Utah's water code is driven more by public relations concerns than constitutional concerns. To accept this would be to strip Utah's water code of any constitutional content. "[I]n this arid state, where a drop of water is a drop of gold," this would be a drastic mistake. Carbon Canal Co. v. Sanpete Water Users Ass'n, 19 Utah 2d 6, 425 P.2d 407-08 (1967).

2. *The Utah Supreme Court has recognized that the water rights of other persons are at risk or can be adversely affected by an extension request proceeding.*

Defendants rely heavily--as they must--on the 1944 case of Whitmore v. Murray City, 107 Utah 445, 154 P.2d 748 (1944) to buttress their overly broad and singular assertion that the State Engineer cannot conceivably affect any water rights in any proceeding. However, Whitmore is distinguishable because the plaintiff in that case was "aware of [the change application] but did not protest." Id. It is undisputed that Mr. Longley was not aware of Leucadia's application until after the time for taking protests had expired. (R. 354-55.) Furthermore, United States and Utah Supreme Court decisions in the past 53 years have drastically undermined the validity of Whitmore's reasoning. For example, in United States v. District Court, 121 Utah 1, 238 P.2d 1132, 1134 (1951) (hereinafter "District Court I"), reh'g denied, 121 Utah 18, 242 P.2d 774 (1952) (hereinafter "District Court II"), the Utah Supreme Court recognized:

The administration of the waters of the western arid states present many vital and complicated problems. The right to the use of water, although a property right, is very different from the ownership of specific property which is subject to possession, control and use as the owner sees fit. Such right does not involve the ownership of a specific body of water but is only a right to use a given amount of the transitory waters of a stream or water source for a specified time, place and purpose, and a

change in any of these might materially affect the rights of other users of the same stream or source.

* * *

The State Engineer's decisions[] often have the effect of determining valuable rights.... His decisions require notice to all interested persons who may protest, whereupon the Engineer must investigate and hear evidence of all interested parties and he should approve or reject applications to appropriate, and applications for a change and issue or deny certificates that such applications have been accomplished in accordance with the law and the facts as he finds them. . . . Thus the decision of the Engineer . . . [has] the effect of establishing or denying valuable rights but such decisions, except where the issuance of a certificate of appropriation or change is involved do not purport to have the effect of adjudicating the right to the use of water

Id. (emphasis added).

Thus the Utah Supreme Court subsequently undermined its holding in Whitmore by recognizing that while the State Engineer does not adjudicate water rights, his decisions often have the practical consequence of affecting valuable rights.⁵ This recognition by the Utah

⁵ The Court recognized this distinction in a series of opinions shortly following Whitmore. In those cases, the Court distinctly recognized that approval of applications to change water can injure the vested rights of other users. See, e.g., District Court II, 242 P.2d at 777 (recognizing adjudication/impairment distinction; Salt Lake City v. Boundary Springs Water Users Ass'n, 2 Utah 2d 141, 270 P.2d 453, 455 (1954) (same; recognizing impairment of vested rights possible); East Bench Irrigation Co. v. Deseret Irrigation Co., 2 Utah 2d 170, 271 P.2d 449, 453-55 (1954) (same); East Bench Irrigation Co. v. State, 5 Utah 2d 235, 300 P.2d 603, 607 (1956) (on appeal from engineer's decision, court "must adjudicate whether a foreseeable possible effect will constitute an impairment of vested rights"). That the result of a State Engineer proceeding on a change application may injure vested rights of other water users was recognized in Crafts v. Hansen, 667 P.2d 1068 (Utah 1983), where the court reversed a summary judgment because there were disputed material issues of facts as to whether there was reasonable cause to believe other rights would not be impaired by approval. Id. at 1081. Justice Oaks dissented, citing Whitmore, and commented

By reversing the district court and remanding this case for trial to resolve issues of fact on the existence of "reason to

Supreme Court, coupled with the United States Supreme Court's expansion of the core of interests considered "property" under the federal constitution in the 1970s,⁶ indicates that Whitmore's rigidly formalistic and simplistic approach, which essentially required a water user to be stripped of his legal claim to water before being deemed to have suffered a deprivation of property, would not be sustainable under modern principles of due process. Risk of a real world deprivation of water--not a water *right*--is all that is required to state a claim for an unconstitutional deprivation.⁷ "If the state prevents you from entering your house it deprives you of your property right even if the fee simple remains securely yours. A *property right is not bare title, but the right of exclusive use and enjoyment.*" Reed v. Village of Shorewood, 704 F.2d 943, 949 (7th Cir. 1983) (emphasis added). Accord Mennonite Bd. of Missions, 462 U.S. at 798 (holding tax sale

believe," the majority effectively . . . telescopes an interlocutory administrative determination on a change application into a mini-adjudication of vested rights. Seen in a larger context, this is just one more instance *where the law is being changed*

Id. at 1081 (citing Whitmore) and 1082 (Oaks, J., dissenting).

⁶This expansion is well-documented. See, e.g. Laurence H. Tribe, American Constitutional Law § 10-9, at 685 (1988) ("During the early 1970's, the circle of interests sufficient to create 'liberty' or 'property' for purposes of due process was significantly widened.")

⁷Mr. Longley well understands that the Leucadia extension proceeding could not strip away the legal title to his water rights. That is not his concern. His concern is how the extension will affect his ability to divert his full entitlement of water. (R. 352-55.) Of course, as Defendants correctly point out, the only way for Mr. Longley to safeguard his rights is to protest the extension by showing the applicant failed to exercise diligence and failed to make a proper showing of reasonable cause for delay. (Br. of Appellees at 25.)

"diminishes the value of a [mortgagee's] security interest by granting the tax-sale purchaser a lien with priority" even though "nullification" of mortgagee's legal interest has not occurred). Likewise, if a decision of the State Engineer would have the practical effect of preventing a water user from receiving the quantity or quality of water to which he is entitled, he deprives that user of his property right even if the purely legal right to use water remains unadjudicated and, therefore, legally unaffected.

