

1989

Larry Little v. Greene & Weed Investments, Leon S.
Lippincott, Caroline Lippincott, and Dee C.
Hansen : Brief of Respondent

Utah Court of Appeals

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E. J. Skeen; VanCott, Bagley, Cornwall & McCarthy; Keith S. Christensen; Attorneys for Respondents.

John W. Anderson; Clyde, Pratt & Snow; Attorney for Appellant.

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UTAH
DOCUMENT
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0 IN THE SUPREME COURT OF THE STATE OF UTAH

110
DOCKET NO. **89-177 CA**

~~LARRY LITTLE,~~

Plaintiff and Appellant,

vs.

GREENE & WEED INVESTMENTS,
LEON S. LIPPINCOTT, CAROLINE
LIPPINCOTT, and DEE C. HANSEN,
State Engineer of the State of
Utah.

Defendants and Respondents.)

89-0177-CA

Case No. 860607

BRIEF OF RESPONDENTS
GREENE & WEED INVESTMENTS
AND
LEON S. LIPPINCOTT AND CAROLINE LIPPINCOTT

Appeal from the Judgment of the Sixth District Court
In and For Kane County
Honorable Don V. Tibbs, Judge

VAN COTT, BAGLEY, CORNWALL & McCARTHY
E. J. SKEEN
50 South Main Street, Suite 1600
Post Office Box 45340
Salt Lake City, Utah 84145

Attorneys for Defendants/Respondents
Leon S. and Caroline Lippincott

KEITH S. CHRISTENSEN
230 South 500 East, Suite 160
Salt Lake City, Utah 84102

Attorney for Defendants/Respondents
Greene & Weed Investments

CLYDE, PRATT & SNOW
JOHN W. ANDERSON
77 West 200 South, Suite 200
Salt Lake City, Utah 84101

Attorneys for Plaintiff/Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

LARRY LITTLE,)	
)	
Plaintiff and Appellant,)	
)	
vs.)	
)	
GREENE & WEED INVESTMENTS,)	Case No. 860607
LEON S. LIPPINCOTT, CAROLINE)	
LIPPINCOTT, and DEE C. HANSEN,)	
State Engineer of the State of)	
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VAN COTT, BAGLEY, CORNWALL & McCARTHY
E. J. SKEEN
50 South Main Street, Suite 1600
Post Office Box 45340
Salt Lake City, Utah 84145

Attorneys for Defendants/Respondents
Leon S. and Caroline Lippincott

KEITH S. CHRISTENSEN
230 South 500 East, Suite 160
Salt Lake City, Utah 84102

Attorney for Defendants/Respondents
Greene & Weed Investments

CLYDE, PRATT & SNOW
JOHN W. ANDERSON
77 West 200 South, Suite 200
Salt Lake City, Utah 84101

Attorneys for Plaintiff/Appellant

TABLE OF CONTENTS

	<u>Page</u>
Table of Cases and Authorities Cited	iii
Statement Showing Jurisdiction of this Court and the Nature of the Proceedings Below	1
Preliminary Statement	2
Statement of the Issues	2
Determinative Statutes	3
Statement of the Case	5
Summary of Arguments	11
Argument	13
I. The Trial Court Properly Held that the Water Right in Dispute was not Conveyed by the 1968 Deed	13
II. It was not Error for the Trial Court to Find that the Intentions of the Parties to a Transaction Involving Ambiguous Documents can be Determined After Consideration of Related Instru- ments and Surrounding Circumstances	17
III. The Water Right in Dispute was Con- veyed by Lester F. Little to Lorna Cottam and Clara Bess Grams by Water Deeds Exhibits L-1 and L-2	22
IV. Respondents Greene and Weed Became the Owners of all of the Water Right Evidenced by State Engineer's Certificate No. 8497 Before Conveyance to Lippincotts.	25
V. The Findings of Fact, Conclusions of Law, and the Judgment Regarding the Fractional Ownership of the Water Right are Supported by the Evidence	28
Conclusion	29

TABLE OF CONTENTS (Cont'd)

APPENDIX

p. 32

- A Hand Written Agreement Signed by all the Sons and Daughters of Lester F. and Madge Little
- B Quit Claim Deed---Water, Lester F. and Madge Little to Lorna Cottam and Clara Bess Little Grams, Nov. 17, 1969
- C Quit Claim Deed---Water, Lester F. and Madge Little to Lorna Cottam and Clara Bess Little Grams
- D Signed and Notarized Statement of Larry L. Little, March 19, 1971
- E Agreement of Purchase Land, Caroline Lippincott (Oct 20, 1975) and Larry L. Little, (Oct 24, 1975)

TABLE OF CASES AND AUTHORITIES CITED

	<u>Page</u>
<u>CASES CITED</u>	
<u>Chournos v. D'Agnillo</u> , (1982) 642 P2d, 710	17
<u>Clotsworthy v. Clyde</u> , 1 Utah 2d 251, 265 P2d 420 (1954)	18
<u>Creason v. Peterson</u> , (1970) 24 Utah 2d 305, 470 P2d 403	17
<u>Duchesne County v. Humpherys</u> , 106 Utah 332, 148 P2d 338 (1944)	11,14,15
<u>Jordan vs Utah RR</u> , 47 Utah 519, 156 p. 939 (1916)	25
<u>Lake Shore Duck Club v. Lake View Duck Club</u> , 50 Utah 76, 166 P. 309 (1917)	14
<u>Little Cottonwood Water Co., v. Kimball</u> , 76 Utah 243, 289 P. 116 (1930)	15
<u>Mitchell vs Palmer</u> , 121 Utah 245, 240 P2d 970 (1952)	25
<u>Riordan v. Westwood</u> , Utah 203 P2d 922, 930 (1949)	15
<u>Russell v. Geyser-Marion Gold Mining Co.</u> , (1967) 18 Utah 2d 363, 423 P2d 487	17,18
<u>Tarpey vs Desert Salt Co.</u> , 5 Utah 205, 14 p. 338 (1887)	25
<u>United States v. District Court</u> , 121 Utah 1, 238 P2d 1132 (1951)	15
<u>AUTHORITIES CITED</u>	
<u>23 Am Jur 2d</u> , pp 226, 227	17
<u>23 Am Jur 2d</u> , p. 236	18

STATUTES AND RULES

<u>Section 57-3-3</u> , Utah Code Annotated, 1953	25
<u>Section 73-1-10</u> , Utah Code Annotated, 1953	3,16,27
<u>Section 73-1-11</u> , Utah Code Annotated, 1953	4
<u>Section 73-3-17</u> , Utah Code Annotated, 1953	4
<u>Section 73-3-18</u> , Utah Code Annotated, 1953	4,16
<u>Rule 3(a)</u> , Rules, Utah Supreme Court	1
<u>Rule 54(b)</u> , Utah Rules of Civil Procedure	1

IN THE SUPREME COURT OF THE STATE OF UTAH

LARRY LITTLE,)	
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Plaintiff and Appellant,)	
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GREENE & WEED INVESTMENTS,)	Case No. 860607
LEON S. LIPPINCOTT, CAROLINE)	
LIPPINCOTT, and DEE C. HANSEN,)	
State Engineer of the State of)	
Utah.)	
)	
Defendants and Respondents.))	

