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Metropolitan Water District of Salt Lake and Sandy v. Zdenek Sorf : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

METROPOLITAN WATER DISTRICT
OF SALT LAKE & SANDY,

Plaintiff/Appellee,

v.

ZDENEK SORF,

Defendant/Appellant.

Case No. 20110443

District Ct. No.: 100921025

APPELLANT'S REPLY BRIEF

ON APPEAL FROM DECISION OF THE
THIRD DISTRICT COURT OF SALT LAKE COUNTY

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Appellant requests oral argument and a published decision.

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SUMMARY OF ARGUMENT

The District is trying to distract the Court from the true crux of this matter. What is genuinely at issue is Sorf's constitutional right to seek redress against a governmental entity, and whether an individual can be stripped of a legal claim as a result of a default judgment even though the claim was not addressed in the default.

Through mistake, surprise, inadvertence and/or excusable neglect, a default judgment was entered against Sorf. Despite satisfying the applicable standard, the trial court denied Sorf's Motion to Set Aside and thereby finalized the terms of the default. Enforcement of the default judgment resulted in a taking of Sorf's property by a governmental entity. Accordingly, pursuant to Utah R. Civ. P. 13(d), Sorf moved for leave to file an after-acquired counterclaim. The trial court denied Sorf's Motion for Leave and deprived him of any opportunity for redress. The default orders Sorf to remove \$150,000 worth of improvements from his backyard and to comply with an extensive list of regulations that were unilaterally created by the District for the District's benefit.

It is the District's position that the result of a default should include not only entry of the relief sought in the complaint, but also loss of all legal claims that arose subsequent to the default. Such a rule cannot be reconciled with the Utah Constitution. One cannot be deprived of a redressable claim simply because default was entered on earlier issues. To promulgate such a rule in this case would unfairly prejudice Sorf and would establish negative precedent in Utah that would reach far beyond the realms of takings law.

The useful purpose and financial value of Sorf's home is at stake in this litigation. As such, the potential consequences are far too great to allow the District's authority to

be determined without a trial on the merits. Just because default was entered as to the claims filed by the District, that cannot possibly mean that Sorf is out of luck with regard to his taking claim. The default should not act as a bar to Sorf's inverse condemnation action. The decisions of the trial court denying Sorf's Motion to Set Aside and Motion for Leave to File were an abuse of discretion and must be reversed.

ARGUMENT

A. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING SORF'S MOTION TO SET ASIDE THE DEFAULT JUDGMENT.

The Utah Supreme Court has clearly advised that when considering a motion to set aside a default judgment, the trial court should be inclined towards "granting relief . . . to the end that the party may have a hearing." *Lund v. Brown*, 11 P.3d 277, ¶ 10 (Utah 2000). Moreover, "it is quite uniformly regarded an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification or excuse for the defendant's failure to appear, and timely application is made to set aside." *Id.* at ¶ 11 (citation omitted.) Sorf provided reasonable justification for his failure to answer the District's Complaint and timely filed a Motion to Set Aside. Accordingly, the trial court abused its discretion in refusing to vacate the default judgment.

1. The Trial Court Failed to Make Adequate Findings of Fact as to All of the Rule 60(b) Reasons Proffered by Sorf.

Just because Sorf argued the Rule 60(b) requirements in his briefings does not mean that the trial court made adequate findings of fact as to all of the proffered reasons. The District is seeking to limit the Court's focus to only the language found in the Order denying Sorf's Motion to Set Aside. The District's efforts must be rejected.

During the hearing on Sorf's Motion to Set Aside, Judge Fratto only made findings of fact as to the existence of excusable neglect. Judge Fratto did not issue findings of fact concerning mistake, surprise or inadvertence.

THE COURT: Yes. Now, I appreciate everyone's presentation. I'm prepared to make a decision. The matter is in front of me as a motion to set aside the default judgment. It is a Rule 60(b) motion, pled as a 60(b) motion. It has two prongs to the analysis. The first is that there must be, in this case, it appears to me, invoked the excusable neglect. I should set aside the judgment as a result of excusable neglect

* * * *

MR. BELNAP: And I understand your ruling, but the rule also speaks of mistake and inadvertence, which I understand your analysis of the letter, but the letter can certainly –

THE COURT: Well, Mr. Belnap, I'm going to stop you there. I appreciate the other – and there's other factors in the rule, also, but it appears to me the only one that would be applicable in this instance and with what excuses have been given is excusable neglect, and, for the reasons I've already stated, I do not see that there has been a showing here of excusable neglect.

(Transcript at p. 56-63 (starting at R. 556)(Add. 3)(emphasis added).) Despite Judge Fratto's clear ruling, the District prepared an Order that stated "Defendant has not made an adequate showing of excusable neglect, mistake, or inadvertence" (R. 353-354)(emphasis added.) The Order was drafted broadly by the District for the District's benefit. Sorf objected to the Order and the language contained therein. (R. 350-352)(Add. 1.) Thereafter, at a hearing on May 12, 2011, Judge Fratto made statements in open court that clearly contradicted the Order. (See Transcript at p. 30-32 (starting at R. 558)(Add. 2).) The terms of the Order do not accurately reflect what Judge Fratto actually decided. As such, the Court cannot rely on language in the Order as being

accurate and/or binding. The Court must consider all factual information that relates to the denial of Sorf's Motion to Set Aside, and must remand this matter for a determination as to all of the proffered Rule 60(b) reasons.

The trial court failed to support its denial of Sorf's Motion to Set Aside with adequate findings of fact. According to *Hernandez v. Baker*, 104 P.3d 664, 666 (Utah App. 2004), the trial court needed to make adequate findings of fact as to “any . . . reason specified in rule 60(b)” (i.e., mistake, surprise, inadvertence and excusable neglect) (emphasis added). The District did not address or distinguish *Hernandez* in any way and thus, it remains controlling authority. Judge Fratto's ruling was based only on whether excusable neglect was present. Judge Fratto did not issue findings of fact with regard to mistake, surprise or inadvertence. (Transcript at pp. 56-63 (starting at R. 556)(Add. 3).) As such, he did not fully address the reasons why default was entered against Sorf. Judge Fratto's actions were improper and amount to an abuse of discretion. This matter must be remanded to the trial court to make findings as to whether the default judgment was entered against Sorf because of mistake, surprise or inadvertence.

The District also failed to distinguish *Lund v. Brown*, 11 P.3d 277 (Utah 2000). In *Lund*, the Utah Supreme Court stated that relief under Rule 60(b) requires only that the moving party show “they possessed a reasonable, good faith belief” as to the reasons the default was entered. *Id.* at 280 (emphasis added). Sorf made such a showing. Sorf did not act blatantly or willfully to ignore pleading deadlines. Default was entered due to excusable neglect, genuine mistake, surprise and/or inadvertence. While the Complaint and Summons were delivered to Sorf's house, the woman at the home did not accept

them. By the time Sorf returned home, the papers were gone. The first document Sorf actually received in this matter was a letter from the District expressing willingness to discuss an “amicable resolution.” (R. 118.) Based on that letter and subsequent conversations with the District’s counsel, Sorf had a reasonable and good faith belief that the parties would work together to reach a resolution before a complaint was filed. (Declaration of Z. Sorf at ¶ 52 (R. 307)(Add. 4).) As soon as Sorf became aware of the default judgment, he retained counsel and initiated efforts to set the default aside.

The District has tried to paint a picture suggesting Sorf intentionally ignored this case and willingly turned his back on the court. Such a depiction makes no sense and is completely inaccurate. Sorf’s home is his pride and joy. He recently spent \$150,000 to improve the backyard. He did so for the purpose of personal enjoyment and residential investment. No one in their right mind would knowingly or intentionally jeopardize their home by not answering a complaint and risking a default judgment. Sorf has been actively engaged and cooperative with the District. He met with District employees on two separate occasions for inspection of his backyard improvements. Neither employee informed Sorf that his landscaping violated the SLA easement and neither employee requested Sorf cease landscaping. (Dec. of Z. Sorf at ¶¶ 24-34 (R. 305 & 306)(Add. 4).) If a District employee had told Sorf to stop landscaping he would have. (Dec. of Z. Sorf at ¶ 35 (R. 306)(Add. 4).) A stop-work order was not posted on Sorf’s property until August 2010. By then, the backyard improvements were two days away from completion. (Dec. of Z. Sorf at ¶ 44 (R. 307)(Add. 4).) Pursuant to the District’s request, and in order to facilitate the District’s access to the SLA, Sorf installed a gate on the

north side of his property and provided the District with a key to the lock. (Dec. of Z. Sorf at ¶ 40-42 (R. 306 & 307)(Add. 4).) Sorf has spoken with the District's counsel in an attempt to resolve the underlying matter. Sorf's actions do not show blatant disregard or willful ignorance. Sorf simply made a mistake about the status of the parties' discussions. Sorf believed the parties were negotiating prior to pursuing litigation, while the District was actually negotiating simultaneous to pursuing litigation. This is a perfect case of mistake, surprise and inadvertence.

The District cited to *Arbogast Family Trust v. River Crossings, L.L.C.*, 191 P.3d 39 (Utah App. 2008) in attempts to further its argument that default was not entered due to excusable neglect. *Arbogast* is distinguishable from this matter and thus, fails to support the District's position. In *Arbogast*, a loan repayment dispute arose between the Arbogast Family Trust and River Crossings. Arbogast filed a complaint and served it on Crossing's out-of-state counsel. On June 28, 2006, Crossing's out-of-state counsel communicated a settlement offer to Arbogast's counsel. The next day, June 29, 2006, Arbogast's counsel sent a letter rejecting the offer and stating:

My client has previously granted your client an extension of time within which to answer the complaint. However, given the present state of the case, I am, on behalf of my client, hereby requesting that your client file an Answer to the complaint within twenty (20) days of the date of this letter.

Id. at 41 & 42. Crossings failed to file an answer and thus, the trial court entered default. The trial court denied Crossing's motion to set aside and an appeal ensued. The Utah Court of Appeals upheld the decision and found that no excusable neglect, inadvertent surprise or mistake existed because Crossings had counsel at the time of the events at

issue, counsel was served with the complaint, and counsel received a letter stating that a complaint had been filed and that an answer was due. In this case, unlike *Arbogast*, Sorf was not represented by counsel when the District filed its Complaint and the District's Complaint was not served on an attorney. Further, there was no correspondence between the District, Sorf and/or an attorney demanding an answer be filed. Accordingly, *Arbogast* is factually distinguishable and fails to suggest an absence of excusable neglect in this matter.

2. Sorf Has Demonstrated Meritorious Defenses to the Underlying Action.

Despite claims to the contrary, Sorf has not argued that the default should have been set aside because he has meritorious defenses. Rather, Sorf properly argued that based on his reasonable explanation for not answering the District's Complaint coupled with his meritorious defenses, it was an abuse of discretion for the trial court to deny his Motion to Set Aside. As explained above, during a court hearing held after the Order denying Sorf's Motion to Set Aside had been entered, Judge Fratto made statements that clarified and corrected language in the Order. There is no confusion in Judge Fratto's subsequent statements. He unequivocally explained that no consideration of Sorf's defenses was done and that no determination as to the merits of Sorf's defenses was made. (*See* Transcript at p. 30-32 (starting at R 558)(Add. 2).) Sorf made the necessary showing to have the default set aside under Rule 60(b). Therefore, the trial court had a duty to consider whether a meritorious defense had been presented. Failure to consider Sorf's defenses was an abuse of discretion.

The fact that Sorf asserted 19 affirmative defenses in his proposed Answer but argues only four on appeal in no way suggests Sorf has conceded the unargued defenses lack merit. Sorf would have liked to argue all 19 defenses on appeal, but had to be selective in deciding which arguments to assert in order to comply with page length restrictions. Sorf's proposed Answer satisfied the meritorious defense requirement because if proven, would have precluded recovery by the District.

a. *The District's Regulations Exceed the Express Language of the Easement.*

Sorf asserted a meritorious defense concerning the overbroad scope of the District's regulations. Sorf has correctly framed the argument on this issue. The focus is not whether the District has authority to promulgate regulations. The proper analysis is whether the District's regulations exceed the express language of the original easement. Even if the District has power to promulgate regulations concerning the SLA, such authority is not without limits. In fact, the District recognized limits to its authority by initiating the underlying case. In its Complaint, the District asked the trial court to "declar[e] [the District's] property rights; . . . declar[e] [the District's] regulatory authority; . . . [and] declar[e] [the District's] rights and powers to remove Defendant's improvements" (Complaint at ¶ 61 (R. 16)(Add. 5).) If the District had the type of unlimited authority it suggests in its brief, there would have been no reason to file the underlying matter or to ask the trial court to make a determination as to the scope of its regulatory authority, rights and powers.

The District's current authority over the SLA easement cannot be any broader than

the rights granted by the original easement. “Where an easement is created by a written instrument, like an agreement, a grant, or a deed, the rights founded on such an instrument are limited to the uses and extent fixed by the instrument.” *Gillmor v. Macey*, 121 P.3d 57, 67 (Utah App. 2005)(citation omitted.) The District has pieced together language from multiple easement deeds in attempts to make the original grant of rights seem broader than it truly was. (See Brief of Appellee at p. 27.) The original easement deed entered in 1946 was a simple, one page document that gave the District authority “to construct, reconstruct, operate and maintain a pipeline or pipelines on, over and across the following described property” (R. 39)(Add. 6.) When the District deeded the easement to the United States in 1962, the easement language was expanded such that the District claimed the authority to convey to the United States the right “to construct and reconstruct, operate and maintain an underground pipeline and appurtenant structures, which latter may be situated above ground surface, on, over or across the following described property” (R. 48 & 49)(Add. 7)(emphasis added.) The underlined language and/or rights did not appear in the original deed.

