

2010

# Mike Meguerditchian v. Max Smith : Brief of Appellant

Utah Court of Appeals

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Counsel for Appellee; Paul M. King; Hoole & King.

Counsel for Appellant; Darwin C. Fisher.

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IN THE COURT OF APPEALS FOR THE STATE OF UTAH

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MIKE MEGUERDITCHIAN, an  
individual,

Plaintiff/Appellee/Cross-Appellant,

vs.

MAX SMITH, individually and as  
Trustee of the Smith Family Living Trust,  
u/a/d March 19, 1991,

Defendant/Appellant/Cross-Appellee.

Case No. 20100850-CA

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BRIEF OF APPELLANT

---

Appeal from the Sixth District Court of Sanpete County, State of Utah  
The Honorable Marvin Bagley

COUNSEL FOR PLAINTIFF/  
APPELLEE/CROSS-APPELLANT

Paul M. King (#5500)  
HOOLE & KING, L.C.  
4276 South Highland Drive  
Salt Lake City, UT 84124-2634  
Telephone: (801)272-7556

COUNSEL FOR DEFENDANT/  
APPELLANT/CROSS-APPELLEE

Darwin C. Fisher (#1080)  
A Professional Corporation  
40 North 300 East, Suite 101  
St. George, UT 84770  
Telephone No. (435) 688-1170

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UTAH APPELLATE COURT  
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Paul M. King (#5500)  
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4276 South Highland Drive  
Salt Lake City, UT 84124-2634  
Telephone: (801)272-7556

**COUNSEL FOR DEFENDANT/  
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Darwin C. Fisher (#1080)  
A Professional Corporation  
40 North 300 East, Suite 101  
St. George, UT 84770  
Telephone No. (435) 688-1170

## LIST OF PARTIES

The following are parties to this appeal:

1. Defendant/Appellant/Cross-Appellee Max Smith, individually and as Trustee of the Smith Family Living Trust, u/a/d March 19, 1991.
2. Plaintiff/Appellee/Cross-Appellant Mike Meguerditchian

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## **STATEMENT OF JURISDICTION**

On November 15, 2010, the Utah Court of Appeals received this case via pour-over from the Utah Supreme Court. Jurisdiction is proper in this Case under Utah Code §78A-4-103(2)(j).

## **STATEMENT OF ISSUES AND STANDARDS OF REVIEW**

**ISSUE I:** The trial court incorrectly interpreted the holding in *Pyper v. Bond*, 224 P.3d 713 (Utah App., 2009) in concluding that the only standard for setting aside the Sheriff's sale is demonstrating both inadequacy of price and irregularities attending the sale.

**PRESERVATION OF ISSUE:** This issue was preserved below in Mr. Smith's (hereafter "Smith") closing argument, in Smith's Reply Memorandum in Support of Motion to Set Aside Sale, and in the trial Court's Findings of Fact and Conclusions of Law. (R. 1089, 157:1-9; R. 859-860; R. 1048, ¶1).

**STANDARD OF REVIEW:** This issue presents a question of law that is reviewed for correctness. *Pyper v. Bond*, 224 P.3d 713 (Utah App., 2009) at ¶ 9.

**ISSUE II:** The trial court committed error in concluding that there were no irregularities involving the sale of the real property at the Sheriff's Sale.

**PRESERVATION OF ISSUE:** This issue was preserved below in Smith's closing argument, in Smith's Reply Memorandum in Support of Motion to Set Aside Sale, and in the trial Court's Findings of Fact and Conclusions of Law. (R. 1089, 157:23 to 158:11; R. 861-863; R. 1047, ¶ 8;)

STANDARD OF REVIEW: This issue presents a mixed question of law and fact. *Utah Chapter of Sierra Club v. Air Quality Bd.*, 226 P.3d 719 (Utah,2009) at ¶44.

### CONSTITUTIONAL OR STATUTORY PROVISIONS

There are no governing constitutional or statutory provisions.

### STATEMENT OF THE CASE

Prior to January 2000, Mr. Smith and Mr. Meguerditchian (hereafter “Meguerditchian”) orally agreed to jointly develop and sell Phase IV of the Oaker Hills Subdivision consisting of 155 acres (“Real Property”). Misunderstandings arose as to Smith’s and Meguerditchian’s interests in the Real Property and on January 10, 2000, they executed a written Agreement to set forth in writing the terms of their agreement.

On April 25, 2005, Meguerditchian filed a complaint against Smith individually and as Trustee of the Smith Family Living Trust alleging claims for Quiet Title and Partition of the Real Property and for Breach of Contract. Meguerditchian claimed that Smith and the Smith Family Trust had breach the Agreement by failing to transfer title to Lot 349 in Phase III of the Oaker Hills Subdivision to him.

Meguerditchian filed a motion for summary judgment on March 12, 2007. The trial court, on July 9, 2008, granted judgment to Meguerditchian on his breach of contract claim but denied summary judgment on Meguerditchian’s claim for quiet Title and Partition of the Real Property.

On December 8, 2008, the trial court entered an order making the summary judgment a final judgment in the amount of \$54,690.92. In March 2009, Meguerditchian



filed an Application for Writ of Execution which lists non-exempt personal property and a Praecipe directing the sheriff to levy upon, seize, attach, hold and sell Mr. Smith's non-exempt personal property. And, in April 2009, Mr. Meguerditchian filed a Writ of Execution directing the Sheriff of Sanpete County to levy on and sell enough of the non-exempt personal property to satisfy the judgment, and if sufficient non-exempt personal property could not be found, to levy on and sell any non-exempt interest in real property.

On May 19, 2009, the Notice of Sheriff's Sale was issued setting the sale date of Tuesday, July 7, 2009. (R. 635). The Notice of Sale identified the property to be sold as: 1) 9.42 acres, more or less, would be sold; 2) Phase IV of Oaker Hills, containing approximately 145 acres, would be sold; 3) water right number 51-224 would be sold; 4) all other rights of Smith and the Smith Family Trust in water coming from, and the well producing said water, would be sold; and 5) that all other rights of Smith in water rights and/or interests in water wells located in Sanpete County, Utah would be sold. The Notice of Sheriff's sale did not include Smith's personal property. Also on May 19, 2009, Smith was incarcerated and still is in prison.

On July 10, 2009, Meguerditchian was the sole bidder at the Sheriff's sale and purchased the following real property and water rights:

- A. 9.42 acres located in Oaker Hills Subdivision, for \$3,000.
- B. Phase IV of the Oaker Hills Subdivision, consisting of 155 acres, for \$30,000.
- C. Water Right No. 51-224 for \$30,000.

D. Other water rights of Mr. Smith located in Sanpete County, Utah, for \$3,000.

On December 8, 2009, Smith served a Motion to Set Aside the Sheriff's Sale. An evidentiary hearing was held on July 9, 2010, and on September 15, 2010, the trial court issued its Findings of Fact and Conclusions of Law and Order Denying in Part and Granting in Part Smith's Motion to Set Aside the Sheriff's Sale. The trial court granted Smith's motion to set aside the Sheriff's sale of the water rights, but denied Smith's motion to set aside the Sheriff's sale of the real property.

#### **STATEMENT OF FACTS**

1. On July 9, 2008, the trial court entered an Order granting Merguerditchian's motion for summary judgment on his claim for breach of contract. (R. 548, ¶ a.).

2. On December 8, 2008, a final Judgment was filed granting Meguerditchian summary judgment against Smith and the Smith Family Living Trust, jointly and severally, on his second cause of action for breach of contract in the amount of \$54,690.92. (R. 609-610, ¶ 1).

3. On March 26, 2009, Meguerditchian filed an Application for Writ of Execution on the following non-exempt personal property: 1) Fifth Wheel Trailer; 2) Storage Containers; 3) Grading Equipment: Loader and Tractor with brush cutter; 4) Vehicles Registered in Max Smith's name; 5) Accounts; 6) Claims; 7) Causes of action; 8) General Intangibles; 9) Materials; and 10) Equipment. (R. 618, 3. A.).

4. The Application for Writ of Execution states that the non-exempt personal

property is located at the Oaker Hills Subdivision. (R. 618, 3. A.).

5. The Application for Writ of Execution also states that real property is to be sold only if there is insufficient non-exempt personal property sold to satisfy the judgment. (R. 618, 3. A.).

6. On April 1, 2009, Meguerditchian's Writ of Execution was issued commanding the Sheriff to "sell enough of the non-exempt personal property" of Smith and the Smith Family Living Trust to satisfy the judgment and to sell the real property only if there was insufficient non-exempt personal property sold to satisfy the judgment. (R. 622).

7. On April 1, 2009, Meguerditchian filed a Praecipe directing the Sheriff to levy upon and seize "[a]ll of the right, title and interest in non-exempt personal property including, but not limited to: Fifth Wheel Trailer; Storage Containers; Grading Equipment: Loader and Tractor with brush cutter; Vehicles Registered in Max Smith's name; Accounts; Claims; Causes of action; General Intangibles; Materials; Equipment." (R. 624-625, ¶ 1).

8. The Praecipe also provided that the real property would not be sold unless there was insufficient non-exempt personal property sold to satisfy the judgment. (R. 625, ¶1).

9. On May 19, 2009, Smith was incarcerated and remains in prison.

10. On May 19, 2009, a Notice of Sale was issued by the Sanpete County Sheriff's Department setting the sale date of Tuesday, July 7, 2009. (R. 635).

11. The Notice of Sale stated that at the Sheriff's Sale 9.42 acres would be sold, that Phase IV of Oaker Hills would be sold, and all Smith's and the Smith Family Living Trust's rights in water right number 51-224, all rights of Smith and the Smith Family Living Trust in water coming from, and the well producing said water, located near the Oaker Hills Subdivision, and that all other rights of Smith and the Smith Family Living Trust in water rights and/or interests in water wells located in Sanpete County, Utah would be sold at the Sheriff's sale. (R. at 635-636).

12. The Notice of Sale did not include Smith's and the Smith Family Living Trust's non-exempt personal property. (R. at 635-636).

13. On June 15, 2009, the Notice of Sale was posted at five public locations by the Deputy of the Sanpete County Sheriff's Department. (R. at 634).

14. According to the publicly posted Notice of Sale, the date of the Sheriff's Sale was to be July 7, 2009 at 11:00 AM. (R. at 635.)

15. The Sheriff's Sale did not occur on July 7, 2009, but three days later on July 10, 2009. (R. 810).

16. On July 10, 2009, Meguerditchian was the sole bidder at the Sheriff's sale and purchased the following real property and water rights:

- A. 9.42 acres located in Oaker Hills Subdivision, for \$3,000.
- B. Phase IV of the Oaker Hills Subdivision, consisting of 155 acres, for \$30,000.
- C. Water Right No. 51-224 for \$30,000.

D. Other water rights of Smith located in Sanpete County, Utah, for \$3,000. (R. 869-871)

17. On December 8, 2009, Smith served his Motion to Set Aside Sale. (R. 759-760)

18. On September 15, 2010, the Findings of Fact and Conclusions of Law and Order Denying in Part and Granting in Part Smith's Motion to Set Aside the Sheriff's Sale was entered. (R. 1045-1050).

19. The trial court found that the real property had a value of \$505,000. (R. 1046 at ¶1).

20. The trial court found that the water rights had a fair market value in excess of \$150,000. (R. at 1047, ¶¶4 & 5).

21. The trial court granted Smith's motion, and set aside the sale of the water rights. (R. 1050, ¶3).

22. The trial court denied Smith's motion to set aside the sale of the real property. (R. 1050, ¶1).

23. Meguerditchian formed an LLC to develop the real property as a subdivision (R. 1089, 91:3-5).

24. Mr. King, Meguerditchian's attorney, is Meguerditchian's partner in the LLC formed to develop the real property as a subdivision. (R. 1089, 91:6-7).

### **SUMMARY OF ARGUMENT**

First, the trial erred in concluding that Mr. Smith must prove both an inadequacy

of sales price and irregularities in the Sheriff's sale to justify the setting aside of the Sheriff's sale. In doing so, the trial court wrongfully concluded that the two-part test approved by the Utah Court of Appeals in *Pyper v. Bond*, 224 P.3d 713 (Ut. Ct. App., 2009) was the only way that Mr. Smith could have the Sheriff's sale set aside.

The trial court erred because a Sheriff's sale can be set aside when the sales price is so gross as to shock the conscience. In such a case, the sales price will amount to proof of fraud and there is no need to prove irregularities in the Sheriff's sale. Since the trial court found that the sales price was grossly inadequate and shocks the conscience of the Court, the Sheriff's sale should have been set aside even though the trial court concluded that there were no irregularities attending the sale.

Second, the trial court also erred in finding and concluding that there were no irregularities attending the sale because the officer conducting the Sheriff's Sale, being unable to find sufficient personal property, acted appropriately in selling the real property of Smith's listed in the Certificate of Sale.

The irregularities in the sale are: 1) Meguerditichian's failure to sell Smith's personal property known to him and of sufficient value to cover the judgment; 2) the Notice of Sale which publicly advertised the Sheriff's Sale for July 7, 2009, but conducting the sale on July 10, 2009; and 3) Meguerditichian's attorney had formed an LLC with Meguerditichian for the development of the real property as a subdivision and exercised direction and control of whether and how much of the real property, water rights and non-exempt personal property would be sold at the sale.

Meguerditichian and his attorney directed the Sheriff to sell all of the real property and all of the water rights but not to sell the non-exempt personal property by excluding any reference to the non-exempt personal property in the Notice of Sale. They determined the amount that they would pay for the real property and the water rights based on the amount of the judgment to insure that they obtained all of the real property and all of the water rights.

Such conduct constitutes unfairness on the part of Meguerditichian and irregularities attending the sale.

### **ARGUMENT**

#### **I. THE TRIAL COURT INCORRECTLY CONCLUDED THAT THE ONLY STANDARD FOR SETTING ASIDE THE SHERIFF'S SALE IS DEMONSTRATING BOTH INADEQUACY OF PRICE AND IRREGULARITIES ATTENDING THE SALE.**

The trial court ruled that “[t]he proper standard for setting aside the Sheriff’s Sale in this matter is that standard outlined in *Pyper v. Bond*, 224 P.3d 713 (Ut. Ct. App., 2009). The trial court further concluded that the standard set out in the *Pyper* case required Mr. Smith to prove: 1) a gross inadequacy of the purchase price as compared to value of the property sold; and 2) irregularities attending the sale. (R. at 1048, ¶1).

The two part test set forth in the *Pyper* case is not the exclusive test to set aside a sheriff’s sale.

It is insisted by appellants that mere inadequacy of price, however gross, will not authorize the courts to set aside a judicial sale. The general rule undoubtedly is that mere inadequacy of price, alone, does not authorize the disturbance of such a sale; but we are not prepared to sanction the unqualified statement of the rule as

put by appellants' counsel. If the inadequacy is so gross as at once to shock the conscience of all fair and impartial minds, if the sacrifice is such that every honest man would hesitate to take advantage of it, it may well be doubted whether every such case would be beyond the power of a court of equity to relieve against. (*Pender v. Dowse*, 265 P.2d 644, 648 (Utah 1954)).

The *Pyper* Court not only upheld the two-part test but also affirmed the trial court's determination that the disparity between the sales price and the market value of the real property justified the setting aside of the sale even if there had been no irregularities in the sale.

Building on this analysis, the *Pyper* court affirmed the trial court's determination that the sale of *Pyper's* \$75,000 of equity in his property for \$329 "shock[ed] the conscience of an impartial mind" and was "[such a] sacrifice of [*Pyper's*] property ... that an honest man would hesitate to take advantage of it." (Citations Omitted). (*Bangerter v. Petty*, 228 P.3d 1250 (Ut. Ct. App., 2010) at ¶17).

Where the sales price is so gross as to shock the conscience, then the sales price will amount to proof of fraud.

... wherever the court perceives that a sale of property has been made at a grossly inadequate price, such as would shock a correct mind, this inadequacy furnishes a strong, and, in general, a conclusive, presumption, though there be no direct proof of fraud, that an undue advantage has been taken of the ignorance, weakness, or the distress or necessity of the vendor; and this imposes on the purchaser a necessity to remove this violent presumption by the clearest evidence of fairness of his conduct. (*Young v. Schroeder*, 37 P. 252, 254 (Utah, 1894) (Quoting *Butler v. Haskell*, 4 Desaus. Eq. 65)).

Therefore, a Sheriff's Sale may be set aside where the inadequacy of the purchase price is so grossly inadequate that it shocks the conscience even if there are no irregularities in the sale. (See *Pender*, at p. 648) ("From the cases here cited we may draw the general conclusion that, if the inadequacy of price is so gross as to shock the



conscience, .....then the sale will be regarded as fraudulent and void, or the party injured will be permitted to redeem the property sold.”) (Quoting *Graffam v. Burgess*, 117 U.S. 180, 6 S.Ct. 686, 29 L.Ed. 839).

In this case, the trial court found that the difference between the sales price of \$33,000 and the fair market value of \$505,000 for the real property “shocks the conscience of the court.” (R. 1046 ¶3). The trial court further concluded that the “purchase price for the two parcels of real property sold at the Sheriff’s Sale, was grossly inadequate, shocking the conscience of the Court meeting the first element required by the *Pyper v. Bond* standard.” (R. 1049, ¶2).

Even though the trial court concluded that the disparity between the sales price and fair market value of the real property “shocks the conscience of the court”, it did not set aside the sale, but ruled that *Pyper* required that there must be irregularities in the sale as well. Thus, the trial court erred in ruling that the two-part test set forth in *Pender* was the exclusive manner to set aside a Sheriff’s Sale.

Having found that the sales price was so inadequate as to shock the conscience, the trial court should have set aside the Sheriff’s Sale of the real property without requiring irregularities in the sale.

## **II. THE TRIAL COURT COMMITTED ERROR IN CONCLUDING THAT THERE WERE NO IRREGULARITIES INVOLVING THE SALE OF THE REAL PROPERTY AT THE SHERIFF’S SALE.**

In setting aside a sheriff’s sale, the unfairness on the part of the purchasing party need not be in the sale itself. (See *Pyper v. Bond*, 224 P.3d 713(Ut. Ct. App., 2009) at

¶12) (Therefore, the [c]ourt should consider any unfairness in the conduct of a purchasing party.); (See also *Pyper v. Bond*, at ¶ 15) (“In *Pender*, a judgment creditor purchased real property worth about \$8,000 for \$47.46 to satisfy a judgment of \$22.80. After the redemption period had expired, the judgment debtor petitioned the district court to set aside the sale. The district court did so, relying on the great inadequacy of price and two additional factors: (1) the creditor's failure to levy upon and sell the debtor's personal property, which was known to the creditor and of sufficient value to easily cover the judgment, and (2) the creditor and his attorney's "studious silence" about their intent to collect the judgment, despite repeated contact with the debtor and his attorney both before and after the execution sale. Neither of these circumstances can be characterized as irregularities in the sale itself, which was apparently properly noticed and conducted.” (Citations Omitted).

To show that the trial court erred in finding that there were no irregularities in the sale of the real property, Mr. Smith must marshal all the evidence that supports the findings and demonstrate that, despite this evidence, the findings are so lacking in support as to be “against the clear weight of the evidence” and, thus, clearly erroneous. (*Horton v. Gem State Mut. of Utah*, 794 P.2d 847, 849 (Ut. Ct. App., 1990)).

The following findings of fact by the trial court are so lacking in support as to be “against the clear weight of the evidence” and, thus, clearly erroneous:

1. “The officer conducting the Sheriff’s Sale, being unable to find sufficient personal property, acted appropriately in selling real property of the

Defendants listed in said Certificate of Sale.” (R. 1047, ¶7).

2. “The Court finds that there was nothing misleading regarding the sale of real property included in the Sheriff’s Certificate of Sale, and no unfairness in the conduct of the purchasing party with respect to the two parcels of real property included in said Certificate of Sale. The Court found that there was nothing irregular in the sale of real property at said Sheriff’s Sale.” (R. 1047, ¶8).

The evidence supporting the trial court’s finding is: 1) the officer did not sell the fifth-wheel trailer because it was not properly described as there was no serial numbers or model numbers in the Praeipie (R. 1089, 12:5-22); 2) the officer does not recall if he contacted Meguerditchian or his attorney, Mr. King, to tell them that the fifth-wheel trailer was not described properly (R. 1089, 12:24 to 13:1); 3) the officer did not execute on the non-exempt personal property because he did not know exactly where the non-exempt property was or what the non-exempt property was (R. 1089, 13:7-9); 4) the officer assumes that he informed Mr. King that he did not know exactly where the non-exempt personal property was or what the non-exempt personal property was (R. 1089, 13:10-12); 5) the officer does not recall Mr. King or Meguerditchian telling him not to sell the non-exempt personal property at the Sheriff’s sale (R. 1089, 13:13-15); 6) the officer thinks that the order he sells the non-exempt personal property and the real property is entirely up to him (R. 1089, 13:15-18); 7) the officer was not concerned that the real property was being sold first because the non-exempt personal property was not

properly described (R. 1089, 14:4-6); 8) the officer does not know if by statute he is required to sell the non-exempt personal property first (R. 1089, 14:7-12); 8) the officer understands that if the non-exempt property cannot be found that he is to execute on the real property (R. 1089, 14:11-12); 9) the officer does not recall if Mr. King or Meguerditchian expressed that the non-exempt personal property was not being sold at the Sheriff's sale (R. 1089, 14:13-16); 10) the officer doesn't recall if he conducted a bid or if the amounts for the two parcels of real estate was given to him by Mr. King or Meguerditchian (R. 1089, 15:25 to 16:9); 11) Meguerditchian divided the judgment and offered an amount on the two parcels of real property and the water rights to equal his judgment (R. 1089, 89:1-25); and 12) the sale was conducted on July 10, 2009. (R. 810).

A finding of fact is clearly erroneous if it is against the clear weight of evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made. (*Cal Wadsworth Const. v. City of St. George*, 898 P.2d 1372, 1378 (Utah, 1995)).

This evidence does not support a finding that there was no unfairness in the Sheriff's Sale, but supports a finding that there was unfairness in the Sheriff's Sale. The evidence establishes that Meguerditchian knew that Mr. Smith had sufficient non-exempt personal property to satisfy the judgment but prevented the Sheriff from selling Smith's non-exempt personal property at the sale because he and Mr. King did not provide serial numbers, etc. The failure to sell Smith's non-exempt personal property first at the sale constitutes unfairness on the part of Meguerditchian and requires the setting aside of the

sale. (*Pender v. Dowse*, 265 P.2d 644, 648 (1954)).

The evidence supporting the trial court's findings of fact establishes that Meguerditchian knew that Mr. Smith had sufficient non-exempt personal property to satisfy the judgment. Mr. Meguerditchian listed Mr. Smith's non-exempt personal property in the Application for Writ of Execution (R. 618, ¶3.A.) and in the Praecipe (R. 624-625, ¶1). Meguerditchian also directed the Sheriff to sell the non-exempt personal property first and sell the real property only if there was insufficient non-exempt personal property to satisfy the judgment. (R. 618, ¶3.A.; R. 622; R. 625, ¶1).

The officer conducting the Sheriff's sale assumes that he informed Mr. King that he did not know exactly the location where the non-exempt personal property was being kept, and that he did not know the nature of the non-exempt personal property. Mr. King and Meguerditchian did not supply serial numbers or model numbers or other information to help the officer to identify and seize the non-exempt personal property. Because Mr. King and Mr. Meguerditchian did not provide the serial numbers, etc., the Notice of Sale did not include the non-exempt personal property but only the real property and water rights. (R. 635-636).

Meguerditchian testified at the evidentiary hearing that he intended to purchase the real property and water rights at the Sheriff's Sale, subdivide the real property and sell the lots. He also testified that he divided the amount of the judgment to determine the amount he would pay for the two pieces of real estate and the water rights. He further testified that he formed an LLC for the specific purpose of subdividing the real property

and selling the lots. Lastly, he testified that his attorney, Mr. King, is his partner in the LLC.

Mr. King directed and controlled the Sheriff as to which and how much of the real property, water rights, and non-exempt personal property would be sold at the sale. By failing to provide serial numbers, etc., Mr. King and Mr. Meguerditchian prevented the non-exempt personal property from being sold. By directing the sale of all of the real property and all of the water rights, Mr. King and Mr. Meguerditchian purchased the entire subdivision and the necessary water to develop the subdivision. Since Mr. King was a partner with Meguerditchian, he was, in effect, a purchaser of the real property and water rights at the sale. Therefore, the sale should be set aside. (*Young v. Schroeder*, 37 P. 252, 256 (Utah, 1894)).

Lastly, the Notice of Sale inaccurately declared the date of the Sheriff's sale to be July 7, 2009, but the sale was conducted on July 10, 2009. Such action had a direct tendency to prevent the procuring of a fair price for the property sold because potential buyers would not know to appear on July 10, 2009 and therefore, constitutes unfairness on the part of Mr. Meguerditchian justifying the setting aside of the sale. (*Pyper v. Bond*, 224 P.3d 713 (Ut. Ct. App., 2009) at ¶ 12).

Thus, the trial court erred by finding that there was no unfairness in the sale.

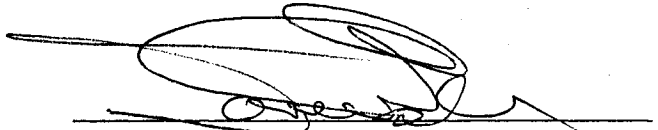
### **CONCLUSION**

For the reasons set forth above, Max Smith respectfully requests that this Court

reverse and remand the trial court's ruling that the Sheriff's sale is not set aside.

DATED this 9<sup>th</sup> day of March, 2011.

DARWIN C. FISHER P.C.

A handwritten signature in black ink, appearing to read 'Darwin C. Fisher', written over a horizontal line.

Darwin C. Fisher  
*Attorney for Defendant/Appellant/Cross-  
Appellee Max Smith*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 9<sup>th</sup> day of March, 2011, I caused to be served by the method indicated below a true and correct copy of the attached and foregoing **BRIEF OF APPELLANT** to the following:

☐ VIA FACSIMILE  
☐ VIA HAND DELIVERY  
☒ VIA U.S. MAIL  
☐ VIA E-MAIL

Paul M. King  
HOOLE & KING, L.C.  
4276 South Highland Drive  
Salt Lake City, UT 84124-2634  
*Attorneys for Appellee/Cross-Appellant*





## **ADDENDUM**

1. Transcript of Evidentiary Hearing RE: Sheriff's Sale [July 9, 2010]
2. Order [on Plaintiff's Motion for Partial Summary Judgement]  
[July 9, 2008]
3. Judgment  
[December 8, 2008]
4. Application for Writ of Execution  
[March 26, 2009]
5. Writ of Execution  
[April 1, 2009]
6. Praecipe  
[April 1, 2009]
7. Affidavit of Posting [and] Notice of Sale  
[June 17, 2009]
8. Findings of Fact Conclusions of Law and Order, Denying in Part and  
Granting in Part Defendant's Motion to Set Aside Sheriff's Sale  
[September 15, 2010]

## Tab 1

2010 NOV 10 PM 12:10

CASE NO. 050600136  
APPELLATE # 20090590  
DEPT. MANTI - DISTRICT #2

**ORIGINAL**

IN THE SIXTH DISTRICT COURT IN AND  
FOR SANPETE COUNTY, STATE OF UTAH

-----ooOoo-----

MIKE MEGUERDITCHIAN,  
Plaintiff,

vs.

MAX SMITH,  
Defendant.

TRANSCRIPT  
OF  
EVIDENTIARY HEARING  
RE: SHERIFF'S SALE

BEFORE THE HONORABLE MARVIN BAGLEY  
DISTRICT COURT JUDGE

FRIDAY, JULY 9, 2010  
10:06 A.M.

## APPEARANCES:

For the Plaintiff: PAUL KING, ESQ.  
Hoole & King

For the Defendant: DARWIN FISHER, ESQ.  
Darwin C. Fisher, P.C.

**FILED  
UTAH APPELLATE COURTS**

NOV 29 2010

Transcribed by: Mary Beth Cook, CSR, RPR

**20100850-CA**

MARY BETH COOK, CSR, RPR (435) 865-6895

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SIXTH DISTRICT - MANTI  
SANPETE COUNTY, STATE OF UTAH

FRIDAY, JULY 9, 2010  
10:06 A.M.

\* \* \*

PROCEEDINGS

\* \* \*

THE COURT: Good morning, ladies and gentlemen. Today is July 9, 2010. We're in Sanpete County, Sixth District Court. Call the case of Mike Meguerditchian versus Max Smith, individually and as trustee of the Smith Living Trust, Case 050600136. We're here today on defendant's motion to set aside sheriff's sale, and we're here for an evidentiary hearing.

Ask counsel to make their appearances.

MR. KING: Paul King appearing on behalf of the plaintiff, Your Honor.

THE COURT: Mr. King.

MR. FISHER: Darwin Fisher appearing on behalf of Max Smith and the Smith Family Living Trust.

THE COURT: Mr. Fisher. I notice from the file that there has been a mediation, but apparently it was unsuccessful; is that correct?

MR. FISHER: Yes, Your Honor. Actually we were extremely close, and we just got hung up on one thing, and unfortunately that was a big thing, and we just couldn't

MR. KING: Without getting into the detail. Of course, that would be inappropriate, I think, for the Court, but I don't see the likelihood of that happening.

THE COURT: Does your client realize that he stands a chance to lose today?

MR. KING: Yes, he does.

THE COURT: And, Mr. Fisher, your client realizes that he has a chance to lose today as well?

MR. FISHER: Yes, Your Honor.

THE COURT: Okay. Because I certainly have not made up my mind in any sense of the word, and I will be persuaded by what the evidence is.

So, Mr. Fisher, it's your motion. Are you ready to proceed?

MR. FISHER: Yes, we are, Your Honor. I'm wondering if we can get Mr. Smith on the phone. We are going to have him testify first.

THE COURT: Before we do that, do you want to make an opening statement?

MR. FISHER: Unless the Court would like to have one, I'm sure -- from the last time, I'm sure the Court is well-advised as to what our memorandum say except for why we're here. Essentially to me it's nothing more than determining whether or not there has been a difference between the actual amount paid of \$66,000 and the value of

4

6

overcome that.

THE COURT: So there's no optimistic thought that you could overcome it today?

MR. FISHER: We're certainly willing to try to overcome it, but I think the problem is that the amount of water rights that they would like to have. We just don't have as much as they want to have and still be able to develop the project, so it puts us in a position that we lose everything because we couldn't meet it, but it's really just the amount of water rights that they would like to have.

THE COURT: If we go forward today, there's going to be -- I'm going to rule in favor of somebody. You know, somebody's going come out what they feel is the winner, and somebody's going to come out what they feel is the loser, and I don't know who that is. I won't know until after I hear the evidence. If the parties want to get some type of an assurance that one of them is not going to be a loser, and there's any possibility at all, I'll give you some time to see if you can hash through some things.

Mr. King.

MR. KING: Well, Your Honor, we, as counsel indicated, spent an entire day trying to do just that, and I think we exhausted all reasonable possibility of working things out.

THE COURT: All right.

the property that shocks the mind, or, secondly, that there's a disparity -- a substantial disparity, and there's been some misconduct on the part of Mr. Meguerditchian. And I think that's the only issue before the Court, and the only evidence that will be presented will be on those two issues.

THE COURT: Okay. Mr. King, do you wish to make an opening statement?

MR. KING: No, Your Honor. Other than just to summarize what's already been stated in the case law that's been presented on the Petty case primarily is the component case law which requires the two-part test to be met.

THE COURT: You mean the Pyper case?

MR. KING: I'm sorry, the Pyper case. Bangerter versus Petty I think is a later case that discusses the Pyper case. I apologize.

THE COURT: I just wanted to make sure that I'm on the right case.

MR. KING: Yes, Pyper versus Bond, Your Honor, that we've already cited to the Court, is the case that I'm talking about. That case established a two-part test. One is price so low that it shocks the conscience, and inequity, essentially fraud, involved with the conduct of the sale itself. Not prior conduct of the parties having anything to do with their prior relationship, but fraud involved with the conduct of the sale itself. So we're happy to discuss with

7

1 the Court the conduct of that sale on that day. Any other  
 2 evidence would be inappropriate to discuss for purposes of  
 3 today's motion.  
 4 THE COURT: Well, I'll just let both of you know  
 5 that I have read the Pyper case. I think it says what it  
 6 says, and I intend to apply the rules there. I'm not sure  
 7 that each of you are reading it the same way that the other  
 8 reads it, and maybe you're not reading it the same way I read  
 9 it, but I'm going to apply the law the way I read it from the  
 10 Pyper case.  
 11 Mr. Fisher, you want me to get Mr. Smith on the  
 12 phone?  
 13 MR. FISHER: Yes. We do have Officer Henningson  
 14 here today. He's the one that conducted the sale. We do  
 15 have a short question for him. We had told the prison,  
 16 though, that we'd call at 10:00, so I don't want his --  
 17 THE COURT: You just want Mr. Smith to listen until  
 18 he's called.  
 19 MR. FISHER: Right. I was going to call him first,  
 20 but I was thinking maybe we could have Mr. Henningson testify  
 21 because I don't anticipate his testimony is going to last  
 22 very long, and perhaps that way let him go so he can get back  
 23 to work.  
 24 THE COURT: It's your case. You call the witnesses  
 25 in the order that you choose.