BRIEF OF RESPONDENTS
GREENE & WEED INVESTMENTS
AND
LEON S. LIPPINCOTT AND CAROLINE LIPPINCOTT

STATEMENT SHOWING JURISDICTION OF THIS COURT
AND THE NATURE OF THE PROCEEDINGS BELOW

The Court has jurisdiction of this appeal from a final judgment of the District Court under Rule 54(b) of the Utah Rules of Civil Procedure and Rule 3(a) of the Rules of the Utah Supreme Court.

The amended complaint alleges three causes of action:

(1) an action to review the decision of the State Engineer approving Change Application No. a12291 (85-925) filed by respondents Greene and Weed, (2) an action to quiet title to a water right evidenced by Water Users Claim to 0.92 cfs, (based on State Engineer's Certificate of Appropriation No. 8497 on Segregated Application No. 26838a), and (3) an action to quiet title to the same water right against the respondents Leon S. Lippincott and Caroline Lippincott. (R. 19-23)

PRELIMINARY STATEMENT

The parties will be referred to by name or by the appellant (Larry L. Little), respondents Greene & Weed, and respondents Lippincott. References to the record, comprising some 200 pages, will be (R.). The transcript, which is separately numbered, will be referred to as (Tr.).

There is considerable duplication among the exhibits. Those marked with a blue "Exhibit" label were attached to the Pre-Trial Order (R. 112-126), and were referred to at the trial by the blue label "Exhibit" numbers. Other Exhibits were introduced in the trial and were identified in the usual way. In this brief, the documents in evidenced marked by blue "Exhibit" labels will be identified as (Ex.). The documents which are not included in the foregoing group will be referred to as (Pl.) or (Def.). Where there are duplicate exhibits in the file, the number of each exhibit will be given.

STATEMENT OF THE ISSUES

1. Whether the trial court properly found and held that the water right in dispute, evidenced only by an uncertificated water application, was not appurtenant to the land conveyed by the 1968 deed.

2. Whether it was not error to find that the intention of the grantors in the 1968 deed to convey only land could be determined after the consideration by the court of related instruments and the surrounding circumstances.

3. Whether the water deeds, Exhibits L-1 and L-2, conveyed to Cottam and Grams the title to Well No. 1 (upper well) and the water right in dispute.

4. Whether the respondents, Greene and Weed, became the owners of all of the water right evidenced by Certificate No. 8497.

5. Whether the findings of fact, conclusions of law, and the judgment regarding the fractional ownership, by the parties, of the water right in dispute are supported by the evidence.

DETERMINATIVE STATUTES

Section 73-1-10, Utah Code Annotated, 1953.

"Conveyance of water rights - Deed - Exceptions
Filing and recordation of deed.

"Water rights, whether evidenced by decrees, by certificates of appropriation, by diligence claims to the use of surface or underground water or by water users' claims filed in general determination proceedings, shall be transferred by deed in substantially the same manner as real estate, except when they are represented by shares of stock in a corporation, in which case water shall not be deemed to be appurtenant to the land; and such deeds shall be recorded in books kept for that purpose in the office of the recorder of the county where the place of diversion of the water from its natural channel is situated and in the county where the water is applied. A certified copy of such deed, or other instrument, transferring such water rights shall be promptly transmitted by the county recorder to the state engineer for filing. Every deed of a water right so recorded shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof, and subsequent purchasers, mortgagees and lien holders shall be deemed to purchase and take with notice thereof."

Section 73-1-11, Utah Code Annotated, 1953.

"Appurtenant waters - Use as passing under conveyance.

"A right to the use of water appurtenant to land shall pass to the grantee of such land, and, in cases where such right has been exercised in irrigating different parcels of land at different times, such right shall pass to the grantee of any parcel of land on which such right was exercised next preceding the time of the execution of any conveyance thereof; subject, however, in all cases to payment by the grantee in any such conveyance of all amounts unpaid on any assessment then due upon any such right; provided that any such right to the use of water, or any part thereof, may be reserved by the grantor in any such conveyance by making such reservation in express terms in such conveyance, or it may be separately conveyed."

Section 73-3-18, Utah Code Annotated, 1953.

"Lapse of application - Notice - Reinstate-
ment Priorities - Assignment of application -
Filing and recording - Constructive notice -
Effect of failure to record.

"When an application lapses for failure of the applicant to comply with the provisions of this title or the order of the state engineer, notice of such lapsing shall forthwith be given to the applicant by regular mail. Within sixty days after such notice the state engineer may, upon a showing of reasonable cause, reinstate the application with the date of priority changed to the date of reinstatement. The original priority date of a lapsed or forfeited application shall not be reinstated, except upon a showing of fraud or mistake of the state engineer. The priority of an application shall be determined by the date of receiving the written application in the state engineer's office, except as provided in section 73-3-17 and as herein provided.

"Prior to issuance of certificate of appropriation, rights claimed under applications for the appropriation of water may be transferred or assigned by instruments in

writing. Such instruments, when acknowledged or proved and certified in the manner provided by law for the acknowledgement or proving of conveyances of real estate, may be filed in the office of the state engineer and shall from time of filing of same in said office impart notice to all persons of the contents thereof. Every assignment of an application which shall not be recorded as herein provided shall be void as against any subsequent assignee in good faith and for valuable consideration of the same application or any portion thereof where his own assignment shall be first duly recorded."

STATEMENT OF THE CASE

The amended complaint states three causes of action:

(1) to review the decision of the State Engineer approving a change application filed by the respondent Greene and Weed; (2) to quiet title to the water right in dispute as against Greene and Weed; and (3) to quiet title to the same water right against the respondents Lippincott. (R. 19-23) The Court made an order of bifurcation, directing that the quiet title issues be tried first. (R. 46,47)

The subject of the quiet title issues is the right to the use of 0.92 cfs of water from a well referred to in the record as "upper well" and "well No. 1" evidenced by Application to Segregate No. 26838a (85-102) (Ex. B) and Certificate No. 8497 (Ex. E-b). The well is located in Kane County. The segregation of 0.92 cfs is from Application to Appropriate Water No. 26838 (85-33) (Ex. A) (Pl. 1), sometimes referred to in the record as the mother application, which is not otherwise involved in

this case. The description of the location of well No. 1 (upper well) in the mother application and the application to segregate No. 26838a (Ex. B) (Pl. 2) was erroneous. The error was corrected in the segregated application by the approval by the State Engineer of Amendatory Change Application No. a5389. (Ex. F) (Pl. 3)