In 2006, the United States quitclaimed the SLA to the District in a five-page document. The District was purportedly given “all . . . interests in lands, facilities, equipment, improvements, fixtures, features and appurtenances that in any wise are part of or essential to the ownership, operation, or maintenance of the Aqueduct Division of the Provo River Project” (R. 43-47)(Add. 8.) The language in the 2006 deed exceeds the scope of rights granted by both the original easement and the 1962 easement. Based on the 2006 quitclaim deed, the District formulated 11 pages of regulations

restricting how homeowners can use and improve their property within the easement area. (R. 21 to 32)(Add. 10.)

At every turn, the District has broadened its alleged authority over the SLA. What once was a simple one page grant of power to “construct, reconstruct, operate and maintain” a pipeline has become 11 pages of restrictions and limitations. The District’s rights today cannot be any greater than the rights it was given through the original easement. The original easement in no way contemplated or included the 11 pages of rules the District is now imposing. The District’s regulations exceed the express language of the easement and thus, the District has no right to recover against Sorf.

Sorf has never agreed to the scope of easement claimed by the District. The terms of the District’s authority in relation to Sorf’s property are in dispute. Even if the District does hold an easement dominant to Sorf’s estate, that does not give the District free reign to impose any restriction or regulation that it desires. Utah law is clear that use of an easement must be as reasonable and minimally burdensome as the easement will permit. “It is elementary that the use of an easement must be as reasonable and as little burdensome to the servient estate as the nature of the easement and its purpose will permit.” *Big Cottonwood Tanner Ditch Co. v Moyle*, 109 Utah 213, 233 (Utah 1946). It is the language of an easement that controls and rights and relationship of a landowner and easement holder. In this case, the easement language is limited to a “perpetual easement to construct, reconstruct, operate and maintain a pipeline or pipelines on, over and across the following described property” (R. 39)(Add. 6.) When that language is contrasted against the case law cited by the District, it quickly becomes evident that the cited case law is neither controlling nor

persuasive. The easement language in the cited case law is substantially broader and fundamentally different from the easement language in this case.

In *Mid-America Pipeline Co. v. Lario Enterprise, Inc.*, 942 F.2d 1519, 1522 (10th Cir. 1991), the easement stated:

Grantee shall have the right to clear and keep clear all trees, undergrowth and other obstructions from the herein granted right of way, and Grantor agrees not to build, construct or create, nor permit others to build, construct or create any buildings or other structures on the herein granted right of way that will interfere with the normal operation and maintenance of the said line or lines. (Emphasis added.)

In *Mississippi River Transmission Corp. v. Wachter Const., Inc.*, 731 S.W.2d 445, 446 (Miss. App. 1987), the easement provided the grantee the right to control:

. . . the right of ingress and egress to and from the said right of way and to and from the said line or lines, or other equipment, or any of them, for the purpose aforesaid. (Emphasis added.)

In *Banyan Const. Co., Inc. v. Union Elec. Co.*, 840 S.W.2d 298, 301 (Ms. App. 1992), the easement stated:

. . . the perpetual right, . . . in Grantee to survey, stake, construct, reconstruct, erect, place, keep, operate, maintain, inspect, patrol, add to the number of and relocate at will, at any time, and from time to time, in, on, upon, along, over, through, across, and under the herein described easement a line or lines of towers, poles, conduits, and appurtenances, crossarms, wires, cables, transformers, anchors, guy wires, foundations, footings, and other appurtenances The grantor agrees that it will not erect any building or structure or create or permit any hazard or obstruction of any kind or character which, in the judgment of Grantee, will interfere with . . . Grantee's facilities. (Emphasis added.)

Lastly, in *Cox v. East Tenn. Nat. Gas Co.*, 136 S.W.3d 626, 627 (Tenn. App. 2003), the easement provided the Grantee:

a perpetual right of way and easement . . . the Grantee shall have the right

from time to time to cut and keep clear all trees, undergrowth and other obstructions on said right of way and easement that may injure, endanger or interfere with the use of said pipe line or pipe lines (Emphasis added.)

No where in the original easement granted to the District is there any language by which the District was given the authority to preclude building on the easement, to remove trees, undergrowth or other obstructions from the easement, to relocate the SLA pipeline or to otherwise control the right of ingress and egress. The easement language in the cited cases is substantially broader than the language in this matter and thus, the case decisions have no bearing on the dispute between the District and Sorf.

Sorf's description of the impact of the District's regulations is accurate. The regulations do in fact deprive him of all useful purpose of his backyard. The default judgment demands Sorf permanently remove all of the landscaping and structures that he paid for and that were created for his enjoyment. Any future use of Sorf's backyard is left to the discretion and restriction of the District. Therefore, contrary to the District's assertion, Sorf is no longer free to enjoy his backyard like he did in the past.

While the District's regulations permit limited landscaping to exist more than 20 feet from the center of the pipeline, that does little for Sorf because the easement consumes the majority of his property. (See Picture 1 of Ex. A of Supplemental Record)(Add. 9.) The SLA pipeline divides Sorf's backyard into two halves. The easement to the west of the pipeline encompasses the first half of the backyard. The easement that extends to the east of the pipeline encompasses all but a small corner of the second half of the backyard. The fact that Sorf can use the southeast corner of his yard outside the restriction of the District in no way provides him with "useful purpose."

The existence of Bureau of Reclamation land-use directives in no way justify or authorize the District's current regulations. The federal authority cited by the District went into effect after Sorf's home was erected. Specifically, 43 CFR 429.7 was enacted in 1983 and the Reclamation Manual was created in 2002. Sorf's home was built in 1971. Accordingly, the home had been in existence, and sitting on the SLA easement, for many years before any federal authority was enacted demanding encroachment licenses. The existence of Sorf's home, along with the rest of his neighborhood that sits on the SLA easement, is clear evidence that encroachment licenses have not been historically required. Sorf's home, created for exclusive private use, was allowed to be built on the SLA easement without an encroachment license. At no time while holding the SLA easement did the Bureau of Reclamation demand an encroachment license be obtained for the continued existence of Sorf's home or development of his backyard. It was not until 2009, 39 years after Sorf's home was built and 21 years after Sorf purchased the property, that he was advised by the District that submission of an application was necessary in order to make improvements to the SLA easement. (Dec. of Z. Sorf at ¶ 11 (R. 304)(Add. 4).) The regulations and restrictions being imposed by the District do in fact present a new and never before seen regulatory environment.

Mr. Sorf's occupation of the SLA is not trespass per se. The facts in *Gallegos v. Lloyd*, 2008 UT App 40, are significantly different from this matter and thus, the case is clearly distinguishable. In *Gallegos*, James and Julie Lloyd built their home on property that *belonged to* Andrew and Joan Gallegos. In turn, the Gallegos' filed a complaint for trespass, negligence and quiet title. In discussing the standards for awarding damages on

a trespass claim, the court referenced the Restatement of Torts that was cited by the District (i.e., “in order to be liable for a trespass on land under the rule stated in Restatement § 158, it is necessary only that the actor intentionally be upon any part of the land in question . . .”). The fundamental difference between the Lloyds’ actions and the actions of Sorf is that the Lloyds built improvements on property that did not belong to them while Sorf improved property that he purchased and owns. It is ridiculous to suggest Sorf is trespassing in his own backyard.

b. Sorf’s Adverse Possession Defense is Meritorious.

Sorf’s adverse possession defense is also meritorious. The District has incorrectly characterized this issue. The District is misleading the Court by suggesting that only “governmental property” is at issue. Such is not the case. In 1988, Sorf purchased the home at the subject address. Since that time, Sorf has occupied, maintained and improved property that he legally owns.

The citations referenced by the District do not support its arguments. First, Utah Code Ann. § 78B-2-216 does not apply because that statute concerns adverse possession of public streets held by a town, city or county. This case concerns neither a public street nor property held by a town, city or county. Second, Am. Jur. 2d § 268 and the cited Utah case law does not apply because those matters concern governmental land being held in a public trust. The District has admitted that the easement was not placed into a public trust until 2006. By that time, Sorf had occupied, maintained and improved the easement area for 18 years adverse to the interests of the District and its predecessors. Neither the District nor its predecessors communicated any objection to Sorf’s actions

during that time. The 18 years of adverse use by Sorf coupled with the easement holder's non-use of the portion of the easement not occupied by the SLA pipeline evidenced an intent to abandon and resulted in termination of the easement.

c. *The Easement Has Been at Least Partially Abandoned by the District.*

Sorf has not argued that the District abandoned the easement where the SLA pipeline actually runs. However, it is Sorf's position that the District has abandoned the portion of the easement that is not directly occupied by the pipeline. In his opening brief, Sorf cited to *Lunt v. Lance*, 2008 UT App. 192. The District did not distinguish *Lunt* in any way. In *Lunt*, the Court of Appeals affirmed a trial court's decision that there was a partial abandonment of an easement because a portion of the easement had not been used within the past twenty years, a gate had been constructed blocking that portion of the easement from being used, and Lunt had acquiesced in the closure by never taking any action to object. *Id.* at ¶¶ 27-29. The court held that a "history of non-use, coupled with an act or omission showing a clear intent to abandon" is sufficient to show abandonment. *Id.* at ¶25. The *Lunt* decision supports Sorf's arguments.

Just like in *Lunt*, the inactivity of the District and its predecessors for the past several decades constitutes an abandonment. The District admitted that enforcement of the easement was "admittedly lax." (Brief of Appellee at p. 5.) In all actuality, enforcement was not just "lax" but has been non-existent. Between 1946 and 2009, homes, patios, sheds, trees, swimming pools, tennis courts, neighborhood streets, etc. were allowed to be erected on the easement. Now suddenly, without there being any

change in the easement language, the District is claiming that homeowners cannot have any physical structures on the easement and that the District can restrict all improvements to the easement area. The District's right to restrict surface improvements was abandoned by the inaction of the last six decades in permitting permanent physical structures to be built on the easement. As such, there is a strong likelihood that principals of abandonment would meritoriously defend against the District's allegations.

d. *Equitable Estoppel Would Meritoriously Defend Against the District's Allegations.*

Sorf asserted a meritorious defense for equitable estoppel. Finding Sorf's equitable estoppel arguments meritorious would not result in an unprecedented expansion of Utah law. The caution exercised in applying equitable estoppel to a governmental entity exists only when the entity is "functioning in a governmental, as opposed to a proprietary, capacity." *Eldredge v. Utah State Retirement Bd.*, 795 P.2d 671, 677 (Utah App. 1990). "It must be remembered that when the State functions in its proprietary capacity, it will receive no better treatment than any two private individuals who bring their dispute before the courts for final resolution." *Id.* (citation omitted.) The Utah Supreme Court has held that the furnishing of water to inhabitants is a proprietary function. "Where a municipality is engaged in supplying water to its inhabitants, it acts in its business or proprietary, rather than its governmental, capacity." *Home Owners' Loan Corp. v. Logan City*, 92 P.2d 346, 349 (Utah 1939). In this case, the District is acting to "provide retail public water service" to various areas of Salt Lake County. (Complaint at ¶ 5 (R. 6)(Add. 5)(emphasis added.) Such actions are a proprietary

function. Accordingly, the District is not entitled to any specific protections and it is subject to the principals of equitable estoppel without reservation or restriction.

Despite the District's suggestions otherwise, when establishing grounds for equitable estoppel, there is no requirement that verbal statements by a governmental official be corroborated by a written document. The elements of equitable estoppel are:

(1) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; (2) reasonable action or inaction by the other party taken on the basis of the first party's statement, admission, act, or failure to act; and (3) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act.

Eldredge, 795 P.2d at 675. The first element requires only that "a statement, admission, act, or failure" be inconsistent with a claim later asserted. *Id.* The first element says nothing to suggest that the statement cannot be verbal or that the statement must be made in writing. The District has cited no authority to support its assertion that a statement or admission serving as the basis for an equitable estoppel claim must be written and/or supported by corroborating documents.

The *McLeod v. Retirement Bd.*, 257 P.3d 1090 (Utah App. 2011) decision cited by the District does not apply to this case and thus, must be disregarded. In *McLeod*, Kevin McLeod asserted claims of equitable estoppel against the Utah State Retirement System. McLeod claimed that employees of the Retirement System made verbal statements that he relied upon in deciding to retire from the Davis County Sheriff's Office. During its dealings with McLeod, the Utah State Retirement System was acting in a governmental capacity. Accordingly, equitable estoppel was applied with a high degree of caution. In

this case, as explained above, the District is acting in a proprietary capacity. As such, the District is not entitled to the protections afforded to the Utah State Retirement System. The *McLeod* decision has no bearing on the dispute between Sorf and the District.

Sorf's arguments concerning the development of other properties affected by the SLA easement go directly to issues of equitable estoppel. Specifically, the developments permitted on other properties substantiate the reasonableness of Sorf's reliance on conversations with District employees. On at least two occasions, District employees told Sorf that his landscaping was appropriate. There was no reason for Sorf to question the employee's assurances because the approval was consistent with other developments and improvements seen around Sorf's neighborhood. (See Pictures 7 & 8 of Supplemental Record)(Add. 9.)

Sorf's argument concerning application of the District's regulations across all properties impacted by the SLA easement is not being asserted for the first time on appeal. In Sorf's Supplemental Declaration filed as an exhibit to his Reply Memorandum in Support of Motion to Set Aside, Sorf described his observation of "concrete pads, driveways, houses, large trees, cinder block walls, rock walls, sheds, and other structures and objects over the SLA easement" in his neighborhood and explained that "based on those observations" he believed he could improve his backyard as long as he did not directly interfere with the SLA pipeline. (Dec. of Z. Sorf at ¶¶ 9 & 10 (R. 303)(Add. 4).)