Furthermore, since Whitmore, the Utah Supreme Court has recognized the drastic impact repeated extensions, such as Leucadia's Fifth Extension, can have on other water users. For example, in Carbon Canal Co. v. Sanpete Water Users Ass'n, 19 Utah 2d 6, 425 P.2d 405 (1967), the Court reversed a trial court's judgment granting an extension request to Sanpete Water Users Association. Sanpete, like Leucadia, had filed several extension requests, thereby extending the time to put its water to beneficial use and effectively "tying up" that amount of water "for over a quarter century," allegedly to the detriment of the protestant, Canal Co. The Court commented,

"Sanpete's successful extensions for decades . . . impel this court . . . to canvass the facts to determine if, in this arid state, where a drop of water is a drop of gold, one, by extension after extension, may equitably prevent beneficial use of water by others through procedural stagnation for about forty years. We think not" Id. at 407-08.

The Utah Supreme Court therefore not only expressly recognized that "extension after extension[] may . . . prevent beneficial use of water by others" but also recognized the inequity of such a situation and expressly disallowed it. Id.⁸

⁸ See also Blake v. Lambert, 590 P.2d 351, 352 (Utah 1979) ("Water, in an arid state like Utah, is its life-blood, measured in currency

3. *Defendants cannot demonstrate as a matter of law that the water rights of users from the same water source cannot conceivably be harmed by any decision of the State Engineer "under any scenario advanced."*

There are several scenarios under which approval of an extension application could drastically affect the water rights of others on the same source. For example, assume application A was made in 1957 for 25 cfs when 100 cfs was flowing in a stream and available for appropriation. It is now 1997. Applications B, C, and D, in that order, were made in the intervening 40 years, giving B, C, and D each junior rights to 25 cfs in addition to A's senior right, thereby fully appropriating the 100 cfs flowing in the stream. However, since 1957 stream flow has diminished to just 70 cfs and now, after 40 years of delay, A seeks another extension on his 25 cfs. If the extension is granted, A, being a senior, can in the future, under the prior appropriation doctrine in effect in Utah, use his entire 25 cfs, leaving 45 cfs in the stream for B, C, and D. B can still receive his 25 cfs. But once A begins using the water, C has just been permanently deprived of 5 cfs and D has lost the practical ability to divert water altogether.⁹ On the other hand, had C and D protested A's extension

represented by survival itself,--without a high degree of equitable justification for protracted extension."); See In re Determination of Relative Rights to Use of Waters of Deschutes River, 108 P.2d 276, 284 (Ore. 1940) (Oregon Supreme Court retracted "statement [in a prior opinion] that the granting of an extension of time . . . within which to complete the application of water to a beneficial use could not in any way affect the adjudicated rights of other claimants").

⁹ It is therefore shortsighted and overly simplistic for Defendants to maintain "when the State Engineer approves an extension request, all other water rights continue as originally approved; the same quantity of water may be diverted under the same priority date, from the same point of diversion, at the same place of use, and for the same nature of use. . . . They are not adversely affected in any way." (Br. of

application and demonstrated A's lack of diligence lapse and C and D would suffer no deprivation.¹⁰

Assuming the same facts as above, assume further that A's last extension request was denied and no action was taken by the State Engineer upon a request for rehearing, thereby deeming the application lapsed. Relying on the public records, which reflected that the application for extension had lapsed, C and D prudently invest hundreds of thousands of dollars to improve their respective diversion and distribution facilities and change their farming methods, relying on the fact that they would now be able to utilize their water rights to the fullest extent possible.¹¹ Thinking that A is now out of the picture, and that C can divert his full 25 cfs and D can divert the remaining 20 cfs in the stream, D now learns that A's extension request had been unlawfully reinstated after a hearing preceded by defective public notice. A now has the right to put 25 cfs to beneficial use

Appellees at 18.) While it is true that the paper rights of C and D are not adversely impacted in any way, C and D's real world ability of use and enjoyment has been emasculated.

¹⁰ The scenario of an intervening drought or other changes in the water supply over the course of many years is not mere conjecture in an arid state like Utah. It is, perhaps, for this reason that section 73-3-12 allows the State Engineer to approve extensions without notice or right to protest within 14 years of application but requires notice and the right to protest for extensions beyond that date. See Utah Code Ann. § 73-3-12(1)(d) (1989). There is a significant likelihood that a water supply has changed 14 years after an application was filed.

¹¹ Of course, C and D realize that upon denial of A's application the waters which A would have been entitled to theoretically revert to the state. But, being two of only three appropriators, each with rights to 25 cfs, on a stream that is now over appropriated (70 cfs of water available but 75 cfs in approved applications) C and D realize that there is no more water left for appropriation to citizens of the state and that the waters of the stream, as a practical matter, are theirs for appropriation. And even if the State Engineer approved more rights on the same source those rights would be junior to C and D's.

and, should A do so, D's farming operation and investments incident thereto are irretrievably lost. As illustrated, Defendants' assertion that a decision of the State Engineer cannot affect other water users' water rights "under any scenario advanced" is false.

C. Mr. Longley's Water Rights Were Adversely Affected by the State Engineer's Illegal Approval of Leucadia's Unlawful and Untimely Extension Request.

A water source has a fixed capacity, like seating in a theater. And water users, like anxious theater goers, line up for the right to enjoy a share of the fixed resource. One's place in line determines the extent to which he or she may enjoy the resource. He who is "first in time is first in right" and therefore enjoys the superior right. District Court I, 238 P.2d at 1136. Of course, with a limited number of seats available for a one-time-only performance, no one could seriously doubt the injury that other theater goers might suffer by allowing one who has been rightfully removed from the line to cut back in ahead of others. This is particularly true of theater goers who were theretofore behind the cutter and when the rules of the theater state that a theater goer must go to the very back of the line if he has not followed theater rules. Likewise, "in this arid state, where a drop of water is a drop of gold," Carbon Canal Co. 425 P.2d at 407-08, and priority is the essence of a water right, District Court I, 238 P.2d at 1136, no court should seriously doubt the injury that other water users might suffer by allowing one who has been rightfully removed from the line to cut back in. See Mennonite Bd. of Missions, 462 U.S. at 798 (holding tax sale deprived mortgagee of constitutionally protected property interest because the sale

"diminishe[d] the value of [mortgagee's] security interest by granting the tax-sale purchaser a lien with priority").