Proof of appropriation on the segregated application was filed on December 19, 1967. (Ex. F) The state engineer issued Certificate of Appropriation No. 8497 on October 21, 1969, (Ex. E-a) (Pl. 5), and amended it on November 25, 1969. (Ex. E-b) (Pl. 5) The certificates list the same 83.3 acres as described in the segregated application No. 26838-a (85-102). (Pl. 4) (Ex. E-a, E-b)

Lester F. Little (now deceased) owned a ranch in Kane County and by a deed dated January 16, 1968, conveyed to each of his five children, John Kenyon Little, Larry Lester Little (appellant), Lorna Little Cottam, Caroline L. Lippincott (respondent), and Clara Bess Little Grams, an undivided one-fifth interest in land which included all of the 83.3 acres of land described in the segregated application (Ex. D-2) (Pl. 9), except 3.2 acres which had previously been conveyed to John Kenyon Little. (Pl. 8)

On August 3, 1968, the five sons and daughters of Lester divided the land and water rights by a handwritten document signed by all. (Ex. L) (Def. 35) (Appendix A) The "upper well" is mentioned in the third section, divided by lines, from the top of the page in which the name "Lorna" clearly appears.

Exhibits L-1 and L-2 are deeds with the heading, "Quit Claim Deed - Water". The first one mentioned was notarized November 17, 1969, and signed by Lester F. Little and Madge C. Little, husband and wife. It conveys to Lorna Cottam and Clara Bess Little Grams the following:

"Application No. 26838, File No. 85-33,
"Well No. 1
"Described as being; North 2465 feet and West
2640 feet from the Southeast Corner of Section
25, Township 43 South, Range 5 West, Salt Lake
Meridian, Utah."

The second deed corrects the description to conform to that in the Certificates of Appropriation. It is signed, but is undated and not notarized. Exhibit L-1 is Appendix B and L-2 is Appendix C. Both deeds were filed in the State Engineer's Office. (Ex. L-6-a)

Exhibit L-3 is a bill of sale from Lester F. Little to Lorna Little Cottam and Clara Bess Little Grams dated April 19, 1971, transferring all well equipment and the sprinkling system, "....used in connection with, and necessary for the use and operation of that certain water well located in the Southwest quarter of the Northeast quarter of Section 25, Township 43 South, Range 5 West, Salt Lake Meridian, which well and water right were heretofore conveyed to the parties of the second part by the party of the first part."

There is a letter dated May 10, 1971, from Donald C. Norseth of the State Engineer's Office to Lorna L. Cottam, relating to Change Applications a-3790 and a-6196 (85-33), which indicates confusion of the segregated application, No. 26838a (85-102),

with the original application No. 26838 (85-33), (Ex. L-4). In a letter to Mr. Norseth, dated May 11, 1971, (Ex. L-5), Lorna sent to the State Engineer a copy of Exhibit L-6, dated March 19, 1971, which states:

"It was my understanding at the time my siblings and I divided the property we held in common, that the original well #1 of application #26838 (85-33), together with the existing pump, header pipe, sprinkler pipes and engine were to go to Lorna Cottam and Clara Bess Grams."

"/s/ Larry L. Little"

There follows a State of California acknowledgment. Exhibit L-6 is Appendix D.

The letter marked "Exhibit L-6-a", dated May 24, 1972, states that the State Engineer has received documents showing conveyance of title to the subject water rights to Lorna and Clara.

Exhibit "L-7" is a Contract of Sale, dated August 2, 1972, between Lorna L. Cottam and Clara Bess Little Grams, Sellers, and A. H. Greene, Jr., and Daniel R. Weed (herein referred to as Greene and Weed), Buyers, for the sale of land described on Schedule A and the water rights described on Schedule B attached to the contract. All of the water right evidenced by Application No. 26838a (85-102) is included in the sale and is specifically described. Exhibit "L-8" is an escrow agreement which describes the above-mentioned contract, a Warranty Deed, Assignment of Water Rights (Ex. "L-9"), and an abstract of title.

Exhibit "L-22", which consists of title documents filed in the State Engineer's office, contains the deed from Lorna and

Clara to Greene and Weed, dated September 1, 1972, and recorded August 16, 1976. See page 8 of the exhibit.

The State Engineer set up in his Proposed Determination, Water Users Claim 102, the ownership of the water right evidenced by Application No. 26838a and Certificate No. 8497, as follows:

"Lorna L. Cottam and Clara B. Grams
86.55% interest
East Canyon Irrigation Co. 13.45% interest"

(Ex. L-21)

East Canyon Irrigation Co. conveyed its interest in the application and Certificate No. 8497 by a Quit Claim Deed, dated December 18, 1974, to Greene and Weed. (Ex. D-7)

On October 20, 1975, Caroline Lippincott and Larry L. Little signed an Agreement, Exhibit "L-10", by the terms of which they agreed to purchase from Greene and Weed approximately 80 acres of land located East of the county road for \$350.00 an acre, with each party paying 50% of the cost of the land and water right and each receiving 50% of the land and water rights. Larry agreed to do whatever is necessary to preserve the water right and he was to get the feed. Exhibit L-10 is Appendix E.

Exhibit "L-11" is a handwritten letter, dated November 1, 1975, from Larry to Caroline which relates to the Greene and Weed transaction and suggests that Greene and Weed should give them a letter stating that they had deeded away 3/8 only of the water right, and that the water right should be deeded to Caroline. Exhibit "L-12" is a letter, dated November 4, 1975, from Caroline to Greene and Weed which carries out the arrangement evidenced by

Larry's letter, dated November 1, 1975, relating to the land division and the water right, and Exhibit "L-13" is a note to Larry which accompanied a copy of the above-mentioned letter to Greene and Weed. Exhibit "L-14" is a letter, dated January 27, 1976, which obviously refers to the successful completion of the Greene and Weed deal.

Exhibit "L-15" is a deed from Greene and Weed to Leon S. and Caroline Lippincott, conveying a 5/8 interest in the subject water right, and describing it with particularity. Exhibit "L-16" is a deed to a one-quarter (1/4) interest in the water right.

Exhibits "L-17" through "L-23" are certified documents from the State Engineer's file which relate to administrative action taken by the Lippincotts and by Greene and Weed to change the point of diversion and place of use of their respective water rights in the percentages claimed in this action.

The State Engineer, in a document entitled, "Title Abstract" (L-22), divided the subject water as follows:

"Recap 5/23/83

Lippincott	(0.5175 cfs)	237.843 AF
Larry Little	(0.2875 cfs)	132.134 AF
Greene & Weed	(0.115 cfs)	52.853 AF

(Ex. L-22, p. 3)

The fractional equivalents of the foregoing are:

Lippincott	9/16
Larry Little	5/16
Greene & Weed	2/16.