The District claims that employee statements cannot be considered in conjunction with Sorf's equitable estoppel defense because such statements would divest assets held in trust for the public. For the reasons discussed above, the District's statements are not

historically accurate. The SLA easement was not put in to a public trust until 2006. The SLA easement existed for 60 years (i.e., 1946 to 2006) without ever being held in a trust. The District cannot abruptly choose to place long-standing property rights into a trust and then claim it is entitled to protections of that trust. The majority of Sorf's use and occupation of his property within the SLA easement took place long before the easement was held in a public trust.

This case has critical financial and personal implication on Sorf. This is not a matter that should be decided without considering, analyzing and resolving the District's allegations on the merits. The trial court failed to make adequate findings of fact as to all of the Rule 60(b) reasons proffered by Sorf and failed to consider Sorf's multiple meritorious defenses. Accordingly, the trial court abused its discretion when it denied Sorf's Motion to Set Aside. The trial court's decision must be reversed.

B. THE TRIAL COURT ERRED IN DENYING SORF'S MOTION FOR LEAVE TO FILE A COUNTERCLAIM.

The District has recognized and admitted that Sorf has a legitimate takings claim. "Sorf's regulatory taking claim ripened when [the District] took action to enforce its regulatory rights under the easement." (Brief of Appellee at p. 37)(emphasis added.) Despite that recognition, the District is urging this Court to trap Sorf with procedural technicalities such that he loses his claim. On one hand, the District is arguing that Sorf lost his taking claim because the District filed its Complaint first and Sorf's claim was compulsory to those addressed in the default. On the other hand, the District is arguing that the Motion for Leave was procedurally improper and thus, not an available

alternative. The District is using the court's rules as both a shield and a sword. The way the District is interpreting court procedure leaves Sorf with nowhere to turn despite him holding a legitimate and redressable claim.

It would be unjust, illogical and unconstitutional for Sorf to lose his taking claim simply because the District got to the courthouse first and fortuitously obtained a default judgment. It is the District's position that Sorf's taking claim arose when the stop-work order was affixed to his property in August 2010. Two months later, in October 2010, the District filed its Complaint. The District is arguing that Sorf's taking claim was compulsory to its Complaint and that the counterclaim was lost because Sorf did not serve a pleading and default was entered. The District's arguments should be disregarded because they have already been considered and legally rejected. In *Laverty v. Massad*, 661 F. Supp. 2d 55 (D. Mass. 2009), LBM filed a complaint against Laverty arising from a real estate dispute. Laverty did not answer the complaint or otherwise appear and thus, default was entered against him. Laverty moved to vacate the default and his motion was denied. Laverty then filed a complaint against LBM. LBM argued the complaint should be dismissed because it was a compulsory counterclaim that had been lost with the default judgment. The court rejected LBM's argument.

As noted, LBM brought an action for breach of contract in the Superior Court, and was awarded a default judgment against Laverty. At first blush, the application of Mass. R. Civ. P. 13(a) to the default judgment would appear to preclude plaintiff's claims against LBM. However, Rule 13(a) specifically says that a "*pleading shall state as a counterclaim*" those claims that arise out of the same 'transaction or occurrence' that was the subject matter of the prior suit (emphasis added.) Plaintiff never filed a pleading in the Superior Court. See *Restatement (Second) of Judgments* § 22, comment e, Illustration e; see 10A Wright & Miller, Federal Practice and Procedures

§ 2682 (“a defendant who fails to appear or to file a responsive pleading and against whom a judgment is entered under Rule 55(b) should not be prevented from asserting a claim in a later action that would have been a compulsory counterclaim in the action that terminated by default judgment”); see also Restatement (Second) of Judgments § 22, Reporter’s Notes (“the compulsory counterclaim rule does not apply with respect to a default judgment entered before the filing of a responsive pleading”), citing 10A Wright & Miller, Federal Practice and Procedures § 2682. Rule 13(a) is therefore inapplicable.

Laverty, 661 F. Supp. 2d. at 63 & 64 (italics in original, underline added.) The requirements of Rule 13(a) only come into effect after a pleading has been served. It is the District’s position that Sorf has never served a pleading in this matter and thus, it cannot rely upon or seek to enforce Rule 13(a) against Sorf.

With regard to the Motion for Leave to File an After-Acquired Counterclaim, the District is attempting to whipsaw Sorf from both sides. The District argues that the Motion for Leave was improper because the default was final and thus, Sorf needed to reopen the judgment. In the next breath, the District argues that the default is not final because it is on appeal. Simply put, the District cannot have it both ways. When his Motion to Set Aside was denied, Sorf was left holding a valid takings claim. As such, Sorf took reasonable steps to ask the trial court for an opportunity to assert his claim. Sorf’s Motion for Leave was appropriate because he had already attempted to reopen the default judgment by filing the Motion to Set Aside.

When Sorf used the term “finalized” in his initial brief, he was referring to the act of the trial court upholding the default judgment. Until it was clear that the default was going to remain in effect, the right and authorities of the District over Sorf’s property were up in the air. In the event the trial court set the default aside, the parties would have

gone back to the terms of the Complaint, including the District's request for the court to declare its rights and authorities over Sorf's property. In that situation, the restrictions and regulations on Sorf's property would have been put on hold and there would be no taking. It was the denial of the Motion to Set Aside that defined how Sorf's property could and could not be used and thus, it was that event that triggered the ripening of Sorf's taking claim.

The case law cited in Sorf's initial brief does in fact support his argument concerning when his takings claim ripened. The District has attempted to distinguish *Droste v. Board of County Commissioners*, 85 P.3d 585 (Colo. App. 1993), on the grounds that claims were still pending before the trial court when the appeal in *Droste* ensued. The procedural formalities of why only a partial final judgment was rendered in *Droste* are not of great significance. What is important is the court's reasoning behind its decision. The court held that Drostes' inverse condemnation claim was not ripe because "a final determination on that claim ha[d] not been made." *Id.* at 591. The same situation exists in this matter. The District's attempts to impose regulations on Sorf did not constitute a final decision. The District simply told Sorf that the regulations applied but then asked the trial court to make a determination as to whether the regulations were appropriate and whether the District even had the authority to promulgate regulations. Until the default judgment was upheld with the denial of the Motion to Set Aside, no final determination had been made as to the District's rights over Sorf's property.

In relation to *Williams v. City of Central*, 907 P.2d 701 (Colo. App. 1995), the District again focused on immaterial facts in attempts to distinguish relevant case law.

Despite the District's assertions, it was not the length of the moratorium or the absence of a permit denial that led the court to conclude plaintiff's inverse condemnation claim was not ripe. Rather, just like in *Droste*, the holding was based on the absence of a final determination as to application of the governmental regulation to the plaintiff's property.

A claim for inverse condemnation alleging that the government has executed a permanent regulatory taking is not ripe until a final decision has been made as to the uses to which the property may be put. *Wilkinson v. Board of County Commissioners*, 872 P.2d 1269 (Colo. App. 1993); *Reale Investments, Inc. v. City of Colorado Springs*, 856 P.2d 91, 94 (Colo. App. 1993) (a "**court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes**").

Id. at 708 (emphasis added.)

The District's reliance on *Reale Investments, Inc. v. City of Colorado Springs*, 856 P.2d 91 (Colo. App. 1993) is unfounded. The decision in *Reale* actually supports Sorf's arguments. Just like in *Droste* and *Williams*, the critical factor in *Reale* for determining ripeness was the existence of a final determination. "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes. That effect cannot be measured until a final decision is made as to how the regulations will be applied to the property in question." *Id.* at 94 (citation omitted.) In *Reale*, the city planning commission had full authority to review and deny Reale's zoning application. However, the commission did not have an opportunity to exercise its power because Reale withdrew his zoning request. Accordingly, no final decision was made concerning application of the regulations to Reale's property. In this case, the District lacked confidence in its authority to issue a final decision concerning application of its

regulations to Sorf's property and thus, asked the trial court to do so. *Reale* does not stand for the proposition that a final determination has to be made by the governmental entity. Rather, *Reale* simply holds that a taking claim is ripe when a final decision has been made. In this case, the District asked the trial court to make such a determination. No final determination was reached until the default judgment was upheld with the denial of Sorf's Motion to Set Aside. Raising an inverse condemnation claim prior to finalization of the default judgment would have been premature.

The District is trying to convince the Court that unless Sorf has been denied all economically beneficial use of his property he cannot suffer a taking. The District's representation is incorrect. A taking exists when a "regulation goes too far" and can be found even if the regulation falls short of eliminating all economically beneficial uses of the property. *Arnell v. Salt Lake County Bd of Adjustment*, 112 P.3d 1214, 1220 (Utah App. 2005) (abrogated on other issues).

Even if a regulation falls short of eliminating all economically beneficial use of land, an analysis of a complex of factors indicates whether the interference is so great that a virtual taking has nonetheless occurred. The factors include the economic impact of the regulation on the claimant and particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . . [and] the character of the governmental action.

Id. at 1220 & 1221.

The facts of this case clearly show Sorf has in fact suffered a taking. When Sorf purchased his property in 1988, no restrictions or regulations were being enforced in conjunction with the easement. Accordingly, Sorf purchased a home that he reasonably believed could be utilized to his liking and that would be a sound financial investment.

Two decades later, the District suddenly formulated 11 pages of regulations concerning how Sorf's property can, and more importantly, cannot be used. (*See* Add. 10.) Sorf's ability to sell his home has been dramatically diminished, if not completely destroyed, as a result of the default judgment. No reasonable buyer would purchase a home that is subject to the extreme use regulations imposed by the default judgment. To the extent Sorf is no longer able to sell his home, he has suffered a total taking. To the extent he would be forced to sell his home at a significantly reduced price would create a virtual taking based on distinct investment-backed expectations.

Even if this Court concludes that the default judgment was not the result of mistake, surprise, inadvertence or excusable neglect, the Court should not be comfortable with upholding the trial court's decisions. To do so would create a new law whereby a party could get trampled on by the government, and not obtain redress, simply because default was entered on earlier issues. Such a holding would have dramatic ramifications not only on takings law, but any type of legal matter where default is a possibility. It is a basic principle of jurisprudence that every case should be heard on its merits. As such, Sorf should be afforded an opportunity to assert his taking claim. The trial court's denial of Sorf's Motion for Leave was an abuse of discretion and must be reversed.

CONCLUSION

For the reasons set forth above, Sorf respectfully requests that the decisions of the trial court denying his Motion to Set Aside and Motion for Leave be reversed.

CERTIFICATE OF SERVICE

I herby certify that on this 20 day of January, 2012, two true and correct copies of the foregoing APPELLANT'S REPLY BRIEF and a copy of this Certificate of Service were served by the method indicated below to the following:

Shawn E. Draney
Scott H. Martin
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P. O. Box 45000
Salt Lake City, UT 84145
Attorneys for Plaintiff/Appellee

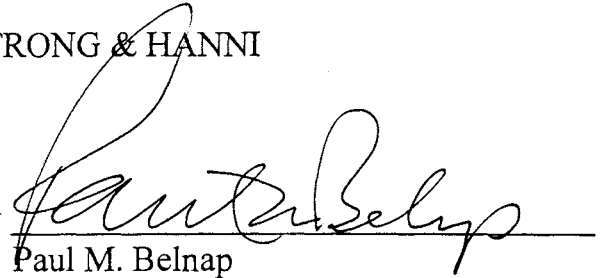
☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

A handwritten signature in cursive script, appearing to read "Paul R. Kelly", is written over a horizontal line.

DATED this 20th day of January, 2012.

STRONG & HANNI

By

A handwritten signature in black ink, appearing to read "Paul M. Belnap", written over a horizontal line.

Paul M. Belnap

Bradley Wm. Bowen

Jennifer R. Carrizal


Attorneys for Appellant Zdenek Sorf

ADDENDUM

- Addendum No. 1: Sorf's Objection to Proposed Order Denying Motion to Set Aside
- Addendum No. 2: Select pages from Hearing Transcript dated May 12, 2011
- Addendum No. 3: Select pages from Hearing Transcript dated March 8, 2011
- Addendum No. 4: Supplemental Declaration of Zdenek Sorf
- Addendum No. 5: Complaint
- Addendum No. 6: Original Easement
- Addendum No. 7: 1962 Deed
- Addendum No. 8: 2006 Deed
- Addendum No. 9: Supplemental Record accepted by the Court on October 28, 2011
- Addendum No. 10: Regulations for Non-District Use of Salt Lake Aqueduct

ADDENDUM “1”

Paul M. Belnap, #0279
Bradley Wm. Bowen, #5042
Casey W. Jones, #12133
STRONG & HANNI
3 Triad Center, Suite 500
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FILED
THIRD DISTRICT COURT
11 MAR 17 AM 11:11
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Attorneys for Defendant Zdenek Sorf

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

METROPOLITAN WATER DISTRICT OF
SALT LAKE & SANDY,
Plaintiff,

v.

ZDENEK SORF,
Defendant.

**OBJECTION TO PLAINTIFF'S
[PROPOSED] ORDER DENYING
DEFENDANT'S MOTION TO SET
ASIDE DEFAULT JUDGMENT**

Civil No.: 1009214025

Judge Fratto

The defendant Zdenek Sorf objects to the Plaintiff's [Proposed] Order Denying Defendant's Motion to Set Aside Default Judgment for the following reasons:

1. The Court misapprehended the factual basis and showing of mistake, inadvertence and excusable neglect under Rule 60(b) URCP as it applies to the position of defendant on his motion. A finding that defendant was properly served did not preclude and override defendant's argument of mistake, inadvertence and excusable neglect relative to his

understanding that the letter of October 28, 2010 was soliciting discussions for resolution of the matter.

The Court was in error in applying the legal standard it indicated to defendant's argument.

The Court abused its discretion in refusing to set aside the default on defendant's argument of mistake, inadvertence and excusable neglect.