A junior water user is also analogous to a junior mortgagee. Both have rights in a limited resource--a home or a water source--but do not have legal title to the resource. Both have rights that are junior or inferior to rights of those whose rights are prior in time. Therefore, both run the risk of being deprived of the practical realization of their "paper" rights.¹² For this reason, courts have held that a junior mortgagee is entitled to due process protections. See Island Financial, Inc. v. Ballman, 607 A.2d 76, 79 (Md. Ct. Spec. App. 1992) (a junior mortgagee, which did not receive notice of a senior's foreclosure, was entitled to actual notice because "ratification of the foreclosure sale has the ultimate effect of nullifying [its] interest in the property" even though a surplus of \$321.33 existed after foreclosure of the first trust deed).

A junior mortgagee, who had supplanted a senior mortgagee when the senior's interest had terminated by operation of law, would obviously

¹² For example, if a water source was limited to 120 cfs at the time the junior water user acquired his water right for 20 cfs, subject to the 100 cfs right of a prior appropriator, but the water source is reduced to 100 cfs, the junior water user obtains no water though his paper right remains in tact. Likewise, if a home was worth \$120,000.00 at the time the junior mortgagee acquired his \$20,000.00 interest subject to the \$100,000.00 interest of the prior mortgagee, but is only worth \$100,000.00 at the time of foreclosure, the junior mortgagee obtains nothing from the foreclosure proceeds even though his paper rights are not taken from him. Given the sensitive nature of the junior mortgagee and water user's rights, each would have a vested interest in receiving notice of any proceeding that might affect the rights of the senior. If the rights of the senior are somehow eliminated or lapsed, the right of the junior is obviously a much more valuable right as a result. On the other hand, even if the senior rights are not somehow eliminated, any assertion by the senior of those rights has a drastic real world impact on the rights of the junior.

be adversely affected or deprived of a valuable interest in proceedings wherein the senior asserted that his interest was not actually extinguished and should remain intact. See Mennonite Bd. of Missions, 462 U.S. at 798 (deprivation of priority without notice is unconstitutional). This is the essence of Mr. Longley's complaint, wherein it is alleged that Leucadia was rightfully removed from line but was allowed to cut back in through the illegal action of the State Engineer, (R. 160-67).¹³ Leucadia's water rights lapsed as a matter of law when it failed to submit verified proof of appropriation on or before November 30, 1989. (R. 42-47, 163, 331.) The State Engineer had no authority or power to resurrect Leucadia's water right by a purported Fifth Extension Request filed on September 21, 1990, a full ten months after Leucadia's water rights lapsed as a matter of law. (R. 52, 58-59, 163-65.) In Baugh v. Criddle, 19 Utah 2d 361, 431 P.2d 790 (1967), a water user's predecessor had, like Leucadia, been granted an extension request under a similar statute and, like Leucadia, on the eve of the extension deadline submitted unverified proof of appropriation. Id. at 791. The Utah Supreme Court held that the water right had lapsed under Utah Code Ann. § 73-1-4 when verified proof was not submitted by the deadline. Id. The Court held that the statute mandated that the application lapse and that the State Engineer lacked authority to alter this result. Id.

¹³ Thus, Defendants' assertion that "When the State Engineer decides that due diligence or reasonable cause for delay has not been shown and that an application must lapse, the State Engineer's decision may indirectly benefit other appropriators. . . . [but] does not adversely affect their water rights," (Br. of Appellee's at 18), severely misses the point by completely ignoring the facts of this case.

The Court further held that statutory provisions like section 73-1-4 and 73-3-12 "should be strictly construed," id. (quoting Kinney, Irrigation and Water Rights, 2d ed., 1912, Vol. 2, § 1120), because "[i]n this arid state, where water is the heartbeat of our economy, more and more it becomes quite obvious that development of water must require strict adherence to statutory sanctions, without delay or non-conformance thereto,--lest our whole economy lag to the detriment of our future," Id. The principles of Baugh, which dealt with the forfeiture of water rights that had been proved up, demonstrate that under section 73-3-12 failure to submit proof that water has been put to beneficial use by the stipulated deadline for doing so lapses the application by operation of law and, consequently, automatically deprives the applicant of any right to water. Therefore, when Leucadia failed to submit verified proof by the appropriate deadline, (R. 42-47, 163), its water application lapsed by operation of law and the State Engineer had no authority to resurrect that right as he did in this case.¹⁴ The unlawful actions of both Leucadia and the State Engineer to

¹⁴ Even if he did have such authority and the right was resurrected after its November 30, 1989 death, (R. 42-47, 163), Leucadia's right suffered a second death because the State Engineer took no action on Leucadia's request for reconsideration on or before August 19, 1992, a date 20 days from the time Leucadia's request for reconsideration was received, (R. 52, 164). See Utah Code Ann. § 63-46b-13(3)(b) (emphasis added) ("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.") Defendants mislead the Court with their representation that both the Utah Supreme Court and this Court have held that "state agencies may act on requests for reconsideration beyond the 20-day period." (Br. of Appellees at 28 n.12.) Neither Harper Inv., Inc. v. Auditing Div., 868 P.2d 813, 815-16 (Utah 1994) nor 49th Street Galleria v. Tax Comm'n, 860 P.2d 996, 999 (Utah Ct. App. 1993), cert. denied 878 P.2d 1154 (Utah 1994), can be read so broadly. Instead, both cases dealt with proper tolling of the 30-day appeal period and held that the 30-day period is not triggered until the latter of the following: (1)

resurrect that right effectively allowed Leucadia to cut back in line when other water users, like Mr. Longley, had already, by operation of law, moved ahead. Accordingly, under the peculiar facts of this case, Mr. Longley could have been injured by Leucadia's and the State Engineer's unlawful action. (R. 159, 172, 353-55, 562, 564-65, 567.)