8

1 THE COURT: Your lawyer says that will be fine.  
 2 MR. SMITH: Thank you.  
 3 THE COURT: Go ahead, Mr. Fisher.  
 4 MR. FISHER: Call Officer Henningson.  
 5 THE COURT: Officer Henningson, please be sworn.  
 6 Whereupon,  
 7 **ROBERT HENNINGSON,**  
 8 Was administered the following oath by the court clerk.  
 9 THE CLERK: You do solemnly swear to tell the  
 10 truth, the whole truth, and nothing but the truth so help you  
 11 God.  
 12 THE WITNESS: Yes.  
 13 THE COURT: I'll ask you to take the witness stand  
 14 and to speak into the microphone so that we can get a  
 15 recording.  
 16 Mr. Smith, I need you to be quiet.  
 17 MR. FISHER: Your Honor, I have an exhibit book for  
 18 the Court as well as for the witness.  
 19 THE COURT: Any objections, Mr. King, if I look at  
 20 this?  
 21 MR. KING: No, Your Honor.  
 22 THE COURT: All right.  
 23 MR. FISHER: Your Honor, we'll be covering  
 24 Exhibits 2, 3, 4 and 5 with Mr. Henningson, and those all  
 25 have to do with the sale, the praecipe, the writ of

10

1 MR. FISHER: Why don't we call Officer Henningson  
 2 so he doesn't have to stay.  
 3 THE COURT: But you do want Mr. Smith on the phone?  
 4 is that right?  
 5 MR. FISHER: Yes.  
 6 (Phone Call Placed To Max Smith.)  
 7 THE COURT: Mr. Smith?  
 8 MR. SMITH: Yes.  
 9 THE COURT: This is Judge Bagley. I'm calling from  
 10 the Sixth District Court in Manti, and we're here. Your  
 11 lawyer, Mr. Fisher, got you on the phone. He tells me that  
 12 he's going to call another witness first but wants you to be  
 13 on the phone listening.  
 14 MR. SMITH: Okay.  
 15 THE COURT: And so for the first little while  
 16 you'll just be a listener.  
 17 MR. SMITH: Okay.  
 18 MR. FISHER: May I ask him a question, Your Honor?  
 19 THE COURT: Your lawyer wants to ask you a  
 20 question. Go ahead.  
 21 MR. FISHER: Max, are you going to be limited to  
 22 the amount of time that you're on the phone?  
 23 MR. SMITH: He doesn't know how long that I'll be.  
 24 I don't either. I guess I've got an hour.  
 25 MR. FISHER: Okay. That should be fine.

1 execution, et cetera, and ask counsel whether he'll stipulate  
 2 to admissibility.  
 3 MR. KING: I have no objection to their  
 4 admissibility, Your Honor.  
 5 THE COURT: All right. Exhibits 2, 3, 4 and 5 are  
 6 received.  
 7 (Thereupon, Defendant's Exhibit 2-5  
 8 were admitted into evidence.)  
 9  
 10 **DIRECT EXAMINATION**  
 11 BY MR. FISHER:  
 12 Q Mr. Henningson, would you please state your name  
 13 for the record.  
 14 A Robert Henningson.  
 15 Q And where do you work?  
 16 A Sanpete County Sheriff's Office.  
 17 Q And as part of your responsibilities, do you do  
 18 sheriff's sales?  
 19 A I do.  
 20 Q Do you recall handling the sheriff sale in this  
 21 matter?  
 22 A I do.  
 23 Q Do you recall approximately when that took place?  
 24 A Approximately six months ago.  
 25 Q How many do you do a month?

11

1 A Oh, fewer than one.  
2 Q So in the last six months, you've done maybe five  
3 or six?  
4 A Maybe.  
5 Q Now, looking at Exhibit 2, do you recognize that  
6 document?  
7 A Yeah.  
8 Q And what is it?  
9 A It's a praecipe.  
10 Q And did you receive that?  
11 A I did.  
12 Q Now, on the very first page, which is marked MS092,  
13 down in Paragraph 1 there's nonexempt personal property  
14 listed; do you see that?  
15 A I do.  
16 Q There's a fifth-wheel trailer, storage containers,  
17 et cetera. Did you receive that property for sale?  
18 A No.  
19 Q And why not?  
20 A Because it wasn't properly described.  
21 Q Why wasn't it properly described?  
22 A It lacked serial numbers or model numbers,  
23 et cetera, et cetera.  
24 Q Did you contact Mr. King or Mr. Meguerditchian to  
25 let them know it wasn't properly described?

12

1 paragraph says if sufficient personal property cannot be  
2 found and sold pursuant to said writ, then to attach and sell  
3 all the rest of the property.  
4 Were you at all concerned that the personal  
5 property was not being sold first prior to the real property?  
6 A No, because it wasn't properly described.  
7 Q And it's your understanding that by statute you are  
8 not required to sell the personal property first?  
9 A I'm not -- I don't recall exactly what the rule is.  
10 Q I just wonder what your understanding is.  
11 A My understanding is that if it cannot be found we  
12 are to execute on the real property.  
13 Q Now, on the day of the sale, did Mr. King or  
14 Mr. Meguerditchian express any concern that the personal  
15 property was not being sold?  
16 A I don't recall.  
17 Q So you don't recall any discussions with them  
18 regarding the unavailability of the personal property?  
19 A I don't recall.  
20 Q Now, with the real property, there were two  
21 parcels; is that correct?  
22 A There was.  
23 Q Were you directed on how those -- which parcels  
24 should be sold first?  
25 A I don't recall.

14

1 A I don't recall.  
2 Q Am I correct in assuming then that they were not  
3 presented for sale at the sheriff's sale?  
4 A That's correct.  
5 Q And that's the only reason why it was not  
6 presented?  
7 A It's my recollection that the property was not  
8 executed on because we didn't know exactly where the property  
9 was or what the property was.  
10 Q And did you inform Mr. King of that at any point?  
11 A I assume so. Obviously we didn't do the sale on  
12 the personal.  
13 Q Did Mr. King or Mr. Meguerditchian ever tell you  
14 not to sell the personal property at the sheriff's sale?  
15 A Not that I recall. I think that's entirely up to  
16 us what order we do it. I mean, lacking the ability to sell  
17 the personal property, our next recourse is to go to the real  
18 property.  
19 Q Now, going to Exhibit No. 3, did you receive that?  
20 A I did.  
21 Q And going to Exhibit No. 4, notice of sale, did you  
22 receive that?  
23 A We prepared it, yes.  
24 Q Going back to Exhibit No. 2, if you'll go back to  
25 Exhibit No. 2, page 2, MS093, there in the first full

1 Q There was also water rights that were being sold?  
2 A Correct.  
3 Q And were you directed on how those water rights  
4 should be sold?  
5 A I don't recall.  
6 Q Were the water rights sold all at one time?  
7 A I don't recall.  
8 Q You don't recall whether or not you actually took  
9 each share of water right and sold it individually?  
10 A I don't recall.  
11 Q Do you recall how the price for the water rights  
12 was arrived at?  
13 A I don't recall.  
14 Q According to Exhibit No. 5, the certificate of  
15 sale, on page 3 of the certificate of sale is that your  
16 signature?  
17 A It is.  
18 Q And did you prepare Exhibit No. 5, certificate of  
19 sale?  
20 A I did. Well, the secretary did. I signed it. It  
21 was approved by myself.  
22 Q Now, it says that Item No. 1 was sold at bid for  
23 \$3,000. Do you recall which was Item No. 1?  
24 A It would have been -- I don't recall.  
25 Q Looking at the first page, I'm wondering if you



1 just didn't go in order there. That's the 9.42 acres.  
2 A Yeah.  
3 Q Now, did you actually conduct a bid, or was the  
4 amount given to you by Mr. King or Mr. Meguerditchian of  
5 \$3,000?  
6 A I don't recall.  
7 Q And you wouldn't recall that for the other three  
8 items as well, correct?  
9 A That's correct.  
10 Q Now, have you had any conversations with Mr. King  
11 concerning your testimony today?  
12 A Briefly.  
13 Q When did that take place?  
14 A Prior to the hearing. Actually I was trying to  
15 find out who was actually trying to subpoena me. I have not  
16 been subpoenaed.  
17 Q Until this morning?  
18 A Only by your word. I have not had a subpoena put  
19 in my hand.  
20 Q So you appeared here today because you knew it was  
21 today?  
22 A I only knew because of your process server calling  
23 me something after 8:00 last night that this hearing was  
24 today.  
25 Q Why didn't you go home and receive the subpoena

16

1 sale that you prepared. When you prepared that, you left off  
2 the personal property for reasons you've already described,  
3 and then I presume it was posted and published in the normal  
4 fashion; is that correct?  
5 A That's correct.  
6 Q Did you receive any objection from Mr. Smith or his  
7 counsel at that time that the personal property was not  
8 listed on your notice of sale?  
9 A None that I recall.  
10 Q Did anyone contact your office or otherwise appear  
11 at the sheriff's sale other than myself and  
12 Mr. Meguerditchian?  
13 A No.  
14 MR. KING: Thank you. Nothing further, Your Honor.  
15 THE COURT: Redirect.  
16 MR. FISHER: No, Your Honor.  
17 THE COURT: All right. Deputy Henningson, you can  
18 step down. Thank you.  
19 THE WITNESS: Am I excused?  
20 THE COURT: Can he be excused?  
21 MR. FISHER: Yes.  
22 MR. KING: Yes.  
23 THE COURT: You're excused.  
24 MR. FISHER: Call Max Smith next, Your Honor.  
25 THE COURT: All right. Mr. Smith, you're being

18

1 last night?  
2 A I was home. I chose not to answer the door at that  
3 late hour.  
4 Q So my understanding is today -- and correct me if  
5 I'm wrong -- but from your testimony I understand that you  
6 really don't remember the order in which you sold the  
7 properties or how the price was determined or whether the  
8 water rights were sold individually or as a package, correct?  
9 A That's correct. I don't have access to my notes  
10 taken during the sale because the secretary doesn't work on  
11 Fridays, and I had such short notice, even knowing that this  
12 was going to go ahead today, so I was totally unprepared.  
13 Q And your office didn't tell you in June that  
14 messages had been left for you to call?  
15 A No, not at all.  
16 Q Or that the process servers had been at your office  
17 on at least three or four occasions?  
18 A No.  
19 MR. FISHER: I don't think I have any other  
20 questions for him, Your Honor.  
21 THE COURT: All right. Cross.  
22 CROSS-EXAMINATION  
23 BY MR. KING:  
24 Q Just one or two things quickly -- (indiscernible).  
25 Exhibit 4 that was referred to by counsel is the notice of

1 called as the next witness.  
2 MR. SMITH: Yes.  
3 THE COURT: I can't see you, but I'm instructing  
4 you to stand up and to raise your right hand.  
5 MR. SMITH: Okay.  
6 THE COURT: And I'm going to have the clerk issue  
7 an oath to you.  
8 MR. SMITH: Okay. There is an officer here with  
9 me.  
10 THE COURT: All right. I'll have the officer  
11 verify that you're standing and that you have your hand  
12 raised.  
13 MR. SMITH: Okay. Should I put him on?  
14 THE COURT: Yes, please.  
15 OFFICER ADAMSON: This is Officer Adamson.  
16 THE COURT: Officer Adamson, we're trying to ensure  
17 that Mr. Smith is sworn under oath. I've instructed him to  
18 stand and raise his hand, and I'll ask you to verify that  
19 he's doing it.  
20 OFFICER ADAMSON: He's currently standing with his  
21 right hand up in the square.  
22 THE COURT: Thank you. Go ahead, Clerk.  
23 ///  
24 ///  
25 ///

19

1 Whereupon,  
2  
3 **MAX SMITH,**  
4 Was administered the following oath by the court clerk.  
5 THE CLERK: You do solemnly swear to tell the  
6 truth, the whole truth, and nothing but the truth so help you  
7 God.  
8 THE WITNESS: I do.  
9 THE COURT: I'll have the officer verify that that  
10 was your voice saying I do.  
11 OFFICER ADAMSON: This is Officer Adamson. That  
12 was him.  
13 THE COURT: Thank you very much.  
14 Mr. Smith, you're now under oath.  
15  
16 **DIRECT EXAMINATION**  
17 BY MR. FISHER:  
18 Q Max, will you please state your name.  
19 A Max L. Smith.  
20 Q And what's your present address?  
21 A PO Box 250, Draper, Utah, Utah State Prison.  
22 Q And, Max, when did you go into prison?  
23 A May 21, 2009.  
24 Q And when did you first learn of the sheriff's sale?  
25 A After I arrived here at the prison, my wife told me  
that there was some packages came in the mail.

20

1 However, the year prior to that, I was going through the  
2 steps with the county commission concerning the Ochre Hills  
3 property -- well, at that time we called it Hideaway Hills,  
4 and they asked us to change the name because of Hideaway  
5 Valley made it confusing, but that would have been in 1985  
6 and late '84.  
7 MR. FISHER: Your Honor, we have the original plat  
8 for Hideaway or the drawings for that. I do have an  
9 individual here who can testify and authenticate this.  
10 Mr. Smith obviously is not here, and he does not have a copy  
11 of this, although I did give him copies of others, and we'd  
12 like to have this introduced into evidence if we could.  
13 THE COURT: Any objection, Mr. King?  
14 MR. KING: As long as it can be authenticated, Your  
15 Honor, I have no objection.  
16 THE COURT: What about that, Mr. Fisher? How are  
17 you going to authenticate it?  
18 MR. FISHER: This individual here.  
19 THE COURT: But you've got Mr. Smith on the stand  
20 right now.  
21 MR. FISHER: That's true. If you'd like --  
22 actually with Mr. Smith we don't really need to cover a whole  
23 lot of this. I can have our witness get up and authenticate  
24 it. Just kind of trying to save a little bit of time and get  
25 the Court oriented as to what we're talking about with

22

1 Q And did you get -- when did you get copies of the  
2 documents for the sheriff's sale?  
3 A It was sometime after that, possibly two or three  
4 weeks. I think that I received copies two or three days  
5 before the sale.  
6 Q Now, did you try to contact anyone about the sale?  
7 A My wife, I believe, talked with the deputy sheriff  
8 about the sale of the property, and she was trying to get  
9 ahold of our attorney and the -- (indiscernible).  
10 THE COURT: What was that last thing you said?  
11 Trying to get ahold of the deputy and what?  
12 THE WITNESS: She called a deputy down there, I'm  
13 not sure which one, about the sale of the property and the  
14 theft of our tractor.  
15 BY MR. FISHER:  
16 Q And what tractor are you referring to?  
17 A I'm referring to the JD 400 tractor that I  
18 purchased from Meguerditchian.  
19 Q Now, Max, specifically directing your attention to  
20 the sale of the 155 acres, that 155 acres is that what has  
21 been referred to in this lawsuit as Phase 4 of Ochre Hill?  
22 A I believe so.  
23 Q And when did you first file the plat for Ochre  
24 Hill?  
25 A I think Plat 1 was filed and ordered in 1985 or '6.

1 Phase 4 and where the 9.42 acres is.  
2 THE COURT: I interpret Mr. King's objection that  
3 it has to be authenticated first, and so I guess I'll deny --  
4 I won't allow it to be admitted until it is.  
5 MR. FISHER: If we'd like we can interrupt -- I  
6 hate to do this because I'm going to call him for other  
7 things. That's fine. We'll locate these things on the map  
8 for the Court.  
9 MR. KING: I'm not sure as to how the witness will  
10 testify as to a document he can't see anyway. I suggest that  
11 the witness testify as to his knowledge regarding this  
12 development, but not with regard to this document that I've  
13 never seen, nor does he have in front of him.  
14 THE COURT: I haven't admitted it yet, so you'll  
15 have to do something different, Mr. Fisher.  
16 MR. FISHER: That's fine, Your Honor.  
17 BY MR. FISHER:  
18 Q Max, you were testifying that about a year earlier  
19 than filing the plat for Phase 1, you had filed the Hideaway  
20 subdivision -- proposed subdivision; is that correct?  
21 A Yeah, that's probably the stuff you have in front  
22 of you. It was originally going to be called Hideaway Hills,  
23 and I believe that you have a plat there that shows the  
24 entire project begun in phases over the course of time, yes.  
25 Q Now, Max, part of the property that was sold here

23

1 was 9.42 acres. Can you tell us where that property is  
 2 located?  
 3 A That property is located exactly south, and I  
 4 believe on the plat it would be Lot No. 110. There's a gate.  
 5 There's an entry gate. There's two of them on the south side  
 6 of the project.  
 7 Q And how far is that from Phase 4?  
 8 A Well, that would be over a mile, around a mile.  
 9 Q And are you the sole owner of the 9.42 acres?  
 10 A The Smith Family Living Trust is the owner, and I  
 11 had deeded that as a joint tenancy with Mr. Meguerditchian.  
 12 Q And when did you do that?  
 13 A I believe in about 2001.  
 14 Q And why did you do that?  
 15 A At the time we were in the process of recording the  
 16 third phase in the Ochre Hills subdivision, and there was a  
 17 14-by-70 mobile home located on Lot No. 349 as it had been  
 18 platted. At one point Mike wanted that trailer. However,  
 19 the zoning department did not want the trailer on the  
 20 property. Also, the engineer that engineered the area,  
 21 Richard Johanson, he wanted the property, so I asked  
 22 Mr. Meguerditchian if he would exchange that property for  
 23 half of the 9.42 acres on the south side in lieu of removing  
 24 the trailer at considerable cost. He agreed, and so I had a  
 25 plat prepared by Richard Johanson of the 9.43 acres and

24

1 looking at the Utah Division of Water Rights.  
 2 Q And do you recognize that document?  
 3 A Yes.  
 4 Q And what is it?  
 5 A This is just a list of owners that have had water  
 6 rights segregated and processed through the state of Utah  
 7 into well permits from Permit No. 51-224.  
 8 Q And do you or the trust own water in that water  
 9 right?  
 10 A The water right happens to be in my name, yes.  
 11 MR. FISHER: We'd ask for admission.  
 12 THE COURT: I'm confused. I don't think he  
 13 responded to your question. You asked him if the trust has  
 14 rights in that, and he said my name is on that water right.  
 15 Can you clarify that for me, Mr. Fisher?  
 16 BY MR. FISHER:  
 17 Q Max, in water right 51-224, do you or the trust own  
 18 water in that water right?  
 19 A Yes. The water rights in 51-224 and segregations  
 20 off of that are in my name, Max Smith.  
 21 MR. FISHER: Again, we'd ask that Exhibit No. 6 be  
 22 admitted into evidence, Your Honor.  
 23 THE COURT: Any objection, Mr. King?  
 24 MR. KING: Your Honor, I don't want to get hung up  
 25 on our telephone testimony difficulties, but could you have

26

1 surveyed and staked. Mike was happy with that as the other  
 2 property, the nine-and-a-half acres, has power and phone and  
 3 county road access.  
 4 Q Does it also have fencing around it?  
 5 A It has a fence on the north side of it, yes.  
 6 Q Now, the 155 acres which was sold at the sheriff's  
 7 sale, who's on the title of that 155 acres?  
 8 A The Smith Family Living Trust.  
 9 Q Was Mike ever placed on title?  
 10 A No.  
 11 Q And why not?  
 12 A We had an agreement that was made by his request in  
 13 lieu of forfeiture of a prior agreement, and it was to split  
 14 proceeds after all development costs and 77.25 acres of the  
 15 160.  
 16 Q But why wasn't he placed on title?  
 17 A Well, because it wasn't an agreement to have  
 18 ownership of any property, only to split monies after the  
 19 property was developed and sold.  
 20 Q Now, Max, would you turn to -- I believe the  
 21 documents I sent you it's No. 13, division of water rights  
 22 information printout.  
 23 And for us, Your Honor, it's Exhibit No. 6.  
 24 A Okay, I've got that, Exhibit No. 13. I thought I  
 25 had mine mixed up and been re-marking them as you went. I'm

1 Mr. Smith describe -- he's looking at something that he said  
 2 is No. 13. I'm looking at No. 6 here. I'd like to put at  
 3 least on the record some sort of minor description what he's  
 4 looking at so we can make sure we're looking at the same  
 5 document.  
 6 BY MR. FISHER:  
 7 Q Max, on page 1 of what we're referring to as  
 8 Exhibit No. 6.  
 9 A Yes.  
 10 Q Would you please read the first three or four names  
 11 on that page?  
 12 A Florine and Naomi Adams, Richard Baker, Harold H.  
 13 and Janice Boone.  
 14 Q Turn to the next page, please.  
 15 A Yes.  
 16 MR. FISHER: And, Your Honor, I want to make sure,  
 17 is yours marked in yellow where it shows Max Smith?  
 18 THE COURT: It is.  
 19 MR. FISHER: Counsel, is yours? It should be. I'm  
 20 not sure Max's is or not. I was going to find his name on  
 21 it.  
 22 BY MR. FISHER:  
 23 Q Just read the first couple of names on page 2,  
 24 please.  
 25 A James Payne and Caravit Payne, Carey Endipauly

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2 ----- MR. FISHER: Is that enough, Counsel, or would you  
3 like him to read --  
4 MR. KING: How many pages is it?  
5 MR. FISHER: It is about -- I haven't counted them.  
6 THE COURT: Why don't you ask the witness how many  
7 pages he's looking at.  
8 BY MR. FISHER:  
9 Q Max, would you couldn't the number of pages that  
10 you have?  
11 A It says that I have eleven.  
12 Q Well, you're looking at the cover sheet. Just  
13 count the number of pages in that exhibit.  
14 A Looks like I have all eleven.  
15 MR. FISHER: That's what I have, Your Honor. Is  
16 that what the Court has?  
17 BY MR. FISHER:  
18 Q And just to be sure, go to page 11 and tell us  
19 what's on page 11.  
20 A These are change applications that have been made  
21 off of 51-224.  
22 Q And the first name up there what is that on yours?  
23 A This will be Monty Hancock which Monty is a  
24 property owner inside Ochre Hills subdivision.  
25 MR. FISHER: Counsel?

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2 Q And today without the water, subtracting the water  
3 that you have pledged to other owners -- or to the owners in  
4 Ochre Hill, how much water do you have left that has not been  
5 pledged?  
6 A Oh, I'd have to look at my stuff at home, but I  
7 would say probably around 10 acre-feet or less.  
8 Q And how many acre-feet do you need in order to  
9 develop or have the plat recorded for Phase 4?  
10 A Well, I just need to divide .25 into 29. I don't  
11 have a calculator here.  
12 Q Now, Max, do you have an opinion as to the value of  
13 an acre-foot of water in water right 51-224?  
14 A 51-224 and any of the other water rights that have  
15 been sold to my knowledge in the Utah Lake drainage area  
16 there goes for \$7,000 per share.  
17 Q And what do you base that on?  
18 A Recent sales to Ochre Hills customers, Hideaway  
19 Valley customers, Blackhawk Mountain Estates customers,  
20 Fairview Rancho customers.  
21 THE COURT: Mr. Fisher, if that's going to be his  
22 answer, I'm confused because I haven't heard any testimony  
23 about there being shares of water. These aren't shares.  
24 They're portions of the water right.  
25 MR. FISHER: Yes, I'm sorry. I should be referring

30

1 MR. KING: No objection, Your Honor. I consent to  
2 proceeding with defendant's testimony on this exhibit.  
3 THE COURT: All right. Exhibit 6 is received.  
4 (Thereupon, Defendant's Exhibit 6  
5 was admitted into evidence.)  
6 BY MR. FISHER:  
7 Q Now, Max, in looking through your pages, have the  
8 water shares that you own been marked?  
9 A The ones that I have had recorded, yes.  
10 Q And, Max, how much water do you own in water right  
11 51-224 or any of its derivatives?  
12 A I started off with 40 acre-feet that I processed  
13 and recorded, and I think I have some more deeds to record at  
14 the house, probably around seven or eight more acre-foot of  
15 water at the house.  
16 Q So you're saying you have about 47 or 48 acre-feet  
17 of water?  
18 A At one time. A lot of that water has been promised  
19 out and change applications applied for for specific  
20 customers inside Ochre Hills Ranches.  
21 Q In fact, when you had Phase 3, the plat of Phase 3  
22 approved, did the County require that you actually pledge .25  
23 acre-feet to each of the lots?  
24 A Correct. That's what is required with each lot in  
25 the subdivision, and it looks like those applications are

1 to them as acre-feet.  
2 BY MR. FISHER:  
3 Q Max, you had mentioned earlier that you have  
4 10 acre-feet of water?  
5 A Yes, 1 acre-foot of water is equal to \$7,000 in  
6 most recent sales, and it's really been my nephew, Jamison,  
7 that's been selling water.  
8 Q So what you're saying is that with 10 acre-feet of  
9 water you believe that has a value of \$70,000, is that  
10 correct?  
11 A Yes.  
12 MR. KING: Objection, hearsay, Your Honor. He can  
13 testify as to what he has sold himself, but not to what he  
14 has heard other people sell.  
15 THE COURT: Sustained.  
16 MR. FISHER: Your Honor, I think he can testify  
17 what his own value as an owner. He can give what his value  
18 is, and I --  
19 THE COURT: I'm sure he can, but that's not the  
20 question he was asked.  
21 MR. FISHER: Let me ask it again.  
22 BY MR. FISHER:  
23 Q Max, do you have an opinion as to what the value of  
24 each acre-foot of water is in that water right?  
25 A At least \$7,000, yes.

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1 Q Now, Max, would you turn -- Max, when you pledged  
2 the water to the other phases of Ochre Hills, in Phase 3 of  
3 Ochre Hills, have you deeded that water to the lot? How did  
4 you pledge it?  
5 A We pledged that in the form of the declaration of  
6 protective covenants or sold the property separately as at  
7 the time we really didn't have a set way, but through the  
8 declaration of protective covenants or on each individual  
9 contract.  
10 Q So you haven't actually deeded the water to the lot  
11 or to another individual; is that correct?  
12 A Correct.  
13 Q So the water right is still owned by you?  
14 A Correct.  
15 Q So when you talk about having 47 acre-feet of  
16 water, that water is actually still in your name?  
17 A What ever I haven't deeded is still in my name,  
18 yes.  
19 Q Going to Exhibit No. 7, which is Exhibit 14 for  
20 you, Max.  
21 A Yes.  
22 Q Can you identify that for us?  
23 A Well, this is also information from the Division of  
24 Water Rights.  
25 Q How many pages?

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1 A Just two pages.  
2 Q Can you read the first couple of names on page 1?  
3 A Yes. Smith Family Living Trust, Smith Family  
4 Protection Trust, Smith family Ranch, LLC.  
5 Q Now, the Smith Family Living Trust, is that the  
6 Smith Family Living Trust that's part of this lawsuit?  
7 A Yes.  
8 Q On the second page, would you read the first couple  
9 of names there.  
10 A Smith Hart Dickson PLLC, Smith Hart Dickson PLLC,  
11 Smith Hart Dickson.  
12 Q Now, Max --  
13 A Just a second. Okay, go ahead, Darwin.  
14 Q On page 1 of Exhibit No. 7 where it says Smith  
15 Family Living Trust and shows .75 acre-feet in water right  
16 51-373; do you see that?  
17 A Yes.  
18 Q Does that mean that the Smith Family Living Trust  
19 is the owner of that water right?  
20 A Yes.  
21 MR. FISHER: We'd ask that Exhibit No. 7 be  
22 admitted into evidence, Your Honor.  
23 THE COURT: Any objection?  
24 MR. KING: No objection, Your Honor.  
25 THE COURT: Exhibit 7 is received.

1 (Thereupon, Defendant's Exhibit 7  
2 was admitted into evidence.)  
3 BY MR. FISHER:  
4 Q Max -- and I may have asked you this and if I did I  
5 apologize. Do you have sufficient acre-feet of water to  
6 develop Phase 4?  
7 A Yes.  
8 Q What is left to be done in order for the plat on  
9 Phase 4 to be recorded?  
10 A Based on the last plat that was recorded, I believe  
11 we just need extra gravel that is in between -- well, it's  
12 the old railroad track actually. It's one road that has not  
13 been graveled sufficient enough to be in to a county  
14 standard.  
15 Q Are all the roads completed on Phase 4?  
16 A Yes.  
17 Q Have lots been surveyed?  
18 A Yes.  
19 Q In order to get the plat recorded, is it necessary  
20 to have power to each of the lots?  
21 A No.  
22 Q Is there any other requirement other than the roads  
23 and the surveying that we've discussed?  
24 A Not that I know of.  
25 Q Now, when you had -- when you filed the Phase 3

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1 plat, had the requirements for subdivisions changed in  
2 Sanpete County?  
3 A They have changed considerably, yes.  
4 Q Were you required in Phase 3 to meet all those  
5 changes?  
6 A No.  
7 Q Why not?  
8 A When the subject property, the Cook property, was  
9 introduced to the commission in 1984 and '5, there wasn't a  
10 set of rules or standards at that particular time that exists  
11 since then, and we had a thousand acres of property for a  
12 proposed subdivision there, and they accepted our proposal.  
13 We moved on since then.  
14 Q And they allowed you to file the Phase 3 plat on  
15 essentially the same conditions that you filed Plats 1 and 2,  
16 correct?  
17 A With the exception of the gravel road. We did  
18 gravel roads inside Phases 1 and 2. However, that seemed  
19 like that was a mandatory issue for the County in Phase 3.  
20 Q And did you argue with the County that because they  
21 had already had the proposed subdivision before that it was  
22 just a matter of filing the plat maps for each of the phases?  
23 A We didn't argue that point much. We knew we needed  
24 the gravel for access. There was some argument, yes.  
25 Q And the County agreed because it had already been

35



1 filed before as a proposed subdivision that you did not need  
2 to meet all the new criteria, correct?  
3 MR. KING: Your Honor, can I object to leading  
4 questions?  
5 THE COURT: Yes. Sustained.  
6 BY MR. FISHER:  
7 Q Can you tell us why the County agreed to allow the  
8 filing of the plat -- or Phase 3 plat without meeting all of  
9 the new conditions?  
10 A The County approved us under the conditions and  
11 restrictions that existed in 1985 and '6. There had been  
12 some changes. However, this was not a new subdivision. This  
13 was an addition of an existing subdivision, and after we -- I  
14 think we had a new legislative body there, and we researched  
15 out in the minutes and letters from some of the signature  
16 people that were required on the plat, and once it was  
17 defined that the new members, you know, we had a -- I guess  
18 you could call it a planned unit development approval back in  
19 the beginning with the subdivision. We continued forward  
20 with the individual well systems and five-acre lots.  
21 Q Now, Max, you had mentioned before that you had  
22 entered into agreement with Mike in 2000 where Mike was going  
23 to receive 50 percent of the net profit from the sale of the  
24 lots in Phase 4; is that correct?  
25 A Yes.

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1 Q Had you spoken with Mike prior to the sale of the  
2 property about the value of the lots?  
3 A Well, sure, from the very beginning.  
4 Q And what was that discussion?  
5 A Well, we felt like that the property as time  
6 continued on that the last end of the property would be  
7 probably the most valuable of the subdivision.  
8 Q Specifically did you have discussion as to what the  
9 sales price would be for each lot?  
10 A We had a projected sales price of, like, 20- or  
11 \$35,000 per lot.  
12 Q And the lots that you have sold -- well, you  
13 haven't sold any in Phase 4. What about Phase 3, the lots  
14 you've sold in Phase 3?  
15 A Some of the lots have sold for as high as 59-9.  
16 Some of the lots have sold for less. Some of the lots have  
17 sold for 20, so we've been pretty much on an average right on  
18 with our projections that he and I had talked about years  
19 ago.  
20 Q Now, what about water for Phase 4? Did you have  
21 any discussions with Mr. Meguerditchian regarding providing  
22 water to Phase 4?  
23 A Mr. Meguerditchian had an attorney draw up the  
24 existing contract that we're governed by now, and that would  
25 have just been one of the expenses that we would, you know,

1 come up with when needed.  
2 Q Did you agree to provide water to Phase 4?  
3 A Well, I think it was just an unsaid fact between  
4 Mike and I that I would do it all and incur the expenses and  
5 deduct the expenses from the net profits.  
6 Q Were you to be paid for the water rights that you  
7 provide?  
8 A Of course.  
9 Q Otherwise is there water that goes with the  
10 155 acres?  
11 A The water, like with any property, is a separate  
12 commodity. Until it's recorded and we get water to it either  
13 through the form of ownership in the covenants or we apply  
14 for a well permit for each parcel, the water is a separate  
15 commodity than the property.  
16 Q And in order to have the plat recorded, is it  
17 necessary to show the County that there will be water  
18 available or is water available to each of the lots?  
19 A Yes.  
20 Q Can you sell the five-acre lots without water?  
21 A Yes.  
22 Q What would be the value then though?  
23 A Well, the value would be less as I don't believe  
24 they recognize building permits of a residential nature  
25 without a source of water on the building site.

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1 Q Max, do you have an opinion as to the value of  
2 Phase 4 once it's been platted?  
3 A Well, the total of 29 lots there I think could  
4 easily produce somewhere between a million dollars and  
5 2 million with the interest involved in over a 20-year period  
6 of time.  
7 Q What do you mean by interest involved?  
8 A Well, the interest on the contract sales over  
9 20-year period, you know, could bring the value up and the  
10 property quite a bit.  
11 Q Do you have an opinion how much it would cost to  
12 finish the roads if you have to do any more on the gravel in  
13 Phase 4?  
14 A Normally I'm there to do the work part myself, but  
15 I think there's probably \$10,000 worth of gravel needed, and  
16 since the issue has come up between Mike and I, I think we  
17 call Phase 4 just 12 lots above the railroad track.  
18 Q The 9.42 acres, do you have an opinion of what he  
19 value of that is?  
20 A I had it listed once with a local real estate  
21 agent. I think that was Coldwell Banker in the area, and we  
22 listed it for 95,000 based on the sales of Hotspot  
23 Investments along the highway there with power and phone to  
24 the property. We thought a fair market value on it was  
25 100,000. We didn't sell the property, but that's what I

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1 listed it for last time to, I guess, test the market.  
 2 Q But what do you think the value would be?  
 3 A I think it's least valuable at, oh, 55-, 60,000.  
 4 Q Now, at the time of the sale, you also had some  
 5 personal property, tractors, et cetera, correct?  
 6 A Yes.  
 7 Q What do you believe the value of that personal  
 8 property was?  
 9 A Oh, well, to me -- well, it's very valuable. I'm  
 10 sure I have 100,000 in personal property laying around there.  
 11 Q Can you give us an idea of what that personal  
 12 property would be?  
 13 A Well, there's a Champion road grader. There's a  
 14 Caterpillar motor. There are several vehicles there.  
 15 There's a '92 Chevy, there's a '90 Chevy, and there's an  
 16 '89 Ford, a '92 Ford. There's a '32 Ford. There's two motor  
 17 homes there, three fifth wheels. There was a farm tractor  
 18 there and a brush mower there and several items of personal  
 19 property like that.  
 20 Q When you say brush mower, are you referring to  
 21 what's referred to as a brush hog?  
 22 A Yes. It's a Model 406 brush hog that I purchased  
 23 from Johnson Tractor originally.  
 24 Q Now, you mentioned the tractor. Is that the  
 25 tractor that you said had been taken?