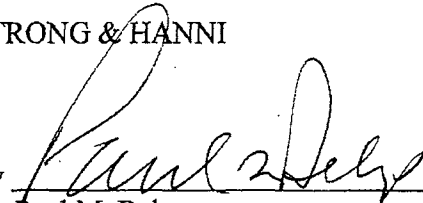
The Court erred in its legal interpretation and relationship of legal determination with the facts argued by the defendant relative to defendant's defenses and the Court's determination that the same were not meritorious.

The Court's stated basis for its rulings are inadequate under the facts presented by the defendant and an error in legal standards have been applied.

DATED this 5 day of March, 2011.

STRONG & HANNI

By


Paul M. Belnap

Bradley Wm. Bowen

Casey W. Jones

Attorneys for Zdenek Sorf

CERTIFICATE OF SERVICE

I herby certify that on this 15th day of March, 2011, a true and correct copy of the foregoing **Objection to Plaintiff's [Proposed] Order Denying Defendant's Motion to Set Aside Default Judgment** and a copy of this Certificate of Service were served by the method indicated below to the following:

Shawn E. Draney	(√)	U.S. Mail, Postage Prepaid
Scott H. Martin	()	Hand Delivered
SNOW, CHRISTENSEN & MARTINEAU	()	Overnight Mail
10 Exchange Place, 11th Floor	(√)	Facsimile
P. O. Box 45000		
Salt Lake City, UT 84145		
<i>Attorneys for Plaintiff</i>		

Beverly Haggis

003770.00701

ADDENDUM “2”

10092-0000 ORIGINAL

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH 2

METROPOLITAN WATER) CIVIL NO. 100921025
DISTRICT OF SALT LAKE &)
SANDY,) COURT HEARING
Plaintiff,) May 12, 2011
vs.) 3:50 p.m.
ZDENEK SORF,)
Defendant.)

* * *

TRANSCRIPTION OF ELECTRONICALLY RECORDED PROCEEDINGS

HELD MAY 12, 2011

BEFORE THE HONORABLE JOSEPH C. FRATTO, JR.

* * *

Transcribed by Renee L. Stacy
Registered Professional Reporter
Certified Realtime Reporter



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1 don't think that -- or maybe is minor -- in the great
2 scheme of things, a minor -- a bit of dirt and a bit
3 of rock and so forth.

4 But I don't know that I take that into
5 account. I take into account the character of what
6 is the judgment, and what will happen here is, if
7 this judgment is executed upon, that means the
8 bulldozers go in and make some -- not anything that
9 can't be restored, but something that's permanent,
10 and I think that's the Johnson case, the -- yes, I
11 suppose you could restore your law practice, but the
12 fact of the matter is, if you're shut down, your
13 practice comes to an end, and the effects of that can
14 be permanent, even in the long haul, but it's
15 certainly permanent in the short run.

16 And then I -- and so I think the statutory
17 scheme is this: In a civil action, if you post a
18 supersedeas bond, the judgment is stayed, and the
19 only question is what the amount of the supersedeas
20 bond should be. That is my discretion, as to what
21 the amount of the supersedeas bond should be.

22 In this case I take into account the fact
23 that this is a default judgment. I did, as part of
24 Mr. Belnap's motion to reconsider this, opine in
25 terms of the -- whether there was a meritorious

1 defense presented, and there's a distinction here
2 between a meritorious defense presented at the time
3 of the motion. That's the only time I can judge it,
4 in relation to the motion, and whether there is
5 ultimately a meritorious defense.

6 But, in any event, I did not opine that
7 what was offered were frivolous defenses, so we have
8 a default judgment in which the merits of the matter
9 have not been determined, and I cannot find that what
10 has been raised as defenses are frivolous, and it
11 seems to me that, as I say, that the execution on the
12 judgment results in permanent -- a permanent
13 situation.

14 And then I suppose the fifth element that
15 I'm looking at here is that the amount suggested, and
16 by your own admission, is really just pulled out of
17 the air, what would reflect your damages cannot be
18 reduced to a dollar amount, I mean, in terms --

19 MR. DRANEY: In large part, that's true.

20 THE COURT: -- of if there is a stay. And,
21 in fact, the damages are quite speculative, in any
22 event, that I'll have to go in -- that this
23 cooperation, in the event that we have to go in, will
24 not be there and so forth is very, very speculative,
25 really, on all sides.

1 If anything, Mr. Belnap -- Mr. Sorf,
2 through Mr. Belnap, has expressed a desire to
3 cooperate, and -- but, in any event, it seems to me,
4 as I say, that it's a permanent thing.

5 On the other hand, the rule, it seems to
6 me, does not give discretion as to whether there
7 should be no supersedeas bond, but there has to be
8 some supersedeas bond, and my only task here is to
9 determine what the amount is, not whether there
10 should be any. That was my question, as to whether
11 there's anything else in our rules or authority that
12 said in a civil matter you can stay a judgment.

13 And so it seems to me, in short -- I'm
14 trying to be as clear as I can -- that if you post a
15 supersedeas bond, the judgment is stayed. The amount
16 of the bond is to be determined by me. I take into
17 account, in determining what the amount is, the
18 factors I've already outlined. It's a default
19 judgment. There's been no determination on the
20 issues. I have not found the defenses -- what's been
21 raised here is frivolous or that the appeal is --
22 would be engaged in for dilatory reasons for improper
23 purposes, and it seems to me that if the judgment is
24 permitted to be executed upon, that it results in a
25 permanent situation rather than -- although possibly

ADDENDUM “3”

ORIGINAL

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

METROPOLITAN WATER)	CIVIL NO. 100921025
DISTRICT OF SALT LAKE &)	
SANDY,)	<u>COURT HEARING</u>
)	
Plaintiff,)	March 8, 2011
)	
vs.)	2:30 p.m.
)	
ZDENEK SORF,)	
)	
Defendant.)	

* * *

TRANSCRIPTION OF ELECTRONICALLY RECORDED PROCEEDINGS

HELD MARCH 8, 2011

BEFORE THE HONORABLE JOSEPH C. FRATTO, JR.

* * *

Transcribed by Renee L. Stacy
Registered Professional Reporter
Certified Realtime Reporter

FILED DISTRICT COURT
Third Judicial District

JUL 15 2011

SALT LAKE COUNTY

by md
Deputy Clerk



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1 cases.

2 THE COURT: Thank you, Mr. Belnap.

3 MR. BELNAP: Thank you very much. Can I
4 take that paper from you?

5 THE COURT: Yes. Now, I appreciate
6 everyone's presentation. I'm prepared to make a
7 decision.

8 The matter is in front of me as a motion to
9 set aside the default judgment. It's a Rule 60(b)
10 motion, pled as a 60(b) motion. It has two prongs to
11 the analysis.

12 The first is that there must be, in this
13 case, it appears to me, invoked the excusable
14 neglect. I should set aside the judgment as a result
15 of excusable neglect. That, of course, has two
16 parts. Number one, that there was neglect, and
17 number two, that the neglect was excusable.

18 And then, once having found that, excusable
19 neglect, let me proceed to what is the second factor
20 to consider, and that is whether there is a
21 meritorious defense. Not whether there is a
22 prevailing defense, but whether there's a meritorious
23 defense. And the reason for that, of course, is
24 that -- no need to set aside the judgment if we'll be
25 back -- we'll be back to the same spot because

1 there's really no meritorious defense presented.

2 But those are two separate prongs. The
3 first prong must be considered first, and, depending
4 on that decision, lead into the second prong,
5 excusable neglect.

6 What's been offered here as excusable
7 neglect is that, it seems to me, is fairly
8 characterized as Mr. Sorf was not aware of the
9 complaint in the first instance, and then in the
10 second instance, that he was led to believe that the
11 posture of the matter was discussion, negotiation --
12 well, negotiation, discussion, and so forth.

13 The undisputed facts appear to be this, and
14 that is that the rule provides that one is properly
15 and personally served if you serve the complaint at
16 the residence of the defendant and upon a person
17 residing at that residence over the age of 18. "A
18 suitable age" maybe is the rule, rather than 18, but
19 "a suitable age."

20 The undisputed facts here appear to be that
21 the complaint was served at the residence of
22 Mr. Sorf, and although the person was characterized
23 as his wife, representing as "my wife," that, in
24 fact, every inference here in terms of that there was
25 a person, a female, maybe more correctly

1 characterized as his girlfriend, who was residing at
2 the residence -- and there's nothing to suggest that
3 yet a different female was served. That doesn't
4 really seem to be in dispute. And so the rule here
5 seems to be complied with, the rule in terms of
6 perfecting service, that is, at the -- Mr. Sorf's
7 residence, upon a female residing, and a suitable
8 age.

9 Now, what's offered here in terms of
10 excusable neglect is that Mr. Sorf was not aware of
11 that service, I guess inferred here that the
12 girlfriend, a female resident, did not advise
13 Mr. Sorf of that service.

14 Now, I have some discretion here, but I
15 think I have a lot of guidance in terms of what is
16 excusable neglect that would guide me as to what
17 would be the appropriate exercise of that discretion.
18 It appears to me that the law is fairly clear that,
19 "You've actually served it on someone else who didn't
20 advise me they had been served" is not excusable
21 neglect. If, in fact, it was excusable neglect, then
22 it seems to me the rule would accommodate that very
23 real possibility, that someone else is served and
24 not -- and does not advise the other person in the
25 household.

1 But the rule doesn't accommodate that. It
2 provides that service is complete and perfected if
3 that third person, if you will, who resides at the
4 residence, has been served with papers.

5 But I also note, in terms of factually,
6 that apparently there was a notice of the intent to
7 take the default --

8 MR. DRANEY: And the default and several
9 other documents.

10 THE COURT: -- that was sent, and there's
11 no dispute that that had been sent in terms of the
12 notice to take the default.

13 MR. BELNAP: Your Honor, could you also
14 address the mistake --

15 THE COURT: Yes. Let me finish, and then
16 if there's some questions, I'll entertain a few of
17 those, but I'm just trying to give you the reasons
18 I'm going to rule as I'm ruling.

19 As I say, I have this first prong. The
20 second is the -- in terms of the service, that -- and
21 with this letter and so forth, that somehow "I was
22 misled as to the status of the matter, that I didn't
23 have to answer the complaint because we were in
24 serious negotiations and so forth," and, indeed, that
25 would present a meritorious defense -- or not a

1 meritorious defense, but excusable neglect, that "I
2 was misled as to the posture of having to respond to
3 this complaint by what the plaintiff did in
4 contacting me" and so forth.

5 Well, without analyzing further in terms of
6 the contact and the reason in terms -- that only is
7 appropriate if I'm aware I have been served and my
8 obligation to answer and that I have been misled, but
9 apparently Mr. Sorf was not aware he had been served,
10 so whether he thought the posture was just in a
11 posture of negotiation over the lawsuit is not
12 applicable here.

13 In other words, you can't be dissuaded from
14 answering the complaint by being misled by the other
15 party when you're not aware there was even -- if
16 there is even a complaint and a lawsuit.

17 And so it seems to me that there's a
18 failure to show that excusable -- that first prong,
19 excusable neglect. And I suppose I could bring the
20 analysis to a close with that, because without a
21 showing of excusable neglect, then the matter cannot
22 be set aside. The complaint cannot be set aside.

23 However, there is that second prong, and
24 that is whether there was a meritorious defense, and
25 I want to address that, because I -- without really

1 too much, other than to say this, that -- as I say, a
2 meritorious defense is not a prevailing defense,
3 especially, but has some merit to it, but those
4 offered, if you will, defenses -- that is, estoppel,
5 the scope of the easement is too great and the --
6 everyone else is in jeopardy here around the
7 valley -- are not defense in this instance that
8 have -- that are meritorious.

9 Estoppel does not appear to me to be
10 applicable as a matter of law. In terms of the scope
11 of the easement, indeed -- and maybe I use that word
12 advisedly -- there may have been, because the -- some
13 of the structures and some of the requirements here
14 did not astride the pipe, and so, as a matter of law,
15 we can say, "Well, there's some room for debate here
16 as to how far this easement goes."

17 But where you have a deed on this
18 particular property that puts into metes and
19 bounds -- and that's the only fair reading of that
20 deed -- what the easement is, then I suppose the
21 conclusion is, if that deed is applicable to that
22 property, you build and you do things within that
23 easement at your own risk, and it is not really a
24 question of the analysis that one would go through
25 with the dominant and the servient estate analysis,

1 and Mr. Belnap correctly points out in terms of the
2 analysis you make but for that deed, and so,
3 consequently, I don't see that there's a meritorious
4 defense.

5 For all those reasons, as I've tried to
6 articulate, your motion to set aside this default
7 judgment is respectfully denied.

8 Mr. Draney, if you will prepare an order
9 that reflects that.

10 MR. DRANEY: I will, your Honor.

11 MR. BELNAP: Your Honor --

12 THE COURT: Thank you for your
13 presentations.

14 MR. BELNAP: -- may I ask a question?

15 THE COURT: Yes.

16 MR. BELNAP: And I understand your ruling,
17 but the rule also speaks of mistake and inadvertence,
18 which I understand your analysis of the letter, but
19 the letter can certainly --

20 THE COURT: Well, Mr. Belnap, I'm going to
21 stop you there. I appreciate the other -- and
22 there's other factors in the rule, also, but it
23 appears to me the only one that would be applicable
24 in this instance and with what excuses have been
25 given is excusable neglect, and, for the reasons I've

1 already stated, I do not see that there has been a
2 showing here of excusable neglect.

3 MR. BELNAP: Your Honor, could we talk
4 about the next step here, and that is --

5 THE COURT: I'm going to stop you there,
6 because we're going to have to do that in another
7 context. We've actually -- the next matter, I think,
8 was scheduled, if I'm correct, at 3:30, and so we've
9 gone well beyond that. I can only deal with what
10 we've got here in front of me today.