II. THE PUBLISHED NOTICE OF LEUCADIA'S EXTENSION REQUEST WAS CONSTITUTIONALLY INADEQUATE UNDER THE CIRCUMSTANCES, DEFECTIVE ON ITS FACE, AND FAILED TO COMPLY WITH UTAH LAW.

A. Notice by Publication Was Constitutionally Inadequate Under the Circumstances and Constitutionally Defective On Its Face.

This Court must start with the premise that notice by publication is generally disfavored and that Defendants' "justification" of this method "is difficult at best," New York v. New York, N.H. & H.R. Co., 344 U.S. 293, 296 (1953), particularly under the facts and circumstances of this case.¹⁵

Defendants' sole justification for eclipsing Mr. Longley's constitutional rights--that because the State Engineer administers

the date on which an order or denial was issued or (2) the date on which an order was deemed to have been denied. See Harper, 868 P.2d at 815-16. "[I]f an agency chooses to issue an order denying a petition for reconsideration after the twenty-day presumptive denial period, the actual date of issuance would mark the beginning of the thirty-day time period." Id. at 816 (emphasis added). Neither case holds that the agency may approve a petition for reconsideration after the twenty-day presumptive denial period.

¹⁵ Nothing in the Utah Supreme Court's recent opinion in V-1 Oil Company v. Dept. of Environmental Quality, 939 P.2d 1192 (Utah 1997) alters the constitutional analysis this Court should utilize. The proper constitutional standards are clearly set forth in Part I.B. of Mr. Longley's initial brief and are incorporated herein by this reference. The V-1 Oil court simply recognized the Mathews v. Eldridge, 424 U.S. 319, 335 (1976), balancing approach adopted more than 20 years ago by the United States Supreme Court and discussed at page 20 of Mr. Longley's initial brief.

approximately 120,000 water rights individual notice to water users would be "overwhelmingly burdensome" (Br. of Appellees at 29)--is a misleading red herring that must be rejected for a number of reasons. First, water users often own more than one right from the same source of supply. For example, a single water user may hold 50 water rights. Therefore, notice to water rights holders is all that would be required and would be much less burdensome than Defendants suggest. Second, the State Engineer would not be required to give actual notice to all water users in the state any time he took action. Instead, actual notice would be given only to those who: (1) request it; (2) provide information making their whereabouts and identity reasonably ascertainable; and (3) could be affected adversely by his decision (e.g., only those who hold water rights in the same source of supply). The number of persons conforming to these criteria would be a mere fraction of 120,000.

Third, Defendants cannot dispute that other agencies in this state provide notice of their proceedings to all who request it. (See Br. of Appellant at 26 & n.13.) Fourth, they cannot dispute that states much more populous than Utah are required to provide notice of administrative proceedings to all who request it. (See Br. of Appellant at 25-26.) Fifth, and finally, Defendants cannot dispute that Mr. Longley's name and address were reasonably ascertainable, and that he--and only he--requested actual notice of this particular application. (Br. of Appellees at 7; R. 330-31, 353-54, 365, 515, 530, 556-57, 562-63, 565-67.)¹⁶

¹⁶ The State Engineer maintains a file on each water right. Mr. Longley's request for actual notice was placed in the file for

Therefore, Defendants cannot dispute the conclusion that the cost of one sheet of paper, one envelope, and one stamp, should not outweigh Mr. Longley's constitutional right to receive adequate notice.¹⁷ There is no risk of destabilizing water rights in this State by requiring that actual notice be given to those water users from the same source of supply who request it, as Defendants' spuriously contend. (Br. of Appellees at 29-30.) This system of providing actual notice has not destabilized the water rights in Colorado or Nebraska. See Colo. Rev. Stat. § 37-92-302(3)(b), and (c) (1990) (requiring that 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"); Neb. Rev. Stat. § 46-238(2) (1996) (requiring notice of an extension request to be given to "any person who requests notification of the [extension] hearing"). It has not destabilized the numerous other Utah agencies who follow such a policy. (See Br. of Appellant at 26 & n.13.) The essence of Defendants' objection to an actual notice requirement is this: "If such a duty were found to exist by reason of due process . . . [s]uch a task is . . . contrary to the reasonable procedures outlined by the Legislature." (Br. of Appellees at 29.) However, when legislated administrative convenience inadequately safeguards sacred constitutional protections, the legislation must yield.

Leucadia's water right. There is no burden on the State Engineer to give actual notice to those persons who have a request for such notice placed in the file of a particular water right.

¹⁷ The State Engineer could also charge an administrative fee to those desiring such notice.

Moreover, as demonstrated in Part I above, Leucadia's failure to file verified proof by November 30, 1989, (R. 42-47, 163) or 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), dissolved Leucadia's water right by operation of law and sent notice to all water users from the same source of supply that Leucadia had been bumped out of line and stripped of its priority date. Baugh, 431 P.2d at 791-92. The Defendants' subsequent attempts to resurrect this lapsed right were unlawful. But, even assuming the lawfulness of these attempts, Defendants were constitutionally required to take more drastic steps to notify interested persons of this unusual action, particularly in the event that water users had detrimentally relied on the State Engineer's decisions lapsing Leucadia's right. (See Br. of Appellant at 23-24.)

Finally, for the reasons explained in Part II.B. below, which is incorporated herein by this reference, the published notice itself was constitutionally defective on its face. Therefore, even if this Court were to conclude that Mr. Longley was not entitled to actual notice under the circumstances, it would still need to reverse the trial court's decision because the published notice itself was not reasonably calculated to inform interested parties of the pending state action.

B. Although Strict Compliance is Required, The April 1994 Notice Does Not Even Substantially Comply with Statutory Notice Requirements.