The trial court made findings of fact and conclusions of law, which will be discussed in some detail in the argument, and made an interlocutory decree determining that the fractional interests of the parties in the water right in dispute to be the same as stated by the state engineer (R. 148, 149). This appeal is from that decree.

SUMMARY OF ARGUMENTS

The findings of fact, conclusions of law, and interlocutory judgment appealed from are supported by the evidence, most of which is documentary, and by the law. The contention of the appellant, that the January 16, 1968, deed from Lester F. Little and his wife conveyed to the five children the water rights evidenced by the pending uncertificated application to segregate No. 26838a (85-102), is contrary to the opinion of this court in the case of Duchesne County v. Humpherys, 106 Utah 332, 148 P2d 338 (1944), that a water application, when approved but not yet certificated, is not a vested right to the use of water, but merely gives the applicant the right to complete the appropriation.

The opinion cited is not only supported by the statutes, but by common sense. Until the State Engineer makes a field examination, based on the proof of appropriation, the quantity or flow of water which is available from the source and which can be diverted without impairing the rights of others cannot be determined administratively. It is not of record until the Certificate is issued following the field examination. The contention of the

appellant ignores the basic theory of the water law, that an approved water application merely gives the applicants a right to put water to beneficial use and is referred to in the cases as an inchoate right. The certificate of appropriation is most important and finally determines the flow or quantity of water appropriated. Until this determination is made, the flow or quantity of the water right which becomes appurtenant cannot be determined. If an uncertificated right should become appurtenant to land, the result would be confusion because there would, in many cases, be a difference between the deeded flow or quantity and the certificated flow or quantity.

There are several agreements, letters, deeds, and other documents which clearly show the intentions of the grantors to sever the water rights from the land and to convey them separately. It was the intention of all of the children of Lester and Madge Little to convey the upper well and water right to Lorna and Clara. This is established by the hand written agreement, Exhibit L. This and other documents convinced the State Engineer that the water right evidenced by Water Users Claim No. 102 is in the State Engineer's Proposed Determination, page 152, dated September 30, 1974, was owned by the parties as follows: Lippincott - 9/16, Larry Little - 5/16, and Greene and Weed - 2/16. Since then, the fractional ownership had not been questioned until this action was filed on October 17, 1983.

Furthermore, the appellant, by a letter in evidence, admitted in so many words that it was his understanding at the time he and his siblings divided the property they held in common that the original well No. 1, together with the existing pump, header pipe, sprinkler pipes, and engine, were to go to Lorna Cottam and Clara Bess Grams. Exhibit L-10, Appendix E. He undoubtedly changed his mind when he was told that a technicality in the law might be relied upon to defeat the family plan for division of the property which, many years ago (1968), had been agreed to in writing. (Ex. L)

ARGUMENT

I.

THE TRIAL COURT PROPERLY HELD THAT THE WATER RIGHT IN DISPUTE WAS NOT CONVEYED BY THE 1968 DEED

The Appellant has based his case on the argument that the water right in dispute, evidenced by uncertificated application No. 26838a (85-102), (Pl. 2) (Ex. B), was appurtenant to the land described in the deed, dated January 16, 1968, (Pl. 2) (Ex. D-1), from Lester and Madge Little to their five children when the deed was delivered. He describes the deed as his "root title". The argument in the appellant's brief is made as though the question before this Court is one of first impression. This is not so.

The case of Duchesne County v. Humpherys, 106 Utah 332, 148 P2d 338 (1944), holds that rights evidenced by applications to appropriate water pending, but uncertificated in the State Engineer's office, did not constitute water rights which would be transferred to the grantee of the land described in the applications.

It is stated in the opinion:

"The filing of the application with the state engineer does not give the applicant a vested right to the use of water sought to be appropriated, it merely gives a right to complete the appropriation and put the water to a beneficial use in compliance with the act."

This has been held in a number of Utah cases:

Lake Shore Duck Club v. Lake View Duck Club, 50 Utah 76, 166 P. 309 (1917):

"The certificate so issued and filed shall be prima facie evidence of the appropriator's right to use the water in the quantity, for the purpose, and during the time mentioned therein, and shall be evidence of such right."

"It certainly must be conceded that the purpose of the law is to endow the appropriator of the water with all the insignia of private ownership. The certificate is his deed; his evidence of title good, at least against the state, for all it purports to be, and good as against everyone else who cannot show a superior right."

"The approval of an application to appropriate is only a preliminary step. It confers upon the applicant no perfected right to the use of water. It does not in any way impair or diminish the existing rights of others. It merely clothes the applicant with authority to proceed and perfect, if he can, his proposed appropriation by the actual diversion and application of the water claimed to a beneficial use."

Little Cottonwood Water Co., v. Kimball, 76 Utah 243,
289 P. 116 (1930).

Riordan v. Westwood, Utah 203 P.2d 922, 930 (1949):

"But the approval of this application does not mean that it is adjudicated that there is unappropriated water in the source. The applicant still has to demonstrate that such is the case before a certificate of appropriation can be issued to him."

United States v. District Court, 121 Utah 1, 238 P2d
1132 (1951):

"....no rights to the use of water accrue by mere approving or rejecting of an application, the only thing thereby determined is whether the applicant may proceed, in accordance with the statute, to perfect the right applied for."

The practical reason for the decision in the Duchesne County case that an uncertificated application is not appurtenant to land is that until proof of appropriation is filed on the application and the state engineer makes a field examination, neither the applicant nor the state engineer know whether there is unappropriated water, if so, how much water is available for appropriation from the proposed source, and whether water can be diverted without the impairment of vested rights to the use of water from such source.

If, before a certificate is issued, a deed is made conveying a right to the use of the flow or quantity of water stated in the application and after a field examination is made by the state engineer, the flow or quantity is reduced as is very often the case, the deed and the certificate are in conflict.

Section 73-1-10, UCA, 1953, provides for conveyances of water rights by deed, after certification. It will be noted that the statute states:

"Water rights, whether evidenced by decrees, by certificates of appropriation, by diligence claims to the use of surface or underground water, or by water users' claims filed in general determination proceedings, shall be transferred by deed in substantially the same manner as real estate...."

No reference is made to pending applications. They are clearly excluded by the use of the language, "certificates of appropriation".

Section 73-1-18, UCA, provides for assignment of applications before certification. We quote the pertinent part:

"Prior to issuance of certificate of appropriation, rights claimed under applications for the appropriation of water may be transferred or assigned by instruments in writing. Such instruments, when acknowledged or proved and certified in the manner provided by law for the acknowledgement or proving of conveyances of real estate, may be filed in the office of the state engineer and shall from time of filing of same in said office impart notice to all persons of the contents thereof. Every assignment of an application which shall not be recorded as herein provided shall be void as against any subsequent assignee in good faith and for valuable consideration of the same application or any portion thereof where his own assignment shall be first duly recorded."