11 MR. BELNAP: Thank you.

12 THE COURT: If you'll prepare that.

13 MR. DRANEY: Yes.

14 THE COURT: We appreciate everyone's --

15 MR. DRANEY: Thank you for your time, your
16 Honor.

17 (Hearing concluded at 4:06 p.m.)

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ADDENDUM “4”

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Attorneys for Defendant Zdenek Sorf

**IN THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH**

METROPOLITAN WATER DISTRICT OF
SALT LAKE & SANDY,

Plaintiff,

v.

ZDENEK SORF,

Defendant.

**SUPPLEMENTAL DECLARATION OF
ZDENEK SORF**

Civil No.: 1009211025

Judge Fratto

I, ZDENEK SORF, declare as follows:

1. I am over the age of 18, a current resident of the State of Utah, and I am the Defendant in the above-captioned lawsuit.
2. I have personal knowledge of my statements set forth herein.
3. In 1988, I purchased my home located at 9625 South Mount Jordan Road, Sandy, Utah and have resided there ever since.
4. Several large trees, rocks and brush were located on the SLA easement in my backyard before I bought my property in 1988.

5. Two of the trees were at least 60 feet tall.
6. A small shed was also located on the easement prior to the time I purchased my home.
7. Plaintiff Metropolitan Water District of Salt Lake and Sandy ("Plaintiff") recently informed me that a corner of my house and concrete patio extending from the backdoor of my house are on the easement.
8. For at least twenty years after I purchased my home, no one ever expressed any concern to me regarding the trees, rocks, patio, brush and shed being located on the SLA easement.
9. During the nearly twenty-three years I have lived in my neighborhood, I have observed and continue to observe concrete pads, driveways, houses, large trees, cinder block walls, rock walls, sheds, and other structures and objects over the SLA easement. (*See Exhibit 1* which is a picture of my neighbor's basketball court which is directly over the pipeline; *see also Exhibit 2* which is a picture of large tree, driveway and other large objects over the SLA easement across the street from Mr. Sorf's property; *see also Exhibit 3* which is a picture of a stake, placed by Plaintiff, in front of the cinderblock wall identifying the Western edge of the easement. The picture demonstrates that Mr. Sorf's neighbor has large trees over the easement. The cinderblock wall, which is directly over the easement, has three foot cement foundations; *see also Exhibit 4* which is a picture of a stake, placed by Plaintiff, identifying the Western edge of the easement. The picture shows that approximately 5 to 6 feet of my neighbor's house and foundation are on the SLA easement.)
10. Based upon those observations, I believed that I could improve my backyard as long I did not interfere with the SLA pipeline.

11. I did not know that Plaintiff had regulations that required a landowner to submit an application in order make improvements over the SLA easement.

12. In approximately March 2009, I began improving my backyard.

13. I removed the large trees, rocks and brush from the easement and graded the dirt but did not bring new dirt onto my property. (Attached as Exhibit 5 is a picture of the tree stump from one of the trees I removed. The gazebo and hot tub are located directly where this tree was located.)

14. Based upon instruction that was given by Plaintiff's representatives, I purposely did not place any structures directly over the pipeline.

15. I located all structures and objects far enough away from the pipeline so as to not interfere with Plaintiff's right to maintain and operate the pipeline.

16. The small storage shed was on the easement at the time I purchased the property and is approximately twenty-six (26) feet from the pipeline.

17. I placed the Hot tub in the spot where I tore out one of the large trees.

18. In addition, the Hot tub and gazebo are located approximately forty-eight (48) feet from the pipeline.

19. The decorative rocks and other features on the easement are not cemented in and can be removed if necessary.

20. The garden boxes for vegetables are located approximately thirty-one (31) feet from the pipeline and the water feature is approximately twenty-three (23) feet from the pipeline.

21. In addition, another shed is not cemented into the ground and is located approximately forty-four (44) feet from the pipeline.

22. In November 2009, one of Plaintiff's employees visited me at my property. I believe his name was Lynn Coon.

23. By this time, a majority of my landscaping was finished, except for a few items such as the rock sidewalk, grass, roof on the gazebo, fencing and a concrete pad in front of my second shed.

24. Mr. Coon did not instruct me to cease landscaping or that I needed permission to continue.

25. Instead, Mr. Coon told me that my landscaping should not interfere with the easement and suggested that I submit an application to Plaintiff indicating that I had improved my property for the purpose of updating their records.

26. Mr. Coon showed me where he thought the easement boundaries on my property were and instructed me that I should not build or place any structures directly over where the pipeline was located.

27. Mr. Coon told me that the location of my second shed was not a problem because it was far enough away from the easement. However, he told me that two of my newly planted pine trees needed to be relocated.

28. I told Mr. Coon that I could move the second shed if he thought it was on the easement but he said it was located far enough away from the center of the easement.

29. In reliance upon Mr. Coon's affirmative representations, I poured a concrete patio around the second shed and finished the remainder of my landscaping project.

30. I would have immediately stopped landscaping had Mr. Coon instructed me to cease landscaping or if he told me I was interfering with the SLA pipeline.

31. In May 2010, a second employee of Plaintiff's visited me at my property. I believe his name was Troy Simmons.

32. Mr. Simmons did not inform me that any part of my landscaping was in violation of the SLA easement.

33. However, Mr. Simmons suggested that I submit an application indicating that I had improved my property.

34. Mr. Simmons did not request that I cease landscaping.

35. I would have immediately stopped landscaping had Mr. Simmons instructed me to cease landscaping.

36. Part of my landscaping project included replacing the old fences around my property with a new wood fence.

37. A tall cinder block wall with three foot foundations existed on the North side of my property prior to the time I purchased my home approximately 23 years ago. (See Exhibit 6 which is a picture of the cinder block wall after I cut into a portion of it and before I tore it completely down.)

38. The cinder block wall did not contain a gate or otherwise permit access to that portion of the SLA easement on my property.

39. I tore down the tall cinder block wall and its 3 foot foundations and installed the wood fence in its place. (See Exhibit 7 which is a picture of my wood fence abutting the old cinder block wall.)

40. In compliance with Plaintiff's request, I installed an access gate on the North side of the fence in the location Plaintiff directed me to so that Plaintiff could have access to the portion of the SLA easement on my property.

41. I believe I am the only person in my neighborhood that has provided such access to Plaintiff.

42. I have given Plaintiff a key to the lock on my access gate.

43. Since I have lived in my home, I have never observed anyone performing any routine inspections of that portion of the easement which transverses across my property until I tore down part of the north cinder block wall along 94th South.

44. In August 2010, Plaintiff requested for the first time that I stop work on my landscaping project. I was approximately two days from completing the project.

45. I was never personally served with the summons and complaint nor had I seen a copy of the same until January 24, 2011.

46. I was not at home when the summons and complaint were purportedly served on October 28, 2010.

47. I have not been married for over eight years.

48. I do not know what happened to the summons and complaint that was purportedly served on October 28, 2010.

49. I would have contacted a law firm immediately had I known I had been served with a complaint.

50. I only received a letter dated October 28, 2010 which I thought had come in the mail for me without a complaint and summons enclosed.

51. This letter led me to believe that Plaintiff wanted to reach an amicable resolution and that is why I called Plaintiff's counsel on November 22, 2010.

52. When I telephoned Plaintiff's counsel on November 22, 2010, I understood that Plaintiff would only initiate an action against me if I could not reach a settlement with Plaintiff.

53. I am not an attorney and do not understand what it means to "enter a default certificate."

54. I telephoned Mr. Winsor and Mr. Wilson on or about November 22, 2010 but I was unable to contact either of them.

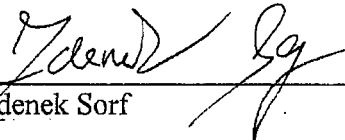
55. I have three numbers I could have called Mr. Winsor and Mr. Wilson from, including (801) 301-1160, (801) 531-9922 and (801) 521-4177.

56. I have never been arrested or put in jail.

57. Based upon my conversations with Murray City Court and Third District Court, there is not a warrant for my arrest.

I DECLARE UNDER CRIMINAL PENALTY OF THE STATE OF UTAH THAT THE FOREGOING IS TRUE AND CORRECT.

Executed this 16 of February, 2011.

By 
Zdenek Sorf

ADDENDUM “5”

FILED DISTRICT COURT
Third Judicial District

OCT 28 2010

SALT LAKE COUNTY

Deputy Clerk

SHAWN E. DRANEY (4026)
SCOTT H. MARTIN (7750)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000
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Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

300
METROPOLITAN WATER DISTRICT
OF SALT LAKE & SANDY,

Plaintiff,

v.

ZDENEK SORF,

Defendant.

VERIFIED COMPLAINT

Civil No. 100921025

Judge Fratto

Plaintiff, Metropolitan Water District of Salt Lake & Sandy ("MWDSLS") alleges as follows:

PARTIES, JURISDICTION, AND VENUE

1. MWDSLS is a Metropolitan Water District, a form of Local District, governed by Utah Code Ann., Title 17B, Chapters 1 and 2a, particularly Title 17B, Chapter 2a, Part 6. As

such, MWDSLS is an independent political subdivision of the State of Utah. MWDSLS' offices are located in Salt Lake County.

2. Defendant is an individual residing in Sandy City, Salt Lake County.

3. This Court has jurisdiction pursuant to Utah Code Ann. §§ 78A-5-102, 78B-3-205, and 78B-6-401.

4. Venue is proper pursuant to Utah Code Ann. § 78B-3-301(1), as the real property that is the subject matter of this action is located in Salt Lake County.

FACTS AND GENERAL ALLEGATIONS

MWDSLS and the SLA

5. MWDSLS provides an on-demand, supplemental, wholesale, treated water supply to its member cities, Salt Lake City and Sandy City. The Public Utility Departments of MWDSLS member cities provide retail public water service to not only the residents and businesses within their respective city boundaries, but to other areas of Salt Lake County as well. For example, the Salt Lake City Public Utilities Department service area extends as far south as Sandy on the east side of Salt Lake Valley, with approximately 100,000 customers outside Salt Lake City, and approximately 100,000 customers inside Salt Lake City.

6. MWDSLS also shares certain facilities with Jordan Valley Water Conservancy District ("JVWCD"), the other large water wholesaler that provides supplemental drinking water to most of the Salt Lake Valley not served by Salt Lake City Public Utilities or Sandy City Public Utilities.

7. One of the critical pieces of public water delivery infrastructure in the Salt Lake Valley is the Salt Lake Aqueduct ("SLA").

8. The SLA was designed and constructed by the United States, Department of the Interior, Bureau of Reclamation ("Reclamation") as a division of the Provo River Project. The most prominent feature of the Deer Creek Division of the Provo River Project is the Deer Creek Dam and Reservoir at the head of Provo Canyon in Wasatch County. MWDSL is by volume the largest user of Provo River Project water and the second largest user of Central Utah Project water stored in the Jordanelle and Deer Creek Reservoirs.

9. The SLA is a mostly 69-inch inside diameter, mostly steel reinforced concrete, pipe, constructed beginning in 1939 and completed in 1951.

10. The capacity of the SLA is approximately 175 cubic feet per second (cfs). This equates to nearly 79,000 gallons per minute, and approximately 113 million gallons per day (GPD). At the peak demands of summer the SLA typically runs at maximum capacity.

11. The SLA extends more than 41 miles from the toe of the Deer Creek Dam at the head of Provo Canyon, to a 40 million gallon finished water storage reservoir at approximately 3300 South and I-215 near the mouth of Parleys Canyon.

12. The SLA carries untreated Provo River System water to the Little Cottonwood Water Treatment Plant ("LCWTP") at the end of Danish Road, Cottonwood Heights, Utah, near the mouth of Little Cottonwood Canyon. The SLA also seasonally serves untreated water to the JVVCD Southeast Regional Water Treatment Plant in Draper.

13. LCWTP treats Little Cottonwood Creek water in addition to water from the Provo River System. From LCWTP, the SLA carries treated (aka “finished”) Provo River System and treated Little Cottonwood Creek water to a wide variety of places in Salt Lake County ultimately.

14. The finished water portion of the SLA is tied to 3 other large aqueducts. The Point of the Mountain Aqueduct (“POMA”) runs between the SLA at the LCWTP site, and the Point of the Mountain Water Treatment Plant (“POMWTP”) in Draper. Near POMWTP, POMA connects to the 150th South Pipeline, which connects to the finished water portion of the Jordan Aqueduct (“JA”), a very large aqueduct that carries water on the west side of the valley. The raw water portion of JA takes water from the Provo River System to the Jordan Valley Water Treatment Plant (“JWTP”) in Herriman.

15. The SLA, POMA, the 150th South Pipeline and JA allow movement of water from the east side of the valley to the west side, and from the west side of the valley to the east side.

16. The SLA plays a critical role in the water supply for essentially the entire Salt Lake Valley.

17. In 1938, MWDSLS contracted with Reclamation to repay to the United States all of the costs of constructing the SLA. Under that 1938 Repayment Contract, MWDSLS was also obligated to operate, maintain, repair and replace the SLA. In return, MWDSLS received the exclusive use of the SLA.

18. The 2004 Provo River Project Transfer Act, Pub.Law 108-382, authorized the Secretary of the Interior to transfer the SLA to MWDSLS. As a result, MWDSLS now owns the SLA.

19. The SLA is located within the SLA corridor. The SLA corridor consists of easement and fee lands now held by MWDSLS.

20. While the SLA is mostly 60+ years old, it is in good condition. However, MWDSLS is making preliminary preparations for major rehabilitation work on the SLA in the next decades.

21. The SLA is "open flow," which is to say it is not pressurized, and can be shut off only at the intake at the toe of the Deer Creek Dam.

22. Routine access by MWDSLS staff to all parts of the SLA is critical to the care, operation, and maintenance of the SLA and the interests of the public.