40

1 how much of the 47, 48 acre-feet you have actually deeded  
 2 away?  
 3 A I don't know exactly, but I would just guess more  
 4 than half of it, because 50 shares equaling about .25 have  
 5 been given to the 50 lots in Phase 1, so quite a bit of it,  
 6 yes.  
 7 Q What I'm referring to -- I think we've established  
 8 already that that water is still in your name. You've  
 9 pledged it, but it's now in your name, correct?  
 10 A Correct.  
 11 Q So I'm talking about water of the 47, 48 acre-feet,  
 12 how much have you deeded away that's no longer in your name?  
 13 A I'm not sure of that question, but I would guess  
 14 20 acre-feet.  
 15 Q So you feel that you have about 27, 28 acre-feet  
 16 still in your name?  
 17 A You know, I think the last time I checked as of  
 18 record there might have been 17, and that was in 2001.  
 19 Q Seventeen acre-feet?  
 20 A I think so, yes.  
 21 Q About 17.25 acre-feet?  
 22 A I think so, yeah.  
 23 MR. KING: Objection, Your Honor. Counsel is  
 24 testifying again.  
 25 MR. FISHER: I'm qualifying.

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1 A Yes.  
 2 Q Now, how long have you known Mr. Meguerditchian?  
 3 A I've known Mike since, gosh, from about 1983 or '4.  
 4 I've known him over 20 years.  
 5 Q And during that period of time, have you and he  
 6 been involved in the buying and selling of property?  
 7 A Many properties, yes.  
 8 Q And has that been in the Indianola area?  
 9 A Yes.  
 10 Q And also in the purchase and sale of water rights?  
 11 A Yes.  
 12 Q And would you discuss with Mr. Meguerditchian or  
 13 did you have discussions with Mr. Meguerditchian about the  
 14 value of the water rights in the Indianola area?  
 15 A Oh, yeah.  
 16 Q And had you discussed what the value and actual  
 17 price of the water rights?  
 18 A Yes.  
 19 Q And what did you discuss?  
 20 A Well, at the time we were discussing that I think  
 21 water rights were a little bit less. Mike has bought a  
 22 property without water rights before, and he knows the cost  
 23 involved to acquire one and where to get it for property that  
 24 he owns now that does not have water rights included with it.  
 25 Q Max, going back to the water rights, do you know

1 THE COURT: It is. I'll just -- I'm not going to  
 2 strike it, but I'll take into consideration as to  
 3 credibility.  
 4 BY MR. FISHER:  
 5 Q Did you discuss with Mr. Meguerditchian that you  
 6 had pledged water rights to purchasers in Ochre Hill?  
 7 A Absolutely. Mike had bought a piece of ground in  
 8 Phase 1 without water in the mid-'80s or maybe it was the  
 9 late '80s.  
 10 Q And you discussed that with him prior to the sale?  
 11 A Yes.  
 12 MR. FISHER: I don't have any other questions, Your  
 13 Honor.  
 14 THE COURT: Cross.

CROSS-EXAMINATION

16  
 17 BY MR. KING:  
 18 Q Mr. Smith, what was the zoning classification for  
 19 Phases 1, 2 and 3 when you filed those plats?  
 20 A The zoning classification?  
 21 Q Yes.  
 22 A I believe it's always been the same. It's a -- I'm  
 23 trying to think of how they call it. On my tax notice it's  
 24 rural residential.  
 25 Q Your appraiser has classified it as Zone A. Is

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1 that your understanding?  
 2 A I'm not familiar with what A equals under the  
 3 current zoning schedule in that county.  
 4 Q At any rate, your understanding is when you filed  
 5 Phase 1, 2 and 3 plats, the property was zoned rural  
 6 residential; is that correct?  
 7 A That's what it says on the tax notice. I think  
 8 they had a different name for Phase 1, a different name for  
 9 Phase 2, a different name for Phase 3. It could have been  
 10 zoned since then.  
 11 Q And it's your understanding that the property when  
 12 subdivided the zoning allowed for five-acre parcels; is that  
 13 correct?  
 14 A That's how the property was approved, yes.  
 15 Q No. My question is when the property was  
 16 subdivided, the zoning classification that was applicable at  
 17 the time allowed for five-acre parcels; is that your  
 18 understanding?  
 19 A Yes.  
 20 Q How many lots do you own right now in Phases 1, 2  
 21 and 3?  
 22 A I'm not sure but in excess of 30, I guess. I'm not  
 23 really sure as I don't have that information in front of me.  
 24 Q You own currently approximately 30 lots in  
 25 Phases 1, 2 and 3?

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1 A I think there's about that many still in my name.  
 2 Again, I can't give a correct answer on that one without the  
 3 information in front of me.  
 4 Q Are they for sale?  
 5 A Yes, there are some for sale.  
 6 Q What are they worth?  
 7 A Say that again.  
 8 Q What are they worth in your opinion?  
 9 A We had a sale in Phase 3 the other week for 45,000.  
 10 Q And why aren't they all sold? You don't want to  
 11 sell them?  
 12 A I would say based on the economy we've had some  
 13 repossessions, and we're working on reselling what we had to  
 14 take back.  
 15 Q If you were to sell all 30 lots today, could you  
 16 sell them for their full value, or would you have to discount  
 17 that value?  
 18 A Like I said, most of the 30 lots are already sold.  
 19 I think we only have --  
 20 MR. KING: Move to strike, Your Honor,  
 21 nonresponsive.  
 22 BY MR. KING:  
 23 Q My question, Mr. Smith, is if you were to sell 30  
 24 lots today, could you get full value or would you have to  
 25 discount that value, in your opinion?

1 A I don't think we could sell them all in one day. I  
 2 think they're worth somewhere between 27,500 and 45,000  
 3 today, yes.  
 4 Q But you can't sell them for that today, so they're  
 5 not worth that.  
 6 MR. FISHER: Your Honor, I object.  
 7 THE WITNESS: Just a moment. I just sold a lot a  
 8 week ago at 45,000.  
 9 BY MR. KING:  
 10 Q No, my question is if you were to sell all of them  
 11 right now, I don't mean today obviously, but if you were to  
 12 sell all of them in the next couple of weeks or next couple  
 13 of months, you would have to discount the price in your  
 14 opinion; is that correct?  
 15 A I don't think so.  
 16 Q Okay. But they're for sale, and they haven't been  
 17 sold at their current listed value; is that right?  
 18 A I have some lots for sale right now, yes.  
 19 Q Let me ask you about your testimony about proposed  
 20 Phase 4. You've said that over the course of 20 years that  
 21 the property may return a value of \$1 million or more; is  
 22 that correct?  
 23 A Yes.  
 24 Q If you were to sell it as a single parcel today,  
 25 what could you get for it; do you have any idea?

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1 A I think the asking value for some of it would be  
 2 upwards of 50. Some of it would be less than 50 but no less  
 3 than 35.  
 4 Q So you don't have any idea what the entire parcel,  
 5 155 acres as one parcel, would sell for today; is that  
 6 correct?  
 7 A I've had an appraisal done, and I had my own  
 8 experience over the last 30 years, so I think I have a pretty  
 9 good idea.  
 10 Q Thank you. We have your appraisal before the  
 11 Court, so we'll address that later on.  
 12 Have you obtained preapproval from the County in  
 13 written format for Phase 4, what's been described as Phase 4  
 14 of Ochre Hills?  
 15 A The County had given a blanket approval in the  
 16 early '80s of the whole subject property, yes.  
 17 Q No. My question is do you have specific written  
 18 approval for the recording of a Phase 4 plat?  
 19 A I think we can find it in their  
 20 minutes -- (indiscernible).  
 21 Q You do have approval? You have approval -- written  
 22 approval from the County for the filing of the Phase 4 plat?  
 23 A I said I think they have it in their minute entries  
 24 in the clerk's office, yes.  
 25 Q Do you have any written agreement from the County

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1 to waive the current zoning or land use requirements for the  
 2 Phase 4?  
 3 A Only that they've done it in the past.  
 4 Q Okay. The regulations changed in 2001. Do you  
 5 have anything from the County since 2001 that would indicate  
 6 they are willing to waive those current regulations?  
 7 A Well, I recorded a plat in late 2001, yes.  
 8 Q Is that Phase 3 you're talking about?  
 9 A Yes.  
 10 Q My records indicate it was recorded before 2000. I  
 11 show deeds to Richard Johanson, deeds to your attorney Darwin  
 12 Fisher, that were before 2000. So the Phase 2 plat must have  
 13 been recorded before 2000.  
 14 A That's not so.  
 15 Q All right. Specifically you have no written  
 16 agreement from the County to waive the current zoning and  
 17 land use requirements for any future Phase 4 subdivision;  
 18 isn't that correct?  
 19 A I think the County's reputable, and they've stuck  
 20 with their approvals since the subdivision started. I don't  
 21 see any reason why they'd change that now.  
 22 Q Is that yes or no, Mr. Smith?  
 23 A I would say yes.  
 24 Q You have a written waiver from the County of the  
 25 current zoning and land use regulations?

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1 A I believe it's in the clerk's notes, and I searched  
 2 those out once before.  
 3 Q I'm not talking about 1985. I'm talking about  
 4 since 2001 --  
 5 A The only thing written that I have in front of me  
 6 is these exhibits that Darwin has sent.  
 7 Q All right, thank you.  
 8 MR. KING: No further questions, Your Honor.  
 9 THE COURT: Redirect.  
 10 MR. FISHER: Nothing, Your Honor.  
 11 THE COURT: All right. Mr. Smith, you're done.  
 12 Mr. Fisher, do you want him to stand by or.  
 13 MR. FISHER: It would be nice for him to hear the  
 14 testimony, Your Honor. I think it's really up to the Court  
 15 whether you'd like him to stay on the phone and whether  
 16 they'll allow him to stay on the phone. I would like at some  
 17 point to be able to have him call us back at a certain time  
 18 period so if I need to ask him some additional questions in  
 19 rebuttal or something I can do that. It makes it very hard  
 20 where he's on the phone. My concern is before when we've  
 21 done these phone calls once I've done it they don't allow me  
 22 to call him back again. I have to have him call us back.  
 23 I'm not sure if they've arranged that today or not. Can I  
 24 ask Max that?  
 25 THE COURT: Let me ask.

1 THE WITNESS: Judge, I can have you ask the officer  
 2 that's sitting here with me. I believe we're using the  
 3 lieutenant's office right now, and I think he went home for  
 4 the weekend, but you can ask that to Officer Adamson that's  
 5 here beside me.  
 6 THE COURT: I will, but before I do that I want to  
 7 ask the clerk do you know if the County is incurring long  
 8 distance charges for this phone call?  
 9 THE WITNESS: That I don't know.  
 10 THE COURT: I didn't ask you, Mr. Smith. I asked  
 11 the clerk.  
 12 THE WITNESS: Oh, excuse me.  
 13 MR. FISHER: If that's the case, Your Honor, could  
 14 we ask the officer whether or not we can call him back if  
 15 we -- I need to check something with him?  
 16 THE COURT: Let me talk to the officer.  
 17 THE WITNESS: Okay.  
 18 OFFICER ADAMSON: This is Officer Adamson.  
 19 THE COURT: Yes, officer, this is Judge Bagley. If  
 20 later in the proceedings we need to talk to Mr. Smith and we  
 21 dial this number back again, would we be able to talk to him,  
 22 or is he done?  
 23 OFFICER ADAMSON: We can pull him out, and we can  
 24 set it up to where you can talk to him. The number to call  
 25 would be -- I don't know which number you have written down

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1 there.  
 2 THE COURT: We have (801)476-8215.  
 3 OFFICER ADAMSON: That's Lieutenant Curtis's  
 4 office, so instead of 8215 call 8200 and ask for -- tell them  
 5 who you are and ask for any officer there, and we'll  
 6 facilitate the redeployment in the sergeant's office or  
 7 another room where we can have a phone call.  
 8 THE COURT: All right, thank you. I'm going to  
 9 hang up then, and you can have Mr. Smith back.  
 10 OFFICER ADAMSON: Okay.  
 11 MR. FISHER: Your Honor, we'd call Ms. Denbow.  
 12 THE COURT: Ms. Denbow, if you'd come forward, face  
 13 the clerk, raise your right hand.  
 14 Whereupon,  
 15 **SUSAN DENBOW,**  
 16 was administered the following oath by the court clerk.  
 17 THE CLERK: You do solemnly swear that the  
 18 testimony you give in this action shall be the truth, the  
 19 whole truth, and nothing but the truth so help you God.  
 20 THE WITNESS: I do.  
 21 THE COURT: I'll ask you to take the witness stand  
 22 and to speak into the microphone so that we can record you.  
 23 ///  
 24 ///  
 25 ///

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1 DIRECT EXAMINATION  
2 BY MR. FISHER:  
3 Q Ms. Denbow, would you introduce yourself to the  
4 Court, please.  
5 A I'm Susan C. Denbow.  
6 Q What is your address?  
7 A I live at 257 West 400 South, Orem, Utah.  
8 Q Is that your residence or your office?  
9 A That is actually both now.  
10 Q What do you do?  
11 A I'm a certified general appraiser in the state of  
12 Utah. I own Denbow Appraising, appraisal firm. We have four  
13 appraisers.  
14 Q And how long have you been a certified general  
15 appraiser?  
16 A I became a certified general appraiser in 1992.  
17 Q Is there any difference between a certified general  
18 appraiser and a residential appraiser?  
19 A Yes. A certified residential appraiser, which I  
20 was originally in 1990 by the State of Utah, is approved to  
21 do one to four family properties. They're not allowed to do  
22 complex properties.  
23 Q Are they allowed to do subdivisions?  
24 A Not allowed to do subdivisions.  
25 Q So in this case a residential appraiser could not

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1 appraise this property that's been sold as a subdivision,  
2 correct?  
3 A No, not as a subdivision.  
4 Q Have to do it as raw land?  
5 A Yes, as one raw land parcel.  
6 Q Where did you go to college?  
7 A I went to Arizona Western College in Arizona,  
8 attended UVU, and also University of Colorado at Boulder.  
9 Q Did you receive a degree?  
10 A I received a degree from Arizona Western College.  
11 I have extensive hours in college hours, but I didn't receive  
12 a degree from University of Colorado.  
13 Q When did you become licensed as a certified general  
14 appraiser?  
15 A I believe it was early 1992.  
16 Q What professional organizations do you belong to?  
17 A I'm a member of the Appraiser Institute. I'm an  
18 SRA member of that organization. I'm a member of other --  
19 UAA, which is Utah Association of Appraisers, member of the  
20 Wasatch Front Multiple Listing Service, Wasatch County  
21 Multiple Listing Service, Women's Council of Realtors.  
22 Q Has your license ever been revoked or placed on  
23 probation?  
24 A No.  
25 Q Have you received any awards in your profession?

1 A I was UAA state president in 1999, and I believe it  
2 was 2001 I was the -- (indiscernible) -- and state appraiser  
3 of the year.  
4 MR. FISHER: We'd ask that she be deemed qualified  
5 to testify as an expert witness, Your Honor.  
6 THE COURT: Any objection?  
7 MR. KING: No objection, Your Honor.  
8 THE COURT: She's qualified.  
9 MR. FISHER: Thank you, Your Honor.  
10 BY MR. FISHER:  
11 Q Ms. Denbow, have you testified as an expert witness  
12 before?  
13 A Yes, I have.  
14 Q And how long have you been acting as an expert  
15 witness?  
16 A I'm not sure the exact date, but it was probably  
17 the late 1980s.  
18 Q And how many cases do you review a year as an  
19 expert witness?  
20 A It varies. Probably a couple of them a month.  
21 Q How long have you been involved with your present  
22 company?  
23 A 1979.  
24 Q Now, have you appraised other subdivisions here  
25 in -- in Indianola?

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1 A Yes, I have.  
2 Q How many have you appraised?  
3 A Entire subdivisions years ago I did Elk Ridge.  
4 I've done quite a few properties in Hideaway Valley, several  
5 other properties in Indianola. Some were acreage, some were  
6 subdivisions.  
7 Q Now, have you been retained by Mr. Smith?  
8 A Yes, I have.  
9 Q And what has he asked you to do?  
10 A I was asked actually by Laurie Smith who is part  
11 of, I believe, the family trust to do a market value on the  
12 property.  
13 Q And did you do that appraisal?  
14 A Yes, I did.  
15 Q I'd like you to turn, if you would, in the exhibit  
16 book.  
17 A I don't have.  
18 Q Would you turn to Exhibit No. 8, please. Do you  
19 recognize that document?  
20 A It appears to be the appraisal that I completed.  
21 Q Do you want to take a second and just look through  
22 it and make sure that is your appraisal?  
23 A Yes, it appears to be a copy of the appraisal.  
24 MR. FISHER: Your Honor, we'd ask that Exhibit  
25 No. 8 be admitted.

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1 THE COURT: Any objection?  
2 MR. KING: No objection, Your Honor.  
3 THE COURT: Exhibit 8 is received.  
4 (Thereupon, Defendant's Exhibit 8  
5 was admitted into evidence.)  
6 BY MR. FISHER:  
7 Q Now, when you were asked to do a fair market  
8 evaluation of the Phase 4 of Ochre Hills, were you given any  
9 documents?  
10 A I was given a copy of a tax notice, and I believe I  
11 was given a copy of the two legal descriptions and that was  
12 about it.  
13 Q Did you visit the property?  
14 A Yes.  
15 Q And what was the purpose in going to the property?  
16 A Just to inspect the property and take a look at the  
17 lay of the land, and, yes, we were there for a couple of  
18 hours.  
19 Q Now, have you formed an opinion as to fair market  
20 value of the real property?  
21 A Yes, I did.  
22 Q And what was that?  
23 A As of October 2009 -- October 21, 2009, 505,000.  
24 Q Does that include both the 9.42 acres as well as  
25 the 155 acres?

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1 A Yes, that was for the 164.42 acre total.  
2 Q Now, did you subtract from that 501,000, the  
3 interest of Mr. Meguerditchian that he has half interest in  
4 the 9.42 acres?  
5 A No, I did not.  
6 Q And to do that you just simply multiple the number  
7 of acres by the price per acre and subtract it from 501?  
8 A Yes.  
9 Q How did you determine the fair market value?  
10 A I researched the compatible listing and sold sales  
11 in the general area and compared them back to the subject  
12 property.  
13 Q Did you follow industry standards in valuing the  
14 Phase 4 as well as the 9.42 acres?  
15 A Yes, I did.  
16 Q Now, this property is not yet -- or the plat for  
17 the subdivision hasn't been recorded; is that correct?  
18 A That's correct.  
19 Q Did you value it as a recorded subdivision?  
20 A No, I did not.  
21 Q How did you value it?  
22 A I valued it as acreage that although it's not a  
23 recorded subdivision it is a planned -- the fourth phase of  
24 an existing subdivision, and I felt -- in the report I felt  
25 it very important what the highest and best use of the

1 property was, and that is to be the fourth phase of the Ochre  
2 Hills Ranches.  
3 Q Did you check to determine whether or not it had  
4 been approved or at least the total subdivision had been  
5 recorded?  
6 A I talked with -- I can't remember his last name,  
7 Reed. He's the county recorder, and I spoke with him, and he  
8 said back in the -- he didn't know the exact date, but he  
9 said back in the mid-'80s the four phases of the subdivision  
10 were accepted by the commissioners and that it was planned,  
11 but he did also indicate that it was not recorded.  
12 Q Now, were you asked to value water rights that were  
13 owned by Mr. Smith and the Smith Family Trust?  
14 A Yes, but not in depth. I'm not sure if that's a  
15 good way to say it or not. Just did some research with some  
16 local realtors and some past history and found that acre-feet  
17 shares -- I came up with 7500 per acre-foot.  
18 Q And how did you do that?  
19 A Just talking to local realtors. I did not find  
20 very many actual sales. Just talking mainly to local  
21 realtors what people were asking for water rights. We even  
22 looked in, like, some of the local real estate newspapers  
23 that are that are out what people were asking, what people  
24 were advertising, that type of thing.  
25 Q Now, in the appraisal how acre-feet did you

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1 attribute to Mr. Smith and/or the trust?  
2 A Well, Mr. Smith had, 3 point -- I think it was  
3 .275. The estate indicated it looked like around 17 acres  
4 total for the trust. In the report I just put the 3.25 acres  
5 because weren't real sure of all the ownership information  
6 and everything on the water rights.  
7 Q And to make sure I understand, did you determine  
8 them the value of that 3.2?  
9 A That's 75 per acre foot, and I think we've got  
10 share here which is incorrect. It was acre-foot would be  
11 about 25,000.  
12 Q And to determine if he does own more?  
13 A If he did the 7500 per acre-foot times 17, you'd be  
14 closer to like 127,000.  
15 Q Now, have you also had an opportunity to review  
16 Mr. Kjar's report.  
17 A I did read through the report, yes.  
18 Q And can you tell us what the major difference is  
19 between your report and his?  
20 A The major difference between the report was that  
21 he's looking at the property as raw pasture land. I'm  
22 looking at the property as a potential subdivision. Even  
23 though I'm not doing a subdivision appraisal, I'm looking at  
24 the highest and best use, and the highest and best use, even  
25 though the property is not yet recorded as a plat, would be

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1 Phase 4 of the Ochre Hills development.  
 2 MR. FISHER: Your Honor, I'm wondering if I could  
 3 ask the Court for a short recess. I have a back problem, and  
 4 I'm having a little trouble standing up at this point.  
 5 THE COURT: That's appropriate. How much time do  
 6 you need?  
 7 MR. FISHER: I think if I'd just be able to sit  
 8 down for three or four minutes I should be all right.  
 9 THE COURT: All right. We'll resume at a quarter  
 10 to. Court's in recess.  
 11 (Whereupon, a recess was taken.)  
 12 THE COURT: We're back on the record.  
 13 Go ahead, Mr. Fisher.  
 14 MR. FISHER: Thank you Your Honor. Apologize for  
 15 the time.  
 16 BY MR. FISHER:  
 17 Q Ms. Denbow, have you read Mr. Kjar's appraisal  
 18 report?  
 19 A Yes, I have.  
 20 Q And do you agree with his opinion of estimated  
 21 market value?  
 22 A No, I do not.  
 23 Q Why not?  
 24 A I feel that it's low because it's based on  
 25 basically looking at the ground as just pasture ground.

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1 MR. FISHER: I believe all of them are colored.  
 2 THE WITNESS: This is a colored.  
 3 THE COURT: All right.  
 4 MR. FISHER: I don't know. This isn't my set.  
 5 MR. KING: They're just printed copies.  
 6 THE WITNESS: They're copies.  
 7 THE COURT: I was looking at the witness exhibit  
 8 stickers, and these appear to be the originals. I'm saying  
 9 the witness should have the originals, and I should have the  
 10 copy.  
 11 THE WITNESS: Okay.  
 12 BY MR. FISHER:  
 13 Q I think we were talking about the comparables; is  
 14 that correct?  
 15 A Yes.  
 16 Q And what concerns did you have with the comparables  
 17 that were used by Mr. Kjar?  
 18 A Comparables 1, 2 and 3 --  
 19 Q And what page are you on?  
 20 A I'm on -- it says page 4 of 24 at the top, land  
 21 appraisal report.  
 22 Q Okay.  
 23 A It has comparables about halfway down the page.  
 24 We've got subject information and then Comparables 1, 2 and  
 25 3. Comparables 1 and 3 are pasture type land. Comparable 2

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1 Q And why shouldn't it be looked at as pasture  
 2 ground?  
 3 A Because I feel highest and best use is either,  
 4 though it's not a recorded plat now, that it would be Phase 4  
 5 of Ochre Hills, and it has future much higher value than just  
 6 pasture ground.  
 7 Q In his comparables do you agree with all his  
 8 comparables he's used?  
 9 A I agree that they were accurate, you know, in the  
 10 information, but is comparables -- is his report here one of  
 11 my exhibits?  
 12 Q Not in there but I believe it's in Mr. King's  
 13 exhibits.  
 14 MR. KING: Your Honor, I have a couple of exhibits  
 15 and materials for the Court that I've bound here in this  
 16 book. The court clerk has marked them. I have a copy on the  
 17 witness stand and given to opposing counsel. May I approach,  
 18 Your Honor?  
 19 THE COURT: You may. Any objection, Mr. Fisher, if  
 20 I look at this?  
 21 MR. FISHER: No.  
 22 BY MR. FISHER:  
 23 Q Let's turn to --  
 24 THE COURT: This appears to be the original.  
 25 Should the witness have the original?

1 is a 5.47 acre lot over in Indianola. Comparable 1 and 3 are  
 2 pasture type land, and I feel that that's not relevant to the  
 3 subject property with its potential of the five-acre lots --  
 4 future five-acre lots.  
 5 Q What about Comparables 4, 5 and 6?  
 6 A Four, 5 and 6 are listed are under contract  
 7 properties. No. 5 is under contract. Four and 6 are listed  
 8 properties which I actually thought were -- No. 5 is very  
 9 comparable to the subject property. I felt that listings are  
 10 important when you're doing reports even though in his report  
 11 he says he did not give them any weight, which is a little  
 12 confusing why he did not give them weight.  
 13 Q Why would you have given them weight?  
 14 A Well, I feel that listings are very important in  
 15 the current market right now. When we don't have very many  
 16 sales, listed properties are very important and should be  
 17 given weight in a final estimate of value.  
 18 Q Is it a standard of the industry to give listings  
 19 weight --  
 20 A It depends on the situation. With the current  
 21 economy and lack of sales right now, many lenders are  
 22 requiring listings as part of the reports. It varies from  
 23 what the purpose of the appraisal is, et cetera, but much of  
 24 the industry now is requiring listings. We look into the  
 25 future a little bit, and listings normally do that.

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1 Q Did you include any of the Comparables No. 4, 5 and  
2 6 in your report?  
3 A I don't recall. I don't believe we used the same  
4 ones, no.  
5 Q And why not?  
6 A Well, there's quite a few listings available, and  
7 so it would be just by chance that we may have used the same  
8 ones.  
9 Q Now, 4, 5 and 6 in Mr. Kjar's report they are  
10 not -- are they subdivisions?  
11 A No. 5 is over in Hideaway Valley, Lot 421, a sale  
12 for 14,500. This is a comparable development to Ochre Hills.  
13 Q Any other concerns that you had with the  
14 comparables that he used?  
15 A No. It comes back to the same situation that we're  
16 looking at a different highest and best use for the property,  
17 and so our appraisals -- it was a complete report. I have  
18 nothing -- you know, we're just going a different direction.  
19 I'm looking at vacant pasture land and -- when we do  
20 subdivision work, often we'll have what's called paper lots  
21 or a paper subdivision. You know, subdivisions don't go from  
22 just raw ground to being completely finished. I feel that  
23 the subject property is somewhere in between there, and  
24 that's the way I appraised it. It's under development and  
25 should not be just looked at as raw ground.

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1 A Correct. I believe that is the main difference  
2 between the two.  
3 Q You've testified you talked to the recorder's  
4 office about things that happened back in '84?  
5 A Yes, I did.  
6 Q Did you talk to the planning commission or the  
7 county commission about the likelihood of this subdivision  
8 approved?  
9 A I did not.  
10 Q Any other evidence -- do you have any other  
11 evidence that this proposed subdivision would be approved in  
12 its current format?  
13 A I don't, but the county recorder did tell me that  
14 when a subdivision -- all the phases have to be in like the  
15 original plan when it went to the county commission back in  
16 the early '80s, and he said all those phases had to be in it  
17 at that time, but I don't have any documentation.  
18 Q Nothing from the planning commission as to whether  
19 or not they would actually approve --  
20 A No, I don't.  
21 Q So if Phase 4 of the -- proposed Phase 4 for Ochre  
22 Hills were not approved, then the value that you have in your  
23 appraisal would be invalid; is that correct?  
24 A Yes.  
25 Q You testified that there haven't been very many

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1 Q Do you have any other concerns with Mr. Kjar's  
2 appraisal report?  
3 A No, not really. I think that's the main difference  
4 between the two reports. And I did have a concern that  
5 because he's a certified residential appraiser and not a  
6 general appraiser that maybe he might have been influenced to  
7 appraise the property just as raw -- one large parcel of raw  
8 ground because that's all he's allowed to do. I don't know,  
9 but I did have that concern because he's not -- if a  
10 property -- the State says if property whether residential or  
11 acreage is complex, then you need to be a certified general.  
12 I feel that the partial development of the property and being  
13 the new phase of the subdivision does make it a complex  
14 property.  
15 MR. FISHER: I don't have any other questions, Your  
16 Honor.  
17 THE COURT: Cross.  
18  
19 CROSS-EXAMINATION  
20 BY MR. KING:  
21 Q Is it fair to say that the biggest difference  
22 between the two appraisals, you've said some of the comps are  
23 even the same, is really that you've appraised it as a  
24 proposed subdivision, and Mr. Kjar has appraised as it  
25 currently sits today?

1 sales. The determination the Court needs to make is what the  
2 value is of the property today, not what it might sell over a  
3 course of time, but if all these lots were sold today what  
4 they would sell for. So if there were 29 lots or 30 lots,  
5 and you had to sell them today, they would be subject to a  
6 steep discount in order to sell them all at once; is that  
7 correct?  
8 A That's correct.  
9 Q Far less than your evaluation in your appraisal; is  
10 that correct?  
11 A Yes. But I was not asked to do a subdivision  
12 appraisal. A subdivision appraisal would have absorption.  
13 You would have a discounted value on the individual lots.  
14 Q But you appraised as a proposed subdivision?  
15 A I can appraise it as one parcel -- I presented it  
16 as a total acreage that has a potential of being divided into  
17 five-acre lots. There's a lot of property that -- in fact, I  
18 own some up at Schofield, and it's in the M and G zone. You  
19 have to have 50 acres. There's no potential to develop that  
20 property.  
21 Q My understanding is that -- your report -- I'm  
22 going to refer you to it. I have it as Exhibit No. 1 in my  
23 book. It's easier for me to read the color copies. Let me  
24 refer you and the Court to page 4 of your report.  
25 A Okay.

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1 Q Page 4 of 24 where you describe the subject  
 2 property in the most left column there. You say that Zone A  
 3 with CC&Rs and five-acre minimums. What do you mean by  
 4 CC&Rs?  
 5 A CC&Rs are just basically when each subdivision has  
 6 restrictions, covenants and restrictions of what can be in  
 7 the project.  
 8 Q Are there any for this property?  
 9 A You know, I never could locate it. I was told that  
 10 there was, but I didn't locate it in any of the county  
 11 information, and, of course, since -- so I did not locate it.  
 12 Actually I have back on the zoning and farther in the  
 13 report -- let me see what page it was -- as an SL zone.  
 14 Q So that A zone is incorrect; is that right?  
 15 A The A zone was just kind of a general description.  
 16 It did not describe the zoning of the property there.  
 17 Q Well, it's either A or SL. Is there specific  
 18 zoning classification --  
 19 A It's an SL zone. I have that in the report.  
 20 Q On page 12 of your report, let me let the Court get  
 21 there, follow with us there, that's where you're referring to  
 22 top half of that page is the zoning map, and it shows the  
 23 subject in the SL zone?  
 24 A SL zone, that's correct.  
 25 Q Sensitive land zone; is that correct?

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1 County would rezone this property?  
 2 A No, I don't.  
 3 Q And you've appraised it with a proposed subdivision  
 4 at five-acre minimums; is that correct?  
 5 A Yes.  
 6 Q Let me refer you to down in these exhibits that  
 7 I've got for you Exhibit 5 which is the Sanpete County land  
 8 use ordinance. I can represent to you that that's a copy of  
 9 the ordinance that I printed and obtained from the county  
 10 today. If you would turn to page 16 of that Exhibit 5,  
 11 please. This is what the County told me was the requirements  
 12 for sensitive land zone. Do you have any information that  
 13 would indicate that this is incorrect?  
 14 A No, that is the current sensitive land zone.  
 15 Q So sensitive land zones don't allow five-acre  
 16 minimum. They require 40-acre parcels; is that correct?  
 17 A Right, but Elk Ridge that's next to Ochre Hills,  
 18 Hideaway Valley, quite a few of the developments in Indianola  
 19 show the SL zone, but the ones that were planned earlier do  
 20 allow the five-acre zone. When I talked to Reed -- I still  
 21 don't remember his last name, the county recorder, he  
 22 indicated that there was no plan to change the newest phase  
 23 of Ochre Hills into larger than five-acre lots.  
 24 Q County recorder doesn't govern the approval of  
 25 subdivision plats --

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1 A Sensitive land zone; that's correct. It's in a  
 2 couple parts of the report.  
 3 Q Below that you've got the A zone standard. That  
 4 seems misleading to me that you would include A zone  
 5 standards rather than sensitive land zone standards if the  
 6 property is sensitive lands. Do you know why -- was that a  
 7 mistake, or was that intentionally put in there?  
 8 A You know, I'm not real sure why. We had all the  
 9 information to go into the report.  
 10 Q Do you have any indication that the county  
 11 commission would rezone this property?  
 12 A No.  
 13 Q (indiscernible)  
 14 A When I talked to the county recorder --  
 15 MR. FISHER: Excuse me, Your Honor. He keeps  
 16 interrupting and not allowing her to answer.  
 17 MR. KING: I'm sorry if I talk over you.  
 18 THE COURT: Let the witness answer.  
 19 BY MR. KING:  
 20 Q I think you've answered that. Let me try again,  
 21 and not talk over you. Do you have any information that the  
 22 County has committed to rezone this property?  
 23 A The County recorder did not indicate that to me  
 24 when I spoke with him last October.  
 25 Q Any information from anyone that indicates that the

1 A He doesn't govern the approval, but he would be  
 2 someone that you would go to talk to that would be familiar.  
 3 I went to their office mainly to see if the phase had been  
 4 recorded yet, and it had not been recorded yet, but they  
 5 talked about the plan and how all four phases originally in  
 6 the original plan back in the '80s, and we discussed that.  
 7 He did not indicate any change higher than the five-acre  
 8 zone.  
 9 Q And I've already beat you up about the idea that no  
 10 one at the county commission --  
 11 A No, I did not talk to them.  
 12 Q So there's no guarantee in your mind that this  
 13 Phase 4 would be approved; is that accurate?  
 14 A I did not -- in talking to him, I did not see any  
 15 reason why it would not be.  
 16 Q But you don't know --  
 17 A There's very little guarantees in much of anything  
 18 to do with real estate except that the land will be there.  
 19 Q In my old days reading the USPAP, which is the  
 20 Uniform Standards of Professional Appraisal Practice, my  
 21 understanding is that extraordinary assumptions need to be  
 22 listed in your report. The assumption that this approval  
 23 would be granted after 20 years when the zone has changed and  
 24 everything else has changed, would that be an extraordinary  
 25 assumption in your mind?