In the present case, the certificate of the state engineer was issued on October 21, 1969, nearly two years after the deed to the five children, dated January 16, 1968, was made. There was no vested water right to be appurtenant to the land. It was merely an inchoate water right.

II.

IT WAS NOT ERROR FOR THE TRIAL COURT TO FIND THAT THE INTENTIONS OF THE PARTIES TO A TRANSACTION INVOLVING AMBIGUOUS DOCUMENTS CAN BE DETERMINED AFTER CONSIDERATION OF RELATED INSTRUMENTS AND SURROUNDING CIRCUMSTANCES

This case, as above indicated, involves numerous deeds, some of which are ambiguous, and many other related documents.

The rule is well settled that when the meaning of a deed is not clear or is ambiguous or uncertain, the intention of the grantor is controlling.

23 Am Jur 2d, pp 226, 227. It is stated on page 227:

"The modern tendency is to disregard technicalities and to treat all uncertainties in conveyance as ambiguities to be clarified by resort to the intention of the parties as gathered from the instrument itself, the circumstances attending and leading up to its execution, and the subject matter and the situation of the parties as of that time. Substance rather than form controls. Hence, in the construction of deeds, surrounding circumstances are accorded due weight. In the consideration of these various factors, the court will place itself as nearly as possible in the position of the parties when the instrument was executed, and where the language of a deed is ambiguous, the intention of the parties may be ascertained by a consideration of the surrounding circumstances existing at the time of the execution of the deed."

See also: Chournos v. D'Agnillo, (1982) 642 P 2d, 710; Creason v. Peterson (1970) 24 Utah 2d 305, 470 P2d 403; Russell v. Geyser-Marion Gold Mining Co., (1967) 18 Utah 2d 363, 423 P2d 487.

In order to ascertain the intention of the parties, separate deeds and other instruments relating to the same subject matter may be considered together.

23 Am Jur 2d, p. 236:

"Where the provisions of a deed are doubtful the court may look to the practical construction placed upon the instrument by the parties. The construction put on such a deed by the parties is an indication of their intention, and to determine their construction the court may properly consider their subsequent acts or conduct and statements or admissions. Great weight is to be given to the construction put upon an ambiguous or uncertain deed by the parties, especially in the case of doubtful questions which must be presumed to be within their knowledge, and such practical interpretation of the parties themselves by their acts under a deed is entitled to great, if not controlling, influence...."

Russell v. Geyser-Marion Gold Mining Co., supra.

In the Russell case it was held that the court could consider surrounding circumstances and agreements between the parties to determine the intent and could consider the practical construction placed upon the instrument by the parties.

The case of Clotworthy v. Clyde, 1 Utah 2d 251, 265 P2d 420 (1954) involved various transactions concerning title and a series of legal documents by which plaintiffs made a labored effort to undermine the defendants' title. The court stated:

"Where an instrument or instruments of title leave ambiguity or uncertainty as to intent, the court may look to surrounding circumstances to determine it. After the trial court has done so, we will not disturb his findings nor the judgment based thereon unless the weight of the evidence is clearly against them or he has misapplied principles of law or equity."

The above statement is very much applicable to the present case which likewise involves a series of legal documents mentioned in the statement of the case, some of which are in the appendix.

The plaintiff is attempting to defeat a family plan expressed in writing dated August 3, 1968, several agreements in writing and other written instruments involved in the division of family ranch lands and water rights extending over a period of more than 15 years. He also repudiates his own statement that the water right in dispute was to go to his sisters Lorna and Clara (Ex. L-6) (Appendix E)

The trial court properly considered all of the written instruments and surrounding circumstances to determine the ownership of the water right.

On August 3, 1968, the five grantees, named in the deed dated January 16, 1968, each of whom became the owner of an undivided one-fifth interest in the land described in the deed, met and entered into a handwritten agreement for the division of the land. (Pl. 35) (Ex. L). A copy of the Agreement is Appendix A to this brief. It will be noted that the legal descriptions of the several parcels are separated by lines and that the third and fifth parcels show the name "Lorna preceded by "&", which was undoubtedly following the word "Clara", because, although she signed the instrument, her name does not appear elsewhere in the agreement. Also, the interests of Lorna and Clara were conveyed and otherwise linked together in other instruments. The left hand margin is ragged and indicates that it was probably torn out of a note book.

It will also be noted that the third parcel to Lorna includes the words, "upper well".

Chronologically, the next deed is from Lester F. Little and Madge Little, husband and wife, grantors, to Lorna Cottam and Clara Bess Little Grams, grantees, quit-claimed "....the following described water rights....". It is undated, but was acknowledged on November 27, 1969. It first described an application and "well No. 3", not involved in this case, and then states:

" ALSO
"APPLICATION NO. 26838 - File No. 85-33
"Well No. 1
"Described as being: North 425 feet and West
2582 feet from the East 1/4 corner of Section
25, Township 43 South, Range 5 West, Salt Lake
Meridian Utah."

(Ex. L-1 as corrected by Ex. L-2)

The conveyances of land following the agreement (Ex. L) (Appendix A) among the children, dated August 3, 1968, were all from the five children of Lester and Madge to various members of the family. Each deed was either dated or notarized in December 1969.

Warranty deed (Pl. 8) (Ex. D-3) conveyed to John Kenyon Little the land in Section 25 which included the 3.2 acres previously conveyed to him by his father in 1962 and other land unrelated to the case. (Ex. D-3).

Warranty deed (D-4) conveyed to Larry Little and wife the SE 1/4 of Section 25 and other land in the section. The wells mentioned in the deed did not include Well No. 1 (upper well).

Warranty deed (D-5) conveyed to Lorna Cottam and Clara Bess Little Grams the land described in Exhibit L.

All of the foregoing deeds were either dated or were notarized after the water deeds from Lester and wife to Lorna and Clara effectually severed the water right from the land. The deed dated December 12, 1969, from the five children to Larry and wife therefore conveyed only land. No water right in Well No. 1 was conveyed because Lester had previously by deeds Exhibits L-1 and L-2 conveyed the water rights to Lorna and Clara.

The intention of the parties that the water right in Well No. 1 was to go to Lorna and Clara is shown by the following instruments and circumstances.

1. Agreement, dated August 3, 1968, which expressly so states. (Ex. L) (Appendix A)

2. Deeds from Lester and Madge to Lorna and Clara, dated in November, 1969, (Ex. L-1 and L-2).

3. Notarized statement by Larry L. Little, dated March 19, 1971, (Ex. L-6) in which he states: "It was my understanding at the time my siblings and I divided the property we held in common, that the original Well #1 of Application #26838 (85-33) together with the existing pump, header pipe, sprinkler pipes and engine were to go to Lorna Cottam and Clara Bess Grams.