Under this Court's holding in Badger v. Madsen, 896 P.2d 20, 23 (Utah Ct. App. 1995) (emphasis added), cert. denied, 910 P.2d 425 (Utah 1995), strict compliance is required even if the failure to adhere to notice requirements could just "possibly prejudice" that person. And

this Court also held in W&G Co. v. Redevelopment Agency, 802 P.2d 755, 761 (Utah Ct. App. 1990) (emphasis added) that "the potential to harm individual property rights" necessitated strict compliance. Since Mr. Longley is more than possibly or potentially affected by an illegal extension request, strict compliance is required. Id.¹⁸

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

Even if Mr. Longley studiously perused the pages of *The Chicago Manual of Style* or the *New York Public Library Writer's Guide to Style and Usage* he still would not have been able to understand the cryptic April 1994 notice. Defendants' maintain that the April 1994 notice listed the well sites "in the form of a sentence that used punctuation very purposefully."¹⁹ Defendants' "sentence"²⁰ is nothing of the sort.

¹⁸ The case of Stahl v. Utah Transit Auth., 618 P.2d 480, 482-83 (Utah 1980), cited by Defendants, (Br. of Appellees at 42), is inapposite because it involved a notice of claim statute whereby a plaintiff's claim for personal injury was threatened to be extinguished for not presenting notice of his claim to the proper authority in precisely the prescribed manner. Conversely, in the case at bar, the Defendants--not the plaintiff--had a statutory charge to provide notice so Plaintiff could safeguard his rights and not forfeit his cause of action to defend those rights. Stahl is simply irrelevant and animated by different policy concerns.

The quoted excerpt, (Br. of Appellees at 42), from Defendants' only other cited authority, Felida Neighborhood Assoc. v. Clark County, 913 P.2d 823, 826 (Wash. Ct. App. 1996), review denied, 922 P.2d 98 (Wash. 1996), actually supports Mr. Longley's position. "Failure to satisfy the notice requirements . . . is excused where substantial compliance resulted in full and adequate notice." Id. (emphasis added). It is undisputed that the April 1994 notice did not result in notice to Mr. Longley, (R. 354-55), therefore the notice did not even substantially comply with statutory requirements

¹⁹ Defendants assert:

In his brief, Longley lists the proposed new points of diversion in a form that is misleading. (See Br. of

The first of these "important and sometimes multiple purposes" was "to separate the references to the individual wells, which are indicated by serial numbers enclosed within parentheses. This,"²¹ declare the Defendants, "is a very common style of usage." Id.

Appellant at 9, 29 n.16.) The points of diversion as published were not listed in a table, they were listed in the form of a sentence that used punctuation very purposefully. Longley's tabular listing misleadingly isolates the courses and distances for the individual diversion points and de-emphasizes the punctuation used. While tabular listing is convenient for comparison purposes, Longley's tabular listing is inaccurate because it distorts the actual published notice.

(Br. of Appellees at 38 n.16.)

In the interests of credibility, Mr. Longley would like to point out that Defendants' statement "The points of diversion as published were not listed in a table, they were listed in the form of a sentence that used punctuation very purposefully" should have a semicolon in it rather than a comma. See, e.g., The Chicago Manual of Style § 5.89 at 181 (14th ed. 1993).

Also, Defendants' argument about Mr. Longley's vertical presentation of the list being misleading is specious. It is not a "table" at all. See, e.g., id. chap. 12 "Tables." It is a series (also called an *enumeration*), presentable in either "run-in" style (as in the 1994 notice) or "list" style (as in Mr. Longley's brief). See id. at §§ 5.57-5.61 & 8.75-8.77. The differences are—at least, they are supposed to be—purely stylistic; it's not supposed to make any difference which way the series is presented, and either way is correct. See id. at §§ 5.61 & 8.76. The 1994 notice ought to be intelligible in either form.

²⁰ It runs as follows:

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.

²¹ This, in this sentence, has multiple (and therefore ambiguous) antecedents: separation by commas, "serial" numbers (i.e., numbers in a series), and parentheses around such numbers. Page 173 of the *Chicago Manual*, however, to which Defendants cite, discusses only separation by commas.

Defendants cite to page 173 of *The Chicago Manual of Style* (14th ed. 1993) (the "*Chicago Manual*") for support; page 173, however, covers only general comma usage. The correct citation is § 8.75 on page 313:

Enumerations that are run into the text may be indicated by numerals or italic letters in parentheses. In a simple series with little or no punctuation within each item, separation by commas is sufficient. *Otherwise, semicolons are used.*

(emphasis added); See also *id.* at §§ 5.59 & 5.94 ("when items in a series . . . involve internal punctuation, they should be separated by semicolons for the sake of clarity"). Thus, not only *should* there be a semicolon between "Sec 25" and "(3)," for Defendants' interpretation to make any sense at all, the rules of punctuation would *require* one.

Commas were also used, assert Defendants, "to indicate the omission of words that are understood by the context of the sentence" (Br. of Appellees at 38 (citing *Chicago Manual* at 176)), and "to separate elements that grammatically belonged to two or more wells, but were expressed only after the last well" (Br. of Appellees at 39 (paraphrasing *New York Public Library Writer's Guide to Style and Usage* 255 (1994) (the "*New York Guide*"))). What the *New York Guide* actually says, however, is this:

A comma is placed before an element that grammatically belongs to two or more **phrases** but is expressed only after the last one.

New York Guide at 255 (emphasis added). Defendants' well descriptions are not grammatical phrases. They are adverbials of place, designating the locations of six "16 in. wells 0 to 800 ft. deep." Their structure

is entirely distinct from the *New York Guide's* "4-day work week" example cited by Defendants.²²

An example structurally identical to the 1994 notice will demonstrate the inadequacy of Defendants' grammatical position. Suppose you send a runner for a number of books, then modify the list, sending the new list after him:

Same books as on the previous list, but adding the following:
(1) third from the left, (2) tenth from the left on the top shelf, first bookcase, (3) seventh from the left on the top shelf, (4) second from the left, (5) fifth from the left on the third shelf, (6) eighth from the left on the top shelf, second bookcase, over on the east wall of the University of Utah law library.

The descriptions of books 1 and 4, of course, are hopeless: your runner is standing in the middle of a library, surrounded by books which can be identified as "second from the left" or "third from the left." Assuming, however, that he somehow surmounts this obstacle, should he assume, as Defendants argue, that book 1 is on the top shelf of the first bookcase? Why? Because the description of book 2 mentions a "first bookcase"? A proper list, of course, would state somehow that both books 1 and 2 came from the first bookcase -- by repeating it in each description, or by putting "first bookcase" as a heading.