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1 A I don't feel it would be an extraordinary  
2 assumption, no.  
3 Q Would it be a limiting condition to your report?  
4 A It could be.  
5 Q But you haven't listed it that way?  
6 A No, I have not listed it that way. In my  
7 discussions with the County, I did not have any indication  
8 that that would be that way.  
9 Q Does your valuation as a proposed subdivision have  
10 any discount for improvement cost?  
11 A I didn't appraise it as a subdivision. If I did it  
12 as a subdivision, I would have had development costs  
13 associated with it. I did not appraise it as a subdivision.  
14 Q You've given it value as if it were to be approved  
15 as a subdivision?  
16 A I've given it value that it has the potential to be  
17 the five-acre lots and not just a larger -- just a larger  
18 pasture.  
19 Q But it's in a different zone, sensitive land zone  
20 now, right?  
21 A So was Elk Ridge, Hideaway Valley, the other  
22 properties around it.  
23 Q So any property could be rezoned and subdivided,  
24 but we don't know that it might be rezoned and subdivided; is  
25 that correct?

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1 taxes were that high, right?  
2 A Every county's a little bit different, but that's  
3 maybe an average.  
4 Q That would generally indicate a value of somewhere  
5 around 4- to \$500,000 if the taxes were \$4,000?  
6 A It could.  
7 Q Well, let me refer you down to Tab 3, Exhibit 3 of  
8 my report -- of my exhibit binder that I've given to you.  
9 The first page there is what I'll represent to you as being a  
10 page from your work file that was given to me by opposing  
11 counsel marked MS163 on the bottom.  
12 Do you recall seeing that and putting that in your  
13 work file for this report?  
14 A Yes, I do.  
15 Q It's hard to read, but it says the taxes there are  
16 \$56, not \$4,500.  
17 A That's the greenbelt taxes. I'm not sure if we  
18 have the --  
19 Q Well, greenbelt or no, it's assessed at a certain  
20 value, right? Let me refer you down to the next two pages  
21 are printouts from the county for these two parcels. The  
22 first one is 20221 which is the 155-acre parcel.  
23 MR. FISHER: Your Honor, I've been letting him go  
24 through this, but we haven't had any authentication of  
25 documents that are coming from the county or anywhere else.

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1 A It was approved for the five acres -- when you do a  
2 subdivision, you have to get all the phases in your plan.  
3 They don't have to be recorded, the plats, until later.  
4 Typically even when a property is ready they don't get  
5 recorded because then they have to pay the taxes on the  
6 individual lots, so it's very typical for phases of a  
7 subdivision to not be recorded until they're ready to be  
8 marketed.  
9 Q And until they're recorded, the County has no  
10 obligation to approve those subdivision phases; is that your  
11 understanding?  
12 A True.  
13 Q That's all I wanted to ask. I'm sorry, go ahead.  
14 A That's true.  
15 Q Let me refer you to page 1 of your report. It's  
16 under Tab 2 of -- I'm sorry, Tab 1 of my binder. It's  
17 actually listed as page 1 of 24, but it's actually the third  
18 page into your report printout there. You've listed the real  
19 estate taxes there 30 percent down the page as \$4,247.  
20 Typically taxes are assessed at real property at somewhere  
21 around 1 percent, right?  
22 A Often it's around 1 percent.  
23 Q Somewhere around there. I'm not saying what it is  
24 in this case. Just generally somewhere around 1 percent, so  
25 that would support a value of about 4- to \$500,000 if the

1 I think we need to have some authentication before he  
2 starts --  
3 MR. KING: Which document are you objecting to now?  
4 MR. FISHER: This would be in his Exhibit No. 3,  
5 the last two pages which is tax roll master records dated  
6 July 3, 2010, tax roll master record July 1, 2010.  
7 MR. KING: Those are documents that I prepared to  
8 submit to the witness, Your Honor, printed off and received  
9 them from the county myself. If there's an objection to  
10 their authentication, I can ask the witness if they appear to  
11 be consistent --  
12 THE COURT: Why don't you ask the witness that.  
13 BY MR. KING:  
14 Q Second and third page of that exhibit are for these  
15 two parcels. The only tax notice in your work file was for  
16 Parcel No. 20232 which is the third page. If you review the  
17 first and third pages there, do the values for 2009 appear to  
18 be consistent there with the information -- what I'm asking  
19 you is page 3 is the document that I produced which I  
20 obtained from the county. Is the information there  
21 consistent with page 1 from your file as to the 2009 taxes  
22 for this subject parcel? It says \$56 for both years as I  
23 read it.  
24 A Yes, it does.  
25 Q Do you have any reason to believe that the

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1 information that I've printed from the county is incorrect or  
2 inaccurate in any way?  
3 A I have no reason to believe that's incorrect.  
4 Q So according to these records, the taxes for the  
5 parcels were 700 and some dollars, but you've got in your  
6 report that they were \$4,200. Do you have any idea what that  
7 inaccuracy is?  
8 A I believe that what went into our report was what  
9 the taxes would have been if they had not been in the  
10 greenbelt.  
11 Q Which would be another extraordinary assumption,  
12 isn't that correct, because they are in the greenbelt?  
13 A No, but you can get both -- a greenbelt taxes are a  
14 percentage, and you can put -- I believe when we contacted  
15 the county that was the original information they gave us.  
16 Q Typically in your appraisal reports you prepared,  
17 do you just put the actual taxes, greenbelt or normal taxes?  
18 A We usually do, and why that number got put in -- we  
19 did not base our value in the report on how the property was  
20 assessed or taxed.  
21 Q What value has the County assessed this property  
22 at?  
23 A They have -- they've got \$76,510 on 2008. The same  
24 on 2009, 76,510 on the one and \$4,710 on the other parcel.  
25 Q If I do the math, that's \$500 an acre.

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1 A Yes.  
2 Q Does that seem correct?  
3 A That's what they have it at, yes.  
4 Q So the County has assessed it for valuation  
5 purposes at \$500 an acre. Your evaluation is about \$3,000 an  
6 acre.  
7 A Correct.  
8 Q And our other appraisal that we looked at it is  
9 about \$1,200 an acre.  
10 A That's correct.  
11 Q Page 10 of your report at that first Tab 1, you  
12 show a plat map. Again, that strikes me as misleading  
13 because that's not the plat map. That's just a drawing that  
14 Mr. Smith has prepared.  
15 A It says at the top those are possible future 29  
16 lots.  
17 Q What in your professional opinion is a plat map?  
18 Plat map in my opinion is a very specific thing that gets  
19 recorded with the county as the plat map, so the current plat  
20 map of the property is drastically different from what you've  
21 got in your report; isn't that correct?  
22 A Okay. The outside dimensions are what the county  
23 has recorded. I have the word future or possible lots. That  
24 may have been clear if that had said survey of future  
25 possible lots.

1 MR. KING: No further questions, Your Honor. Thank  
2 you.  
3 THE COURT: Redirect.  
4 MR. FISHER: No.  
5 THE COURT: Can this witness be excused?  
6 MR. FISHER: We're asking her to stay for  
7 Mr. Kjar's.  
8 THE COURT: All right. You can step down.  
9 THE WITNESS: Do I leave the two here?  
10 THE COURT: Yes.  
11 MR. FISHER: Call Mr. Dave Gedo.  
12 THE COURT: Would you come forward, sir, and raise  
13 your hand to be sworn.  
14 Whereupon,  
15 **MIGUEL DAVID GEDO,**  
16 was administered the following oath by the court clerk.  
17 THE CLERK: You do solemnly swear to tell the  
18 truth, the whole truth, and nothing but the truth so help you  
19 God.  
20 THE WITNESS: I do.  
21 THE COURT: Ask you to take the witness stand.  
22  
23 **DIRECT EXAMINATION**  
24 BY MR. FISHER:  
25 Q Would you state your name for the record, please.

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1 A It's Miguel David Gedo, G-E-D-O.  
2 THE COURT: Mr. Gedo, you'll need to speak in the  
3 microphone. I didn't hear you very well.  
4 THE WITNESS: Sorry. Can you hear me now?  
5 THE COURT: Would you say your name again.  
6 THE WITNESS: It's Miguel David Gedo, G-E-D-O.  
7 THE COURT: Thank you.  
8 BY MR. FISHER:  
9 Q And your address?  
10 A 1008 West 200 North in Provo.  
11 Q Are you acquainted with Mr. Max Smith?  
12 A I am.  
13 Q And how long have you known him?  
14 A I went to work for the Smith Family Living Trust in  
15 about early 1990.  
16 Q What do you do?  
17 A I maintenance all of the equipment that the trust  
18 uses to develop all the subdivisions, tractors, graders,  
19 dozers, you know, backhoes, everything that's needed to make  
20 this raw land into subdivisions.  
21 Q You mentioned a tractor. Is it a tractor that Max  
22 had that he said was stolen, was that important in developing  
23 these subdivisions?  
24 A Oh, it was very important because we needed it not  
25 only to cut the brush down, but we need to do it every year

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1 because the brush grows out there like crazy, and you've got  
 2 to stay on it or else the brush goes out of control.  
 3 Q And also the brush cutter is equally as important?  
 4 A Of course.  
 5 Q Now, do you know Mr. Meguerditchian?  
 6 A Of course I do.  
 7 Q How long have you known him?  
 8 A Well, I've known him ever since I went to work for  
 9 Max. It's been about 20 years.  
 10 Q Now, Mr. Gedo, have you ever been involved in a  
 11 conversation with Mr. Meguerditchian where there was a  
 12 discussion about Lot 349 and the 9.42 acres?  
 13 A Yes. I was there at that discussion with Max.  
 14 MR. KING: Your Honor, I need to object as to any  
 15 prior testimony as to prior activities. The sole purpose of  
 16 the Court's inquiry today is either the conduct of the  
 17 sheriff's sale and the value of the property. Any prior  
 18 negotiations or discussions between the parties are  
 19 irrelevant unless they go to the value.  
 20 THE COURT: What's the relevancy, Mr. Fisher?  
 21 MR. FISHER: Your Honor, part of the test -- of the  
 22 two tests one of the tests require that there be some  
 23 misconduct on the part of Mr. Meguerditchian, and the  
 24 conduct, as I understand it, doesn't have to be with the sale  
 25 itself. It can be other type of conduct, at least it was in

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1 the cases.  
 2 THE COURT: It can be afterwards. Are you asking  
 3 for something in advance?  
 4 MR. FISHER: Yes, because here -- as an offer of  
 5 proof, this judgment was obtained on the basis that  
 6 Mr. Meguerditchian states it that he was entitled to Lot 349,  
 7 did not receive it, therefore obtain a judgment of \$27,000.  
 8 Mr. Gedo is going to be testifying that Mr. Meguerditchian  
 9 had agreed to transfer his interest in the 349 for his  
 10 interest in the 9.42 acres. That to me would indicate even  
 11 though it starts with the lawsuit his conduct, you know, was  
 12 not appropriate. It was misconduct. He's lined this up so  
 13 he can have a sale of the property and buy it himself based  
 14 upon fraudulent information, and so I think it goes to his  
 15 conduct.  
 16 MR. KING: Your Honor, the issue of Lot 349 and  
 17 these 9.42 acres has been fully adjudicated and subject to a  
 18 judgment that was appealed already. There's no reason to put  
 19 a court to consider a collateral attack on the judgment  
 20 itself. We're only talking about the execution efforts after  
 21 judgment was -- (indiscernible).  
 22 MR. FISHER: Your Honor, this has nothing to do  
 23 with collateral attacking the judgment. We certainly can and  
 24 will be filing a lawsuit.  
 25 THE COURT: How are you going to relate it to what

1 happened since the sale?  
 2 MR. FISHER: It's not just since. It would be  
 3 before the sale. I don't think it just has to be -- I don't  
 4 think the Pyper case limits it to conduct after the sale or  
 5 at the sale. I think it just says inappropriate conduct  
 6 and --  
 7 THE COURT: It has to be relevant to the sale.  
 8 How's it going to be relevant to the sale?  
 9 MR. FISHER: Because he fraudulently obtained a  
 10 judgment in order -- through fraud obtained a judgment so he  
 11 could have the sale and purchase the property, and so I think  
 12 it is --  
 13 THE COURT: I think the judgment's already been  
 14 entered, and that's not part of what we're doing here today,  
 15 so I'm going to sustain the objection.  
 16 MR. FISHER: Just so I make sure I have a clear  
 17 record, Your Honor, I just want to make sure I've explained  
 18 it properly.  
 19 THE COURT: If what you're saying is that the  
 20 obtaining of the judgment was by fraud and therefore --  
 21 MR. FISHER: That was misconduct on his part that  
 22 relates to the sale because he never had the sale without the  
 23 judgment.  
 24 THE COURT: Right. I think that's something you  
 25 have to raise in an appeal or raise to collaterally attack

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1 the judgment, not to set aside the sale. What we're  
 2 concerned with today is setting aside the sale.  
 3 MR. FISHER: So I understand what the judge is  
 4 saying, Your Honor, is that you feel that that conduct does  
 5 not qualify as misconduct according to the test as set forth  
 6 in Pyper; is that correct?  
 7 THE COURT: Yes.  
 8 MR. FISHER: I just want to make sure I understand.  
 9 THE COURT: Mr. King, do you want to stand by your  
 10 objection?  
 11 MR. KING: Yes, Your Honor. I maintain that -  
 12 objection.  
 13 THE COURT: All right. I sustained the objection.  
 14 MR. FISHER: Thank you, Your Honor. I'm just  
 15 trying to think if there's anything else I need to ask him at  
 16 this point. I don't think so.  
 17 THE COURT: All right. Any cross?  
 18 MR. KING: Nothing, Your Honor.  
 19 THE COURT: All right. You may step down. Should  
 20 he be excused or not?  
 21 MR. FISHER: I believe he's going to be staying  
 22 because he's been asked to by Mr. Smith.  
 23 THE COURT: All right.  
 24 MR. FISHER: Call Mr. Mike Meguerditchian.  
 25 THE COURT: Mr. Meguerditchian, if you'd come

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1 forward, stand before the clerk to be sworn.  
 2 Whereupon,  
 3 **MIKE MEGUERDITCHIAN,**  
 4 was administered the following oath by the court clerk.  
 5 THE CLERK: You do solemnly swear to tell the  
 6 truth, the whole truth, and nothing but the truth so help you  
 7 God.  
 8 THE WITNESS: I do.  
 9 THE COURT: I'll ask you to take the witness stand,  
 10 speak into the the microphone.  
 11  
 12 **DIRECT EXAMINATION**  
 13 BY MR. FISHER:  
 14 Q Would you state your name, please.  
 15 A (indiscernible) Meguerditchian. I go by Mike.  
 16 Q And is it all right if I call you Mike today?  
 17 A Yes.  
 18 Q Mike would you spell your last name.  
 19 A M-E-G-U-E-R-D-I-T-C-H-I-A-N.  
 20 Q And your address?  
 21 A I have a -- (indiscernible) -- for mailing.  
 22 THE COURT: For what?  
 23 THE WITNESS: Mailing.  
 24 BY MR. FISHER:  
 25 Q Do you have a home address?

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1 A 2576 North 500 East, Salt Lake City, Utah, 84106.  
 2 Q Mike, it's true that you've known Max for  
 3 approximately 20 years?  
 4 A Twenty-five.  
 5 Q About 1984, '85?  
 6 A Yes.  
 7 Q And you've actually purchased several pieces of  
 8 property in the Indianola area; is that correct?  
 9 A Yes, in Hideaway Valley.  
 10 Q You've purchased four to seven lots in Hideaway  
 11 Valley?  
 12 A Yes.  
 13 Q Also purchased a 50- or 60-acre parcel of land that  
 14 lies next to the Hideaway Valley?  
 15 A Yes.  
 16 Q Also purchased some water rights or had water  
 17 rights?  
 18 A Yes.  
 19 Q And I think mentioned in deposition also that you  
 20 have some deeds to water rights that you haven't even  
 21 recorded yet, correct?  
 22 A Yes.  
 23 Q Now, Mike, when you went to the sale of this  
 24 property, you were aware that Max owned some personal  
 25 property, correct?

1 A I don't know. He was always telling  
 2 me -- (indiscernible) -- Smith Family Trust did.  
 3 Q Or the Smith Family Trust?  
 4 A Yes.  
 5 Q Graders?  
 6 A I don't know anything about those.  
 7 Q Hadn't you visited the property?  
 8 A Not after the judgment, yes.  
 9 Q And you helped him build a road?  
 10 A I did.  
 11 Q When he built the road, was he using a grader?  
 12 A To grade the road I used the loader. He had me use  
 13 the loader.  
 14 Q But you knew he had equipment to build roads,  
 15 correct?  
 16 A Yes.  
 17 Q Now, did you seek to sell those items in order to  
 18 pay your judgment?  
 19 A I don't know anything about that. I  
 20 just -- (indiscernible) -- he said, and I went with it.  
 21 Q Now, let's look at -- if you've got our exhibit  
 22 book there. If you will turn to Exhibit No. 2, please. On  
 23 there, Mike, on the praecipe it lists a tractor and a brush  
 24 hog. Have you since the sale gone over and picked up the  
 25 tractor and the brush cutter?

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1 A Yes, I did.  
 2 Q And I think you actually stated that the tractor in  
 3 deposition you felt had a value of about \$10,000; is that  
 4 correct?  
 5 A Did I say that?  
 6 Q Do you recall?  
 7 A I don't.  
 8 THE COURT: A value of how much?  
 9 MR. FISHER: \$10,000.  
 10 BY MR. FISHER:  
 11 Q Now, you --  
 12 A Excuse me. I don't know how that tractor if even I  
 13 said that -- (indiscernible) -- tractor and brush cutter. I  
 14 bought that brush cutter from Max Pifer for --  
 15 (indiscernible) -- and I bought the tractor from the  
 16 auction -- (indiscernible) -- and I was using it to cut  
 17 brushes -- (indiscernible).  
 18 Q So if you said \$10,000 in your deposition, it was a  
 19 mistake?  
 20 A It could be.  
 21 Q You use that tractor and brush cutter is important  
 22 for you in Phase 4 of Ochre Hills; is that correct?  
 23 A When Max -- (indiscernible) -- took my tractor and  
 24 the brush cutter.  
 25 Q I don't mean to interrupt you, but if I can just

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1 listen to my question. The tractor and the brush cutter is  
2 important to you in maintaining Phase 4 of Ochre Hills,  
3 correct?  
4 A Yes.  
5 Q And that's one reason why you went over and picked  
6 it up so you could use it in Phase 4, correct?  
7 A Actually I picked it up to see what's going to  
8 happen to the property.  
9 Q But it was to help you maintain the property,  
10 correct?  
11 A I don't even use that tractor.  
12 Q Who uses it?  
13 A Nobody. It's just parked.  
14 Q Now, at the sale, were the water rights sold  
15 individually or were they sold as a bundle?  
16 A I don't remember.  
17 Q How did you arrive at the price for the water  
18 rights?  
19 A What mean arrive?  
20 Q How did you determine the price you were going to  
21 pay for the water rights?  
22 A I guess I went to -- (indiscernible). I mean, I  
23 just got -- I guess we just bid on it, and we got it.  
24 Q Did you actually do the bidding or did Mr. King?  
25 A I did the bidding.

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1 Q Okay. The 9.42 acres I believe you bid \$3,000.  
2 How did you determine that you were going to bid \$3,000 on  
3 the 9.42 acres?  
4 A At auction I buy property. I bought a few  
5 properties from -- (indiscernible). You bid, you get it,  
6 it's yours.  
7 Q Before you went to bid did you say, well, I'm only  
8 going to pay this amount for that property or did you say --  
9 how did you arrive at the property price?  
10 A (indiscernible) -- six, seven, eight months. I  
11 don't know.  
12 Q And is that true also for your bid for the  
13 155 acres? You don't know how you arrived at the 30,000 for  
14 the 155 acres?  
15 A I don't.  
16 Q Or how you arrived at 30,000 for some water rights?  
17 A I don't.  
18 Q Or 3,000 for the well rights?  
19 A I don't.  
20 Q And that just happens to add up to the amount of  
21 your judgment, correct?  
22 A I guess I divided and then I decide to bid that  
23 much. The -- (indiscernible) -- I guess I decide what ever  
24 the judgment I go ahead and divide it and pay the price.  
25 Q Now, did you purchase the property with the intent

1 that you're going to subdivide and sell it?  
2 A Actually I thought maybe we were going to subdivide  
3 it and sell it, but I think we end up -- (indiscernible) --  
4 subdivision it.  
5 Q But that was your intent, correct?  
6 A Yes.  
7 Q And you knew that without water you could not plot  
8 it and subdivide and sell it, correct?  
9 A Actually I knew Max when he sold me the property he  
10 suppose to sell me water right with it, and I find out I have  
11 no water right -- (indiscernible) -- property. He wasn't  
12 giving me -- (indiscernible).  
13 MR. FISHER: Your Honor, I'm going to ask to have  
14 that stricken. It's not responsive.  
15 THE COURT: Ask him again.  
16 BY MR. FISHER:  
17 Q You know and at the time you purchased the property  
18 to sell you knew that without water you could not have a plat  
19 recorded subdividing the lots on Phase 4, correct?  
20 A Yes.  
21 Q And isn't that why you purchased all the water  
22 rights that were owned by Max Smith and the trust in Sanpete  
23 County?  
24 A Water right because the judgment was there, and  
25 then I want what ever in auction I'm going to purchase.

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1 Q Did anybody else show up at the auction?  
2 A No.  
3 Q Now, you've actually formed an LLC in order to  
4 develop the property and sell it as a subdivision, correct?  
5 A Yes.  
6 Q And your partner in that is Mr. King?  
7 A Yes.  
8 MR. FISHER: I don't have any other questions.  
9 THE COURT: Cross.

10

# CROSS-EXAMINATION

11  
12 BY MR. KING:  
13 Q Mike, Mr. Fisher asked you about the tractor and  
14 brush cutter. Was that yours or was that Max's?  
15 A It's mine.  
16 Q When did you buy it --  
17 A I bought it from somebody 5600 West 24 South. They  
18 used to have a city or county auction. I bought it from  
19 there.  
20 Q So you bought that equipment from Max a long time  
21 before the judgment was executed on; is that right?  
22 A Oh, yeah. I bought that tractor about probably in  
23 '90 I was cutting brush.  
24 Q Have you ever sold any water rights in Sanpete  
25 County?

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1 A (indiscernible).  
 2 Q You have recently sold water rights?  
 3 A Yes.  
 4 Q What did you sell?  
 5 A Half point 50 acres for 2250.  
 6 Q So you sold one-half acre-foot of water for \$2,250?  
 7 A Yes.  
 8 Q Why didn't you sell it for more?  
 9 A Well, you can't get it unless you desperately need  
 10 it and -- (indiscernible) -- Max's -- (indiscernible) -- and  
 11 pay the price.  
 12 MR. KING: No further questions, Your Honor.  
 13 THE COURT: Redirect.  
 14  
 15 REDIRECT EXAMINATION  
 16 BY MR. FISHER:  
 17 Q Mike, the water right you said you just sold, do  
 18 you have a bill of sale for it?  
 19 A (indiscernible).  
 20 Q And is it culinary water?  
 21 A What does that mean?  
 22 Q Water you can drink. It's not for irrigation --  
 23 used for irrigation?  
 24 A The water belongs to 856 in Hideaway Valley which I  
 25 believe it should be drinking water.

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1 A I don't agree with it.  
 2 Q Why not?  
 3 A Because I picked up that tractor from Ron Cox in  
 4 Fairview and had to pay \$5,000 on the repair bill. That's  
 5 when we brought it back to the ranch, and Max and Mike made a  
 6 deal with the tractor before I went and picked it up.  
 7 MR. KING: Hearsay, Your Honor.  
 8 BY MR. FISHER:  
 9 Q Why don't you tell us what your involvement  
 10 conversation prior to pick up the tractor that involved  
 11 Mr. Meguerditchian?  
 12 A Yes. Mike wanted to sell that tractor to the  
 13 family trust, and we needed a tractor, but it was broke down,  
 14 so Mike took it to Ron Cox, and I believe we do have a bill  
 15 for that.  
 16 MR. KING: Same objection, Your Honor.  
 17 THE COURT: Mr. Gedo, you can't testify about --  
 18 well, you've got to be careful and listen to the objections,  
 19 but you're not able to talk about hearsay if there is an  
 20 objection.  
 21 THE WITNESS: Okay.  
 22 BY MR. FISHER:  
 23 Q What we need to have you do if you would is tell us  
 24 what Mr. Meguerditchian said about the tractor.  
 25 A Well, the tractor was broke, and he wanted to make

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1 Q You're not sure?  
 2 A People drinking from those wells.  
 3 MR. FISHER: I don't have any other questions, Your  
 4 Honor.  
 5 THE COURT: You can step down.  
 6 MR. FISHER: Your Honor, if it would be appropriate  
 7 now, we'd like to call Mr. Gedo back on rebuttal for his  
 8 testimony as to the tractor.  
 9 THE COURT: Well, you don't do rebuttal until --  
 10 MR. FISHER: Until it's over.  
 11 THE COURT: Until it's over.  
 12 MR. FISHER: (inaudible) that will be fine.  
 13 THE COURT: Unless Mr. King doesn't care if you do.  
 14 MR. KING: I have no objection, Your Honor, if he'd  
 15 like to excuse the witness and do it now, that's fine.  
 16 THE COURT: All right. There's no objection, so  
 17 I'll allow it.  
 18 Mr. Gedo, you're still under oath.  
 19  
 20 DIRECT EXAMINATION  
 21 BY MR. FISHER:  
 22 Q Mr. Gedo, you heard the testimony from  
 23 Mr. Meguerditchian regarding the tractor?  
 24 A I did.  
 25 Q Do you agree with that?

1 a deal to get the tractor, and Mike made a deal, but he had  
 2 already had the tractor up at Ron Cox's.  
 3 Q What was the deal he made?  
 4 MR. KING: Same objection, Your Honor.  
 5 THE COURT: You'll have to lay a foundation as to  
 6 how he knows what the deal is.  
 7 BY MR. FISHER:  
 8 Q How do you know that Mike wanted to sell the  
 9 tractor?  
 10 A Because he was over at the well head when I was  
 11 there, and the Smith Family Living Trust took it as a down  
 12 payment.  
 13 Q Did you hear Mike state that he wanted to sell the  
 14 tractor?  
 15 A Yes.  
 16 Q And did he say why he wanted to sell it?  
 17 A Well, obviously he couldn't pay the bill for it  
 18 from Ron Cox. Like I testified, we paid \$5,000 for the  
 19 repair on that tractor.  
 20 Q Did you actually take the check over yourself?  
 21 A I did, and I picked up the tractor, and I brought  
 22 it back to the well head, and then we later, me and Max,  
 23 purchased the -- what's it called, the weed cutter.  
 24 Q The brush hog?  
 25 A The brush hog we purchased. And when we got that

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1 brush hog, it had a -- the reason Mike says he only paid 500  
2 for it because it had a broken shaft on it and I had to  
3 repair it. I didn't do the repairs myself on it which cost  
4 quite a bit of money, new blades, a new drive shaft to get  
5 it functional because it wasn't functional when we purchased  
6 it, but we've used that tractor for years out there, you  
7 know, and he had no right coming to get it.  
8 Q How long did you have the tractor before he came  
9 and got it?  
10 A At least three years, three or four years.  
11 Q How long did you have the brush hog before he came  
12 and got it?  
13 A Well, they're both attached together. They're one  
14 unit. I mean, you could disattach it, but there'd be no  
15 sense because, you know, neither piece are really any good  
16 unless they're hooked up because it's made for the brush hog.  
17 MR. FISHER: No other questions, Your Honor.  
18 THE COURT: Cross.  
19 MR. KING: No, thank you, Your Honor.  
20 THE COURT: Step down.  
21 MR. FISHER: We have no other witnesses, Your  
22 Honor.  
23 THE COURT: All right. Maybe it's a good time to  
24 take a lunch break. Let me ask Mr. King how many witnesses  
25 do you anticipate calling?

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1 MR. KING: I think just Mr. Kjar, Your Honor, just  
2 the appraiser.  
3 THE COURT: All right.  
4 MR. KING: If we push through I think we'd be done  
5 in an hour, but --  
6 THE COURT: Mr. Fisher, what's your choice?  
7 MR. FISHER: That would be fine.  
8 THE COURT: The other thing is we have a clerk and  
9 bailiff. Do you want a ten-minute break? Let's take a  
10 ten-minute break and then we'll continue.  
11 (Whereupon, a recess was taken.)  
12 THE COURT: Back on the record. We'll now hear  
13 plaintiff's case.  
14 MR. KING: Plaintiffs call Steven Kjar as a  
15 witness, Your Honor.  
16 THE COURT: Mr. Kjar, if you'd come forward and be  
17 sworn.  
18 MR. KING: He just told me how to pronounce it.  
19 Steven "Care" is actually.  
20 THE COURT: I'll ask you to stand before the clerk.  
21 Whereupon,  
22 STEVEN KJAR,  
23 was administered the following oath by the court clerk.  
24 THE CLERK: You do solemnly swear to tell the  
25 truth, the whole truth, and nothing but the truth so help you

1 God.  
2 THE WITNESS: Yes, I do.  
3  
4 DIRECT EXAMINATION  
5 BY MR. KING:  
6 Q Mr. Kjar, would you state your name and address for  
7 the record, please.  
8 A Steven Ben Kjar.  
9 Q And your address, please.  
10 A 290 West 100 South, Manti, Utah.  
11 Q Let me refer you to Plaintiff's Exhibit No. 2 in  
12 the black binder in front of you. Would you review that  
13 document for a moment, please.  
14 A I can turn pages on a computer a lot faster than on  
15 paper.  
16 Q Does that appear -- do you recognize that document?  
17 A Yes.  
18 Q What does it appear to be?  
19 A It's my report as requested by you.  
20 Q Your report meaning that's your appraisal of the  
21 property involved?  
22 A Yes. The two parcels are the two serial numbers  
23 involved.  
24 MR. KING: Your Honor, plaintiff moves to admit  
25 Plaintiff's Exhibit 2 into evidence.

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1 THE COURT: Any objection?  
2 MR. FISHER: No objection. I'm assuming he's going  
3 to ask him to be qualified. Your Honor, we'll stipulate that  
4 he is qualified to testify as an expert witness as a  
5 certified residential appraiser, not as a certified general  
6 or MAI.  
7 THE COURT: Mr. King, do you want to accept the  
8 stipulation?  
9 MR. KING: Your Honor, we simply would move to  
10 qualify him as an expert witness in the case. If counsel  
11 wants to try to exclude or object to his testimony, he's free  
12 to do so.  
13 THE COURT: I think you did stipulate that  
14 Exhibit 2 could be received, did you not?  
15 MR. FISHER: Not at this point until he has been  
16 qualified as an expert witness because it is important  
17 whether he's going to be qualified as a certified residential  
18 appraiser, and I don't know how they can qualify him for  
19 anything else. That's all he's qualified for.  
20 THE COURT: All right. Exhibit 2 is not received  
21 at this point. I'll allow you to lay what foundation you  
22 need to.  
23 BY MR. KING:  
24 Q What's your licensing as an appraiser in the State?  
25 A Certified residential.

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1 Q How long have you been an appraiser?  
2 A I became what used to be a comparable term was  
3 registered, and I believe that was in 1985. I started  
4 employment in the county assessor's office in May 11<sup>th</sup> of  
5 1984.  
6 Q What has been your prior employment with Sanpete  
7 County?  
8 A I hired on as the deputy assessor, field deputy or  
9 appraiser, for Sanpete County Assessor's Office May 11, 1984.  
10 They also needed a building inspector, and I served as a  
11 building inspector from that same date through -- up until  
12 January 1<sup>st</sup> of '92. They did not have a zoning official,  
13 so I served as the zoning official because I had to verify  
14 zoning and other requirements were met before I could issue a  
15 building permit, and I was the building inspector for the  
16 county for that time period.  
17 Q How many years were you the zoning and building  
18 inspector?  
19 A What is that? From '84 -- May 11, '84, up until  
20 January 1<sup>st</sup> of 1992, so that's seven-and-a-half years.  
21 Q How long have you been appraising real property in  
22 Sanpete County?  
23 A Since then.  
24 Q Since 1984?  
25 A Yes.