4. Bill of Sale, dated April 19, 1971, (Ex. L-3) from Lester F. Little, party of the first part, to Lorna Little Cottam and Clara Bess Little Grams, parties of the second part, particularly itemized pipe and other equipment on the Johnson Canyon Ranch, ".... necessary for the use and operation of that certain water well located in the Southwest quarter of the Northeast

quarter of Section 25, Township 43 South, Range 5 West, Salt Lake Meridian, which well and water right were heretofore conveyed to the parties of the second part by party of the first part."

5. Agreement (Ex. L-10) dated October 20, 1975, between Caroline Lippincott and Larry L. Little, by which they agreed to purchase approximately 80 acres lying east of the county road from Weede and Green at \$350.00 per acre by which each party would pay 50% of the cost of the land and water right and each would receive 50% of the land and 50% of the water right.

6. Memo (Ex. L-11), dated November 1, 1975, in Larry Little's handwriting, to which he attached land descriptions for the deeds from "Weed and Greene" in which he stated, "....We can probably best handle the water by having Greene and Weed deed it to you and then handle it with our agreement and later deeds as necessary."

7. Acceptance by Larry of Warranty Deed, dated May 1978, from the Lippincotts conveying a 5/16 interest in the water right in dispute. (Def. 22) (Pl. 6)

III.

THE WATER RIGHT IN DISPUTE WAS CONVEYED
BY LESTER F. LITTLE TO LORNA COTTAM AND CLARA BESS GRAMS
BY WATER DEEDS EXHIBITS L-1 AND L-2

After the water right evidenced by Application No. 26838a (85-102) was certificated by the issuance by the state engineer of Certificate No. 8497 and after the agreement dated

August 3, 1968, among the children of Lester F. and Madge Little that Lorna and Clara were to get the "upper well", Lester and Madge made a document entitled "Quit Claim Deed - Water", (Ex. L-1) (Appendix B), dated November 27, 1969, which conveyed Well No. 1 to Lorna and Clara. This deed contained mistakes in the description and it was followed by a deed (Ex. L-2), worded exactly the same except for changes in the description of the well location.

It should be noted that the description in the deed L-1 is the same as in the mother application No. 26838 (Ex. A) (Pl. 1) which was corrected by the approval of Amendatory Change Application No. a5389 (Ex. F) (Pl. 3). The description in the deed (Ex. L-2) is the same as in the amendatory change application.

These two deeds are attacked by the appellant upon the following grounds:

(1) They refer to the mother application No. 26838 (85-33) and not to the segregated application, No. 26838a (85-102).

(2) The two deeds describe a well and not a water right.

(3) Neither deed was recorded.

(4) The corrected deed, although signed, was not acknowledged.

(5) The grantors named did not own the water right because it had previously been conveyed with land to which it was appurtenant by the deed dated January 16, 1968.

These points will be discussed in the order stated:

(1)

The water to be diverted from the well described in the evidence as the "upper well" and Well No. 1 is described in the mother application, No. 26838 (85-33) in paragraph No. 7. The point of diversion is the same as in the deed (Ex. L-1). The deed is obviously ambiguous because of the reference to the wrong application and the wrong description. The mistake in the application number is cleared up by the application to segregate which separated the No. 1 well right from the mother application. It was still Well No. 1 and the intent to transfer the well to Lorna and Clara is clear.

(2)

The two deeds are entitled "Quit Claim Deed - Water", and the wording preceding the description of the property conveyed is "the following described water rights". The wording in the description, "Well No. 1", was obviously intended to refer to the right to the use of the water from the well. What good is a well without a water right? Did Mr. and Mrs. Little intend to convey to their daughter a hole in the ground without a water right? Obviously not. The facts and circumstances surrounding the family transaction show intent to convey the water right.

(3)

Recording of a deed is not necessary to convey property. The deeds, Exhibits L-1 and L-2, were recorded in the state engineer's office. The fact that they were not recorded in

the county recorder's office did not affect their validity as between the parties. The statute, Section 57-3-3, UCA, merely makes unrecorded conveyances of real property void as against subsequent purchasers in good faith and for a valuable consideration. There is no such purchaser in this case. See Tarpey vs Desert Salt Co., 5 Utah 205, 14 p. 338 (1887).

(4)

The acknowledgment of a deed is not necessary to convey title. Jordan vs Utah RR, 47 Utah 519, 156 p. 939 (1916); Mitchell vs. Palmer, 121 Utah 245, 240 P2d 970 (1952).

(5)

The argument that the grantors in deeds L-1 and L-2 had previously been conveyed by the January 16, 1968, deed to the five children is fully argued above under an appropriate heading and will not be repeated here.

IV.

RESPONDENTS GREENE AND WEED BECAME THE OWNERS
OF ALL OF THE WATER RIGHT EVIDENCED BY
STATE ENGINEER'S CERTIFICATE NO. 8497
BEFORE CONVEYANCE TO LIPPINCOTTS.

The chain of title from Lester F. Little to Greene and Weed is fully documented in the record, and is as follows:

(1) Lester F. Little filed with the state engineer Application No. 2683A which was approved October 15, 1958. (Pl. 1) (Ex. A)

(2) Application to Segregate No. 26838a (85-102) was filed by Lester F. Little to segregate 0.92 second feet from No. 26838 which was approved May 21, 1968. (Pl. 2) (Ex. B) (Ex. C)

(3) Permanent Change Application No. 5389 was filed Dec. 14, 1967, to correct the point of diversion and place of use of Well No. 1. Approved May 21, 1968. (Pl. 3) (Ex. C)

(4) Certificate of Appropriation No. 8497 was issued October 21, 1969, and corrected November 25, 1969, on the segregated application. (Pl. 5) (Ex. Ea, Eb)

(5) Quit Claim Deed - Water, from Lester F. Little and wife to Lorna Cottam and Clara Bess Little Grams conveyed water right in Well No. 1, the location of which was incorrectly described (Ex. L-1), which was corrected by "Quit Claim Deed - Water", (Ex. L-2).

(6) Deed, dated September 1, 1972, from Lorna Little Cottam and Clara Bess Little Grams, grantors, to A. H. Greene and Daniel R. Weed, grantees, conveying a large acreage of land, including land upon which Well No. 1 is located "....together with any and all water rights....". (Pl. 6) (Def. 9)

(7) Deed, dated December 18, 1975, from Lorna Grams to Greene and Weed, conveying a 5/8 interest in disputed water right. (Def. 15)

(8) Deed, dated December 18, 1975, from Clara Bess Little Cottam to Greene and Weed, conveying a 5/8 interest in disputed water right. (Def. 15a)

(9) Quit Claim Deed - Water, from John K. Little and wife to East Canyon Irrigation Company, conveying water rights, including Certificate of Appropriation No. 8497, WUC (85-102) to irrigate 11.20 acres of land. (Pl. 14) (Ex. D-7)

(10) Quit Claim Deed, dated December 18, 1974, from East Canyon Irrigation Company to A. H. Greene, Jr., and Daniel R. Weed, dba Greene and Weed Investments, conveying all rights in Certificate of Appropriation No. 8497, Book W-2, page 84, Kane County records (Water Users Claim No. 85-102), Application No. 26838a, a5989.