²² See Appendix A The description (repeated here for convenience) 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. contains neither subject nor predicate; indeed, the only verb in the entire provision is the gerund "adding," and the only nouns are "wells" and the unstated "point" in POD. Of course, neither noun is the subject of any sentence. There is no sentence-- just a brief appositive, "same as heretofore," and a lengthy gerund phrase--comprising the rest of the description--the object of which is "wells"; the rest is adverbial locatives.

From Defendants' argument, one must infer that the "top shelf" in the description of book 3 refers to the top shelf of the second bookcase, referenced in the description of book 6; but why doesn't it mean the top shelf of the *first* bookcase, as in book 2's description? There is no good reason to group book 3 with book 6; there isn't even a semicolon between book 2 and book 3 to indicate that they don't go together, or that different groupings exist. In fact, there is no reason even to suspect that any of the books except book 6 are located on any *but* the first bookcase since only book 6's description says anything about it. Nor does any of the descriptions (again excepting book 6's) say anything about the east wall of the library.

The vagueness of this addendum to the earlier list makes it practically useless: *no one could correctly locate these books without extraordinary luck; the data given are simply insufficient.* These objections apply with equal validity to the structure of the 1994 notice:

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.

As with our book example, descriptions 1 and 4 are hopeless: we have no idea where to measure them from; Defendants' reassurance that the necessary information can be found tacked on at the end, as we have seen, is neither grammatically sound nor rhetorically sensible.

Why should anyone assume that well 1 is to be measured from the northwest corner of section 25? And since well 3 clearly states "from NW Cor," can it not be reasonably assumed that the northwest corner of section 25 is meant, as in the description of well 2? There is nothing

to stop us inferring that well 5 is in the northeast corner of section 25, nor any good reason to conclude that any well except number 6 is in section 26 at all. Moreover, the fact that well 6 appears to be in township 42 south of range 14 west says nothing whatever about the locations of wells 1 through 5. The import of the reader being able to determine the location of the wells is obvious. A well 500 feet from your water source is of much greater concern than one five miles away. It is curious that the State Engineer employed this awkward, ambiguous, and confusing format, especially in light of the fact that such notice has in the past been quite clear.²³ However, because he has done so, the notice is defective and fails to comport with minimum requirements of due process and section 73-3-12. See W&G, 802 P.2d at 762.

2. The published notice did not inform the public of the diligence claimed or the reason for the request.

The published notice did not "inform the public of the diligence claimed," as required by Utah Code Ann. § 73-3-12(1)(e)(ii), for those reasons set forth in Part II.B.1 of Mr. Longley's initial brief. It also did not "inform the public of . . . the reason for the request,"

²³ Note, for instance, the February 1, 1971, notice on these same wells (numbered differently):

Hereafter, 6.027 sec.-ft. of water is to be diverted from each or all of 8 16-in. wells, 0-800 ft. deep as follows: . . . (S) [sic] 49.5 ft. E. 49.5 ft. from NW Cor. § 26; (4) S. 49.5 ft. W. 66 ft. from NE Cor. § 26; (5) S. 49.5 ft. E. 2531 ft. from NW Cor. § 25; (6) S. 2343 ft. E. 253 ft. from NW Cor. § 25; (7) S. 2343 ft. W. 49.5 ft. from NE Cor. § 26; (8) S. 2343 ft. E. 2970 ft. NW Cor. § 26; all T42S, R14W.

Washington County News, St. George, Utah, Feb. 1, 1971 (Appendix B). Here it appears that the State Engineer (Hubert C. Lambert at that time) had no problem understanding and properly using semicolons; nor clearly stating the corner and section for each well; nor plainly declaring that all of them were in township 42 south, range 14 west.

id., and Defendants' assertion to the contrary is absurd. Defendants argue "the published notice stated that the reason for the request was 'that additional time [was] needed to place the water to beneficial use.'" (Br. of Appellee's at 37.) In other words, "we need an extension because we need an extension," Defendants assert, satisfies the statutory requirement that notice of an extension request must "inform the public of . . . the reason for the [extension] request." Utah Code Ann. § 73-3-12(1)(e)(ii) (emphasis added). This absurdity violates nearly every canon of statutory construction and must be rejected.²⁴

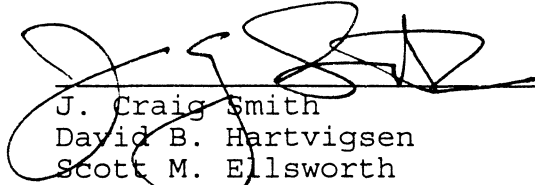
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²⁴ Defendants' argument would suffice if the notice statute said, "The notice shall contain information that will inform the public of . . . the . . . request." However, the statute says, "The notice shall contain information that will inform the public of . . . the reason for the request." Utah Code Ann. § 73-3-12(1)(e)(ii) (emphasis added). Defendants' proffered interpretation requires this court to ignore some of the statutory language. However, "In the process of interpretation, courts may not take, strike, or read anything out of a statute or delete, subtract, or omit anything therefrom." W&G, 802 P.2d at 769 (citations omitted). See also, e.g., Carlie, 922 P.2d at 4 (statutory provisions should be presumed to have been used advisedly); Beaver County v. Utah State Tax Comm'n, 916 P.2d 344, 358 (Utah 1996) (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); Hunt, 906 P.2d at 312 (interpretation that renders parts of a statute superfluous is to be avoided).

CONCLUSION

For the reasons set forth herein, the grant of summary judgment by the district court must be reversed and this matter remanded for further proceedings.

DATED this 12th day of December, 1997.

A large, stylized handwritten signature in black ink, likely belonging to J. Craig Smith, is written over the names of the attorneys.