100

1 Q Are you currently licensed as a certified  
2 residential appraiser in the state?  
3 A Yes, certified residential.  
4 MR. KING: On that basis we'd move to have him  
5 admitted and recognized as an expert witness.  
6 MR. FISHER: We would again state that he's  
7 qualified to be an expert witness as a certified residential  
8 appraiser, but they have not qualified him as a certified  
9 general appraiser or any other type of appraiser. I think  
10 he's qualified simply as a certified residential appraiser.  
11 They have not shown any qualifications for certified -- or  
12 for general appraiser.  
13 THE COURT: As I understand the rule, the rule does  
14 not define experts in whether they are certified residential  
15 or certified general, but the rule is whether or not their  
16 testimony is helpful based upon their experience and  
17 education and knowledge. I find that based upon his  
18 experience, education, knowledge that he is an expert  
19 witness. I do find, however, that Mr. Fisher's objections  
20 are something to take into consideration in determining the  
21 weight that I give to his testimony, so I'll allow him to  
22 testify, and I'll give it such weight as I deem appropriate.  
23 MR. FISHER: Your Honor, may I just voir dire on a  
24 couple of questions that might help?  
25 THE COURT: You're asking me to withhold ruling

1 until after you do that?  
2 MR. FISHER: Yes.  
3 THE COURT: All right, go ahead.  
4 VOIR DIRE EXAMINATION  
5 BY MR. FISHER:  
6 Q Mr. Kjar, as a certified residential appraiser, are  
7 you licensed to appraise subdivisions?  
8 A No.  
9 Q And you do not appraise subdivisions?  
10 A No.  
11 Q And as a certified residential appraiser, you are  
12 not an expert in appraising subdivisions, correct?  
13 A As a certified residential, yes, as the county  
14 assessor was.  
15 Q And why were you as the county assessor?  
16 A That was part of the duties and requirements as ad  
17 valorem appraisal or assessment that was required in the  
18 position of the Sanpete County assessor.  
19 Q Did you receive the same education as a certified  
20 general appraiser receives in order to appraise subdivisions  
21 when you were a county auditor or what ever it was?  
22 A County assessor.  
23 Q County assessor, thank you.  
24 A Yes, I did.  
25 Q And what was that?

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1 A Extensive training through the Utah State Tax  
2 Commission the entire time I was employed by Sanpete County,  
3 and the Appraisal Institute and other sources that we use to  
4 do that. Typically if there was a large commercial project,  
5 such as when we reappraised the Sanpete County commercial  
6 property all of it countywide, we went through the county --  
7 Utah Association of Counties and had a requested proposal to  
8 do that large project. We didn't have the manpower in the  
9 building to do that in the assessor's office.  
10 Q When you were in the assessor's office, did you  
11 ever appraise property, say, more than 150 acres that was  
12 potential subdivision property as a subdivision?  
13 A Not as a subdivision, but as ad valorem for tax  
14 purposes for all the property in the county, yes.  
15 Q But not as a subdivision or potential subdivision?  
16 A Not as a potential subdivision to sell as a  
17 potential subdivision.  
18 Q And really the tax assessor, you're assessing what  
19 the taxes would be on the value of the property as it sat,  
20 raw land or what ever, correct?  
21 A No. As described in the county legal description,  
22 which is one parcel at a time, and it does not include the  
23 entire block subdivision as an entity to try to sell as a  
24 subdivision entity but the ad valorem is one parcel at a time  
25 placing value on that one parcel.

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1 Q So even as an assessor you didn't go out and take  
2 155 acres or what ever and say this has a potential for being  
3 a subdivision; therefore, I would value it for tax purposes  
4 as blank?

5 A That's correct.

6 MR. FISHER: I think that's all, Your Honor. I  
7 think -- again, I understand where the Court's coming from,  
8 but it seems to me that -- we would object and want a  
9 standing objection to any testimony he would have regarding  
10 the valuation of potential subdivisions or subdivision or any  
11 testimony that he may have of critique of her appraisal  
12 because he's not a certified general appraiser and does not  
13 have the experience to critique her appraisal.

14 THE COURT: Your objection is noted. It doesn't  
15 change my decision.

16 MR. FISHER: Thank you.

17

18 RESUMED DIRECT EXAMINATION

19 BY MR. KING:

20 Q When I sent you this assignment, did you make a  
21 determination as to whether or not this should be appraised  
22 as raw land or as a subdivision?

23 A My request was to appraise it as it stood on the  
24 date of the tax sale, and that was two parcels, the legal  
25 descriptions that are included in the report itself.

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1 BY MR. KING:

2 Q I just want to clarify just for the record the  
3 actual amount of taxes assessed against these two parcels for  
4 2009 according to these records.

5 A For 2009 the tax dollars that are showed there, and  
6 that's based upon the agricultural non-FAA which is Farm Land  
7 Assessment Act, so it's not as this document shows at least,  
8 and that's as far as -- I didn't research it with the  
9 treasurer's office to see what was actually paid, but this  
10 should be representation of the taxable -- the market value,  
11 the taxable value, and the taxes for the 2009, and that was,  
12 like I say, printed from the recorder's office on May 14,  
13 2010. You'll notice that the 2009 and 2010 value taxes are  
14 the same -- or the value is the same. The taxes are  
15 different because -- I assume it's because this 2010 shows  
16 the 2010 tax rate. The 2009 is the 2009 tax rate which were  
17 different.

18 Q Let me refer you just to page 14 of 24. The 2009  
19 value there it says market value 76,000 and the taxable value  
20 also 76,000.

21 A Correct.

22 Q So it was taxed at its full market value according  
23 to these records; is that correct?

24 A Correct.

25 MR. FISHER: I'm having trouble finding the exhibit

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1 Q So why didn't you appraise it as a subdivision?

2 A I can't, for one thing. For another thing your  
3 request was as-is as of the date of that which is not a  
4 subdivision. It's basically the ground that's described in  
5 two parcels as I've shown in my report.

6 Q There's been some discussions as to taxes, which is  
7 just a minor issue. Let me just clarify that. You've got  
8 the tax notice records in your report. I'm looking at what's  
9 been identified as Plaintiff's Exhibit No. 2. The top of the  
10 page says main file number then page 14 and 15 of 24. Can  
11 you turn to that so we can just dispose of this minor issue?

12 A Yes.

13 Q What were the tax rates on these two parcels for  
14 2009?

15 A You have to realize this was printed May 14, 2010,  
16 and I believe --

17 THE COURT: Which exhibit are you looking at,  
18 Counsel?

19 MR. KING: I'm sorry, Your Honor. Exhibit No. 2,  
20 Plaintiff's Exhibit 2 in the black binder, limited scope  
21 appraisal that was performed by Mr. Kjar.

22 THE COURT: Which page?

23 MR. KING: Page 14 and 15 of 24. They're numbered  
24 in the top right-hand corner.

25 THE COURT: Thank you. Go ahead.

1 that you're referring to. Mine says 2010.

2 MR. KING: I'm referring to page 14 of his  
3 appraisal, Exhibit 2.

4 THE COURT: His objection is you're asking about  
5 2009 and this is a 2010.

6 MR. FISHER: May I come up and look at his so I can  
7 see the difference?

8 MR. KING: 2009. There are two years of tax values  
9 there, Your Honor, and we're talking about page 14 of  
10 Mr. Kjar's appraisal. I'm referring the Court to the columns  
11 that deal with 2009.

12 THE COURT: His objection is withdrawn.

13 BY MR. KING:

14 Q So according to that, the property is not in  
15 greenbelt; is that correct?

16 A That's correct.

17 Q And the total amount of taxes for these two parcels  
18 for those two years would be approximately \$800, is that  
19 correct, if you combine the two parcels on pages 14 and 15?

20 A 748.27 plus the 46, yes, close.

21 Q And the assessor's office has valued these two  
22 parcels at \$500 per acre approximately according to these  
23 records; is that correct also?

24 A Yes.

25 Q How is this subject property currently zoned?

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1 A Sensitive lands.  
2 Q What are the minimum lot allocations or minimum lot  
3 sizes for sensitive land zone?  
4 A That to my knowledge sensitive land requires for  
5 subdivision there's no acreage requirement in a developed  
6 subdivision. You can have that according to what ever you  
7 desire or is acceptable with commission, planning and zoning,  
8 but they've placed a requirement on there in order to try to  
9 limit the amount of development or cluster development. So  
10 that we don't have overcrowded areas, they're requiring  
11 40 acres to be allotted per residence or per lot. That's not  
12 requiring you have a 40-acre lot. That requires that you may  
13 be able to allow have a half an acre, acre or five-acre lot  
14 in your subdivision if you propose.  
15 Q I don't want to get into the details of cluster  
16 zoning and the design. Simply stated is it or is it not  
17 correct that in sensitive land zone, zoning requirement is  
18 that for each lot -- each buildable lot you have to have  
19 40 acres of land?  
20 A Yes, that's correct.  
21 Q When you were working for the county as the zoning  
22 official or since then, what is your understanding of the  
23 requirement for paved roads in a subdivision today?  
24 A They currently require every subdivision have paved  
25 roads.

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1 Q Are gravel roads allowable for a subdivision of  
2 a -- (indiscernible)?  
3 A After 2001 to my knowledge, no.  
4 Q What about water? What are the water requirements  
5 now for lots in a subdivision like this?  
6 A Currently they require water developed culinary  
7 pumping system if it's larger than your four acre -- or I  
8 mean your four -- what's the term for the small subdivision?  
9 It's just a four-lot subdivision, minisubdivision, what ever  
10 that term is.  
11 Q Minor subdivision?  
12 A Minor subdivision. If it's larger than a minor  
13 subdivision, they're requiring water, power and paved roads,  
14 and I believe, I'd have to check, but I believe they're  
15 requiring underground communications, telephone.  
16 Q So if I had requested you to appraise property that  
17 was capable of being subdivided, would you have accepted that  
18 assignment?  
19 A No. I should qualify that. Every property is  
20 capable of subdivision to the extent that they're required to  
21 meet the zoning ordinances that are in place with the county.  
22 Q But right now the zoning requires 40 acres per lot,  
23 and there's 155 acres, so that would allow three lots to be  
24 built in this if it were subdivided according to current  
25 regulations?

1 A Correct.  
2 Q I wanted to ask you one other thing real quick. My  
3 instructions to you were to attempt to value Mr. Smith's  
4 interest in the property that was sold; is that correct?  
5 A Yes.  
6 Q And in doing so you came up with a value of  
7 \$151,000; is that correct? I'm referring now -- referring  
8 you to page 4 of 24.  
9 A No. Your original request was for the entire  
10 parcel, and we received -- you updated that request to  
11 include Mr. Smith's interest only.  
12 Q And Mr. Smith's interest only as you've appraised  
13 it is at \$150,000; is that correct? I'm referring you now to  
14 page 4 of 24 of your report. It says \$151,000 at the bottom  
15 there; is that right?  
16 A Just one second. Yes, I believe that's correct.  
17 Q Let me refer you now to page No. 8 of 24 of your  
18 report. As I understand it in reading your report, the  
19 fourth paragraph there, which is the large paragraph in the  
20 middle of the page, per client, which is Mr. Paul King, the  
21 middle of that paragraph, you indicate that the overall value  
22 of the property would be approximately \$197,000 except that I  
23 instructed you that Mr. Smith only has a half interest in  
24 nine acres and only a partial interest in the 155 acres.  
25 A Correct.

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1 Q Just so we can explain to the Court, those are  
2 presumptions and assumptions that I gave you as to  
3 Mr. Smith's percentage ownership in the property; is that  
4 correct?  
5 A That's correct. Those are specific conditions.  
6 That's why they're in here.  
7 Q So overall without any discount for what  
8 Mr. Meguerditchian owns in the property, overall it would be  
9 worth approximately \$197,000?  
10 A That's correct. If you simply add all of the  
11 acreage in both parcels and assume that it could be sold in  
12 fee simple ownership, which it's not.  
13 MR. KING: No further questions, Your Honor.  
14 THE COURT: Cross.

CROSS-EXAMINATION

17 BY MR. FISHER:  
18 Q Mr. Kjar, good to see you again. I see you made it  
19 back down without any problems.  
20 A I'm better than your back, I'll tell you that.  
21 Q Did you ever find Tom, Tom Winch?  
22 A I think he's gone.  
23 Q I won't spend my time. Excuse me, I'm sorry.  
24 Mr. Kjar, you just reviewed with counsel some  
25 assumptions that you had made. You mentioned that your



1 initial appraisal was for \$197,000 and something, correct?  
 2 A Correct.  
 3 Q And that would be for the 9.42 acres and the  
 4 155 acres?  
 5 A Yes, and that acreage totaled up to be what I have  
 6 here in the report, 164.42.  
 7 Q Now, have you been given any deed in which  
 8 Mr. Meguerditchian has an ownership interest in the  
 9 155 acres?  
 10 A No.  
 11 Q You are aware though he does have a half interest  
 12 or an ownership -- half interest ownership in the 9.42 acres?  
 13 A I believe that's what that says on the deed that I  
 14 used in the exhibit that Mr. King provided to me so that I  
 15 had --  
 16 Q The certificate of sale by sheriff?  
 17 A Yes, and that's the legal description that I  
 18 included in this report also because that's different than  
 19 the legal description that's included in my report as current  
 20 as of May that we were just looking at. There's an acreage  
 21 difference that that does not add up to the 155 acres.  
 22 Q Now, the 1200 -- you valued the property at \$1,200  
 23 an acre?  
 24 A Correct.  
 25 Q If you'll turn to page 4 of your report, you have

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1 that you said you gave them no weight, but yet in your  
 2 comments you said -- oh, excuse me. I took mine out. In  
 3 No. 4 you stated it does, however, have significant potential  
 4 for future development lots similar to Ochre Hill, again,  
 5 close but not as close as the subject.  
 6 Why didn't you give those some weight where they  
 7 have a potential -- comparables that you had where it has a  
 8 potential for subdivision? Why didn't you give that some  
 9 weight in your appraisal?  
 10 A To my knowledge if a sale is not closed, I can't  
 11 give it any weight because I've -- I am transposing that from  
 12 residential to vacant land which is the case because there's  
 13 too much potential for things to change when under contract,  
 14 listed. You know as well as I do it's very often very common  
 15 for a property to be listed above its required closing price.  
 16 Q If you weren't going to give it any weight, why did  
 17 you put it in your report?  
 18 A Because the same as Ms. Denbow testified, it's  
 19 important to try to gather as much information as you can to  
 20 try to determine a market value, and competing properties are  
 21 just what I said in my report, they're competing with the  
 22 subject should the subject be placed on the market. That's  
 23 going to have an effect particularly in residences, but it's  
 24 the same with vacant land, vacant lots.  
 25 I just delivered an appraisal this morning before I

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1 your comparables start there, Comparables No. 1, Comparable  
 2 No. 2, et cetera, correct?  
 3 A Correct.  
 4 Q Now, your first comparable is the \$1,200, and you  
 5 actually valued yours less than that; is that correct?  
 6 A Rephrase that.  
 7 Q Your value of \$1,200 is less than your first  
 8 comparable?  
 9 A Yes. The first comparable has an indicated  
 10 value -- not an indicated but a per acre rate of actual sale  
 11 per acre of Comparable No. 1 at \$1,217 an acre. If you'll  
 12 look in the body of the report, that describes what that 1217  
 13 is, and that's what that is. It's the actual selling price  
 14 per acre of that comparable.  
 15 Q In fact, as I went through here, it appears like  
 16 all of your comparables, except for perhaps Comparable No. 7,  
 17 all of them were less than -- or were more than your \$1,200  
 18 an acre for this property, correct?  
 19 A Correct.  
 20 Q Also I noticed on Comparable No. 4 --  
 21 A No, that's not correct. Comparable No. 7 was  
 22 actually sold at \$1,116 per acre.  
 23 Q Excuse me. I think that's the one I was referring  
 24 to. I probably gave you the wrong number.  
 25 The Comparable No. 4 and Comparable No. 5, I notice

1 came here of 161.75 acres which is awful close to this, and  
 2 the same thing there, and that client wanted me to have  
 3 competing listings in there. But because they haven't  
 4 closed, you know, how much weight can you give that. And  
 5 legally I'm not aware of grounds that allow me to give that  
 6 actual weight in the actual final market value determination.  
 7 Q Are you aware of anything in the standards of the  
 8 industry that prevents you from doing that?  
 9 A No, but I have been stopped from doing it on  
 10 residences.  
 11 Q But not necessarily on ground that has potential  
 12 for subdivisions?  
 13 A I haven't done any, only this one. Well, I take  
 14 that back. There, again, any piece of ground is potential to  
 15 be -- has potential to be subdivided. I have 143-and-a-half  
 16 acres that has great potential to be subdivided.  
 17 Q Now -- and you do agree that this property does  
 18 have the potential to be a subdivision?  
 19 A Certainly.  
 20 Q And you valued the property as though it had no  
 21 improvements, no roads, et cetera, correct?  
 22 A There are no roads. There are roads boundarying  
 23 it. There are no roads on the subject property.  
 24 Q And also that there's no -- or the lots haven't  
 25 been staked and surveyed, correct?

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1 A As far as I know, they have been surveyed.  
 2 Q Did you include that in your evaluation?  
 3 A No.  
 4 Q Now, did you appraise the water rights?  
 5 A Originally Mr. King had the request include the  
 6 water rights, and the availability of information made that  
 7 rather difficult, plus my expertise and primarily because of  
 8 the uncertainty of the water that's actually included in this  
 9 well right that's mentioned in my report, I didn't feel I  
 10 could appraise the water. Also, it's almost a personal  
 11 property situation with the water where it can be  
 12 transferred. The actual well that that right is in is over  
 13 in what would be considered the town of Indianola which is  
 14 several miles north and east of the subject property.  
 15 Q Did you try to evaluate any of the water rights  
 16 owned by Mr. Smith or the Smith Family Trust?  
 17 A I stated just not exactly an appraisal of the water  
 18 value. I just made an observation -- stated an observation  
 19 of water rights that had been sold, and I didn't have any  
 20 sales or information of the water in Indianola Valley.  
 21 That's a different drainage than the rest of Sanpete County,  
 22 and so I just tried to just state the facts, and basically  
 23 said that I couldn't value the water as originally requested  
 24 by Mr. King.  
 25 Q So make sure I understand, 197,000 is your original

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1 correct?  
 2 A No, that's not correct. You can have one residence  
 3 in this zone per 40 acres. The zoning, planning and the  
 4 commission -- county commission may allow you to have  
 5 different lot sizes, but they will require you to set aside  
 6 40 acres per residence of any subdivision that's approved.  
 7 Q Did you take into consideration in your appraisal  
 8 that in 1985, 1986 or somewhere through there that the plat  
 9 of all the proposed subdivision was filed with the county?  
 10 A No. I was involved in that being the building  
 11 official and the zoning official. I was -- took the tour  
 12 that Max gave the county commissioners, myself and whoever  
 13 else was involved up there, when he had them come up, the  
 14 zoning, planning commission, had us come up to the site and  
 15 showed us where he planned to develop Ochre Hills 1, 2, 3 and  
 16 4.  
 17 Q And you're aware that in approximately 1999,  
 18 2000 the Phase 3 plat was approved?  
 19 A Yes, it was. I'm not sure of the date. I'd have  
 20 to look that up with the county. They open up at 2:00, so  
 21 I'm not sure.  
 22 Q The date isn't that important, but it was some 15  
 23 years or so after he filed the initial plat with the four  
 24 phases, correct?  
 25 A I wouldn't dare say a time because I believe it was

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1 appraisal. It does not include any value for the water,  
 2 correct?  
 3 A I included under the assumption that there is water  
 4 there, and I'm under the assumption that it is buildable per  
 5 one under the zoning ordinances because there's sufficient  
 6 acreage, and it's possible to build at least one residence on  
 7 there without creating a subdivision that I included the  
 8 assumption that there's enough water to include with that.  
 9 Q What did you value that water at?  
 10 A I didn't. That's just included in the overall  
 11 value of the property and the lot itself.  
 12 Q So there's no way for us to sit down and say of the  
 13 \$197,000 this amount was valued as water rights?  
 14 A No.  
 15 MR. FISHER: Can I have just a second, Your Honor?  
 16 BY MR. FISHER:  
 17 Q Mr. King had talked to you about having to have  
 18 40-acre lots. If that were the case, why not just value this  
 19 property as three 40-acre lots?  
 20 A That's not the current state of the property. The  
 21 current state of the property is as it's described in --  
 22 actually two descriptions with that acreage.  
 23 Q Just for clarification, you started saying that  
 24 even though it's 40-acre lots it could be subdivided down and  
 25 you could have more houses on it than just one; is that

1 there when I left the county in 2002 so.  
 2 Q And in Phase 3 you're aware that Mr. Smith was not  
 3 required to do the additional requirements that had been  
 4 proposed by the county since 1985, correct?  
 5 A Yes.  
 6 MR. FISHER: I don't have any other questions.  
 7 THE COURT: Redirect?  
 8 MR. KING: Just one clarification, Your Honor.  
 9  
 10 REDIRECT EXAMINATION  
 11 BY MR. KING:  
 12 Q I believe that Mr. Fisher is confused a little bit  
 13 when he was referring to your comps. He said that only one  
 14 comp --  
 15 MR. FISHER: Can you speak up, Counsel?  
 16 BY MR. KING:  
 17 Q I believe that Mr. Fisher misled you or confused  
 18 you when he said that only one comp in your appraisal was  
 19 less than \$1,200. I refer you to Comparable No. 3 which you  
 20 include in your appraisal. I believe is that page 4 of your  
 21 report? Comparable to the --  
 22 A Yeah.  
 23 Q -- which is \$500 per acre?  
 24 A That's correct, yes. I don't know what I stated,  
 25 but I thought we were talking about Comp No. 7.

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1 Q So there are comparables at \$500 per acre, and  
2 that's what the County has assessed it at; is that correct?  
3 A That's correct. It may be of assistance to anybody  
4 involved in -- as an appraiser I find it very interesting in  
5 talking to people involvement with my reports that have not  
6 read my report. I really -- I spend a lot of time on my  
7 reports. I add a narrative that is important. There are  
8 certain property management companies on residential  
9 properties that strip our data, take it in different context,  
10 don't include a lot of -- don't include your comments, they  
11 don't include a lot of your addenda, they don't include maps,  
12 they don't include photos. All that's important. That's why  
13 it's in the report, and I would encourage anybody involved in  
14 this action in any way, shape, or form to read my report.  
15 MR. KING: Nothing further, Your Honor.  
16 MR. FISHER: Nothing further, Your Honor.  
17 THE COURT: You can step down.  
18 Mr. King, there is something that I want to  
19 clarify. Did you intend to offer Exhibit 2 into evidence?  
20 MR. KING: Exhibit 2 -- yes, Your Honor. I believe  
21 we made motion to have that admitted into evidence.  
22 Certainly if that has not been done, we would move that to  
23 have that admitted following his testimony.  
24 THE COURT: Did you move to admit any of the other  
25 exhibits in your folder?

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1 MR. KING: Yes, Your Honor. Although the materials  
2 included in Tab 7 or 8 are just reference materials for the  
3 Court's consideration, just for courtesy copies for the  
4 Court. The other exhibits, No. 1 is a copy of the appraisal  
5 that was presented by defendant's appraiser just in color  
6 format, just a little bit easier for the Court to read. So,  
7 yes, I would move that those Exhibits 1 through 6 be admitted  
8 in evidence.  
9 THE COURT: Mr. Fisher, any objection?  
10 MR. FISHER: Well, as to 1 and 2, I certainly have  
11 no objection. As to the others, I don't think we received  
12 any type of authentication that these documents are what  
13 they're supposed to be. There's been actually no testimony  
14 on it. No. 7 actually is a case and so is No. 8.  
15 THE COURT: He hasn't requested 7 and 8.  
16 MR. FISHER: Okay. But from 3 to 6 there's been  
17 absolutely no testimony authenticating these documents.  
18 MR. KING: Well, Your Honor, Tab 3 I went over that  
19 with Ms. Denbow. Tab 4 is a zoning map. I don't think that  
20 the current zoning status of the property is in question.  
21 There, again, it's for the Court's convenience. I don't need  
22 to formally admit that as an exhibit. We've had testimony as  
23 to the current zoning status of the property, and we also  
24 have had -- I asked Ms. Denbow about Tab 5 which is a land  
25 use ordinance which has this sensitive land ordinance

1 requirements in it. On that basis we would request that  
2 since the land use ordinance is for the county be admitted  
3 into evidence. And the same thing with the subdivision  
4 ordinance which I have inquired of Mr. Kjar about,  
5 subdivision requirements for acreage minimums and that sort  
6 of thing.  
7 THE COURT: Exhibits 1 and 2 are received based on  
8 stipulation. Exhibit 3 I think that there was testimony from  
9 both appraisers. I find that there's sufficient foundation  
10 for Exhibit 3. I'll admit that. Same with Exhibit 4. I  
11 don't think I've had any foundation for Exhibits 5 and 6.  
12 I'll allow you to recall a witness if you want those to come  
13 in.  
14 (Thereupon, Exhibits 12-15  
15 were admitted into evidence.)  
16 MR. KING: I would call Mr. Steve Kjar as a witness  
17 again, Your Honor, in our case.  
18 THE COURT: Mr. Kjar, you're still under oath.  
19 These are Plaintiff's 1 through 4.  
20 (Inaudible colloquy)  
21 THE COURT: Okay. So Plaintiff's Exhibit 1 is  
22 Exhibit 12, Plaintiff's Exhibit 2 is Exhibit 13, Plaintiff's  
23 Exhibit 3 is Exhibit 14, and Plaintiff's Exhibit 4 is  
24 Exhibit 15. So the two that are in question would be 16 and  
25 17.

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1 MR. KING: Your Honor, we've had current testimony  
2 about what the land use ordinances and the subdivision  
3 ordinances require. These are simply copies from the county.  
4  
5 REDIRECT EXAMINATION  
6 BY MR. KING:  
7 Q Mr. Kjar, I would refer you to Tab No. 5 initially  
8 in the black binder there in front of you.  
9 A Is it going to be No. 5 in this book?  
10 Q Yes. Should have at the top right-hand corner --  
11 yes, Tab 5. I don't think we're looking at the same  
12 document.  
13 A Tab 5, yes.  
14 Q Okay. The court clerk has marked that as  
15 Exhibit 16, Plaintiff's Exhibit 16, in the top right-hand  
16 corner; is that correct?  
17 A That is correct.  
18 Q I've referred the Court specifically to page 16 of  
19 that document. Does this appear to you to be an accurate  
20 copy of the current zoning regulation for sensitive land  
21 zone?  
22 MR. FISHER: Are we talking about one page or are  
23 we talking about all of Exhibit 5?  
24 THE COURT: The question went to page 16.  
25 MR. KING: Question goes to page 16. If you have

1 an objection as to the veracity of this copy, I'm willing to  
2 have just page 16 admitted if for some reason you have some  
3 reason to question the document.  
4 BY MR. KING:  
5 Q I'm referring simply to page 16 which refers to the  
6 sensitive land zone. This page of the regulation, the  
7 question for you is does that appear to you to be an accurate  
8 copy of the current sensitive land zone regulation?  
9 A Yes.  
10 MR. FISHER: We have no problem with page 16 being  
11 admitted.  
12 THE COURT: Page 16 of Exhibit 16 is received.  
13 (Thereupon, Exhibit 16  
14 was admitted into evidence.)  
15 BY MR. KING:  
16 Q We'll go through the same process with the next  
17 exhibit, Mr. Kjar. Under Tab 6 of the binder that I have  
18 prepared in front of you, it should be marked in the top  
19 right-hand corner of the first page Plaintiff's Exhibit 17.  
20 A Correct.  
21 Q Is that correct? Let me refer you to page 33 of  
22 that document.  
23 A This is revised September 6, 2005, page 33?  
24 Q Yes. The first page indicates it was adopted  
25 November 6, 2001, and revised September 6, 2005. Refer you

1 BY MR. KING:  
2 Q Let me refer you now to page 37.  
3 THE COURT: Page 33 of Exhibit 17 is received.  
4 (Thereupon, Exhibit 17  
5 was admitted into evidence.)  
6 BY MR. KING:  
7 Q Referring you now to the bottom of page 17 --  
8 bottom of page 37. You talked about the requirement for  
9 culinary water system for subdivision in the county now.  
10 Does this page 37, Paragraph 13.28.210 appear to be an  
11 accurate representation of the current subdivision ordinance  
12 for Sanpete County with respect to culinary water systems?  
13 A Yes, it does appear to be.  
14 MR. KING: On that basis we'd move to admit page 37  
15 of Plaintiff's Exhibit 17 into evidence, Your Honor.  
16 MR. FISHER: Your Honor, we have no objection,  
17 specifically with Paragraph 13.28.200, under A2 where it says  
18 .25 acre-foot on a part-time dwelling.  
19 THE COURT: All right. Exhibit 37 is received --  
20 page 37.  
21 (Thereupon, Exhibit 18  
22 was admitted into evidence.)  
23 MR. KING: Nothing further for this witness, Your  
24 Honor.  
25 THE COURT: Mr. Fisher, to be fair to you since I

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1 now to page 33 of that document.  
2 A Okay.  
3 Q Referring specifically to that page under  
4 13.28.085, requirement of paved roads for all nonminor  
5 subdivisions, does this page appear to accurately set forth  
6 this regulation with regard to the subdivision ordinance for  
7 Sanpete County?  
8 A 13.28.080 bid construction standards for paved  
9 roadways in minor subdivision. Is that the paragraph you're  
10 talking about?  
11 Q The next paragraph, 13.28.085.  
12 A Construction standards?  
13 MR. FISHER: I've talked to our expert, and she  
14 says this looks appropriate, so we would have no objection to  
15 page 33.  
16 THE COURT: Is all you're requesting is page 33?  
17 MR. KING: Well, I was requesting the entire  
18 regulation, Your Honor, for context. If we're going to argue  
19 about it, I don't want to review it page by page.  
20 THE COURT: Any objection to the entire exhibit or  
21 just page 33?  
22 MR. FISHER: Your Honor, (inaudible) if you want  
23 that.  
24 MR. KING: Let's leave it out. Just leave page 33  
25 in the interest of expediency.

1 allowed Mr. King to add exhibits, you have three exhibits  
2 that haven't been offered, 1, 9 and 10.  
3 MR. FISHER: Your Honor, I think that No. 1 we'll  
4 probably not offer because -- well, could I just ask him a  
5 couple of questions and authenticate?  
6 THE COURT: You may.  
7  
8 REXCROSS-EXAMINATION  
9 BY MR. FISHER:  
10 Q Mr. Kjar, in the white book would you turn to  
11 Exhibit 1, please. Do you recognize that document?  
12 A I do.  
13 Q And what is it?  
14 A That's the acreage explanation that I received from  
15 Mr. King after I had originally done the report with the full  
16 acreage as described by the County.  
17 Q And that indicates there that 43.335 acres was not  
18 owned by Max Smith; is that correct?  
19 A That's the way I understand it, yes.  
20 Q You have net acreage of 125.795 --  
21 A You know, I need to back up because it states not  
22 owned by Mr. Smith, but as explained, because Mr. Smith is  
23 part of the trust, but for other reasons there's only partial  
24 interest in that, and then also as the smaller nine-acre  
25 parcel there's -- the deeded partial interest in that, too.

1 Q What you're saying is the 4.71 acres and half of  
 2 the 77.5 acres Mr. King instructed you not to include in your  
 3 appraisal value for Mr. Smith or the Smith Family Trust,  
 4 correct?  
 5 A Yes, and that's because it was apparently -- it's  
 6 what would be not Mr. Smith's property, correct.  
 7 Q Actually of the 155 acres none of that is  
 8 Mr. Smith's property, correct?  
 9 A It's the trust's property.  
 10 Q All trust property. So this 33 point some odd  
 11 acres is actually the trust property, and he's saying not to  
 12 include that in your valuation, correct?  
 13 A That's correct.  
 14 MR. FISHER: We'd move to have that admitted, Your  
 15 Honor.  
 16 THE COURT: Any objection?  
 17 MR. KING: No objection.  
 18 THE COURT: Exhibit 1 is received.  
 19 (Thereupon, Defendant's Exhibit 1  
 20 was admitted into evidence.)  
 21 BY MR. FISHER:  
 22 Q And based upon Exhibit 1, you actually went back  
 23 and made your second appraisal your corrected appraisal,  
 24 correct?  
 25 A It's the same appraisal. All I did was correct the

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1 acreage and add additional comments within the body of the  
 2 report to try to explain what happened and why.  
 3 MR. FISHER: And I think the last two we had was 9  
 4 and 10, Your Honor?  
 5 THE COURT: Yes.  
 6 MR. FISHER: I think those are affidavits which  
 7 have been attached to our motions. Mr. Smith has  
 8 testified -- actually Mr. Jamie Smith is here now. He had a  
 9 hearing this morning that was continued, and so I wasn't sure  
 10 he was going to get here so I closed the case, but he was  
 11 going to testify just consistent with his affidavit. I would  
 12 probably move at this point to have his affidavit introduced  
 13 into evidence if Mr. King would agree to it to save the time  
 14 of the Court to have Mr. Jamie Smith come up and testify.  
 15 MR. KING: No objection, Your Honor.  
 16 THE COURT: Exhibits 9 and 10 are received.  
 17 (Thereupon, Defendant's Exhibit 9 & 10  
 18 were admitted into evidence.)  
 19 MR. FISHER: Thank you, Your Honor.  
 20 THE COURT: Do you want to ask any followup  
 21 questions, Mr. King?  
 22 MR. KING: No further questions, Your Honor. Thank  
 23 you.  
 24 THE COURT: You can step down.  
 25 Any additional evidence, Mr. King?

1 MR. KING: No, Your Honor. (inaudible)  
 2 THE COURT: Any rebuttal evidence?  
 3 MR. FISHER: Your Honor, I don't want to just take  
 4 the Court's time. We've already had -- Mr. Kjar testified  
 5 that there was really no improvements done to the property.  
 6 We do have Mr. David Gedo here to testify, and Mr. Max Smith  
 7 has already testified that there are roads, surveys that  
 8 shown in Ms. Denbow's as well. I don't want to just  
 9 accumulate evidence, but if the Court feels that we have --  
 10 (inaudible), then I would now call Mr. Gedo to rebut that.  
 11 THE COURT: So your proffer is that there are  
 12 roads?  
 13 MR. FISHER: There's definitely roads. Perhaps  
 14 maybe I should call him up. It might clarify, but there are  
 15 roads. It's been surveyed and more than \$200,000 has been  
 16 put into improvements, and I would have him testify to that.  
 17 THE COURT: Well, it's your choice how you proceed,  
 18 but I'll ask Mr. King if he has any objection to that  
 19 proffer.  
 20 MR. KING: Your Honor, I think the witness should  
 21 probably testify -- (inaudible).  
 22 THE COURT: All right. You're still under oath.  
 23 ///  
 24 ///  
 25 ///

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1 DIRECT EXAMINATION  
 2 BY MR. FISHER:  
 3 Q Mr. Gedo, you heard the testimony of Mr. Kjar that  
 4 there's no roads on Phase 4. Do you agree with that?  
 5 A No, I don't agree with that.  
 6 Q Why not?  
 7 A Because I have spent the past I'd say two or three  
 8 years easy out there putting in culverts, widening out --  
 9 widening out the creek out there with the D9 cat. We've  
 10 built roads all through there. We've dumped -- we should  
 11 have receipts for all the loads of gravel that we've spread  
 12 out there on the roads. We've built -- we've improved our  
 13 office area where our sales office area there, and we've took  
 14 power to that lot. We've got phone on that lot. All the  
 15 utilities are there.  
 16 Q Have you also sat down recently and determined how  
 17 much costs have been extended on improvements in Phase 4?  
 18 A Yes. Me and Max did sit down and make out an  
 19 affidavit for VanCampen. It should be in the file for all of  
 20 the expenses of bringing in the vinyl fencing, all of the  
 21 road work, the culvert, the gravel work and the clearing off  
 22 of the sagebrush.  
 23 Q Do you recall what that was?  
 24 A It was -- I believe it was just a little over  
 25 200,000.