The above chain of title is documented by a packet of deeds certified by the state engineer. (Pl. 6) (Ex. L-22) The Title Abstract of the State Engineer, as of 5/23/83, shows the warranty deed from Lorna Little Cottam and Clara Bess Grams, above-mentioned, conveying 0.79626 cfs, 365.96 AF. The next entry shows the East Canyon Irrigation Company conveyance to Greene and Weed of 0.12374 cfs 56.87 AF with the remark, "Now own total right". (Title Abstract - Pl. 6, Ex. L-22).

The above mentioned water deeds were all filed in the state engineer's office pursuant to Section 73-1-10, UCA. The last sentence of that section states:

"Every deed of water right so recorded shall, from the time of filing of the same with the recorder for record, impart notice to all persons of the contents thereof, and subsequent purchasers, mortgagees, and lien holders shall be deemed to purchase and take with notice thereof."

V.

THE FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND THE JUDGMENT REGARDING THE FRACTIONAL
OWNERSHIP OF THE WATER RIGHT ARE SUPPORTED
BY THE EVIDENCE

The findings of fact are based primarily on documents admitted in evidence which total some 70 in number, including those attached to the pre-trial order with a blue "Exhibit" label. For the convenience of the Court, there follows a tabulation containing the number of each finding of fact, except the introductory and explanatory paragraphs, with the reference to the supporting exhibit number or numbers set opposite:

Finding No. 8	(Pl. 1) (Ex. A)
Finding No. 9	(Pl. 2) (Ex. B)
Finding No. 10	(Pl. 3) (Ex. C)
Finding No. 11	(Pl. 4) (Ex. D)
Finding No. 12 (Except last sentence)	(Pl. 9) (Ex. D-2)
Finding No. 12 (Last sentence)	(Tr. 225 - 234) Amended findings (R. 194)
Finding No. 13	(Ex. L) Appendix A
Finding No. 14	(Pl. 5) (Ex. E-a, E-b)
Finding No. 15 (All but last sentence)	(Ex. L-1, L-2)
Finding No. 15 (Last sentence)	(Tr. 170)
Finding No. 16 (All but last sentence)	(Pl. 10) (Ex. D-3)
Finding No. 16 (Last sentence)	(Tr. 232)

Finding No. 17	(Ex. L-3)
Finding No. 18	(Ex. L-6)
Finding No. 19	(Ex. D-8)
Finding No. 20	(Ex. L-1, L-2)
Finding No. 21	(Ex. L-10, L-15, L-16) (Pl. 6) (Ex. D-22)
Finding No. 22	(Pl. 6) (Ex. 22)
Finding No. 23	(Ex. L-23)

The argument in the preceding pages as to disputed findings will not be repeated here. The reception of the numerous documents included in the pre-trial order into evidence was stipulated by counsel for the litigants. (Tr. 70-76) Other documents were stipulated into evidence and were identified by witnesses, who testified as to handwriting. (Tr. 169, 170, 229) There is no issue in the case as to the authenticity of any of the deeds or other documents referred to above.

CONCLUSION

The numerous documents in evidence clearly show the intention of Lester F. Little and his wife, to divide their ranch property, land and water rights, among their five children. The first deed conveyed undivided interests in land. On August 3, 1969, Lester met with his five children and a handwritten agreement was signed which gave Lorna Cottam and Clara Bess Little Grams the "Upper Well" water right. By Exhibits L-1 and L-2 Lester and his wife severed the water right from the land by deeding it to

Cottam and Grams. The water right and a large acreage of land were sold by Cottam and Grams to Greene and Weed Investments, who later acquired an outstanding interest claimed by East Canyon Irrigation Company. Greene and Weed sold back to respondents Lippincott and appellant some land and a 5/8 interest in the water right. This interest in the water right was conveyed to the Lippincotts who conveyed a 5/16 interest to appellant. The Lippincotts later acquired, in a separate transaction, a 1/4 interest in the water right which left a 2/16 interest owned by Greene and Weed Investments. The findings of fact, conclusion of law, and judgment are fully supported by documented evidence and evidence of surrounding circumstances that the interest in the water right in dispute are:


Larry L. Little	5/16
Leon S. and Caroline Lippincott	9/16
Greene & Weed Investments	2/16

The appellant's arguments in his brief on appeal are contrary to admitted facts and the law, and he, as successor to Greene and Weed and the Lippincotts, is estopped from challenging their titles. The judgment of the trial court should be affirmed.

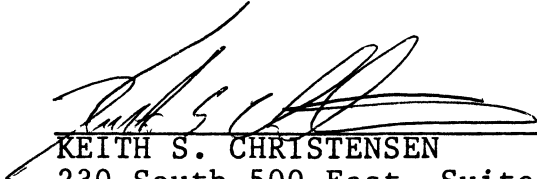
Respectfully submitted,

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By:


E. J. SKEEN
50 South Main Street, Suite 1600
Post Office Box 45340
Salt Lake City, Utah 84145

Attorneys for Defendants/Respondents
Leon S. and Caroline Lippincott



KEITH S. CHRISTENSEN
230 South 500 East, Suite 160
Salt Lake City, Utah 84102


Attorney for Defendants/Respondents
Greene & Weed Investments

CERTIFICATE OF DELIVERY

I hereby certify that I caused four true and correct
copies of the BRIEF OF RESPONDENTS GREENE & WEED INVESTMENTS and
LEON S. LIPPINCOTT and CAROLINE LIPPINCOTT to be hand delivered
this 30th day of December, 1987, to the following:

John W. Anderson, Esq.
CLYDE, PRATT & SNOW
77 West 200 South, Suite 200
Salt Lake City, Utah 84101

Attorneys for Plaintiff/Appellant



E. J. SHEEN

APPENDIX

- A Hand Written Agreement Signed by all the Sons and Daughters of Lester F. and Madge Little
- B Quit Claim Deed---Water, Lester F. and Madge Little to Lorna Cottam and Clara Bess Little Grams, Nov. 17, 1969
- C Quit Claim Deed---Water, Lester F. and Madge Little to Lorna Cottam and Clara Bess Little Grams
- D Signed and Notarized Statement of Larry L. Little, March 19, 1971
- E Agreement of Purchase Land, Caroline Lippincott (Oct 20, 1975) and Larry L. Little, (Oct 24, 1975)

APPENDIX "A"

HAND WRITTEN AGREEMENT

SIGNED BY ALL THE SONS AND DAUGHTERS

OF

LESTER F. LITTLE and MADGE LITTLE

(Ex. L)