J. Craig Smith
David B. Hartvigsen
Scott M. Ellsworth
Daniel J. McDonald

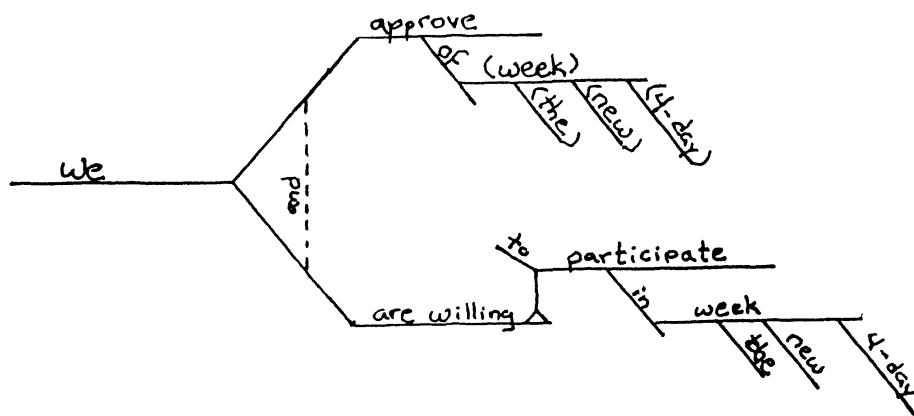
NIELSEN & SENIOR

Attorneys for Plaintiff and Appellant

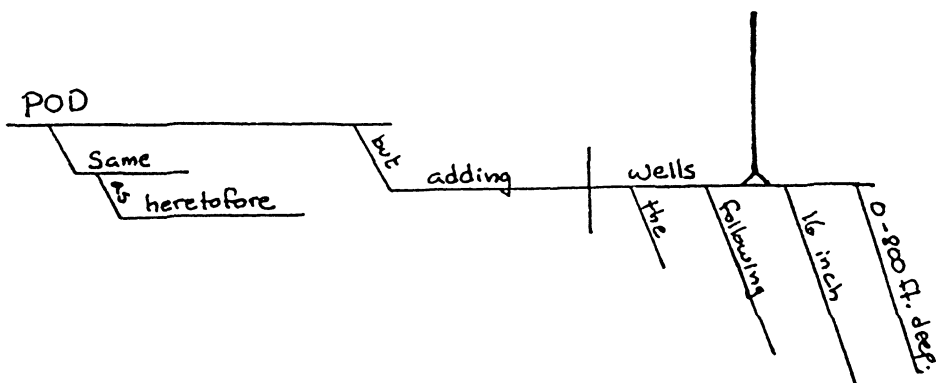
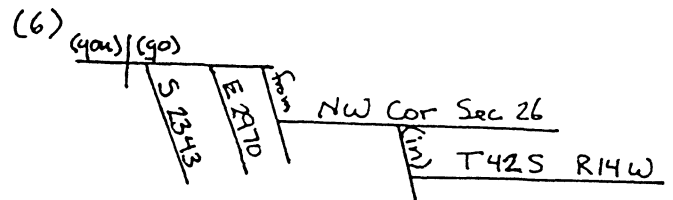
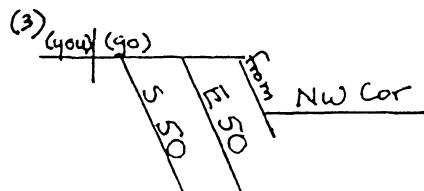
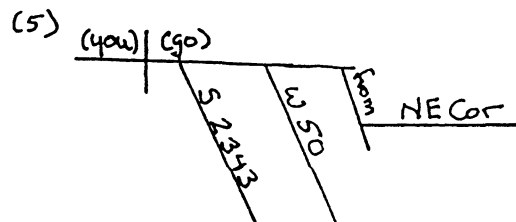
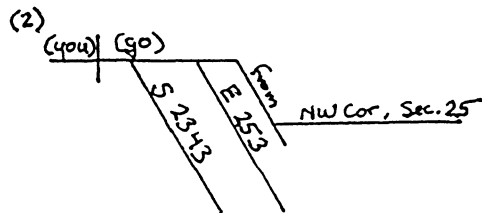
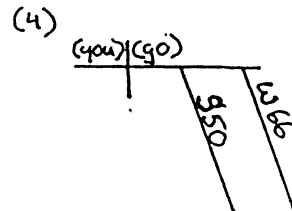
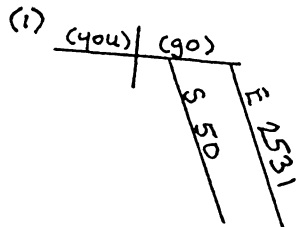
APPENDICES

APPENDIX "A"

We approve of, and are willing to participate in, the new 4-day work week.



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) 2343 E 2970 from NW Cor, Sec 26, T42S,
 R14W.



APPENDIX "B"

STATE OF UTAH
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF WATER RIGHTS

442 STATE CAPITOL
SALT LAKE CITY UTAH 84114

HUBERT C. LAMBERT
STATE ENGINEER

TELEPHONE
328-5671

NOTICE TO WATER USERS

The following applications have been filed with the State Engineer to change water in Washington County, State of Utah, throughout the entire year unless other designated. Locations in SLB&M.

a-6391 Terracor, 529 E. South Temple, Salt Lake City, Utah, proposes to change the point of diversion, place and nature of use of 2.0 sec.-ft. of water as evidenced by App. 33926 (81-669). The water was to have been diverted from a 16-in. well, 40-500 ft. deep at a point N. 40 ft. W. 1320 ft. from S. 16. Cor. Sec. 16, T42S, R13W, and used from May 1 to Dec. 31 for stockwatering of 50 cattle and from May 1 to Oct. 1 for irrigation of 170 acres within W $\frac{1}{2}$ -S $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, S $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ N $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 16, T42S, R13W.