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1 MR. KING: Objection, Your Honor, foundation.  
 2 THE COURT: Well, he asked if he knew.  
 3 MR. KING: I think he can testify as to what he  
 4 wrote down on the paper, but he has no foundation on the  
 5 exact costs of those improvements and offer the testimony.  
 6 THE COURT: See if you can lay a better foundation.  
 7 BY MR. FISHER:  
 8 Q How did you arrive at the figure of \$200,000?  
 9 A Me and Max spent a couple of weeks digging up  
 10 receipts for the welders that made the gates, for the cost of  
 11 the vinyl, the gravel cost, the maintenance cost on the  
 12 machines which would be paid to me, you know, for all of the  
 13 hours of work, fuel tickets, you know, and everything that  
 14 was incurred in the development of that Phase 4.  
 15 Q So it was based upon receipts, et cetera --  
 16 A Exactly. Everything is proven.  
 17 MR. FISHER: No other questions, Your Honor.  
 18 THE COURT: Cross?  
 19  
 20 CROSS-EXAMINATION  
 21 BY MR. KING:  
 22 Q Mr. Smith has been in jail for about a year; is  
 23 that right?  
 24 A That's correct.  
 25 Q So when did you do this with him?

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1 A Before he went to jail.  
 2 Q Obviously. Do you know as to the date?  
 3 A The date would be -- it should have been around --  
 4 it was about four months before he went to jail. It was  
 5 last -- I think it was last spring. When was VanCampen still  
 6 on the case?  
 7 Q I don't know what you're referring to. His prior  
 8 attorney?  
 9 A Yeah.  
 10 Q At any rate, about four months before he went to  
 11 jail?  
 12 A Yes.  
 13 Q You say he went to jail in May, so about a  
 14 year-and-a-half ago?  
 15 A Yeah, about a year-and-a-half ago probably.  
 16 (Overlapping Colloquy)  
 17 Q Before the sheriff sale; is that right?  
 18 A Yes, and I go visit Max at the prison. I'm the  
 19 only one that's allowed to go visit him because I don't have  
 20 a criminal record.  
 21 MR. KING: Thank you. No further questions, Your  
 22 Honor.  
 23 THE COURT: Redirect.  
 24 ///  
 25 ///

1 REDIRECT EXAMINATION  
 2 BY MR. FISHER:  
 3 Q I think you mentioned that you sat down and  
 4 prepared this with Max, an affidavit that was -- that you  
 5 said should be in the file?  
 6 A That's correct. We did make it and gave it to  
 7 VanCampen, and he should have filed it in this case.  
 8 MR. FISHER: No other questions, Your Honor.  
 9 Nothing further.  
 10 THE COURT: Anything further from you?  
 11 You can step down.  
 12 All right, both sides have rested. Are you ready  
 13 for closing arguments or would you like some time to put your  
 14 thoughts together?  
 15 MR. FISHER: No, I think we're ready. I think it's  
 16 quick.  
 17 THE COURT: How about you, Mr. King?  
 18 MR. KING: Yes, Your Honor, we can proceed.  
 19 THE COURT: All right. I'll allow you to go  
 20 forward, Mr. Fisher.  
 21 MR. FISHER: Thank you. Your Honor, as I  
 22 understand the law in this matter, the cases I have read  
 23 including Pyper specifically state there are two instances in  
 24 which the Court may set aside the sale or give Mr. Smith  
 25 additional time to redeem, and one of those is where the

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1 disparity between how much was paid and the actual value of  
 2 the property is so great that it shocks the mind. That does  
 3 not require any misconduct on the part of Mr. Meguerditchian.  
 4 The second one is where there's a disparity, but it doesn't  
 5 rise to the level of shocking the mind, and then you need to  
 6 have some misconduct on the part of Mr. Meguerditchian.  
 7 As I read the cases, I understand that it does not  
 8 have to be related to the sale, it doesn't have to be in part  
 9 of the sale, but that there is a misconduct. Thirdly, I  
 10 think the Court can set aside the sale on the basis of  
 11 irregularities in the sale. Unfortunately Mr. -- the police  
 12 officer did not have a very good memory of what took place at  
 13 the sale, and neither did Mr. Meguerditchian, but it seems to  
 14 me it's quite obvious that there was not a sale of the water  
 15 rights individually.  
 16 What happened at this sale, and I think  
 17 Mr. Meguerditchian actually admitted on the stand, is that he  
 18 had judgment for approximately \$66,000, and he wanted to have  
 19 the water rights. Why? Because he had to have them in order  
 20 to develop the property. He wanted the property, not just  
 21 the 155 acres but also a 9.42 piece that's a mile away from  
 22 it, and so he purchased all the property without regard as to  
 23 what the value was whatsoever.  
 24 Secondly, then purchased all the water rights, and  
 25 unfortunately here the water rights, even though they have

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1 been pledged to, you know, some 20 of these 47 have been  
2 pledged to Phase 3 and Phase 2, those water rights are still  
3 in Max's name. So at this point in time if the sale goes  
4 through, they're going to pick up 40 acre-feet of water that  
5 part of it has been pledged. We're going to have a whole  
6 bunch of people out there not very happy because they're not  
7 going to get the water.

8 Secondly, they didn't look at the value of the  
9 water. I think Max testified it was \$7,000 or more.  
10 Ms. Denbow, who did some research, determined it was over  
11 \$7,000. We're talking about a whole lot of money tied up in  
12 these water rights, and Mr. Meguerditchian admitted on the  
13 stand that he got that water because he had to have the water  
14 to develop the property. There was nothing at this sheriff's  
15 sale that said, okay, I've got -- we've got all this  
16 property. My judgment is \$66,000. What do I need to satisfy  
17 that judgment? That's not what happened. What happened  
18 was -- and this I believe is the misconduct -- is that  
19 Mr. Meguerditchian went in, said I got \$66,000. I'm going to  
20 divide up this way so I get all the water rights, I get all  
21 the property, and I can go out and develop and sell it and  
22 make a whole lot of money on this subdivision.

23 Also somewhat disconcerting is the fact that later  
24 an LLC is formed where the attorney and Mr. Meguerditchian  
25 are partners in this, and they were the ones at the sale.

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1 have sold -- either they should have sold -- one, they should  
2 have sold the personal property. It's obvious that they  
3 didn't even consider the personal property even though they  
4 listed it. They later went back and took a tractor and a  
5 brush hog that they listed as property of Max in the  
6 praecipe, but one is the personal property should have been  
7 sold first. Secondly --

8 THE COURT: Is that the sheriff's fault?

9 MR. FISHER: No, I don't think it's the sheriff's  
10 fault. I think that's Mr. Meguerditchian's fault. I think  
11 Mr. Meguerditchian has the responsibility. He knows the  
12 property. He instructs the sheriff what to sell. The  
13 sheriff doesn't stand there and say I'm going to sell this,  
14 this and this. That's not what happened here. It's obvious  
15 that they sold -- they instructed the sheriff to say I want  
16 this property sold, I want this property sold, I want the  
17 water rights sold, and I want this right, and we're going to  
18 pay this amount for each one of them, and that's what  
19 happened. I don't think the sheriff is necessarily -- well,  
20 I think he has an obligation under the statute.

21 THE COURT: Okay, let's get past the personal  
22 property then and move on to the first piece of real estate.  
23 What should the sheriff have done when the bid only came in  
24 at \$3,000?

25 MR. FISHER: I'm not sure that the sheriff has the

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1 There was no -- that statute is very clear that only so much  
2 of the property that's necessary to satisfy the judgment --

3 THE COURT: That's not an irregularity that they're  
4 the only ones at the sale.

5 MR. FISHER: No. Did I say at the sale? Anyway,  
6 at the sale there was no attempt to say, okay, how much  
7 property is necessary to satisfy this judgment. Even with  
8 their own appraiser, even if that \$1,200 for raw land is  
9 accepted as the appraisal, the appraised value is over  
10 \$190,000, at least 185,000 just for the 155 acres. That is  
11 three times the amount of their judgment. The water rights  
12 at even 17 acre-feet, that's over 100-some odd thousand  
13 dollars. The 9.42 acres, half of that has got a substantial  
14 value. If it's \$3,000 an acre, we're looking at over 12, 13,  
15 \$14,000.

16 This was not a situation where the statute was  
17 followed. The statute says sell only enough that's necessary  
18 to satisfy the judgment. There was no attempt to do that  
19 here. Mr. Meguerditchian, as we've shown, has been involved  
20 in this property out there for over 20 years. He's bought,  
21 sold property; bought, sold water rights. He knew the value  
22 of that land. He knew the value of the water rights, and yet  
23 he --

24 THE COURT: What should the sheriff have done?

25 MR. FISHER: I think that the sheriff they should

1 responsibility determining the value. The case law, as I  
2 understand it, doesn't put the burden on the sheriff, but I  
3 think the statute, where it says only so much, I think also  
4 puts the burden on Mr. Meguerditchian.

5 I think that what should have happened at that  
6 point is that instead of taking 9.42 acres, if they were  
7 going to satisfy the judgment, they should have taken the  
8 155 acres and sold it, and they knew it was worth much more  
9 than \$66,000, and that should have stopped it right there.

10 THE COURT: So the irregularity is that  
11 Mr. Meguerditchian didn't bid high enough.

12 MR. FISHER: No. The irregularity is that he  
13 purposely bid too low -- if you're talking about irregularity  
14 in the statute -- I think I understand what the Court's  
15 saying. Irregularity in the statute, I think, is that  
16 they -- instead of selling it parcel according to what the  
17 value would be.

18 THE COURT: So we're on the same page, for sake of  
19 argument -- I'm not making this finding at this point, but  
20 for sake of argument let's say that the value of the property  
21 is grossly disparate to what was bid, so where's the  
22 irregularity in selling the property?

23 MR. FISHER: Well, we don't need the irregularity  
24 for the two tests there in Pyper, but for the statute the  
25 irregularity would be that they didn't parcel the water

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1 rights and sold them individually.  
 2 THE COURT: I understand that.  
 3 (Overlapping colloquy)  
 4 MR. FISHER: I think that they only should have  
 5 sold one piece of property to make it work; instead, they  
 6 sold both. They did not need to sell both, the 9.42 acres  
 7 and the 155 acres. And I think that that's where the  
 8 irregularity is.  
 9 THE COURT: So it was irregular for them to  
 10 advertise both parcels?  
 11 MR. FISHER: I'm not sure what's irregular to  
 12 advertise. I think it was irregular to sell both of them  
 13 because the statute provides that we'll only sell as much as  
 14 necessary. I don't think the statute says you can't  
 15 advertise everything. I think the statute says you can only  
 16 sell so much of it.  
 17 THE COURT: So after the first parcel was sold,  
 18 then --  
 19 MR. FISHER: Should have stopped.  
 20 THE COURT: Meguerditchian should have said stop,  
 21 don't sell any more.  
 22 MR. FISHER: Right, because the 155 acres, even if  
 23 it's \$1,000 an acre, and I suspect that the sheriff probably  
 24 would know some value out there, but 155 acres at \$1,000 an  
 25 acre is \$155,000. It doesn't take a genius to figure out

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1 that's a lot more than \$66,000.  
 2 So I think under the statute the irregularities  
 3 are, one, they sold both parcels of property which they  
 4 should not have done. Secondly, they did not sell the water  
 5 individually and shouldn't have sold it anyway because it  
 6 wasn't necessary. And I think those are the irregularities  
 7 under the statute.  
 8 I think under Pyper the irregularity is there's  
 9 such a disproportionate -- such a difference in value of the  
 10 66,000 and the value of the property. You look at the water  
 11 rights, and you add those in at 17 acre-feet, we're looking  
 12 at \$110,000 property. Even if you take their appraiser's,  
 13 we're still looking at 180. We're looking at \$220,000 there  
 14 at least plus the 9.24 acres. That's, I think, one, shocks  
 15 the conscience because I think most people would recognize  
 16 that a 155-acre parcel would have satisfied the judgment  
 17 easily.  
 18 But even -- and I think the misconduct is because  
 19 they went into it with the intent and did buy everything on  
 20 the basis they were going to develop this property -- form an  
 21 LLC, develop the property, not with the intent of just  
 22 satisfying the judgment. So I think either under the first  
 23 test of just shocking the conscience I think it's there. I  
 24 think we've proven it.  
 25 On the second test where it doesn't shock the

1 conscience but still there's just a great disparity between  
 2 the amount owed and the purchase price and the misconduct  
 3 here, which I think is obvious. And then the third which is  
 4 irregularity in the statute which I believe is not parceling  
 5 it so you sell only enough property to satisfy the judgment.  
 6 I think on all three of those counts I think we've shown that  
 7 the sale should be set aside and that Mr. Smith should be  
 8 given additional time to redeem the property.  
 9 And for the Court's information, we have taken  
 10 steps to secure funds to redeem the property and do have  
 11 funds in place and just waiting for the terms of repayment,  
 12 et cetera, to be worked out to do that.  
 13 Your Honor, I think under --  
 14 THE COURT: What should I do? If I grant your  
 15 motion, should I set aside the sale or should I extend the  
 16 redemption period?  
 17 MR. FISHER: Oh, I think the sale should be set  
 18 aside because even with the -- I think both should happen.  
 19 We should have -- the sale should be set aside on the basis  
 20 that it's not appropriate. If it's resold other bidders  
 21 could be there easily, or even without other bidders he can  
 22 satisfy his judgment with the 155 acres, but he should also  
 23 have additional time to redeem. Of course, if you set aside  
 24 the sale, I guess we do have automatically a time to redeem  
 25 because they're going to have to redo it, but I think at

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1 least for me I think I'd have to say it in the order that  
 2 there's a period of time to redeem, not just --  
 3 THE COURT: Was your motion to set aside or to  
 4 extend the period?  
 5 MR. FISHER: I think I entitled it to set aside. I  
 6 think I really am looking at both, because that was the point  
 7 of getting it set aside because obviously if we just get it  
 8 set aside they're going to sell it again. We want to redeem  
 9 it. It's been the whole point. Otherwise, we're just  
 10 wasting our time. We're just putting off -- well, not  
 11 wasting our time because we'd have less property to satisfy  
 12 their judgment. Thank you, Your Honor.  
 13 THE COURT: Mr. King.  
 14 MR. KING: One thing I agree with, Your Honor, is  
 15 that we are wasting time. Case law is clear in that the  
 16 remedy for an unreasonably low bid price is redemption.  
 17 Rules provide for it. There's been no proffer of redemption  
 18 prior to this point. Presuming that the price was  
 19 unreasonably low, the defendant could have easily redeemed  
 20 the property, and we wouldn't be here today. He's waived  
 21 that right to do so.  
 22 I would emphasize -- well, I wouldn't presume the  
 23 Court's opinion on the topic, but let me just emphasize that  
 24 in our opinion the case law is clear starting with Pyper and  
 25 then reaffirmed with the Bangerter versus Petty case that

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1 there is a two-prong test. Those are not alternative  
2 remedies. Both elements of that test must be met. So there  
3 must be -- I can just refer the Court to it. I've  
4 highlighted it in yellow in the copy I've provided to the  
5 Court. There must be in the Pyper case gross inadequacy of  
6 price and irregularities attending the sale; nothing to do  
7 with prior conduct between the parties, just the sale itself.

8 The notion that the sheriff should stop the  
9 sheriff's sale when the sheriff determines however that  
10 sufficient fair market value of property has been sold to  
11 satisfy the judgment, typical case is you have several  
12 bidders of the property and third parties bid and take the  
13 property at the sheriff's sale.

14 Well, the only thing that the sheriff can go by or  
15 that the rules contemplate are the bid amounts that are  
16 received. Counsel would impose on the court and the sheriff  
17 instead of the bid amounts requirement that the fair market  
18 value of the property that is sold by the sheriff be that  
19 measure. It's not what the rules provide.

20 THE COURT: Is there an obligation to sell personal  
21 property first?

22 MR. KING: No. And that was clearly a function of  
23 only the sheriff's office. We would have been happy to sell  
24 what personal property we could have found. The sheriff, as  
25 he testified, said I can't sell that because I can't

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1 the Court's consideration in this case is that the defendant  
2 waived his right to determine the order in which the property  
3 was sold. He could have been there. He could have, either  
4 by counsel or by agent, come to the sheriff's sale and  
5 directed the order in which the property, real or personal,  
6 was sold. The order in which it was sold is completely  
7 irrelevant in this case because there was no one else there.

8 What's the practical distinction for the Court  
9 between myself, Mr. Meguerditchian and the sheriff sitting  
10 downstairs where we're going to sell -- we've allocated the  
11 purchase prices that we think are appropriate for this  
12 property: 3,000 for some water rights, 30,000 for others,  
13 30,000 for some real property and 3,000 for other real  
14 property. If there was no one else there to bid, there was  
15 no practical difference on which order those things are sold.  
16 And not only that, the rule does not require that personal  
17 property be sold first.

18 I would refer the Court to Rule 69B -- I need my  
19 glasses more and more these days. Rule 69B subparagraph (d),  
20 conduct at the sale, which refers to several lots of real  
21 property, shall be sold separately. And certainly I suppose  
22 we could brief that issue separately if the Court needs us to  
23 do so, but I would urge the Court to consider the water  
24 rights as personal property, not real property. Real  
25 property, of course, the rights in real property recorded at

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1 determine title or status or anything else so we're only  
2 dealing with the real property, water rights that were  
3 involved. That was the sheriff's election, not ours.

4 THE COURT: What about selling the water rights?  
5 Should they have been sold as individual numbers.

6 MR. KING: No. And I know the Court's concerned  
7 with that, and it's not the case. The rule only requires  
8 that separate parcels of real property be sold individually.  
9 Water rights as personal property are not subject to that  
10 requirement.

11 THE COURT: . Can you show me in the statute where  
12 water rights is personal property, because I disagree with  
13 you.

14 MR. KING: No, Your Honor. There is no rule that  
15 defines water rights as real property that I'm aware of or  
16 personal property for that matter. I think the test for the  
17 Court would be as to whether or not that right is movable, is  
18 it fungible, can it be sold separate from the real property  
19 involved, and it certainly can.

20 THE COURT: Then if it's personal property it  
21 should have been sold before the real property, so there  
22 would be an irregularity.

23 MR. KING: Well, Your Honor, there's no requirement  
24 under the rules that require the personal property to be sold  
25 prior to the real property. Moreover, more importantly for

1 the county recorder's office, that sort of thing, they're not  
2 fixed as the real property as fixtures and improvements would  
3 be in that they are severable from it.

4 The water rights are recorded and transfer of them  
5 are regulated by the state water engineer's office, as the  
6 Court I'm sure is aware, and those rights are sold and  
7 transferred separately. They are simply not real property.  
8 Mr. Meguerditchian testified this morning that he sold  
9 separate from any real property a half acre-foot of water.  
10 Those can be sold separate from real property. Moreover,  
11 that water right, 51-224, is the water right that's involved.  
12 That particular water right is the only one that we were  
13 aware of at the time, and that was sold specifically and  
14 separately.

15 So the Court's concern that they were sold in bulk  
16 only applies to unknown water rights. And to the extent that  
17 the Court would like to set aside the sale for those unknown  
18 water rights if they find that that sale in bulk somehow  
19 violates the rule, that would be a separate consideration for  
20 the Court. But I again refer the Court to Rule 69B  
21 subparagraph (d) which only requires separate parcels of  
22 property to be sold separately if they're real property,  
23 which the water is not.

24 With regard to valuation, as I stated last time we  
25 were here, in my opinion, based on a review of the case law,

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1 if the property is worth \$700,000 or \$150,000, it's really  
2 irrelevant because those numbers do not shock the conscience  
3 of the Court in the same way that the prior case law did.  
4 Those numbers were so far minimal compared to the numbers  
5 we're talking about today, and those were close cases.

6 In this case Mr. Meguerditchian had no nefarious  
7 intent. He had a partial interest in the parcels of real  
8 property that were sold which he could do nothing with  
9 because of Mr. Smith's refusal to proceed on the development  
10 and the sale of these parcels. He didn't bid \$10 for each of  
11 these parcels, and then go to every other county in the state  
12 and try to jam up Mr. Smith's business. All he did was try  
13 and clear title to the parcels of real property that he had  
14 an interest in. Obviously he needed some water for those  
15 properties, no matter what happened. So those were the only  
16 properties that he sought to have the sheriff's sale.

17 And again, of course, the rules do not impose or  
18 contemplate the sheriff determining the fair market value of  
19 those properties. Testimony from defendant's appraiser  
20 admitted that if this subdivision is not approved her  
21 valuation is invalid. There's nothing in the record that  
22 would indicate that this subdivision will be approved.  
23 Certainly Mr. Smith hopes it will. There are three other  
24 subdivision next to this property. The rules have changed.  
25 That was 20 years ago.

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1 THE COURT: I'm not getting into that. I'm just  
2 asking you the question.

3 MR. KING: Am I willing to waive today any  
4 possibility that this could be subdivided? Of course not.  
5 Mr. Meguerditchian, as I've said, would love to maximize the  
6 value of this property or any other property that he owns.

7 THE COURT: I think the real question is what is  
8 the highest and best use of that property.

9 MR. KING: Well, in response to the Court's  
10 question, the planning commission has told me that there is  
11 no way that they will approve this Phase 4. I only proffer  
12 that in response to the Court's question. I have talked with  
13 the planning commission, Lee Holmstead, and he told me the  
14 rules have changed. This is sensitive lands. It's 40-acre  
15 minimums. There is no way possible that the county  
16 commission will approve this Phase 4 of Ochre Hills.

17 THE COURT: I can't accept that as a proffer of  
18 evidence, but I'll accept it as argument.

19 MR. KING: I'm only in response to the Court's  
20 question how we would like to have --

21 THE COURT: And that's fair.

22 MR. KING: I don't think it will be. Next year if  
23 the zoning regulations are changed and this goes back into  
24 A zone, great. Mr. Meguerditchian would love to maximize  
25 that value. The future potential value if various

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1 There is no testimony from the planning and zoning  
2 commission or the county commission that this subdivision  
3 will be approved; therefore, there's no evidence that the  
4 Court can consider a valuation based on approval --

5 THE COURT: But, Mr. King, the evidence is that  
6 you're a partner with Mr. Meguerditchian. At some point in  
7 time when you and Mr. Meguerditchian, assuming that I rule in  
8 your favor, show up at the county commission to get approval,  
9 are you going to argue that no, the new subdivision ordinance  
10 should apply, and you should be required to pave the roads  
11 and do everything the way they are now, or are you going to  
12 argue that you had preliminary approval back in the early  
13 '80s and that you should follow that?

14 MR. KING: Well, Your Honor, first of all --

15 THE COURT: I think I'd be careful if that's your  
16 plan because this transcript could be presented to the county  
17 commission someday.

18 MR. KING: Mr. Meguerditchian, of course, would  
19 like to maximize the value of what ever property he owns, and  
20 my interest as counsel for a contingent fee being brought  
21 before the court in a way to try and discredit me, I find  
22 very offensive. That is simply not relevant to our court  
23 discussion, and for counsel to try and discredit me or call  
24 it into question somehow, certainly contingent fees are not  
25 precluded in this sort of case.

1 contingencies that are anything but secure happen, are not  
2 for the Court's consideration. The only thing the Court  
3 should consider is what the value of the property was last  
4 summer, simply stated.

5 I've reviewed what my opinion would be in a  
6 proffer -- not proffer but argument to the Court on that  
7 two-part test rather than alternative test and Rule 69B.  
8 And, again, if the Court will review prior briefings and the  
9 case law cited there, we noted that the rules contemplate --  
10 and procedural history contemplates that sheriff sales bring  
11 values less than fair market value. These are fire sales by  
12 their nature. They will not maximize the current fair market  
13 of the property. So if third parties had come in and bid at  
14 the sale, they would, by the nature of a sheriff's sale, be  
15 intended -- not intended but be assumed to be bidding in less  
16 than fair market value.

17 So the idea that the bid was less than fair market  
18 value is anticipated. It must go so far beyond that to shock  
19 the conscience, and, again, the Court can't consider prior  
20 cases. We're talking about 1 percent of value when the Court  
21 found that that shocked the value. Not only that, in all of  
22 those cases, they had a judgment for -- I don't recall what  
23 the numbers were -- 50, \$60,000 I believe in the one case,  
24 and they bid in 3-, \$400 at the sheriff's sale intending to  
25 take advantage of the defendant by bidding in a small portion

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1 of their judgment amount and then trying to execute on  
 2 further property later on. Mr. Meguerditchian didn't do  
 3 that. He bid in the entire amount of his judgment.  
 4 THE COURT: Mr. Fisher is saying Mr. Meguerditchian  
 5 should have bid the full amount of the judgment as to say the  
 6 one or two other parcels of real property, shouldn't have  
 7 gotten to the water rights.  
 8 MR. KING: But he's not required to make a bid of  
 9 fair market value. He was only trying to clear title to the  
 10 real property that he had. And, again, Mr. Smith's remedy is  
 11 redemption which he has waived at this point, any low bid.  
 12 Without any irregularities at the sale, the Court does not  
 13 have the ability to set aside the sale.  
 14 There must be an extremely low bid to shock the  
 15 conscience which I think with the evidence that the Court has  
 16 before it the county assessor has valued this property at  
 17 \$500 an acre. Appraisals are 1200 or \$3,000 an acre that  
 18 we've submitted to the Court. So in that range, okay, the  
 19 property is worth -- not only that, but Ms. Denbow's  
 20 appraisal did not discount what ever interest  
 21 Mr. Meguerditchian already owns in those parcels. That can  
 22 be disputed, but certainly if the full value of the property  
 23 with water is \$505,000 according to Ms. Denbow's appraisal if  
 24 it were subdividable as anticipated under that Phase 4 plat,  
 25 Mr. Smith's interest in that property is something less than

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1 505. What exactly we don't know, but we do know that it's  
 2 less than that because Mr. Meguerditchian owns a part of the  
 3 real property that was appraised and included in that  
 4 appraisal. So we're nowhere near the values where the Court  
 5 can find that this bid shocked the conscience. And secondly,  
 6 there are no irregularities attending the sale.  
 7 And lastly I would submit to the Court that  
 8 Mr. Smith has, in fact, waived his right to direct the  
 9 conduct of that sale. If he had participated there, he could  
 10 have perhaps required the sheriff to go sell personal  
 11 property that was on site that he could have provided titles  
 12 to the various equipment involved. He also could have  
 13 directed that the water rights be sold first if that was his  
 14 intention, and that he even has under the rule the right to  
 15 direct the order in which the real property parcels are sold.  
 16 Since he wasn't there, he waived that right, and the actual  
 17 order in which they were sold is irrelevant.  
 18 And unless the Court has any further questions, I  
 19 would submit it on that basis.  
 20 THE COURT: Thank you. Mr. Fisher.  
 21 MR. FISHER: Thank you, Your Honor.  
 22 THE COURT: On your way up, I'm going to ask you a  
 23 question.  
 24 MR. FISHER: All right.  
 25 THE COURT: What about Mr. King's argument -- I

1 think it's pretty persuasive -- that Smith's remedy was  
 2 redemption, and he didn't do it? He had plenty of time, and  
 3 from that standpoint he should have been happy that the bid  
 4 was low because then (inaudible) redeemed.  
 5 MR. FISHER: Number one, Your Honor, that's not  
 6 part of the test as -- the courts don't consider that in  
 7 determining whether or not there's an irregularity at the  
 8 sale or as to whether or not there's a disparity in the price  
 9 or the value and the amount paid. It's not consideration in  
 10 any of the cases. In fact, one of the cases specifically --  
 11 and I don't have that case with me, but one of the cases  
 12 specifically talk about the fact -- and this is a 2009 case.  
 13 I believe I quoted it, and I want to say it starts with a P,  
 14 and I can't remember what it is right now. Be happy to send  
 15 it to the Court, but in there they specifically address the  
 16 fact that -- and it's the one with the attorney that bought  
 17 the property for fee, one of his attorney's fees very low,  
 18 and it was \$75,000 -- I'm sorry I can't remember the name of  
 19 the case.  
 20 THE COURT: Pyper.  
 21 MR. FISHER: Pyper. In that case -- and the court  
 22 specifically addressed that and said, look, we understand  
 23 that the attorney -- I can't remember if it was the defendant  
 24 or the plaintiff, plaintiff probably, that the defendants had  
 25 some other remedies, and there's remedies of law. But that

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1 doesn't affect whether --  
 2 THE COURT: But in that case it was an attorney  
 3 that practices in this district.  
 4 MR. FISHER: I think it was Judge Mower's case.  
 5 THE COURT: Right. But in that case the owner of  
 6 the property was a former client, so didn't the Court find  
 7 some obligation on the part of the attorney to not take  
 8 advantage of his clients, former clients?  
 9 MR. FISHER: I did not get that from that, Your  
 10 Honor. I'm not saying it's not there, but I didn't get that.  
 11 What I found in there is what they're saying, look, you took  
 12 unfair advantage of the situation getting \$75,000 worth of  
 13 property for a debt of a thousand or what ever it was.  
 14 THE COURT: But there was also unfair disadvantage  
 15 afterwards because the former client kept calling.  
 16 MR. FISHER: Right. But the Court --  
 17 THE COURT: And the lawyer wouldn't respond.  
 18 MR. FISHER: And the Court said it is true that he  
 19 did not have to go through the attorney to redeem. And so, I  
 20 mean, they were looking at both sides of it saying that the  
 21 attorney was misleading, but they also said, look, he could  
 22 have gone a different route.  
 23 It seemed to me what the Court was saying is even  
 24 though there's misleading on this side, and he could have  
 25 done something else here, what we're really looking at is the

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1 disparity of price and unfairness, and that's what they  
 2 really looked at. So that person just cannot go in and take  
 3 unfair advantage of others and get the water rights they  
 4 want, get the other things that they want to have. It's just  
 5 not there. So, no, I don't think he's waived it at all.  
 6 As far as him being in jail, he did as much as he  
 7 could once he got the papers in jail. He had his wife call,  
 8 et cetera. His attorney was gone. There was nothing for him  
 9 to do. He couldn't be there at the sale to do that.  
 10 One other thing, Your Honor, you mentioned what the  
 11 officer's responsibility was, and after reading the statute  
 12 again, I do believe the officer did have some responsibility.  
 13 It says the officer shall sell only so much property as  
 14 necessary to satisfy the amount due. And then in Section (c)  
 15 it says if the officer finds sufficient cause, the officer  
 16 may postpone the sale. It would appear to me that if the  
 17 officer feels that there's a substantially -- the property  
 18 and the amount being paid is substantially different, I would  
 19 think the officer under this statute or under the rule could  
 20 say I'm going to postpone this until, you know, what ever.  
 21 I'm not sure he's obligated to. I'm just saying that the  
 22 rule probably gives him the opportunity to do so if he wished  
 23 to. Although subsection (c) really doesn't address the  
 24 situation of (d), but looking back and forth perhaps he could  
 25 do something.