23. Unencumbered access to the entire width of the SLA corridor for emergency repairs is critical to the interests of the public. Construction of permanent structures on or overhanging the SLA corridor, without MWDSLS consent, is a violation of MWDSLS' real property interests. Planting or maintaining trees that may have to be removed for SLA emergency repairs, without MWDSLS consent, is a violation upon MWDSLS' real property interests.

24. Different segments of the SLA consist of different classes of pipe, intended for different maximum loads. Prevention of loads beyond design capacities, resulting from the addition of fill, structures, etc., is critical to the interests of the public. Placing fill, structures, or

other materials on the SLA corridor, without MWDSLS consent, is a violation of MWDSLS' real property interests.

25. Prior to transfer of title to the SLA and SLA corridor to MWDSLS, any development of the SLA corridor, even development by the holder of fee title subject to an SLA easement, required an encroachment agreement from Reclamation.

26. Similarly, Utah Code Ann. §§ 17B-1-103 and 17B-1-301 grants MWDSLS the power to adopt and enforce regulations to protect the public infrastructure of MWDSLS. The MWDSLS Board of Trustees has promulgated regulations regarding the use of aqueduct corridors. A true and correct copy of those regulations is attached as Exhibit 1.

Defendant's Property and the SLA corridor

27. MWDSLS is informed and believes Defendant owns the property located at 9625 South Mt. Jordan Road (at 2550 East) in Sandy, Utah ("Defendant's Property") depicted on the survey, attached as Exhibit 2.

28. The SLA corridor crosses Defendant's Property as depicted on Exhibit 2. This portion of the SLA corridor that crosses Defendant's Property is referred to as Tract 417, a Reclamation designation.

29. Reclamation formerly owned a perpetual easement on Tract 417 "to construct, reconstruct, operate and maintain" the SLA, including "appurtenant structures, which latter may be situated above ground surface. . . ." Originally this easement was acquired by MWDSLS (formerly known as the Metropolitan Water District of Salt Lake City). A true and correct copy of the Warranty Deed of Easement, recorded with the Salt Lake County Recorder February 8,

1946 as Entry No. 1028090, in Book 457, at Page 221 is attached as Exhibit 3. The easement was conveyed to the United States as a part of the original construction of the SLA. As a part of the SLA title transfer in 2006, the easement was conveyed by the United States back to MWDSLS. A true and correct copy of the relevant pages of the Quitclaim Deed (Salt Lake Aqueduct, Salt Lake County Lands), recorded with the Salt Lake County Recorder October 2, 2006, as Entry No. 9862736, in Book 9359, at Pages 6770-6929 is attached hereto as Exhibit 4.

30. On or about April 23, 2009, Defendant, either personally or through his contractor or agent, orally requested from MWDSLS authorization to construct a garage on Defendant's Property adjoining his home.

31. In response to that request, on or about April 23, 2009, MWDSLS personnel contacted and informed Defendant, either personally or through his contractor or agent, of the SLA, the SLA corridor, and the contact information for MWDSLS Aqueduct Inspectors, and that Defendant should request an on-site meeting to review the SLA location and Defendant's construction plans.

32. Thereafter, neither Defendant nor his contractor or agent contacted MWDSLS.

33. On or about November 19, 2009, while on routine inspection of the SLA corridor, MWDSLS personnel encountered Defendant and spoke with him on-site at Defendant's Property. At this meeting, MWDSLS notified Defendant of MWDSLS regulations. Defendant was also provided with a MWDSLS standard form application for encroachment on the SLA corridor, and instructions for filing the same.

Defendant's Unauthorized Construction and Encroachment on the SLA corridor

34. Approximately six months later, on or about April 26, 2010, MWDSLS personnel observed construction work occurring at Defendant's Property on the SLA corridor. MWDSLS had not received the SLA corridor encroachment application from Defendant at that time. As such, MWDSLS personnel spoke to the contractor on site, and instructed him to cease work until the Defendant had obtained the required authorization from MWDSLS.

35. On May 25, 2010, during a follow up inspection of Defendant's Property, MWDSLS personnel again found work being performed on the SLA corridor, including the construction of buildings, retaining walls, and water features. MWDSLS still had not received the SLA corridor encroachment application from Defendant at that time. The MWDSLS personnel spoke with Defendant reminding him of his non-compliance and the requirement that Defendant comply with MWDSLS procedures in making a formal application to undertake construction or other improvements on the SLA corridor.

36. Shortly after his meeting with the MWDSLS personnel at Defendant's Property, Defendant met with MWDSLS representatives at the MWDSLS offices, at which time MWDSLS personnel assisted Defendant in completing the MWDSLS encroachment application.

37. Shortly thereafter, MWDSLS personnel met with Defendant at Defendant's Property assisting him with drawing his landscaping plans for attachment to his encroachment application. A true and correct copy of the Defendant's Application and drawing from a 2008 aerial photograph is attached as Exhibit 5.

38. During this meeting at Defendant's Property, MWDSLS personnel informed Defendant that the water feature and the deck extension on the SLA corridor did not meet MWDSLS regulations and his encroachment application would likely be denied.

39. At this same meeting, Defendant indicated to MWDSLS personnel that it was his intention to install a gated fence across the SLA corridor but would provide for MWDSLS access to the SLA corridor.

40. On June 21, 2010, MWDSLS informed Defendant by letter that his MWDSLS encroachment application was denied ("Denial Letter"). A true and correct copy of the Denial Letter is attached as Exhibit 6.

41. The reasons stated for MWDSLS's denial of Defendant's application included the following:

- (a) Buildings, foundations, footings, retaining walls, decks, decorative pools, ponds, or other water features are not allowed within the SLA corridor;
- (b) Non-compliance with cover depths above the SLA; and
- (c) No new trees or vines are allowed within the SLA corridor.

42. The Denial Letter included a demand upon Defendant to remove or correct his landscaping and building encroachments within thirty (30) days. The Denial Letter also included instructions on procedures for appeal of the MWDSLS denial.

43. On July 19, 2010, Defendant left a voice mail to MWDSLS personnel indicating that he had been out of town and would require an extension of time to file his appeal of the MWDSLS denial of his encroachment application.

44. On July 27, 2010, MWDSLS sent a letter to Defendant granting him a thirty (30) day extension until August 26, 2010 to file his appeal ("Extension Letter"). A true and correct copy of the Extension Letter is attached as Exhibit 7.

45. Despite repeated efforts to reach Defendant, MWDSLS has received no further correspondence from Defendant since his voicemail of July 19, 2010.

46. Based on inspections by MWDSLS personnel, Defendant's construction activities on the SLA corridor continued and the non-complaint structures had not been removed.

47. On August 31, 2010, the MWDSLS General Manager sent by certified mail a letter to the Defendant again instructing him to cease all construction activity on the SLA corridor, to remove all improvements thereon, and to contact MWDSLS personnel within one week ("Third Notice Letter"). A true and correct copy of the Third Notice Letter is attached as Exhibit 8.

48. In addition, on August 31, 2010, a "Stop Work Notice" was posted at Defendant's Property on the SLA corridor. Photographs depicting the Stop Work Notice, the date, and its location are attached as Exhibit 9.

49. On September 2, 2010, MWDSLS personnel again visited the SLA corridor at Defendant's Property and found that the Stop Work Notice had been relocated from its installed location and Defendant's construction work on the SLA corridor was continuing. A photograph taken September 2, 2010 depicting this continuing construction is attached as Exhibit 10.

50. On September 9, 2010, MWDSLS personnel again visited the SLA corridor at Defendant's Property and found Defendant's construction work had continued and a chain link

fence had been erected, barring MWDSLS entry onto the SLA corridor. A photograph taken September 9, 2010 depicting this condition is attached as Exhibit 11.

51. On September 21, 2010, MWDSLS personnel again visited the SLA corridor at Defendant's Property and found Defendant's construction work had continued with additional soil being brought in to the SLA corridor site, and a completed fence was erected with gate locked, fully preventing any access to the SLA corridor. The MWDSLS Stop Work Notice was nowhere to be seen. A photograph taken September 21, 2010 depicting this condition is attached as Exhibit 12.

52. On September 22, 2010, MWDSLS personnel again visited the SLA corridor at Defendant's Property and found Defendant's construction work had continued with additional soil being brought in to the SLA corridor site, the MWDSLS Stop Work Notice was nowhere to be seen, and the gate remained locked barring all access to the SLA corridor. A photograph from September 22, 2010 depicting this condition is attached as Exhibit 13.

53. On or about October 11, 2010, MWDSLS, for the first time, received a Blue Stakes request for fence installation at Defendant's Property. In response, MWDSLS installed a second Stop Work Notice on Defendant's Property.

54. Defendants construction continues, no encroachment agreement has been reached, and the second Stop Work Notice has been removed from Defendant's Property by someone other than MWDSLS personnel.

FIRST CAUSE OF ACTION – MANDATORY INJUNCTION

55. MWDSLS incorporates all previous paragraphs as though fully stated herein.

56. MWDSLS holds the dominant estate on Tract 417 of the SLA corridor, including that portion of Tract 417 which traverses Defendant's Property.

57. MWDSLS's property interests include rights of full enjoyment of a "perpetual easement" on Tract 417 to construct, reconstruct, operate and maintain" the SLA, including above ground improvements.

58. Defendant has wrongfully entered the SLA corridor, trespassed on and damaged MWDSLS property interests, denied MWDSLS its rights and access to its real property interests, violated MWDSLS regulations, and endangered critical public infrastructure.

59. MWDSLS is entitled to an order: i) enjoining Defendant from interfering with MWDSLS' restoration of the SLA corridor; ii) enjoining Defendant from future trespass upon MWDSLS' property interests; and iii) enjoining future violations of MWDSLS regulations.

SECOND CAUSE OF ACTION – DECLARATORY JUDGMENT/QUIET TITLE

60. MWDSLS incorporates all previous paragraphs as though fully stated herein.

61. MWDSLS is entitled to an order: i) declaring MWDSLS property rights; ii) declaring MWDSLS' regulatory authority; iii) declaring MWDSLS' rights and powers to remove Defendant's improvements which infringe MWDSLS property rights, or which violate MWDSLS regulations; and iv) quieting MWDSLS' title.

THIRD CAUSE OF ACTION – DAMAGES

62. MWDSLS has suffered, and continues to suffer, damages proximately caused by Defendant's trespass and regulatory violations. MWDSLS is entitled to a judgment for damages

caused by Defendant's wrongful acts, including the costs to be incurred for restoration of the SLA corridor, together with court costs and interest.

RELIEF REQUESTED

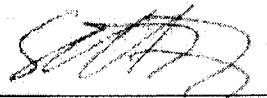
WHEREFORE, MWDSLS requests an order and judgment as follows:

- A. Enjoining Defendant from interfering with MWDSLS' restoration of the SLA corridor; and
- B. Enjoining Defendant from any future trespass upon MWDSLS' property interests or violations of MWDSLS regulations; and
- C. Declaring MWDSLS' property rights; and
- D. Declaring MWDSLS' regulatory authority; and
- E. Declaring MWDSLS' right and power to remove Defendant's improvements which infringe MWDSLS property rights, or which violate MWDSLS regulations; and
- F. Quieting MWDSLS' title; and
- G. For damages suffered by MWDSLS due to Defendant's actions, including costs to be incurred in restoring the SLA corridor, together with interest;
and
- H. For costs incurred by MWDSLS in this action; and

I, For such other relief this Court deems appropriate and just.

Signed this 26th of October, 2010

SNOW, CHRISTENSEN & MARTINEAU



Shawn E. Draney
Scott H. Martin
Attorneys for Plaintiff MWDSL

Plaintiff's Address:
3430 East Danish Road
Sandy, Utah 84093

VERIFICATION

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

Michael L. Wilson, being first duly sworn, upon his oath deposes and states that he is the General Manager of the Metropolitan Water District of Salt Lake & Sandy ("MWDSLS") and is authorized by the MWDSLS Board of Trustees to verify the attached Verified Complaint, and that he is familiar with the contents of the foregoing Verified Complaint, and the allegations in the Verified Complaint are true as stated to the extent of my knowledge and/or regular business records of MWDSLS, except as to matters alleged upon information and belief, and as to those matters, he believes same to be true.

DATED this 26th day of October, 2010.

Michael L. Wilson

SUBSCRIBED AND SWORN to before me this 26 day of October, 2010.