Sec 10 1/4 NW 1/4, N 1/2 SW 1/4 Sec 10

NE 1/4 SE 1/4 Sec 14 with grazing stream 1 acre
plus 7-11-12-13-14-15 To Kuyper

Sec 25 Sec 24 Caroline & Larry
S 1/4 SW 1/4, S 1/2 SE 1/4

+ Lorna S 1/2 of NE 1/4 Sec 25, SE SW 1/4 of NW 1/4 Sec 25
NW 1/4 of SW 1/4 Sec 30 (Upper well) & Barn

SE 1/4 of 25 Lower well. Caroline & Larry
& Grazing in the Kuyper Unit

S SW 1/4 of SW 1/4 of 30. N 1/2 of NE 1/4 of 25
Lorna
Upper Fidelity Horse and Irrigation water
in NW 1/4, SW 1/4 Sec 19, All land in SE 1/4 Sec 24, about 30 acres)

above division of the lands was
at to by the undersigned Aug 3, 1968

John K. Little
Clara S. Brown
Lorna S. Cotton
A. Arroyo
Caroline & Larry



APPENDIX "B"

QUIT CLAIM DEED---WATER

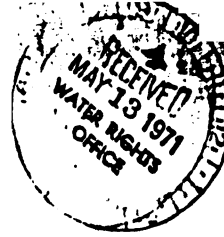
LESTER F. LITTLE & MADGE LITTLE

to

LORNA COTTAM and CLARA BESS LITTLE GRAMS

November 17, 1969

(Ex. L-1)



QUIT CLAIM DEED---WATER

LESTER F. LITTLE & MADGE LITTLE, husband and wife, GRANTORS, of Kanab Kane County, State of Utah, hereby QUIT-CLAIMS TO LORNA COTTAM and CLARA BESS LITTLE GRAMS, both married woman, GRANTEEES, as Tenants in Common, for the sum of Ten (\$10.00) Dollars and other adequate and valuable consideration, the following described WATER RIGHTS,

to-wit:

APPLICATION NO. 32632

Well No. 3

Described as Being; North 1310 feet and East 1310 feet from the Southwest Corner of Section 30, Township 43 South Range 4 West, Salt Lake Meridian Utah.

ALSO

APPLICATION NO. 26838 - File No. 85-37

Well No.

Described as being; North 2465 feet and East 2540 feet from the Southeast Corner of Section 25 Township 43 South Range 5 West, Salt Lake Meridian Utah.

Lester F. Little
Lester F. Little
Madge Little
Madge Little

STATE OF UTAH)

: ss

COUNTY OF KANE)

On the 27th day of November A. D. 1969 personally appeared before me Lester F. Little and Madge Little, husband and wife, the signers of the within and foregoing instrument, who duly acknowledged to me that they executed the same.

[Signature]
Notary Public,
Residing at Kanab Utah

My Commission expires June 1, 1971

APPENDIX "C"

QUIT CLAIM DEED----WATER

LESTER F. LITTLE & MADGE LITTLE

to

LORNA COTTAM and CLARA BESS LITTLE GRAMS

(Ex. L-2)

corrected copy

QUIT CLAIM DEED-----WATER

LESTER F. LITTLE & MADGE LITTLE, husband and wife, GRANTORS,
of Kanab Kane County, State of Utah, hereby QUIT-CLAIMS to LORNA
COTTAM and CLARA BESS LITTLE GRAMS, both married women,
GRANTEES, as Tenants in Common, for the sum of Ten(\$10.00) Dollars
and other adequate and valuable consideration, the following described
WATER RIGHTS, to-wit;

APPLICATION NO. 32632

WELL No. 3

Described as Being; North 1310 feet and East 1310 feet from the southwest
Corner of Section 30, Township 43 South, Range 4 1/2 West, Salt Lake Meridian,
Utah.

ALSO

APPLICATION NO. 26838 - File No. 85-33

Well No. 1

Described as being; North 425 feet and West 2582 feet from the East 1/4
Corner of Section 25, Township 43 South, Range 5 West, Salt Lake Meridian
Utah.

Lester F. Little
Madge C. Little

STATE OF UTAH)

: ss

COUNTY OF KANE)

On the ____ day of November A.D. 1969 personally appeared before me
Lester F. Little and Madge Little, Husband and wife, the signers of the
within and foregoing instrument, who duly acknowledge to me that they
executed the same.

Notary Public,
Residing at Kanab, Utah

My Commission expires _____



APPENDIX "D"

SIGNED AND NOTARIZED STATEMENT

of

LARRY L. LITTLE

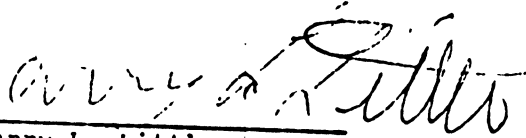
March 19, 1971

(Ex. L-6) (Def 28)



March 14, 1971

It was my understanding at the time my siblings and I divided the property we held in common, that the original well #1 of application #26838 (85-102)³³, together with the existing pump, header pipe, sprinkler pipes and engine were to go to Lorna Cottam and Clara Bess Grams.


Larry L. Little

447 C
individual)

STATE OF CALIFORNIA

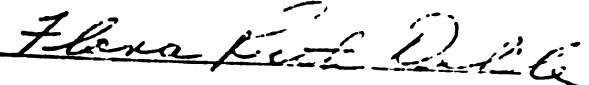
COUNTY OF LOS ANGELES

MARCH 19, 1971

before me, the undersigned, a Notary Public in and for said
state, personally appeared LARRY L. LITTLE

the person whose name is subscribed
the within instrument and acknowledged that he
executed the same.

WITNESS my hand and official seal.

Signature: 
Name (Typed or Printed)



(This area for official notarial use)



APPENDIX "E"

AGREEMENT OF PURCHASE LAND

CAROLINE LIPPINCOTT and LARRY L. LITTLE

Oct. 20, 1975

Oct. 24, 1975

(Ex. L-10)

AGREEMENT OF PURCHASE LAND

The undersigned hereby agree to purchase approximately 80 acres of land laying East of the County road from Weed and Greene at \$350.00 per acre cash on the following basis:

- (1). Each party will pay 50% of the cost of the land and the water right
- (2). Each will receive 50% of the land and 50% of the water right transferred. Any adjustment that may become necessary as the result of pending appeal on adjudication will be made on an equal basis
- (3). The portion of land adjoining that owned by Larry will be included in his one half portion insofar as dividing the water right as described in (2) above will allow.
- (4). Larry Little agrees do whatever is ^{reasonable + legal} necessary to insure the preservation of the water right as relates to the requirement of five year usage. this will be at his sole responsibility and expense. *This item assumes there is still time. LPP also, Larry shall have right to the land for a year or until resale which ever is first.*

Caroline Lippincott
Caroline Lippincott

Larry L. Little
Larry L. Little

Oct. 20, 1975
signed and dated as above

Oct. 24 1975
signed and dated as above