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1 Your Honor, I'm just going to read this one portion  
 2 in here. I definitely believe that Pender makes it very  
 3 clear, and I think the other cases do too, that there are the  
 4 two situations. It is not one situation. In Pender it says  
 5 from the cases here cited, we may draw the general conclusion  
 6 that if the inadequacy of price is so gross as to shock the  
 7 conscience, then the sale shall be regarded as a fraudulent  
 8 void where the party injured will be permitted to redeem the  
 9 property sold.  
 10 Then the second one is, From the cases here cited,  
 11 we may draw the general conclusion that if in addition to  
 12 gross inadequacy -- see, it doesn't have to be a shocking in  
 13 this situation, just gross inadequacy -- the purchaser has  
 14 been guilty of any unfairness. It's just unfairness, and I  
 15 think the unfairness here is what we talked about is the fact  
 16 the way they sold the property, selling more property than  
 17 was necessary, and knowing that they had much greater value  
 18 than what they were paying for it, and they were selling more  
 19 property than necessary. Or if the owner -- or has taken any  
 20 undue advantage, or if the owner of the property or party in  
 21 interest has been for any other reason misled or surprised,  
 22 then the sale will be regarded as fraudulent void, et cetera.  
 23 The moving party doesn't -- is not required to  
 24 prove any type of fraud, not necessary. I'm going to -- this  
 25 is in Pyper, Your Honor -- says in Pender a judgment creditor

1 purchased real property worth about \$8,000 for \$47.46 to  
 2 satisfy a judgment of \$22.80, et cetera, said that here that  
 3 the district court relying on the great inadequacy of price  
 4 with two additional factors, one of them being the creditor's  
 5 failure to levy upon and sell the debtor's personal property.  
 6 Here they notice it up, et cetera. They could have  
 7 followed through with that. I think that's part of the  
 8 unfairness is that they did not do that. They determined  
 9 they wanted the property, real property, and they wanted the  
 10 water rights, and then they went back and took the tractor  
 11 and brush hog that they wanted claiming that was theirs.  
 12 Then it goes on and says the creditor and his  
 13 attorney's studious silence. This is what the Court was, I  
 14 think, referring to earlier when we were talking about their  
 15 intent to collect the judgment, et cetera.  
 16 Your Honor, just in closing, I think that we  
 17 request the Court -- respectfully request the Court to set  
 18 aside the sale, to give Mr. Smith additional time to redeem  
 19 the property, and then if he cannot, although I think we can  
 20 because now we found someone who's willing to, in fact, the  
 21 cash. As I said I was told by him to represent to the Court  
 22 that the cash is there, just needs to work out the payment  
 23 terms, and that's Gerald Covington Capital. That it should  
 24 be set aside in fairness; that Mr. Smith should have the  
 25 opportunity to redeem it. If he can't, then have the sale,

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1 and have the sale done properly, and only so much of the  
 2 property being sold that's necessary.  
 3 Under Mrs. Denbow's valuation for \$505,000, I think  
 4 it was, with a little bit of water in there. If we add the  
 5 rest of the water that he owns in there, we're looking at  
 6 almost over \$700,000. And I think part of the unfairness,  
 7 too, is Mr. Meguerditchian claiming that he has an ownership  
 8 interest in the 155 acres. He does not have an ownership  
 9 interest. There's no deed. There's nothing that gives him  
 10 any type of ownership interest whatsoever.  
 11 We'll submit it, Your Honor.  
 12 THE COURT: All right, thank you. What I'm going  
 13 to do is take a break and go over my notes and reread a  
 14 couple of things. I'll come back and give you my decision.  
 15 I know, much to the dismay of the bailiff who wants to go  
 16 fishing, it will take at least 40 minutes, so if you guys  
 17 want to get some lunch, feel free.  
 18 MR. FISHER: Thank you, Your Honor.  
 19 (Whereupon, a recess was taken.)  
 20 THE COURT: Back on the record in Meguerditchian  
 21 versus Smith, Case 050600136. I've gone back and reviewed my  
 22 notes, looked up some provisions of the law and have this  
 23 decision.  
 24 This case is here on a motion to set aside a  
 25 sheriff's sale following entry of a judgment in favor of the

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1 plaintiff against the defendant. The proper standard for  
2 setting aside a sheriff's sale is what's outlined in the  
3 Pyper case, and as I interpret the Pyper decision it's a  
4 two-prong requirement. First, there must be a gross  
5 inadequacy of the purchase price as compared to the value of  
6 the property being sold, and there must be irregularities  
7 attending the sale, and especially if the irregularities have  
8 a distinct tendency to prevent the realization of a fair  
9 price for the property sold unless the complaining party is  
10 estopped by his or her own laches or failure to act.

11 In this case I find that there were two parcels of  
12 ground, real property, that were sold: One 9.42 acres that  
13 sold for \$3,000, one 155-acre parcel that sold for 30,000.  
14 There were also rights that were -- water rights that were  
15 sold as defined as rights in water right 51-224 that sold for  
16 30,000 and \$3,000 for other water rights in Sanpete County.

17 I find that the fair market -- well, as to the fair  
18 market value of the land, there were two appraisals.  
19 Mr. Kjar testified that the property was worth 151,000, and  
20 he included enough water for essentially one residence.  
21 Ms. Denbow testified that her value was 505,000 without  
22 water. Mr. Kjar appraised the pasture as ag land -- or  
23 excuse me, he appraised the property equivalent as a pasture  
24 with ag land, and Ms. Denbow appraised it as property with  
25 the potential for development.

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1 shock the conscience, particularly when you consider the  
2 potential value if this subdivision was completed.

3 Ms. Denbow testified that she did not value or did  
4 not appraise the property as a completed subdivision but only  
5 as something with a potential, and so if it is completed, and  
6 there is some testimony that it can be completed with as  
7 little as ten more thousand dollars; however, there's still  
8 not approval, and there's a lot of ifs, but I just find that  
9 given all of the facts before me, all the evidence that I've  
10 heard, that \$33,000 for \$505,000 worth of property is too  
11 inadequate, and it shocks my conscience.

12 With regard to the water rights, they sold for a  
13 total of \$33,000. The evidence that I have is that the water  
14 rights are valued at \$7,500 per acre-foot. I accept that  
15 because that is the evidence before me; however, I actually  
16 believe, and firmly believe, that that is undervalued based  
17 on judicial notice of other cases that I'm familiar with.  
18 When those acre-feet of water are divided into .25, which  
19 they are in this case, there's an indication that there's .25  
20 acre-foot per future building lot, and so I think that they  
21 usually sell for four times that amount. 7500 would be a  
22 price for .25 acre-feet of water for an individual lot.  
23 However, that's not the evidence before me, but I still  
24 believe, and firmly believe, that that's true.

25 We don't have a firm number of shares, but there

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1 I find that both appraisers are credible; that both  
2 appraisers are qualified, and that I accept the appraisals  
3 based upon both appraisers -- I find that they were both  
4 correct. However, they appraised it differently. Ms. Denbow  
5 appraised it on a highest and best use of potential for  
6 development; Mr. Kjar appraised it as just raw land.

7 And so I believe the issue before me is what is the  
8 highest and best use of the property so that I know which  
9 appraisal to accept. I find that the highest and best use of  
10 the property is as it was appraised by Ms. Denbow, and the  
11 reason I find that is because it was partially developed.

12 There was some testimony that there had been up to \$200,000  
13 of development costs already into it; that there are roads  
14 and other improvements. Also find that the parties are in  
15 the subdivision business; that they've been developing  
16 subdivisions in the area for some time, and that they got  
17 preliminary approval for the larger parcel as to Phase 4 of a  
18 subdivision; that it was their clear intent that that's what  
19 they intended to do with the property; and that the property  
20 was not being used as ag land. It was not on the greenbelt,  
21 but it was there in the process of being developed.

22 So I find that the property does have a fair market  
23 value without water of \$505,000. The bid price for that  
24 ground was 33,000. I find that the difference between 33,000  
25 and 505,000 is inadequate. It's a sufficient difference to

1 are excess of 20 shares based on the evidence that's before  
2 me. Thus, I find that the value of the water shares is also  
3 in excess of what the price brought, and it also is  
4 inadequate, and it shocks the conscience as well.

5 With regard to prong No. 2, that there has to be --  
6 and one prong is not sufficient; there has to be a  
7 satisfaction of both prongs. There has to be alleged --  
8 there has to be irregularities in the sale. The first  
9 allegation is that the personal property should have been  
10 sold first. Under Rule 69A(a), the law requires a seizure of  
11 property before the sale. Under that rule the sheriff or  
12 whoever is doing the seizing is required to seize the  
13 personal property first, and then if sufficient personal  
14 property cannot be found then to seize the real property.

15 The only testimony that I have as to what the  
16 sheriff did in seizing the property was that he said that he  
17 didn't have sufficient information to know what the property  
18 was. There weren't numbers provided, and there was no  
19 evidence that he didn't do his job. There was no evidence  
20 that he didn't act in good faith, so I find that the officer  
21 acted appropriately. I find that he couldn't find sufficient  
22 personal property, so seizing on the real property was  
23 sufficient.

24 Now, I realize that there's a lot of handholding  
25 that goes on when a sheriff is asked to seize property, but

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1 usually in my experience there's not enough handholding. It  
2 should be the responsibility of the lawyers to dot all the  
3 I's, cross all the T's. Whenever in my practice as a lawyer  
4 whenever I had a sheriff sale and seizure, I would make all  
5 the arrangements. Don't leave anything up to the sheriff's  
6 office. You arrange for storage, you arrange for what is to  
7 be picked up and numbered. And for what ever reason, that  
8 wasn't done, and I don't fault the sheriff in this case, and  
9 I do find that he was unable to find sufficient personal  
10 property, and so the seizure of the real property was  
11 appropriate. Also there was contradictory evidence as to  
12 ownership of the tractor and the brush hog and really no  
13 value as to any other specific item of personal property.

14 With regard to the real property, there were two  
15 descriptions, one of the smaller parcel and one of the larger  
16 parcel. The larger parcel was described -- both of them were  
17 described in metes and bounds, but in addition the larger  
18 parcel was described as Phase 4 of Ochre Hills, Plat 4. I  
19 find that there was nothing misleading about that. I could  
20 not find any unfairness in the conduct of the purchasing  
21 party with respect to the two parcels of real property. I  
22 didn't find anything that was irregular in that sale.

23 With regard to the sale of the water rights, I do  
24 find that there were irregularities. Rule 69B(d) requires  
25 that severable lots of real property be sold separately.

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1 believe also the legislature, resolved that a few years ago,  
2 and water rights that are not in an irrigation company are  
3 real property. Water rights in an irrigation company are  
4 personal property. The rights in this case are not shares of  
5 stock in an irrigation company, and so I find that they are  
6 real property.

7 Also water rights such as these are transferred by  
8 warranty deed. They're also recorded in the office of the  
9 state engineer, but there's also a requirement that there be  
10 a backup of a conveyance document which usually is in the  
11 form of a warranty deed. I believe that that's the law in  
12 the state of Utah, and if it's not, if I'm wrong on that, in  
13 this case I believe that it is appropriate because the water  
14 rights in this case are sufficiently closer to being real  
15 property than they are personal property, and as such I  
16 believe that Rule 69B(b) requires that they be sold  
17 separately and described separately.

18 In addition, I think the sale of the water rights  
19 just smacks of unfairness. I think that the \$7,500 per  
20 acre-foot is very low compared to if they're divided in .25  
21 acre-feet and sold for individual lots. Also I think it was  
22 unfair by the way that the water rights were described. It  
23 appears to smack of unfairness.

24 So in this case I set aside the sheriff sale as it  
25 relates to the sale of the water rights. I do not set aside

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1 Also Rule 69B(b)(3) requires that the notice of sale contain  
2 a particular description of real property to be sold. I find  
3 that the notice in this case did not give a particular  
4 description. It was described as all rights of defendants in  
5 water right 51-224. However, the evidence before me is that  
6 several of those rights have been severed off and have  
7 individual water rights numbers. Also find that the other  
8 description of the water rights was other water of defendant  
9 in Sanpete County. That's just an insufficient description.  
10 I think it leads to confusion and would have an effect of  
11 discouraging bidders at the sale which would have a direct  
12 effect of lowering the price.

13 Exhibit 6 shows several different water numbers of  
14 water rights. However, part of them are -- or all of them  
15 were originally severed from 51-224. Thus, I think that the  
16 description was misleading and was insufficient and did not  
17 describe the water separately.

18 I find that the water rights are real property. On  
19 Section 73-1-11 Utah Code Annotated distinguishes between  
20 shares of stock in an irrigation company, which my  
21 understanding of Utah law is those are personal rights as to  
22 other water rights which are not shares of stock in an  
23 irrigation company. I know that there's been -- the Utah law  
24 went -- there were different cases several years ago. I  
25 believe that the most recent Utah Supreme Court case, and I

1 the sale as it relates to the ground. There still remains a  
2 portion of the judgment outstanding that's not paid, and the  
3 defendant is still the record title owner of the water  
4 rights. I do not extend the redemption period because that  
5 was not what was requested in the motion, but the request was  
6 to set aside the sale.

7 That's my decision. Neither party prevailed  
8 outright, and the rule requires that I request the prevailing  
9 party to prepare the order. I think that neither party is  
10 the prevailing party, so I'm going to ask counsel who wants  
11 to volunteer to prepare the order.

12 MR. FISHER: I'll prepare it, Your Honor.

13 THE COURT: Mr. Fisher, I order that you prepare  
14 the order. I think that the case was well tried. I  
15 appreciate the courtesy of counsel and their preparation, and  
16 that's my order.

17 MR. KING: Thank you, Your Honor.

18 MR. FISHER: Your Honor, is it possible -- you  
19 cited a couple of rules, and I wasn't quick enough to get  
20 them down. Is it possible I could get those from you so I  
21 can put -- I think because it's been an evidentiary hearing I  
22 need to do a findings of fact as well as a short conclusion  
23 of law as well as the order.

24 THE COURT: I can give you the rules or you could  
25 request a transcript. Well, not a transcript just get the

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1 CD.

2 MR. FISHER: Thank you, Your Honor.  
3 (Whereupon, the proceedings concluded at  
4 3:42 P.M.)  
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1 TRANSCRIBER'S CERTIFICATE

2  
3 STATE OF UTAH }  
4 COUNTY OF SANPETE } ss:

5 I, MARY BETH COOK, A CERTIFIED COURT TRANSCRIBER IN THE  
6 STATE OF UTAH, DO HEREBY CERTIFY THAT THE FOREGOING  
7 ELECTRONICALLY RECORDED PROCEEDINGS WERE TRANSCRIBED BY ME  
8 FROM AN AUDIO AND/OR VIDEO RECORDING FURNISHED BY THE SIXTH  
9 DISTRICT COURT IN AND FOR SANPETE COUNTY, STATE OF UTAH

10 THAT THE FOREGOING PAGES REPRESENT THE COMPLETE  
11 TRANSCRIPT OF THE PROCEEDINGS TO THE BEST OF MY ABILITY THAT  
12 WERE HELD ON FRIDAY, JULY 9, 2010, AND THAT SAID TRANSCRIPT  
13 CONTAINS ALL OF THE AUDIBLE TESTIMONY, OBJECTIONS OF COUNSEL  
14 AND RULINGS OF THE COURT.

15 I FURTHER CERTIFY THAT I AM NOT A RELATIVE OR  
16 EMPLOYEE OF ANY OF THE PARTIES OR COUNSEL INVOLVED IN SAID  
17 ACTION, NOR A PERSON FINANCIALLY INTERESTED IN THE ACTION.

18  
19 DATED: OCTOBER 10, 2010.  
20

21   
22 Mary Beth Cook, CSR, RPR  
23  
24  
25

'92 [3] 40/15 40/16 100/12	118/8 119/4
'92 Chevy [1] 40/15	1986 [1] 118/8
'92 Ford [1] 40/16	1990 [2] 52/20 79/15
.	1992 [3] 52/16 53/15 100/20
.25 [8] 29/22 30/10 42/4 126/18 162/18	1999 [2] 54/1 118/17
162/19 162/22 166/20	<b>2</b>
.275 [1] 59/3	2 million [1] 39/5
.75 [1] 33/15	2-5 [1] 11/7
<b>0</b>	20 [11] 37/10 37/17 41/4 46/20 71/23
050600136 [2] 4/11 159/21	80/9 85/3 136/1 137/20 148/25 163/1
<b>1</b>	20 acre-feet [1] 42/14
1 percent [4] 73/21 73/22 73/24 151/20	20-year [2] 39/5 39/9
10 [8] 30/7 31/8 77/11 127/2 129/4	200 [1] 79/10
129/16 129/17 169/19	200,000 [1] 131/25
10 acre-feet [1] 31/4	2000 [3] 48/10 48/12 48/13
100 [1] 98/10	2000 the [1] 118/18
100,000 [2] 39/25 40/10	2000 where [1] 36/22
100-some [1] 137/12	2001 [9] 24/13 42/18 48/4 48/5 48/7
1008 [1] 79/10	49/4 54/2 109/3 124/25
10:00 [1] 8/16	2002 [1] 119/1
10:06 [1] 4/3	2005 [2] 124/23 124/25
11 [5] 28/18 28/19 100/9 100/19 165/19	2008 [1] 76/23
110 [1] 24/4	2009 [18] 20/22 56/23 56/23 75/17 75/21
11th [1] 100/4	76/24 105/14 106/4 106/5 106/11
12 [4] 39/17 68/20 122/22 137/14	106/13 106/16 106/16 106/18 107/5
12-15 [1] 122/14	107/8 107/11 154/12
1200 [2] 112/22 152/17	2010 [13] 4/2 4/8 75/6 75/6 105/15
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125.795 [1] 127/20	107/5 169/12 169/19
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13.28.080 [1] 125/8	21 [2] 20/22 56/23
13.28.085 [2] 125/4 125/11	224 [11] 26/7 26/17 26/19 28/21 29/11
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13.28.210 [1] 126/10	165/15
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122/23	105/23 106/18 110/8 110/14 110/17
14,500 [1] 64/12	25,000 [1] 59/11
14-by-70 [1] 24/17	250 [1] 20/20
143-and-a-half [1] 115/15	257 [1] 52/7
15 [6] 105/10 105/23 107/19 118/22	2576 [1] 85/1
122/14 122/24	27 [1] 42/15
150 acres [1] 103/11	27,500 [1] 46/2
151,000 [1] 160/19	28 [1] 42/15
155 acres [24] 21/20 21/20 25/6 25/7	29 [4] 30/10 39/3 67/4 77/15
38/10 47/5 56/25 89/13 89/14 104/2	290 [1] 98/10
109/23 110/24 112/4 112/9 112/21	2:00 [1] 118/20
128/7 135/21 137/10 139/8 140/7	<b>3</b>
140/22 140/24 142/22 159/8	3,000 [3] *89/18 146/12 146/13
155-acre [3] 74/22 141/16 160/13	3.2 [1] 59/8
16 [13] 70/10 122/24 123/15 123/15	3.25 acres [1] 59/4
123/18 123/24 123/25 124/2 124/5	30 [7] 44/22 44/24 45/15 45/18 45/23
124/10 124/12 124/12 124/13	47/8 67/4
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161.75 acres [1] 115/1	30,000 [6] 89/13 89/16 146/12 146/13
164.42 [2] 57/1 112/6	160/13 160/16
17 [10] 42/18 59/13 122/25 124/19	33 [9] 124/21 124/23 125/1 125/15
126/3 126/4 126/7 126/15 137/12	125/16 125/21 125/24 126/3 128/10
141/11	33,000 [2] 161/24 161/24
17 acres [1] 59/3	349 [5] 24/17 80/12 81/6 81/9 81/16
17.25 [1] 42/21	35 [1] 47/3
18 [1] 126/21	37 [6] 126/2 126/8 126/10 126/14
180 [1] 141/13	126/19 126/20
185,000 [1] 137/10	373 [1] 33/16
197,000 [1] 116/25	3:42 [1] 168/4
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1983 [1] 41/3	40 [3] 29/12 136/4 159/16
1984 [5] 35/9 85/5 100/5 100/9 100/24	40 acres [5] 108/11 108/19 109/22
\$1 [1] 46/21	
\$1 million [1] 46/21	
\$1,000 [2] 140/23 140/24	
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\$1,200 [7] 77/9 112/22 113/4 113/7	
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\$1,217 an [1] 113/11	
\$10 [1] 148/10	
\$10 for [1] 148/10	
\$10,000 [4] 39/15 87/3 87/9 87/18	
\$110,000 [1] 141/12	
\$14,000 [1] 137/15	
\$150,000 [2] 110/13 148/1	
\$151,000 [2] 110/7 110/14	
\$155,000 [1] 140/25	
\$190,000 [1] 137/10	
\$197,000 [4] 110/22 111/9 112/1 117/13	
\$2,250 [1] 92/6	
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\$35,000 [1] 37/11	
\$4,000 [1] 74/5	
\$4,200 [1] 76/6	
\$4,247 [1] 73/19	
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\$400 [1] 151/24	
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\$75,000 [2] 154/18 155/12	
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\$76,510 on [1] 76/23	
\$8,000 [1] 158/1	
\$800 [1] 107/18	
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'4 [1] 41/3	
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'6 [2] 21/25 36/11	
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'85 [1] 85/5	
'89 [1] 40/16	
'89 Ford [1] 40/16	
'90 [2] 40/15 91/23	



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5.47 [1] 63/1	accurately [1] 125/5	ag [3] 160/22 160/24 161/20
50 [6] 42/4 42/5 47/2 47/2 85/13 151/23	acquainted [1] 79/11	against [2] 106/3 160/1
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50 percent [1] 36/23	acre [90]	ago [9] 11/24 37/19 46/8 55/3 133/14 133/15 148/25 165/24 166/1
500 [2] 85/1 96/1	acre-feet [23] 29/12 29/16 29/23 30/7 30/8 31/1 31/8 32/15 33/15 34/5 42/1 42/11 42/15 42/19 42/21 58/16 58/25 136/4 137/12 141/11 162/18 162/22 166/21	agree [11] 38/2 60/20 61/7 61/9 93/25 94/1 115/17 129/13-131/4 131/5 143/14
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60,000 [1] 40/3	ad [3] 102/16 103/13 103/24	allow [15] 23/4 36/7 49/16 49/21 70/15 70/20 93/17 99/21 101/21 108/13 109/23 115/5 118/4 122/12 134/19
60-acre [1] 85/13	Adams [1] 27/12	allowable [1] 109/1
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Tab 2



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PAUL M. KING (5500)  
HOOLE & KING, L.C.  
Attorneys for Plaintiff  
4276 South Highland Drive  
Salt Lake City, Utah 84124  
Telephone: (801) 272-7556

Order



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050600136 SMITH,MAX

IN THE SIXTH DISTRICT COURT

IN AND FOR SANPETE COUNTY, STATE OF UTAH

MIKE MEGUERDITCHIAN, an individual,

Plaintiff,

vs.

MAX SMITH, individually and as Trustee  
of The Smith Family Living Trust, u/a/d  
March 19, 1991

Defendants.

ORDER

Civil No. 050600136

Judge David L. Mower

Pursuant to this Court's Memorandum Decision on Plaintiff's Motion for Partial Summary Judgment and Defendants' Motion for Withdrawal and Amendment of Admissions, the Court having heard oral argument of the parties with respect to said motions, and being fully advised in the premises, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff's Motion for Partial Summary Judgment is granted in part, and denied in part, as follows:

a. Plaintiff's Motion for Partial Summary Judgment is granted in part, the Court finding that the Plaintiff is entitled to partial summary judgment in its favor, decreeing that the Plaintiff has paid the Defendant in full the agreed purchase price for Lot 349, Oaker Hills Subdivision, and that the Defendant is in default under the Agreement for failing to transfer Lot 349 to the Plaintiff as agreed, with such damages awarded to the Plaintiff as shall be established by hereafter by affidavit or hearing, together with attorney's fees and court costs incurred by the Plaintiff as provided in the agreement between the parties.

b. Plaintiff's Motion for Partial Summary Judgment is denied in part, the Court finding that the Defendant has claimed to have done some engineering work on the subject Property since the date of the agreement between the parties, and the Court therefore denying Plaintiff's Motion for Partial Summary Judgment on the issue of dissolution of the partnership agreement and partition of the subject Property, those remaining issues being reserved for trial.

2. Defendant's Motion for Withdrawal and Amendment of Admissions is granted in part and denied in part. Said motion is granted as to Request for Admission No. 5, and is denied as to Request for Admission No. 3. Accordingly, the court finds that Requests for Admission Nos. 3 and 4 are deemed admitted and conclusively proven for all purposes herein, to wit, the following facts are conclusively established for the trial hereof:

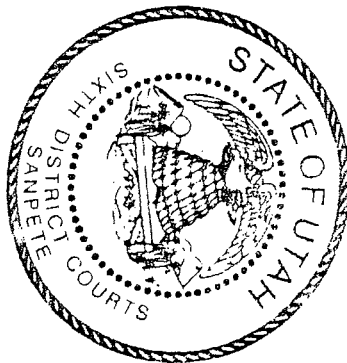
a. The Defendant has taken no action with the Sanpete County officials to cause the Property to be developed and subdivided into individual lots for sale to the public; and

b. No plat subdividing the Property has received final approval from Sanpete County officials.

The issue of what engineering work for the development of the Property or approval of a subdivision plat for the Property has been done since the parties signed the Agreement is reserved for trial.

DATED this 9 day of Jul, 2008.

BY THE COURT:

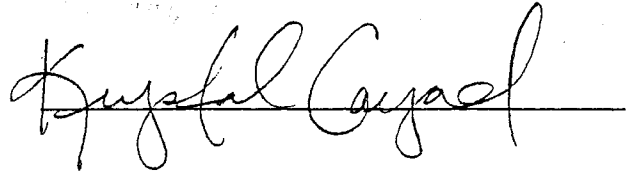


David L. Mower  
District Court Judge

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing ORDER was mailed, postage prepaid, this 19<sup>th</sup> day of June, 2008, to the following:

D. Christopher VanCampen  
3610 North University Avenue  
Jamestown Courtyard, Suite 375  
Provo, Utah 84604

A handwritten signature in cursive script, reading "Kuzal Gargal", written over a horizontal line.

## Tab 3

SIXTH DISTRICT COURT

2008 DEC -8 PM 12:44

CLERK *M. Lund*

PAUL M. KING (5500)  
HOOLE & KING, L.C.  
Attorneys for Plaintiff  
4276 South Highland Drive  
Salt Lake City, UT 84124-2634  
Telephone: (801) 272-7556

Judgment on Pleading



JD27598131

pages: 3

050600136 SMITH,MAX

IN THE SIXTH DISTRICT COURT

IN AND FOR SANPETE COUNTY, STATE OF UTAH

MIKE MEGUERDITCHIAN, an individual,

Plaintiff,

vs.

MAX SMITH, individually and as Trustee  
of The Smith Family Living Trust, u/a/d  
March 19, 1991

Defendant.

JUDGMENT

Civil No. 050600136

Judge David L. Mower

Pursuant to the Plaintiff's Motion for Partial Summary Judgment previously granted by the Court, and pursuant to the motion of the Plaintiff, the Court being fully advised in the premises, it is hereby

ORDERED ADJUDGED AND DECREED as follows:

1. That the Plaintiff recover from the Defendants Max Smith and The Smith Family Living Trust, u/a/d March 19, 1991, jointly and <sup>severally</sup> ~~severely~~, on the Second Cause of Action of the Plaintiff's Complaint filed herein, as follows:

A) \$27,000.00 Principal judgment amount;



- B) \$23,693.42 Interest on said principal amount at the statutory rate of 10% per annum from January 10, 2000 to October 17, 2008;
- C) \$3,997.50 Attorney's fees, costs and disbursements incurred by the Plaintiff in pursuing the action to this point;
- D) **\$54,690.92 Total Judgment Amount as of October 17, 2008; and**
- E) Additional interest at the statutory rate of 5.42% per annum on said judgment amount after October 17, 2008 until paid.

2. This judgment shall be augmented in the amount of reasonable attorney's fees expended in collecting said judgment by execution or otherwise as shall be established by affidavit.

3. The Court has received express <sup>request</sup> ~~direction~~ for the entry of final judgment, pursuant to Plaintiff's Motion for Entry of Final Judgment Pursuant to URCP 54(b) For Plaintiff's Second Cause of Action, and Memorandum in Support Thereof, filed with the Court;

4. The Court finds that there is no just reason for delay of the entry of final judgment against the Defendants in favor of the Plaintiff as to the Plaintiff's Second Cause of Action, the Court's ruling thereon having fully adjudicated Plaintiff's Second Cause of Action against the Defendants; and

5. Therefore, the Court hereby expressly determines and directs the entry of this Judgment as a Final Judgment against said Defendants in favor of the Plaintiff as aforesaid, pursuant to Rule 54(b), Utah Rules of Civil Procedure.

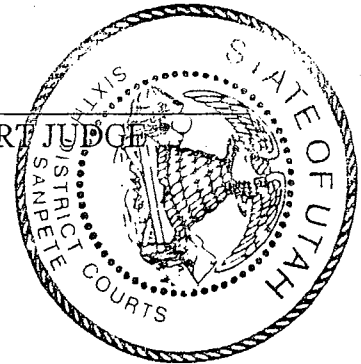
6. This Judgment reflects the adjudication of Plaintiff's Second Cause of Action only, and affects Plaintiff's Second Cause of Action only, the First Cause of Action of the Plaintiff's Complaint against the Defendants named herein is unaffected hereby.

Judgment rendered this the 8 day of <sup>Dec</sup>~~November~~, 2008.

BY THE COURT

*D. L. Mower*

DISTRICT COURT JUDGE



## Tab 4



VD28411255

pages: 4

050600136 SMITH,MAX

PAUL M. KING (5500)

**HOOLE & KING, L.C.**

4276 South Highland Drive

Salt Lake City, Utah 84124


Telephone (801) 272-7556

Facsimile (801) 272-7557

Email paul.king@hooleking.com

FILED  
SANPETE COUNTY, UTAH

MAR 26 2009

SANDY NEILL  
SANPETE COUNTY CLERK  
BY  DEPUTY

*Attorneys for Mike Meguerditchian*

IN THE SIXTH JUDICIAL DISTRICT COURT FOR THE STATE OF UTAH

IN AND FOR SANPETE COUNTY, MANTI DEPARTMENT

MIKE MEGUERDITCHIAN, an individual,  
  
Plaintiff,

vs.

MAX SMITH, individually and as Trustee of  
The Smith Family Living Trust, u/a/d March  
19, 1991

Defendant.

**APPLICATION FOR WRIT OF  
EXECUTION**

Civil No. 050600136

Judge David L. Mower

Plaintiff Mike Meguerditchian, by and through Paul M. King, of and for the law firm of Hoole & King, L.C., attorneys of record for said Plaintiff, hereby makes application to the above-entitled Court for its issuance of a Writ of Execution, and as grounds therefore states as follows:

1. That judgment has been entered in the above-entitled action requiring the payment of money.

2. The original judgment amount entered by this court was for \$54,690.92 as of October 17, 2008. Current judgment balance, with all post judgment interest, fees and costs is \$58,186.86, after applying all credits due to the judgment debtor.

3. The nature of the property is non-exempt real and personal property described and located as follows:

A. All of the right, title and interest in non-exempt personal property including, but not limited to:

- Fifth Wheel Trailer
- Storage Containers
- Grading Equipment: Loader and Tractor with brush cutter
- Vehicles Registered in Max Smith's name
- Accounts
- Claims
- Causes of action
- General Intangibles
- Materials
- Equipment

if known, of Max Smith, located at the real property described in Paragraph C below, or as may be found elsewhere to satisfy the judgment rendered in the above-entitled case as indicated in said Writ.

If sufficient personal property cannot be found and sold pursuant to said writ, then to attach and sell all of the right, title and any interest of said Defendant in the following real property and appurtenant interests:

B. Beginning at the Southwest corner of Section 31, Township 12 South, Range 4 East, Salt Lake Base and Meridian; thence North 88°59'57" East 1288.94 feet; thence North 79°56'18" East 710.82 feet; thence North 59°13'01" East 819.26 feet; thence North 58°52'40" East 428.89 feet; thence North 25°47'50" East 129.558 feet; thence South 424.763 feet; thence South 60°18'17" West 788.156 feet; thence

South 79°29'31" West 504.635 feet; thence West 1935.19 feet to the point of beginning.

Containing: 9.42 acres, more or less. (S#20232X1)

- C. Oaker Hills Plat 4 (Phase IV) [Tax Serial #20221] more specifically described as:

Beginning at the Northeast corner of Section 30, Township 12 South, Range 4 East, Salt Lake Base and Meridian, said point of beginning being on Section Line and being on the boundary line between Oaker Hills and Elk Ridge Subdivision; thence South 89°43'46" west 1642.58 feet to the centerline of the Oaker Hills access road and the following 14 courses; South 266.85 feet; thence South 12°56'35" East 282.88 feet; thence south 38°25'13" East 274.87 feet; thence South 44°31'02" East 210.10 feet; thence South 70°54'52" East 244.38 feet; thence South 63°38'47" East 237.37 feet; thence South 43°36'34" East 204.14 feet; thence South 25°21'18" East 209.58 feet; thence South 08°56'10" West 208.94 feet; thence South 32°06'46" West 173.63 feet; thence South 75°26'28" West 292.16 feet; thence North 89°02'18" West 234.57 feet; thence South 48°04'38" West 112.48 feet; thence South 26°52'33" West 394.85 feet; thence leaving said road centerline, South 61°33'22" East 226.25 feet; thence South 00°45'39" West 299.14 feet to a fence corner and sixteen (1/16) corner; thence North 89°24'38" East 2615.95 feet; thence North 00°00'36" East 2675.36 feet; thence South 89°43'47" West 1323.29 Feet to the point of beginning.

- D. Water Rights:

- (1) All rights of the Defendants in water right number 51-224, and all other rights of the Defendants in water coming from and the well producing said water, said to be located approximately North 950 feet East 300 feet from the Southwest corner, Section 4 Township 12 South Range 4 East, Salt Lake Basin Meridian.
- (2) Other rights of the Defendants in water rights and/or interests in water wells located in Sanpete County, Utah.

The estimated value of the property is unknown.



4. Plaintiff is unaware of any person other than the Defendants known to claim an interest in the property.

DATED this 24 day of March, 2009.

HOOLE & KING, L.C.

By: 

Paul M. King

*Attorneys for Mike Meguerditchian*

Plaintiff's Address:

PO Box 1511  
Salt Lake City, Utah 84165

## Tab 5

PAUL M. KING (5500)  
HOOLE & KING, L.C.  
4276 South Highland Drive  
Salt Lake City, Utah 84124  
Telephone (801) 272-7556  
Facsimile (801) 272-7557  
Email paul.king@hooleking.com

FILED  
SANPETE COUNTY, UTAH

APR 01 2009

SANDY NEILL  
SANPETE COUNTY CLERK  
BY M. Lund DEPUTY

*Attorneys for Mike Meguerditchian*

IN THE SIXTH JUDICIAL DISTRICT COURT FOR THE STATE OF UTAH  
IN AND FOR SANPETE COUNTY, MANTI DEPARTMENT

MIKE MEGUERDITCHIAN, an individual,

Plaintiff,

vs.

MAX SMITH, individually and as Trustee of  
The Smith Family Living Trust, u/a/d March  
19, 1991

Defendant.

WRIT OF EXECUTION

Civil No. 050600136

Judge ~~David L. Mower~~  
Marvin O. Bagley

THE STATE OF UTAH TO THE SHERIFF OF SANPETE COUNTY OR CONSTABLE:

Judgment was rendered in this action by the above-entitled Court on the date of  
December 8, 2008 against Defendant and in favor of Plaintiff in the amount of \$54,690.92, rendering  
an amount now due as follows:

Writ of Execution



UNFILED

\$54,690.92 JUDGMENT AMOUNT

\$1,245.93 Interest on said judgment amount accrued at the post-judgment rate  
of 5.42% per annum to March 19, 2009.