Annalee Munsey

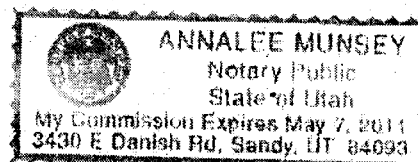
Notary Public

Residing at: 3430 E. Danish Rd

My Commission Expires:

May 7, 2011

1559892



ADDENDUM “6”

1028090

Recorded Request of Metropolitan Water Dist. of Salt Lake
No. 1028090 Date 1.90 Correlate S. Land, Recorder B. County, Utah
By P. W. Hensley Dep. Book 451 Page 33 For D42-240-4

WARRANTY DEED OF EASEMENT

ELIZABETH COLEMEHE, also known as E. COLEMEHE, Grantor, of Salt Lake County, State of Utah, hereby conveys and warrants to Metropolitan Water District of Salt Lake City, a public corporation of Utah, Grantee, for the sum of Ten Dollars (\$10.00) and other good and valuable consideration, a perpetual easement to construct, reconstruct, operate and maintain a pipeline or pipelines on, over and across the following described property in Salt Lake County, State of Utah:

A strip of land in the South Half of the Southeast Quarter of the Northeast Quarter (S $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$) of Section Ten (10), Township Three (3) South, Range One (1) East, Salt Lake Base and Meridian, One Hundred Twenty-five (125.0) Feet wide and included between two lines extended to the property lines and everywhere distant Seventy-five (75.0) Feet on the West or left side and Fifty (50.0) Feet on the East or right side of the following described center line of the Salt Lake Aqueduct from Station 1679+83.0 to Station 1686+15.0, measured at right angles and/or radially thereto. Said center line is more particularly described as follows:

Beginning at Station 1679+83.0 of the Salt Lake Aqueduct, a point on the South line of the Grantor's property in the South Half of the Southeast Quarter of the Northeast Quarter (S $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$) of said Section 10, from which point the Northeast corner of said Section 10 lies North Twenty-six Hundred Twenty-seven and Fourteen/Hundredths (2627.14) Feet and East Seven Hundred Seventy-five and Eighty-three/Hundredths (775.83) Feet, more or less; thence North 7° 11' East Six Hundred Thirty-two (632.0) Feet to Station 1686+15.0, a point on the North line of the Grantor's property, from which point the Northeast corner of said Section 10 lies North Two Thousand and Eleven/Hundredths (2000.11) Feet and East Six Hundred Ninety-six and Eight-tenths (696.8) Feet, more or less; containing 1.81 acres, more or less;

Also, a strip of land in the North Half of the Southeast Quarter of the Northeast Quarter (N $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$) of Section Ten (10), Township Three (3) South, Range One (1) East, Salt Lake Base and Meridian, One Hundred Twenty-five (125.0) Feet wide and included between two lines extended to the property lines and everywhere distant Seventy-five (75.0) Feet on the West or left side and Fifty (50.0) Feet on the East or right side of the following described center line of the Salt Lake Aqueduct from Station 1686+15.0 to Station 1692+82.0, measured at right angles and/or radially thereto. Said center line is more particularly described as follows:

Beginning at Station 1686+15.0, a point on the South line of the Grantor's property in the North Half of the Southeast Quarter of the Northeast Quarter (N $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$) of said Section 10, from which point the Northeast corner of said Section 10 lies North Two Thousand and Eleven/One-hundredths (2000.11) Feet and East Six Hundred Ninety-six and Eight-tenths (696.8) Feet, more or less; thence North 7° 11' East Three Hundred Nine and Eight-tenths (309.8) Feet; thence on a regular curve to the right with a radius of Sixteen Hundred (1600.0) Feet and a length of One Hundred Twenty and One-

tenth (120.1) Feet, as measured on the arc of the curve; thence North 11°29' East Two Hundred Thirty-seven and One-tenth (237.1) Feet to Station 1692/22.0, a point on the North line of the Grantor's property, from which point the Northeast corner of said Section 10 lies North Thirteen Hundred Forty-one and Eighty-six/One-hundredths (1341.86) Feet and East Five Hundred Ninety-one and Thirty-eight/One-hundredths (591.38) Feet, more or less; containing 1.57 acres, more or less.

WITNESS the hand of said Grantor, this 4th day of February, 1946.

Elizabeth Colamere

STATE OF UTAH)
COUNTY OF SALT LAKE) SS.

On the 4th day of February 1946, personally appeared before me Elizabeth Colamere, the signer of the foregoing instrument, who duly acknowledged to me that she executed the same.

Harold K. Gentry
Notary Public, residing at Salt Lake City

My commission expires:

Aug. 25, 1947

ADDENDUM “7”

416;417

Recorded SEP 11 1892 at 12:40 P. M.
 By *John R. H. H. H.*
 Recorder, Salt Lake County, Utah
 & *2.80* by *George M. H. H.* Deputy
 Page 15

WARRANTY DEED OF EASEMENT

P.O. Box 77, Provo, Utah

METROPOLITAN WATER DISTRICT OF SALT LAKE CITY, a metropolitan water district organized and existing under and by virtue of the laws of the State of Utah, with its principal place of business at Salt Lake City, County of Salt Lake, State of Utah, Grantor, hereby conveys and warrants to THE UNITED STATES OF AMERICA, acting pursuant to the provisions of the Act of June 17, 1902 (32 Stat., 388), and acts amendatory thereof or supplementary thereto, Grantee, for the sum of Two Hundred Twenty and 75/100 (\$220.75) Dollars

A perpetual easement to construct and reconstruct, operate and maintain an underground pipeline and appurtenant structures, which latter may be situated above ground surface, on, over or across the following described property situated in Salt Lake County, State of Utah:

416

A strip of land in the South Half of the Southeast Quarter of the Northeast Quarter (SE $\frac{1}{4}$ NE $\frac{1}{4}$) of Section Ten (10), Township Three (3) South, Range One (1) East, Salt Lake Base and Meridian, One Hundred Twenty-five (125) feet wide and included between two lines extended to the property lines and everywhere distant Seventy-five (75) feet West or to the left and Fifty (50) feet East or to the right of the following described center line of what is known as the Salt Lake Aqueduct from Station 1679+83 to Station 1686+15 measured at right angles and/or radially thereto. Said center line is more particularly described as follows:

Beginning at Station 1679+83 a point on the South line of the Grantor's property in said Section 10, from which point the Northeast corner of said Section 10 lies North Twenty-six Hundred Twenty-seven and one-tenth (2627.1) feet and East Seven Hundred Seventy-five and Eight-tenths (775.8) feet, more or less; and running thence North 7.11° East Six Hundred Thirty-two (632) feet, more or less, to Station 1686+15 of said Aqueduct center line, a point on the North line of the Grantor's property, from which point the Northeast corner of said Section 10 lies North Twenty Hundred and one-tenth (2000.1) feet and East Six Hundred Ninety-six and Eight-tenths (696.8) feet, more or less; containing 1.81 acres, more or less.

417

Also, a strip of land in the North Half of the Southeast Quarter of the Northeast Quarter (NE $\frac{1}{4}$ SE $\frac{1}{4}$) of Section Ten (10), Township Three (3) South, Range One (1) East, Salt Lake Base and Meridian, One Hundred Twenty-five (125) feet wide and included between two lines extended to the property lines and everywhere distant Seventy-five (75) feet West or to the left and Fifty (50) feet East or to the right of the following described center line of what is known as the Salt Lake Aqueduct from Station 1686+15 to Station 1692+82, measured at right angles and/or radially thereto. Said center line is more particularly described as follows:

100 m.
100
con.
Utah
Deputy

W. H. H. H.

Beginning at Station 1686+15 a point on the South line of the Grantor's property in said Section 10, from which point the Northeast corner of said Section 10 lies North Twenty Hundred and One-tenth (2000.1) feet and East Six Hundred Ninety-six and Eight-tenths (696.8) feet, more or less; and running thence North 7° 11' East Three Hundred Nine and Eight-tenths (309.8) feet; thence on a regular curve to the right having a radius of Sixteen Hundred (1600) feet, and a distance of One Hundred Twenty and One-tenth (120.1) feet, as measured on the arc of the curve; thence North 11° 29' East Two Hundred Thirty-seven and One-tenth (237.1) feet to Station 1692+82 of said Aqueduct center line, a point on the North line of the Grantor's property, from which point the Northeast corner of said Section 10 lies North Thirteen Hundred Forty-one and Nine-tenths (1341.9) feet and East Five Hundred Ninety-one and Four-tenths (591.4) feet, more or less; containing 1.57 acres, more or less.

The total area of the above-described tracts is 1.38 acres, more or less.

IN WITNESS WHEREOF, said District has caused this deed to be signed by its Chairman of the Board of Directors and its corporate seal to be affixed thereto this 22nd day of August, 1952.

METROPOLITAN WATER DISTRICT OF SALT LAKE CITY

W. H. H. H.
ATTEST (SEAL)
and Secretary

By *George W. Snyder*
Chairman of its Board of Directors

STATE OF UTAH

COUNTY OF SALT LAKE

33

On the 22nd day of August, 1952, personally appeared before me, George W. Snyder, who, being duly sworn by me, did say that he is the Chairman of the Board of Directors of the Metropolitan Water District of Salt Lake City, and that said instrument was signed in behalf of said District pursuant to authority of a resolution of its Board of Directors, and said George W. Snyder acknowledged to me that said district executed the same.

Emma H. Back
Notary Public, Residing at Salt Lake
City, County of Salt Lake, State of
Utah.

My Commission Expires:
August 8, 1952

ADDENDUM “8”

201
When recorded return to:
Snow, Christensen & Martineau
Attn: Shawn E. Draney
10 Exchange Place
P.O. Box 45000
Salt Lake City, Utah 84145

4
9852736
10/02/2006 02:27 PM \$0.00
Book - 9359 Pg - 6770-6929
GARY W. OTT
RECORDER, SALT LAKE COUNTY, UTAH
METROPOLITAN WATER DIST OF SL
3430 E DANISH RD
SANDY UT 84093
BY: ZJM, DEPUTY - W1 160 P.

(Quitclaim Deed No. 1 under Contract No. 04-WC-40-8950)

QUITCLAIM DEED
(Salt Lake Aqueduct, Salt Lake County Lands)

THE UNITED STATES OF AMERICA (Grantor), acting by and through the Bureau of Reclamation, Department of the Interior, pursuant to the provisions of the Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, particularly the Provo River Project Transfer Act (Public Law 108-382, 118 Stat. 2212), hereby quitclaims and conveys to METROPOLITAN WATER DISTRICT OF SALT LAKE & SANDY (Grantee), a political subdivision of the State of Utah, 3430 East Danish Road, Cottonwood Heights, Utah 84093, for Ten Dollars (\$10.00) and other good and valuable consideration, all of Grantor's right, title and interest in and to lands and interests in lands located in Salt Lake County, Utah, commonly referred to as the Salt Lake Aqueduct, more particularly described in Exhibit A, attached and by this reference made a part hereof.

TOGETHER WITH, all facilities, equipment, improvements, fixtures, features and appurtenances located in, under or upon such lands or interests in lands.

TOGETHER WITH the rights, privileges, duties, obligations, and responsibilities of the Grantor which exist, as of the date of this Quitclaim Deed, as a result of any valid right-of-use agreements entered by Grantor. The Grantee shall honor the terms of each such right-of-use agreement, as described in the Provo River Project Transfer Act and Contract No. 04-WC-40-8950, dated November 23, 2004.

ALL OF THE ABOVE described lands or interests in lands, facilities, equipment, improvements, fixtures, features, and appurtenances are hereinafter collectively referred to as the "Real Property". This Quitclaim Deed shall be interpreted as conveying all of Grantor's interest, present and future, in all lands, interests in lands, facilities, equipment, improvements, fixtures, features and appurtenances that in anywise are a part of or essential to the ownership, operation, or maintenance of the Aqueduct Division of the Provo River Project lying or located within Salt Lake County, Utah, whether acquired or constructed by or for Grantor, or acquired or constructed by or for Grantee, or constructed by or for others pursuant to right-of-use agreements, except as expressly excluded or reserved below.

THIS CONVEYANCE DOES NOT INCLUDE OR MODIFY:

1. Any interest in or to any National Forest system lands crossed by the Salt Lake Aqueduct. As to such lands, Grantor shall convey to Grantee, by separate instrument, an appropriately sized, permanent easement for the use, operation, maintenance, repair, improvement,

and replacement of the Salt Lake Aqueduct, as described in the Provo River Project Transfer Act and Contract No. 04-WC-40-8950.

2. Any interests in water rights or rights to use water.

3. Any oil, gas or other mineral rights or interests held in the name of the United States; *provided*, however, that any future exploration for oil, gas or other Federally owned minerals or minerals rights or interests underlying the Real Property shall be conducted in such a manner as will not compromise the structural integrity of, or interfere with the use, operation, maintenance, repair or replacement of, the Salt Lake Aqueduct, or related facilities, equipment, improvements, fixtures, features or appurtenances; *provided further* that no surface occupancy for exploration or exploitation of oil, gas, or other Federally owned minerals rights or interests shall be allowed on the Real Property.

THIS CONVEYANCE IS SUBJECT TO:

1. Oil, gas, and other mineral rights reserved of record by or in favor of third-parties as of the date of this Quitclaim Deed.

2. Valid permits, licenses, leases, rights-of-use, or rights-of-way of record or outstanding on, over, or across the Real Property in existence on the date of this Quitclaim Deed.

3. A perpetual easement reserved by Grantor on, over, or across the Real Property to provide for lawful continued non-motorized public access to and across the Real Property for recreational purposes; *provided* that such non-motorized public use shall not interfere with the use, operation, maintenance, repair, improvement, replacement or protection of the Salt Lake Aqueduct and related facilities, equipment, improvements, fixtures, features and appurtenances, and such non-motorized public use shall be subject to all existing and future state, federal, local and Grantee statutes, rules, regulations, ordinances, policies and procedures regarding safety and security.

4. Title to any equipment, improvements, fixtures, features and appurtenances which are part of the Provo River Project, Utah, Deer Creek Division, is hereby reserved to the Grantor.

5. Title to any equipment, improvements, fixtures, features and appurtenances which are part of the Central Utah Project is hereby reserved to the Grantor.

NOTICE IS HEREBY GIVEN that:

1. Acting pursuant to the requirements of 40 CFR 373, on April 23, May 3, and May 18, 2006, the Grantor performed a hazardous waste survey of the Real Property, and a copy of said survey was delivered to the Grantee in a letter dated September 26, 2006. The Real Property conveyed herein to the Grantee is being conveyed in the same condition as existed on the date of said survey and which is more particularly described in that survey. No remediation by the Grantor on behalf of the Grantee has been or will be made.

2. The Grantee has used, and has had operation and maintenance responsibility for the Real Property for over 50 years. Grantee and its successors and assigns accept the Real Property

"as is" and also accept liability for the Real Property from the date of this Quitclaim Deed forward.

3. The Grantee, its successors and assigns shall be responsible for the protection, identification, and preservation of cultural resources, if any, located on the Real Property as required by the existing and future laws of the State of Utah.

4. Nothing in this Quitclaim Deed shall be construed as including the quitclaim, abandonment, forfeiture, or relinquishment by the Grantor of its basic patent right reserved by the Act of August 30, 1890 (26 Stat. 391) as to the described lands for easements claimed, or to be claimed, for purposes other than the Salt Lake Aqueduct.