Hereafter, 2.0 sec.-ft. of water to be diverted from each or all of 7 16-in. wells, 0-800 ft. deep as follows: (1) Same as heretofore, (2) S. 49.5 ft. E. 49.5 ft. from NW Cor. Sec. 26; (3) S. 49.5 ft. W. 66 ft. from NE Cor. Sec. 26; (4) S. 49.5 ft. E. 31 ft. from NW Cor. Sec. 25; (5) S. 2343 ft. E. 253 ft. from NW Cor. Sec. 25; (6) S. 2343 ft. W. 49.5 ft. from NE Cor. Sec. 26; (7) S. 2343 ft. E. 2970 ft. from NW Cor. Sec. 26, all T42S, R14W; and used as heretofore in addition to misc. uses for domestic recreation and industrial purposes within Secs. 5-8, T43S, R15W, and Secs. 11-15, 22 & 23, T43S, R16W.

a-6392 Terracor, 529 E. South Temple, Salt Lake City, Utah, proposes to change the point of diversion, place and nature of use of 3.0 sec.-ft. of water as evidenced by App. No. 35439 (81-679). The water was to have been diverted from a 16-in. well, 20-200 ft. deep at a point S. 70 ft. E. 1184 ft. from W $\frac{1}{4}$ Cor. Sec. 9, T43S, R15W, and used from Jan. 1 to Dec. 31 by means of an earth-filled dam 10 ft. high creating a reservoir having an 8 ac.-ft. capacity inundating 1 acre; and used for stockwatering of 200 cattle, supplemental irrigation of 300 acres within E $\frac{1}{2}$ Sec. 8, and W $\frac{1}{2}$ Sec. 8, T43S, R15W.

Hereafter, 3.0 sec.-ft. of water to be diverted from 2 wells as follows: (1) Same as heretofore, (2) 16-in. well, 0-800 ft.

deep at a point N. 750 ft. W. 10 ft. from E $\frac{1}{4}$ Cor. Sec. 12, T43S, R16W and stored as heretofore and used as heretofore described in addition to misc. uses for municipal domestic, recreation and industrial purposes, within Secs. 5-8, T43S, R15W, and Secs. 11-15, 22 & 23, T43S,

February 1, 1971

RE: CHANGE APPLICATION NO. a-6393

NOTICE TO WATER USERS PUBLISHED IN:
Washington County News, St. George, Utah on
December 17, 24 & 31, 1970.

PROTEST PERIOD ENDED: January 30, 1971

PROTESTED

jh

a-6393 Terracor, 529 E. South Temple, Salt Lake City, Utah, proposes to change the point of diversion, place and nature of use of 6.027 sec.-ft. of water as evidenced by App. No. 36856 (81-669) & 36857 (81-670). The water has been diverted from 2 wells as follows: (1) 16-in. well, 55 ft. deep, located N. 1491 ft. E. 155 ft. from W $\frac{1}{4}$ Cor. Sec. 23; (2) 8-in. well, 45 ft. deep, located S. 100 ft. W. 1100 ft. from E $\frac{1}{4}$ Cor. Sec. 22; all T43S, R16W; and stored from Jan. 1 to Dec. 31 by means of an earth-filled dam 10 ft. high, creating a reservoir having a 10 ac.-ft. capacity inundating 2 acres; and used as follows: (1) domestic purposes of 4 families, stockwatering of 200 cattle; (2) domestic purposes of 1 family, stockwatering of 50 swine, 10 horses, 50 cattle, and 100 poultry; and from Mar. 1 to Nov. 30 for supplemental irrigation of 400 acres but limited to a sole supply on 350 acres within E $\frac{1}{2}$ Sec. 22, N $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 23, T43S, R16W.

Hereafter, 6.027 sec.-ft. of water is to be diverted from each or all of 8 16-in. wells, 0-800 ft. deep as follows: (1 & 2) same as heretofore, (3) S. 49.5 ft. E. 49.5 ft. from NW Cor. Sec. 26; (4) S. 49.5 ft. W. 66 ft. from NE Cor. Sec. 26; (5) S. 49.5 ft. E. 2531 ft. from NW Cor. Sec. 25; (6) S. 2343 ft. E. 253 ft. from NW Cor. Sec. 25; (7) S. 2343 ft. W. 49.5 ft. from NE Cor. Sec. 26; (8) S. 2343 ft. E. 2970 ft. from NW Cor. Sec. 26; all T42S, R14W; and stored as heretofore, and used for domestic purposes of 5 families, stockwatering of 250 cattle, 10 horses, 50 swine, and 100 poultry, in addition to domestic, recreation and industrial uses and from Mar. 1 to Nov. 30 for supplemental irrigation of 400 acres but limited to a sole supply of 350 acres within Secs. 5-8, T43S, R15W, and Secs. 11-15, 22 & 23, T43S, R16W.

Protests resisting the granting of these applications with reasons therefor must be filed in duplicate with the State Engineer, 442 State Capitol, Salt Lake City, Utah 84114, on or before January 31, 1971.

Hubert C. Lambert
STATE ENGINEER

Published in the Washington
County News on December 17,
24, and 31, 1970.

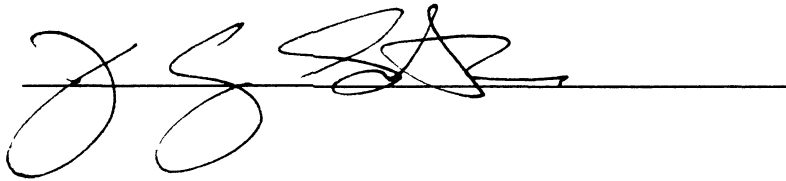
CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on the 12th day of December, 1997, I mailed a true and correct copy of the foregoing Appellant's Reply Brief in the United States mail, first class postage prepaid, to the following:

Richard C. Skeen
Bryon J. Benevento
Thomas W. Clawson
**VAN COTT, BAGLEY, CORNWALL
& McCARTHY**
50 South Main Street
Suite No. 1600
P.O. Box 45340
Salt Lake City, UT 84145

Gary G. Kuhlmann
175 East 200 North
St. George, UT 84770

Michael M. Quealy
John H. Mabey, Jr.
Assistant Attorneys General
1594 West North Temple
Suite No. 300
Salt Lake City, UT 84114-0855

A handwritten signature, likely of John H. Mabey, Jr., is written over a horizontal line. The signature is stylized with large, flowing loops and a prominent 'M'.