\$2,000.00 Post Judgment attorney's fees

\$250.00 Estimated Service/Execution Fees

( 0.00 ) Credits for Payments made

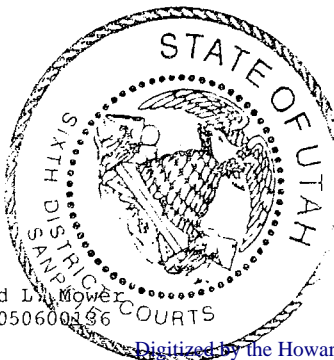
\$58,186.86 TOTAL AMOUNT DUE

with continuing interest on the total judgment amount until paid, plus after-accruing costs, including attorney's fees.

YOU ARE COMMANDED to collect the aforesaid judgment with costs, interest, and fees, together with costs of this execution, and to levy on and sell enough of the non-exempt personal property of the said Defendant; and if sufficient non-exempt personal property cannot be found, to levy on and sell any non-exempt interest in real property of said Defendant that can be found, to satisfy the same, with all legal costs accruing thereon. This shall be your sufficient warrant for so doing. Within sixty days make due returns of this Writ with your doings in the premises herein endorsed.

ISSUED UNDER THE SEAL OF THIS COURT, this 1 day of April,

2009.



CLERK OF THE COURT

SANDY NEILL

Melissa Lund  
Deputy Court Clerk

Judge David L. Mower  
Civil No. 050600156

Plaintiff's Address:

PO Box 1511  
Salt Lake City, Utah 84165

## Tab 6



FILED  
SANPETE COUNTY, UTAH

APR 01 2009

SANDY NEILL  
SANPETE COUNTY CLERK  
BY *M. Lund* DEPUTY

PAUL M. KING (5500)  
HOOLE & KING, L.C.  
4276 South Highland Drive  
Salt Lake City, Utah 84124  
Telephone (801) 272-7556  
Facsimile (801) 272-7557  
Email paul.king@hooleking.com

*Attorneys for Mike Meguerditchian*

Praecipe



VD28460936

pages: 3

050600136 SMITH,MAX

IN THE SIXTH JUDICIAL DISTRICT COURT FOR THE STATE OF UTAH  
IN AND FOR SANPETE COUNTY, MANTI DEPARTMENT

MIKE MEGUERDITCHIAN, an individual,

Plaintiff,

vs.

MAX SMITH, individually and as Trustee of  
The Smith Family Living Trust, u/a/d March  
19, 1991

Defendant.

PRAECIPE

Civil No. 050600136

Judge David L. Mower

TO THE SHERIFF OR CONSTABLE OF SANPETE COUNTY, UTAH, GREETINGS:

You are hereby directed by virtue of the annexed Writ of Execution to levy upon, seize,  
attach, hold in the custody of an appropriate bailee, and sell the following:

1. All of the right, title and interest in non-exempt personal property including, but not  
limited to:

- Fifth Wheel Trailer
- Storage Containers
- Grading Equipment; Loader and Tractor with brush cutter

- Vehicles Registered in Max Smith's name
- Accounts
- Claims
- Causes of action
- General Intangibles
- Materials
- Equipment

if known, of Max Smith, located at the real property described in Paragraph 3 below, or as may be found elsewhere to satisfy the judgment rendered in the above-entitled case as indicated in said Writ.

If sufficient personal property cannot be found and sold pursuant to said writ, then to attach and sell all of the right, title and any interest of said Defendant in the following real property and appurtenant interests:

2. Beginning at the Southwest corner of Section 31, Township 12 South, Range 4 East, Salt Lake Base and Meridian; thence North 88°59'57" East 1288.94 feet; thence North 79°56'18" East 710.82 feet; thence North 59°13'01" East 819.26 feet; thence North 58°52'40" East 428.89 feet; thence North 25°47'50" East 129.558 feet; thence South 424.763 feet; thence South 60°18'17" West 788.156 feet; thence South 79°29'31" West 504.635 feet; thence West 1935.19 feet to the point of beginning.  
Containing: 9.42 acres, more or less. (S#20232X1)

3. Oaker Hills Plat 4 (Phase IV) [Tax Serial #20221] more specifically described as:

Beginning at the Northeast corner of Section 30, Township 12 South, Range 4 East, Salt Lake Base and Meridian, said point of beginning being on Section Line and being on the boundary line between Oaker Hills and Elk Ridge Subdivision; thence South 89°43'46" west 1642.58 feet to the centerline of the Oaker Hills access road and the following 14 courses; South 266.85 feet; thence South 12°56'35" East 282.88 feet; thence south 38°25'13" East 274.87 feet; thence South 44°31'02" East 210.10 feet; thence South 70°54'52" East 244.38 feet; thence South 63°38'47" East 237.37 feet; thence South 43°36'34" East 204.14 feet; thence South 25°21'18" East 209.58 feet; thence South 08°56'10" West 208.94 feet; thence South 32°06'46" West 173.63 feet; thence South 75°26'28" West 292.16 feet; thence North

89°02'18" West 234.57 feet; thence South 48°04'38" West 112.48 feet; thence South 26°52'33" West 394.85 feet; thence leaving said road centerline, South 61°33'22" East 226.25 feet; thence South 00°45'39" West 299.14 feet to a fence corner and sixteen (1/16) corner; thence North 89°24'38" East 2615.95 feet; thence North 00°00'36" East 2675.36 feet; thence South 89°43'47" West 1323.29 Feet to the point of beginning.

4. Water Rights:

- A. All rights of the Defendants in water right number 51-224, and all other rights of the Defendants in water coming from and the well producing said water, said to be located approximately North 950 feet East 300 feet from the Southwest corner, Section 4 Township 12 South Range 4 East, Salt Lake Basin Meridian.
- B. Other rights of the Defendants in water rights and/or interests in water wells located in Sanpete County, Utah.

DATED this, the 29 day of March, 2009.

HOOLE & KING, L.C.

By: 

Paul M. King

*Attorneys for Mike Meguerditchian*

Plaintiff's Address:

PO Box 1511  
Salt Lake City, Utah 84165

Tab 7

Sanpete County Sheriff's Office  
Affidavit of Posting

CLERK M. Lund  
2009 JUN 17 PM 2:54

STATE OF UTAH

: SS

COUNTY OF SANPETE

Robert Henningson, having been first duly sworn upon oath, deposes and says as follows:

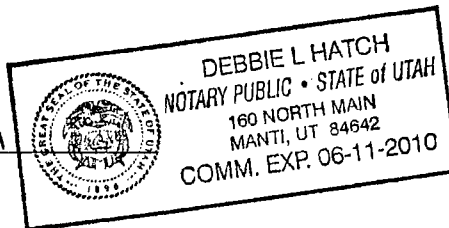
1. That I am a United States citizen 21 years of age, residing in Sanpete County, State of Utah.
2. That on the 15<sup>th</sup> day of June, 2009 affiant completed posting conformed copies of the Notice of Sheriff's Sale, a copy of which is attached hereto as an exhibit and incorporated herein, at the following places within the city or county wherein the property described in said Notice is located:

- 1) Address of Property:  
Approximately 6700 East 33000 North, Fairview, UT
- 2) Manti City Building, 50 S Main, Manti, UT
- 3) Mt. Pleasant City Hall, 115 W Main, Mt. Pleasant, UT
- 4) Fairview Post Office, 50 West Center, Fairview, UT
- 5) Sanpete County Courthouse located at 160 North Main, Manti, Utah.

Robert Henningson  
this 16<sup>th</sup> Day of June, 2009

SUBSCRIBED AND SWORN before me

Debbie L Hatch  
Notary Public



Sanpete County Sheriff's Office Affidavit of Posting



VD29061584

pages: 3

IN THE SIXTH JUDICIAL DISTRICT COURT FOR THE STATE OF UTAH  
IN AND FOR SANPETE COUNTY, MANTI DEPARTMENT

---oo0oo---

MIKE MEGUERDITCHIAN, an individual

Plaintiff

Vs.

Notice of Sale  
Civil No. 050600136

MAX SMITH, individually and as Trustee  
Of The Smith Family Living Trust, u/a/d  
March 19, 1991

Defendant(s)

---oo0oo---

To be sold at a Sheriff's Sale which will be held at the Sanpete County Courthouse located at 160 North Main, Manti, Utah on July 7, 2009 at 11:00 a.m. all rights, title and interest of the above named defendant, in and to the following described real property:

Beginning at the Southwest corner of Section 31, Township 12 South, Range 4 East, Salt Lake Base and Meridian; thence North 88deg 59'57" East 1288.94 feet; thence North 79deg56'18" East 710.82 feet; thence North 59deg13'01" East 819.26 feet; thence North 58deg52'40" East 428.89 feet; thence North 25deg47'50" East 129.558 feet; thence South 424.763 feet; thence South 60deg18'17" West 788.156 feet; thence South 79deg29'31" West 504.635 feet; thence West 1935.19 feet to the point of beginning.  
Containing: 9.42 acres, more or less (S#20232X1)

Oaker Hills Plat 4 (Phase IV) (Tax Serial #20221) more specifically described as:

Beginning at the Northeast corner of Section 30, Township 12 South, Range 4 East, Salt Lake Base and Meridian, said point of beginning being on Section Line and being on the boundary line between Oaker Hills and Elk Ridge Subdivision; thence South 89deg43'46" west 1642.58 feet to the centerline of the Oaker Hills access road and the following 14 courses; South 266.85 feet; thence South 12deg56'35" East 282.88 feet; thence south 38deg25'13" East 274.87 feet; thence South 44deg31'02" East 210.10 feet; thence South 70 deg 54'52" East 244.38 feet; thence South 63deg 38'47" East 237.37 feet; thence South 43 deg 36'34" East 204.14 feet; thence South 25 deg 21'18" East 209.58 feet; thence South 08 deg 56'10" West 208.94 feet; thence South 32 deg 06'46" West 173.63 feet; thence South 75 deg 26'28" West 292.16 feet; thence North 89 deg 02'18" West 234.57 feet; thence South 48 deg 04'38" West 112.48 feet; thence South 26 deg 52'33" West 394.85 feet; thence leaving said road centerline, South 61 deg 33'22" East 226.25 feet; thence South 00deg 45'39" West 299.14 feet to a



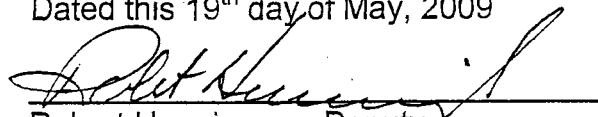
fence corner and sixteen (1/16) corner; thence North 89deg 24'38" East 2615.95 feet; thence North 00 deg 00'36" East 2675.36 feet; thence South 89 deg 43'47" West 1323.29 feet to the point of beginning.

Water Rights:

- (1) All rights of the Defendants in water right number 51-224, and all other rights of the Defendants in water coming from and the well producing said water, said to be located approximately North 950 feet East 300 feet from the Southwest corner, Section 4 Township 12 South Range 4 East, Salt Lake Basin Meridian.
- (2) Other rights of the Defendants in water rights and/or interests in water wells located in Sanpete County, Utah.

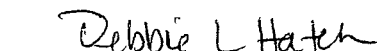
Terms of payment. Cash or certified funds only. Checks will be accepted when accompanied by a letter from maker's bank that certifies funds are available through two weeks after sale. A credit bid will be considered the same as a cash bid when submitted by plaintiff or plaintiff's representative.

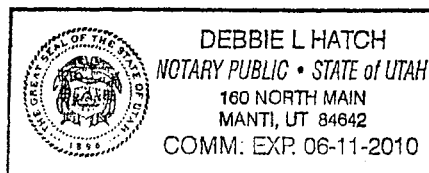
Dated this 19<sup>th</sup> day of May, 2009

  
Robert Henningson, Deputy  
Sanpete County Sheriff's Department

On the 19<sup>th</sup> day of May, 2009 before me, a Notary Public, in and for the County of Sanpete, State of Utah, personally appeared Robert Henningson, Deputy Sheriff of Sanpete County, personally known to me to be the person described in and who executed the foregoing instrument, and who acknowledged to me that he executed the same as such, freely and voluntarily, and for the uses and purposes as provided for by law.

WITNESS my hand and seal this 19<sup>th</sup> day of May, 2009.

  
Notary Public



## Tab 8

CLERK ml

2010 SEP 15 PM 5:01

PAUL M. KING (5500)  
**HOOLE & KING, L.C.**  
4276 South Highland Drive  
Salt Lake City, Utah 84124  
Telephone (801) 272-7556  
Facsimile (801) 272-7557  
Email paul.king@hooleking.com

*Attorneys for Mike Meguerditchian*

---

IN THE SIXTH DISTRICT COURT FOR THE STATE OF UTAH  
IN AND FOR SANPETE COUNTY, MANTI DEPARTMENT

---

MIKE MEGUERDITCHIAN, an individual,  
  
Plaintiffs,  
  
vs.

MAX SMITH, individually and as Trustee  
of The Smith Family Living Trust, u/a/d  
March 19, 1991

Defendant.

**FINDINGS OF FACT CONCLUSIONS  
OF LAW AND ORDER, DENYING IN  
PART AND GRANTING IN PART  
DEFENDANT'S MOTION TO SET  
ASIDE SHERIFF'S SALE**

Civil No. 050600136

Judge Marvin Bagley

At a hearing held before the above captioned court on the 9<sup>th</sup> day of July, 2010, beginning  
*in evidence MDR*  
at 10:00 a.m., all parties appearing through counsel, the Court having received the memoranda  
of counsel and being fully advised of the premises, the Court heard oral argument concerning the  
Defendant's Motion to Set Aside the Sheriff Sale previously conducted in this matter in execution

of the judgment in favor of the Plaintiff previously rendered herein. Accordingly, as to the subject Motion to Set Aside Sheriff's Sale, the Court makes the findings of fact, conclusions of law and order set forth below.

A complete transcript of the Court's ruling made in Court at said date and time is attached hereto as Exhibit "A" and incorporated herein by this reference. A copy of the Certificate of Sale issued by the Sanpete County Sheriff's Office, documenting the Sheriff's Sale which is the subject of the Defendant's Motion to Set Aside Sheriff's Sale, is attached hereto as Exhibit "B" and incorporated herein by this reference.

### **FINDINGS OF FACT**

1. The fair market value of the real property included in the Sheriff's Certificate of Sale, consisting of two parcels of real property, items 1 and 2 in the Sheriff's Certificate of Sale, tax parcels 20232X1 and 20221, respectively, is \$505,000.00.

2. All parties presented expert reports prepared by qualified appraisers, the Court found both appraisers to be qualified and competent. The Court found that the appraiser and expert report relied upon by the Defendant in this matter to be more compelling and more accurately reflected the fair market value of the property, which was found to be \$505,000.00 as set forth above.

3. The price bid at the Sheriff's Sale for the aforementioned two parcels of real property, a total of \$33,000.00, was found by the Court to be inadequate, and the difference

between \$33,000.00 bid and the \$505,000.00 fair market value of the property found by the Court shocks the conscience of the court.

4. With regards to the water rights included in the Sheriff's Certificate of Sale, being items number 3 and 4 in said Certificate, water right number 51-224 and other un-named water rights of the Defendants in Sanpete County, Utah, respectively, the Court found that the fair market value of said water rights are \$7,500.00 per acre foot.

5. Without testimony of the exact number of acre feet of water owned by the Defendant included in said Sheriff's Certificate of Sale, the Court found that the Defendant's held in excess of 20 acre feet of water subject to that certificate.

6. The bid amount for said water shares, being \$30,000.00 and \$3,000.00 respectively for a total of \$33,000.00, is less than the fair market value of said water shares found by the Court, to the extent that the Court found that price to be inadequate and that difference shocks the conscience of the Court.

7. The officer conducting the Sheriff's Sale, being unable to find sufficient personal property, acted appropriately in selling real property of the Defendants listed in said Certificate of Sale.

8. The Court finds that there was nothing misleading regarding the sale of real property included in the Sheriff's Certificate of Sale, and no unfairness in the conduct of the purchasing party with respect to the two parcels real property included in said Certificate of Sale. The Court found that there was nothing irregular in the sale of real property at said Sheriff's Sale.

9. The Court finds that the Notice of Sheriff's Sale described the first portion of water rights as simply the rights to the Defendants in water right #51-224, however, the fact that several of the rights included in said water right have been severed off and have individual water right numbers made said description insufficient.

10. The description of the second part of the water rights sold at said Sheriff's Sale (item #4) was simply other water rights of the Defendant in Sanpete County, Utah.

11. The Court finds that these descriptions of the water rights of the Defendants are insufficient, leading to confusion, which would have the effect of discouraging bidders at the sale and which would have a direct effect of lowering the price at the Sheriff's Sale.

### CONCLUSIONS OF LAW

1. The proper standard for setting aside the Sheriff's Sale in this matter is that standard outlined in *Pyper v. Bond*, 224 P.3d 713 (Utah App., 2009). The standard set out in that case is that two elements must be satisfied; first there must be a gross inadequacy of the purchase price as compared to value of the property sold; and second, there must be irregularities attending the sale, especially if the irregularities have a distinct tendency to prevent the realization of a fair price for the property sold unless the complaining party is estopped by his or her own laches or failure to act.



2. The purchase price for the two parcels of real property sold at the Sheriff's Sale, was grossly inadequate, shocking the conscience of the Court meeting the first element required by the *Pyper v. Bond* standard.

3. There were no irregularities involving the sale of real property at the Sheriff's Sale, therefore, the second element of the *Pyper v. Bond* standard is not met as it applies to the sale of real property at the Sheriff's Sale.

4. The purchase price for the sale of water rights was grossly inadequate, shocking the conscience of the Court, and meeting the first element of the *Pyper v. Bond* case standard for setting aside the Sheriff's Sale as it relates to said water rights.

5. The Court rules as a matter of law that the water rights sold constituted real property and were inadequately described in the Notice of Sheriff's Sale. Therefore, the Court finds that there were irregularities attending the sale of water rights at the Sheriff's Sale, and both elements of the *Pyper v. Bond* case standard were met as they relate the to the sale of water rights at the Sheriff's Sale.

6. The Court rules that under Utah Code Ann. § 73-1-11, because the water rights sold were not shares of stock in an irrigation company, the water rights constituted real property not personal property, and therefore were inadequately described as set forth above, because rule 69B(d) of the Ut. R. Civ. P. requires that parcels of real property be sold separately and be described separately.

## ORDER

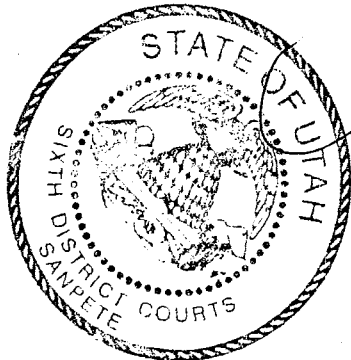
1. The Sheriff's Sale of the two parcels of real property, being items one and two listed in the Sheriff's Certificate of Sale, parcels 202323X1 and 20221, at Sanpete County, Utah, is affirmed. Defendants' Motion to Set Aside the Sheriff's Sale as to the parcels of real property is denied.

2. The Sheriff of Sanpete County, Utah, is authorized to issue its final Sheriff's Deed transferring both parcels of real property to the bidder at said Sheriff's Sale.

3. Defendant's Motion to Set Aside the Sheriff's Sale as it applies to the water rights sold, items number three and four in the Sheriff's Certificate of Sale, being water right number 51-224 and all other water rights of the Defendants in Sanpete County Utah, is granted. The Sheriff's Sale and the Sheriff's Certificate of Sale as it applies to said water rights only is hereby set aside.

4. The judgment in favor of the Plaintiff previously rendered herein remains unsatisfied as to the \$33,000.00 credit bid of the Plaintiff for the water rights purchased, which purchase is set aside pursuant to this Order.

DATED this 15<sup>th</sup> day of September, 2010.



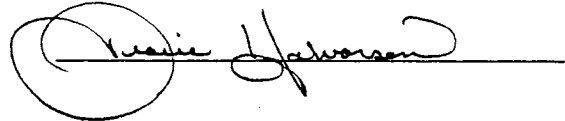
BY THE COURT:

  
Honorable Marvin Bagley  
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **FINDINGS OF FACT  
CONCLUSIONS OF LAW AND ORDER, DENYING IN PART AND GRANTING IN PART  
DEFENDANT'S MOTION TO SET ASIDE SHERIFF'S SALE** was mailed by first-class mail,  
postage prepaid, on this 26<sup>th</sup> day of August, 2010 to the following:

Darwin C. Fisher  
40 N. 300 East, Suite 101  
St. George, UT 84770

A handwritten signature in black ink, appearing to read "Kevin Johnson", is written over a horizontal line. The signature is stylized with a large circular flourish at the beginning.

# EXHIBIT A

*Meguerditchian v. Smith, et al.*

Case No. 050600136

Evidentiary Hearing - Defendants' Motion to Set Aside Sheriff's Sale

July 9, 2010

Transcript of Judge's Ruling

From recording made at hearing by court personnel;

Transcript prepared by the staff of Hoole & King, L.C.

Judge: We are back on the record in Meguerditchian versus Smith case 050600136. I've gone back and reviewed my notes and looked up some provisions of the law and have this decision.

This case is here on a Motion to Set Aside a Sheriff's Sale following entry of a judgment in favor of the Plaintiff against the Defendant. The proper standard for setting aside a Sheriff's Sale is what's outlined in the Pyper case and as I interpret the Pyper decision requirement. First there must be a gross inadequacy of the purchase price as compared to the value of the property being sold, and there must be irregularities attending the sale. And especially if the irregularities have a distinct tendency to prevent the realization of a fair price for the property sold unless the complaining party is estopped by his or her own laches or failure to act.

In this case, I find that there were two parcels of ground, real property, that were sold. One 9.42 acres that sold for \$3,000.00, one 155 acre parcel that sold for \$30,000.00. There were also rights that were...water rights that were sold as defined as rights in water right 51-224 that sold for \$30,000.00, and \$3,000.00 for other rights in San...other water rights in Sanpete County.

I find that the fair market...well as to the fair market value of the land, there were two appraisals, Mr. Kjar, Kjar testified that the property was worth \$151,000.00 and he included enough water for essentially one, one residence. Ms. Denbow testified that her value was \$505,000.00 without water. Mr. Kjar appraised the pasture as ag-land, or excuse me, he appraised the property equivalent as a pasture with ag-land and Ms. Denbow appraised as property with the potential for development. I find that both appraisers are credible, that both appraisers are qualified and that I accept the appraisals based upon both appraisers. I find that they were both correct, however, they both appraised it differently.

Ms. Denbow appraised on a highest and best use of a potential for development. Mr. Kjar appraised it as, just raw land. And so I believe the issue before me is what is the highest and best use of the property so I that I know which appraisal to accept. I find that the highest and best use of the property is as it was appraised by Ms. Denbow.

The reason I find that is because it was partially developed, there was some testimony

that there had been up to \$200,000.00 of development costs already into it, that there are roads and other improvements. I also find that the parties are in the subdivision business, that they have been developing subdivisions in the area for some time, that they got preliminary approval for the larger parcel as to phase 4 of a subdivision, that it was their clear intent that that what they intended to do with the property, and that the property was not being used as ag-land, it was not on the green belt, that is was there in the process of being developed. So I find that the property does have a fair market value without water of \$505,000.00. The bid price for that ground was \$33,000.00. I find that the difference between \$33,000.00 and \$505,000.00 is inadequate, it's a sufficient difference to shock the conscience, particularly when you consider the potential value if this subdivision was completed. Ms. Denbow testified that she did not value, did not appraise the property as a completed subdivision but only as a something with the potential. And so if it is completed, and there was some testimony that it could be completed with as little as \$10,000.00 more dollars; however, there is still not approval and there are a lot of "if's". I just find that given all the facts before me, all the evidence that I have heard, that \$33,000.00 for \$505,000.00 worth of property is too inadequate and it shocks my conscience.

With regard to the water rights, they sold for a total of \$33,000.00. The evidence that I have is that they water rights are valued at \$7,500.00 per acre foot, I accept that because that is the evidence before me. However, I actually believe and firmly believe that that is undervalued based on judicial notice of other cases that I am familiar with. When, when those acre feet of water are divided into .25, which they are in this case, it is an indication that there is .25 acre foot per future building lot and so that I think that they usually sale for four times that amount. \$7,500.00 would be the price for .25 acre feet of water for an individual lot. However that is not the evidence before me but I still believe and firmly believe that's true. We don't have a firm number of shares but there are in excess of 20 shares based on the evidence that before me. Unless that I find the value of the water shares is also in excess of what the price brought and it is also is inadequate and shocks the conscience as well.

With regard to prong number 2, that there has to be...when one prong is not sufficient there has to be a satisfaction of both prongs. There has to be alleged irregularities or there has to be irregularities in the sale. The first allegation is that the personal property should have been sold first. Under Rule 69 A(a), the law requires a seizure of property before the sale. Under that rule, the Sheriff is, or whoever is doing the seizing, is required to seize the personal property first and then if sufficient personal property can not be found, then to seize the real property. The only testimony that I have as to what the sheriff did in seizing the properly was he said he didn't have sufficient information to know that the property was. There weren't numbers provided and there was no evidence that he didn't do his job, there was no evidence that he didn't act in good faith. So I find that the officer acted appropriately, I find that he couldn't find sufficient personal property, so seizing on the real property was sufficient. Now I realize that there is a lot of hand-holding that



goes on when a sheriff is asked to seize property, but usually in my experience there is not enough hand-holding. It should be the responsibility of the lawyers to dot all the 'i's' and cross all the 't's'. Whenever, in my practice as lawyer, if I ever had a sheriff's sale and seizure, I would make all the arrangements. Don't leave anything up to the sheriff's office. You arrange for storage, you arrange for what is to be picked up and numbered and for whatever reason, that wasn't done, and I don't, I don't fault the Sheriff in this case and I do find that he was unable to find sufficient personal property and so the seizure of the real property was appropriate.

Also there was contradictory evidence as to ownership of the tractor and the brush hog and really no value as to any other specific item of, of personal property. With regard to the real property, there were two descriptions, one of the smaller parcel and one of the larger parcel. The larger parcel was described...well both of them were described in metes and bounds but in addition the larger parcel, parcel was described as Phase 4 of Oakerhills Plat 4. I find that there was nothing misleading about that. I could not find any unfairness in the conduct of the purchasing party with respect to the two parcels of real property. I didn't find anything that was irregular in that sale. With regard to the sale of the water rights, I do find that there were irregularities. Rule 69B(d) requires that severable lots of real property be sold separately. Also Rule 69B(b)(3) requires that the notice of sale contain a particular description of real property to be sold. I find that the notice in this case did not give a particular description. It was described as all rights of Defendants in water right 51-224; however, the evidence before me is that several of those rights have been severed off and have their individual water rights numbers. I also find that the other description of the other waters was other water of the Defendants in Sanpete County. That is just an insufficient description, I think it leads to confusion and would have a effect of discouraging bidders at the sale which would have a direct effect of lowering the price.

Exhibit 6 shows several different water numbers of water rights; however, part of the them are, or all of them were originally severed from 51-224, plus I that think the description was misleading and was insufficient and did not describe the water separately. I find that the water rights are real property. Section 73-1-11 Utah Code Annotated distinguishes between shares of stock in an irrigation company, which my understanding of Utah law is those are personal rights as to other water rights, which are not shares of stock in an irrigation company. I know that there has been, the Utah law...went, there were different cases several years ago, I believe that the most recent Utah Supreme Court case, and I believe that the legislature resolved that a few years ago. And water rights that are not in an irrigation company are real property, water rights in an irrigation company are personal property. The rights in this case are not shares of stock in an irrigation company so I find that they are real property. Also, water rights, such as these are transferred by Warranty Deed, they are also recorded in the Office of the State Engineer, but there is also a requirement that there be a backup of a conveyance document, which usually is in the form of a Warranty Deed. I believe that is the law in the State of Utah, and if its not, if I am

wrong on that, in this case I believe that it is appropriate because the water rights in this case are sufficiently closer to being real property than they are personal property, and as such I believe that Rule 69B(d) requires that they be sold separately and described separately.

In addition I think the sale of the water rights is, just smacks of unfairness. I think \$7,500 per acre foot is very low compared to if they are divided into .25 acre feet and sold for individual lots. Also, I think it was unfair by the way that the water rights were described, appears to smack of unfairness.

So in this case I set aside the Sheriff's Sale as it relates to the sale of the water rights. I do not set aside the sale as it relates to the ground. Their still remains a portion of the judgment outstanding that is not paid, and the Defendant is still the record title owner of the water rights. I do not extend the redemption period because that was not what was requested in the motion, but the request was to set aside the sale. That's my decision. Neither party prevailed outright, and the rule requires that I request the prevailing party to prepare the order. I think that neither party is the prevailing party so I am going to ask counsel who wants to volunteer to prepare the order.

Fisher: I'll do it.

Judge: Alright, Mr. Fisher, I order you to prepare the order. I think that the case was well tried, I appreciate the courtesy of counsel and their preparation and that's my Order.

# EXHIBIT B

WHEN RECORDED RETURN TO:

Mike Meguerditchian  
P.O. Box 851  
Salt Lake City, Utah 84165

*Paul M. King*  
*4276 Hgland Dr.*  
*SLC UT 84124*

Ent 166499 Bk 595 Pg 842  
Date: 28-OCT-2009 9:53AM  
Fee: \$15.00 Check  
Filed By: TAJ  
REED D HATCH, Recorder  
SANPETE COUNTY CORPORATION  
For: HOOLE & KING LC  
*31-12-4E 30-12-4E*

IN THE SIXTH JUDICIAL DISTRICT COURT FOR THE STATE OF UTAH SANPETE  
COUNTY, MANTI DEPARTMENT

---oo0oo---

MIKE MEGUERDITCHIAN, an individual,  
Plaintiff(s)

vs.

CERTIFICATE OF SALE  
Case No: 050600136

MAX SMITH, individually and as Trustee of The  
Smith Family Living Trust, u/a/d/ March 19, 1991  
Defendant(s),

---

I, Robert Henningson, Deputy Sheriff of Sanpete County, do hereby certify  
that I received the Writ of Execution, issued by the above-mentioned court, and by  
virtue of the same, I did notice for sale all rights, title and interest of the defendant(s) in  
the following described property:

Beginning at the Southwest corner of Section 31, Township 12 South, Range 4  
East, Salt Lake Base and Meridian; thence North 88deg 59'57" East 1288.94 feet;  
thence North 79deg56'18" East 710.82 feet; thence North 59deg13'01" East 819.26  
feet; thence North 58deg52'40" East 428.89 feet; thence North 25deg47'50" East  
129.558 feet; thence South 424.763 feet; thence South 60deg18'17" West 788.156  
feet; thence South 79deg29'31" West 504.635 feet; thence West 1935.19 feet to the  
point of beginning.

Containing: 9.42 acres, more or less (S#20232X1)

Oaker Hills Plat 4 (Phase IV) (Tax Serial #20221) more specifically described as:

Beginning at the Northeast corner of Section 30, Township 12 South, Range 4  
East, Salt Lake Base and Meridian, said point of beginning being on Section Line and  
being on the boundary line between Oaker Hills and Elk Ridge Subdivision; thence  
South 89deg43'46" west 1642.58 feet to the centerline of the Oaker Hills access road  
and the following 14 courses; South 266.85 feet; thence

South 12deg56'35" East 282.88 feet; thence south 38deg25'13" East 274.87 feet; thence South 44deg31'02" East 210.10 feet; thence South 70 deg 54'52" East 244.38 feet; thence South 63deg 38'47" East 237.37 feet; thence South 43 deg 36'34" East 204.14 feet; thence South 25 deg 21'18" East 209.58 feet; thence South 08 deg 56'10" West 208.94 feet; thence South 32 deg 06'46" West 173.63 feet; thence South 75 deg 26'28" West 292.16 feet; thence North 89 deg 02'18" West 234.57 feet; thence South 48 deg 04'38" West 112.48 feet; thence South 26 deg 52'33" West 394.85 feet; thence leaving said road centerline, South 61 deg 33'22" East 226.25 feet; thence South 00deg 45'39" West 299.14 feet to a fence corner and sixteen (1/16) corner; thence North 89deg 24'38" East 2615.95 feet; thence North 00 deg 00'36" East 2675.36 feet; thence South 89 deg 43'47" West 1323.29 feet to the point of beginning.

Water Rights:

- (1) All rights of the Defendants in water right number 51-224, and all other rights of the Defendants in water coming from and the well producing said water, said to be located approximately North 950 feet East 300 feet from the Southwest corner, Section 4 Township 12 South Range 4 East, Salt Lake Basin Meridian.
- (2) Other rights of the Defendants in water rights and/or interests in water wells located in Sanpete County, Utah.

By posting written notice of time, date and place of sale and particularly describing and posting said property twenty-one (21) days on the property to be sold at the place of sale, the Sanpete County Courthouse and three (3) public places in the precinct where the property is located. Notice of Sale was also advertised in the Sanpete Messenger for three (3) issues once a week for three (3) successive weeks prior to the sale.

On the 10th day of July, 2009 at the Sanpete County Courthouse, 160 North Main Manti, Utah at the hour of 11:00 a.m. I did sell the interest of Max Smith, individually and as Trustee of The Smith Family Living Trust, u/a/d March 19, 1991 to Mike Meguerditchian. Paul M. King, counsel of record for and in behalf of Mike Meguerditchian placed the highest and only bid, a credit bid in the amount of \$66,000.00. There were four items offered for sale, those being listed in order as they appear on the "Notice of Sale".

Item #1 was sold on Credit Bid for \$ 3,000.00


Item #2 was sold on Credit Bid for \$30,000.00

Item #3 was sold on Credit Bid for \$30,000.00

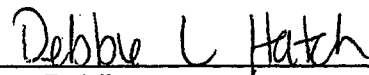
Item #4 was sold on Credit Bid for \$ 3,000.00

Sale of real property is subject to redemption as provided for by law.

Dated at Manti, Sanpete County, State of Utah this 15<sup>th</sup> day of July, 2009.

  
Deputy Robert Henningson  
Civil Division

On the 15th day of July 2009 personally appeared before me, Deputy Robert Henningson, the signer of the within instrument, who duly acknowledged to me that he executed the same.

  
Notary Public