5. Nothing in this Quitclaim Deed shall be construed or interpreted as altering or amending the terms or conditions of any United States contract, or supplements or amendments thereto, except as specifically provided in Article 20 of Contract No. 04-WC-40-8950, dated November 23, 2004.

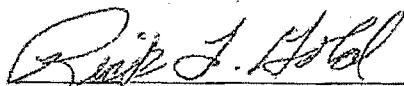
6. If any further specific conveyances should be necessary hereafter, because of the discovery of additional Real Property not listed on the Exhibits, to more specifically and legally describe the Real Property, or because the Grantor acquires any title to or interest in the Salt Lake Aqueduct by reason of an instrument in the Grantor's chain of title, or by operation of law, then Grantor shall make reasonable efforts to provide such conveyances, on the same terms and conditions set forth above.

7. Nothing in this Quitclaim Deed shall be construed or interpreted as creating any condition subsequent, reverter, or possibility of a reverter.

TO HAVE AND TO HOLD unto Grantee, and Grantee's successors and assigns, the Real Property, together with all the rights and appurtenances thereto in anywise belonging, forever.


WITNESS the hand of the Grantor this 2nd day of October, 2006.

UNITED STATES OF AMERICA



Rick L. Gold
Regional Director, Upper Colorado Region
Bureau of Reclamation
Acting for the Secretary of Interior
of the United States

Approved:


Office of the Regional Solicitor

ACKNOWLEDGEMENT

STATE OF UTAH

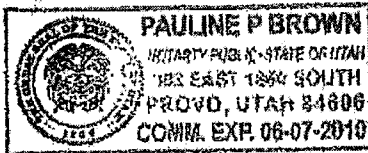
SS.

COUNTY OF SALT LAKE

On this 2nd day of October, 2006, personally appeared before me, Rick L. Gold, known to me to be the Regional Director of the Bureau of Reclamation, Upper Colorado Region, United States Department of the Interior, the signer of the above instrument, who duly acknowledged to me that he executed the same on behalf of THE UNITED STATES OF AMERICA, pursuant to authority delegated to him from the Secretary of the Interior.

(NOTARY SEAL)

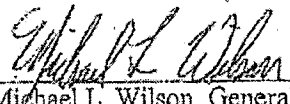
Pauline P. Brown
Notary Public in and for the State of Utah
Residing at: Orion



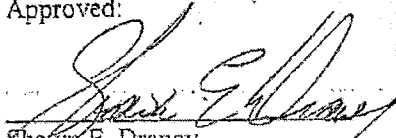
ACCEPTANCE

The parties intend for the above Quitclaim Deed to satisfy a portion of the terms of Contract No. 04-WC-40-8950, dated November 23, 2004, and a portion of the requirements of Public Law 108-382. The Grantee accepts this Quitclaim Deed on the terms and conditions stated herein. The Grantee hereby further agrees and acknowledges that: (1) the Salt Lake Aqueduct shall no longer be regarded or treated either as a Provo River Project or a United States facility, except with regard to Provo River Project water as provided for in Section 17 of Contract No. 04-WC-40-8950, dated November 23, 2004; the Grantee shall not be entitled to receive any future Reclamation benefits with respect to the Real Property, except for benefits that would be available to other non-Reclamation facilities; and (3) to the fullest extent allowed by law, the Grantee agrees to indemnify and hold harmless the Grantor, its officers and employees from any claims, liabilities or other responsibilities which may arise subsequent to the date of this Quitclaim Deed which result from the Grantee's use, operation, or maintenance of the Real Property as described in this Quitclaim Deed.

METROPOLITAN WATER DISTRICT
OF SALT LAKE & SANDY


Michael L. Wilson, General Manager

Approved:


Shawn E. Draney,
Counsel for Metropolitan Water District of Salt Lake & Sandy

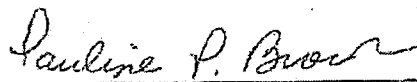
ACKNOWLEDGEMENT

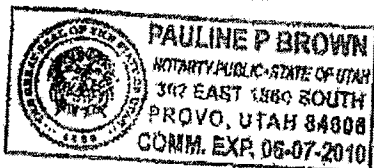
STATE OF UTAH

COUNTY OF SALT LAKE

On this 2nd day of October, 2006, personally appeared before me, Michael L. Wilson, known to me to be the General Manager of the Metropolitan Water District of Salt Lake & Sandy, the signer of the above instrument, who duly acknowledged to me that he executed the same on behalf of Metropolitan Water District of Salt Lake & Sandy, pursuant to authority delegated to him from the Board of Trustees of the Metropolitan Water District of Salt Lake & Sandy.

(NOTARY SEAL)


Notary Public in and for the State of Utah
Residing at:



ADDENDUM “9”

OCT 11 2011

Paul M. Belnap, #0279
Bradley Wm. Bowen, #5042
Jennifer R. Carrizal, #10116
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, Utah 84111
Telephone: (801) 532-7080
Facsimile: (801) 596-1508

Attorneys for Defendant/Appellant Zdenek Sorf

IN THE UTAH SUPREME COURT

METROPOLITAN WATER DISTRICT OF
SALT LAKE & SANDY,

Plaintiff/Appellee,

v.

ZDENEK SORF,

Defendant/Appellant.

STIPULATION

Case No. 20110443

District Ct. No.: 100921025

The above-named parties by and through their counsel of record hereby stipulate and agree that the Motion to Supplement Record on Appeal dated September 22, 2011 filed by Appellant may be granted as follows:

Exhibits 1 through 10 marked and provided to the Court by Appellant at the hearing dated March 8, 2008 be added to the Record as exhibits referenced in the transcript of hearing on said date. Said exhibits are attached as Exhibit "A."

The Appellee, Metropolitan Water District of Salt Lake and Sandy, prepared and caused

to be recorded (without input from the Appellant on the content of the document or the fact of abandonment) the document entitled "Notice of Partial Abandonment of Easement" attached as Exhibit "B" to this Stipulation. The parties stipulate that this three-page document may be added to the record on appeal.

DATED this 11 day of October, 2011.

STRONG & HANNI

By 

Paul M. Belnap
Bradley Wm. Bowen
Jennifer R. Carrizal
Attorneys for Defendant/Appellant
Zdenek Sorf

DATED this 7th day of October, 2011.

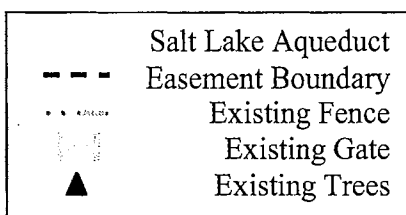
SNOW, CHRISTENSEN & MARTINEAU

By 

Shawn E. Draney
Scott H. Martin
Attorneys for Plaintiff/Appellee
Metropolitan Water District

003770.00701

EXHIBIT “A”



Created: Feb. 17, 2011
9625 S. Mt. Jordan Road
S-10-1107 Zdenek Sorf

1 of 2

Approximate Distance from Center of the SLA Pipeline:

Motorcycle Barn: 44 ft
Gazebo/Jacuzzi: 48 ft
Garden boxes: 31 ft
Equipment shed: 26 ft
Water feature: 23 ft



↑ North



North

9600 So ↑

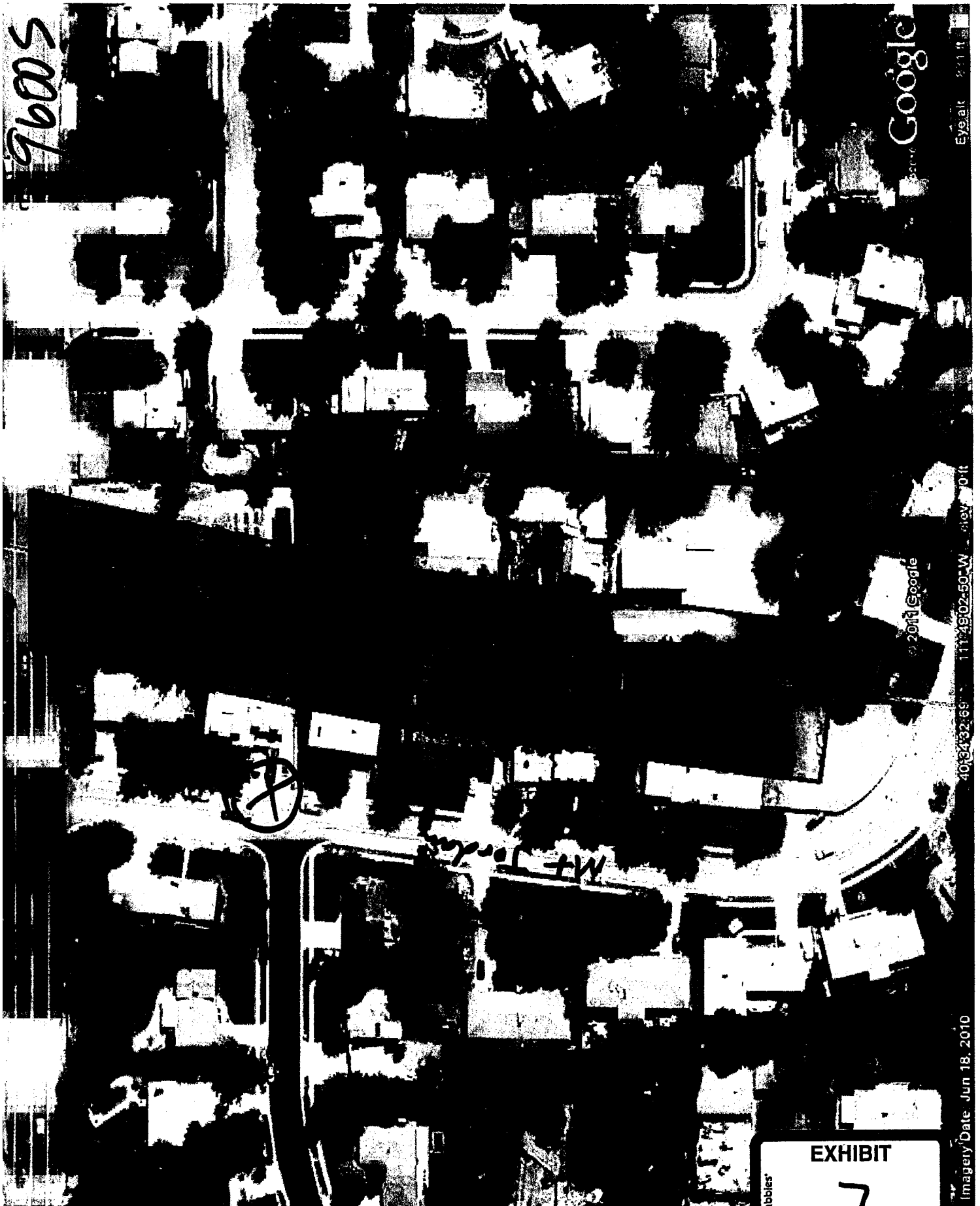


down to



W 11







226 922



EXHIBIT

9

tabbles



tree
Now
gazebo

tabbles
EXHIBIT
10

EXHIBIT “B”

RECEIVED JUL 11 2011

When Recorded Return To:
Metropolitan Water District
of Salt Lake & Sandy
ATTN: General Manager
3430 E. Danish Road
Cottonwood Heights, Utah 84093

1220067028
07/01/2011 09:38 AM #50-000
Book - 9031 Pg - 2476-2476
BARRY M. OTT
RECORDER, SALT LAKE COUNTY, UTAH
METROPOLITAN WATER DIST OF SL
3430 E DANISH RD
SANDY UT 84093
BY: JIM, DEPUTY - 24 3 P.

NOTICE OF PARTIAL ABANDONMENT OF EASEMENT

NOTICE IS GIVEN TO ALL PERSONS that with regard to the property described herein, the METROPOLITAN WATER DISTRICT OF SALT LAKE & SANDY (the "District"), acting consistent with District policy & procedures, hereby abandons a portion of the easement interest held by the District through the Monte Bello Estates Subdivision, which easement includes portions of what is currently known as Lot 2 of said Subdivision. Said easement is more particularly described as:

COMMENCING at a monument at the East Quarter (E $\frac{1}{4}$) Corner of Section 10, Township 3 South, Range 1 East, Salt Lake Meridian;

Thence, South 89°44'10" West, along the South Line of the Northeast Quarter (NE $\frac{1}{4}$) of said Section 10, a distance of 626.65 feet, and North 00°15'50" West 1081.82 to the intersection of the South boundary of Lot 2 Monte Bello Estates as recorded in Book FF at Page 40 in the official records of the Salt Lake County Recorder's Office, and the centerline of the Salt Lake Aqueduct alignment; Thence, along said South boundary line North 89°56'00" West 75.00 feet; thence North 00°15'50" West 7.28 feet to the intersection of West Easement line of that Easement recorded as Entry Number 1028090 in Book 457 at Page 221, and a line coincidental to the roofline at a South facing wall of an existing house being the POINT OF BEGINNING; thence North 11°29'00" East 30.89 feet along said West Easement line to a point on a line coincidental to the roofline at a North facing wall of said existing house; thence along said line South 82°44'52" East 2.07 feet to a corner coincidental to the corner formed by the rooflines at said North facing wall and an East facing wall of said existing house; thence South 07°15'08" West 30.81 feet along a line coincidental to the roofline at an East facing wall of said existing house to a corner coincidental to the corner formed by the rooflines at said East facing wall and a South facing wall of said existing house; thence along a line coincidental to the roofline at said South facing wall of said existing house North 82°44'52" West 4.35 feet to the point of beginning. Contains 99 Square feet more or less.

The original easement granted to the District is a perpetual easement to construct and reconstruct, operate and maintain an underground pipeline and appurtenant structures. The District now abandons that portion of the original easement which is encumbered by a portion of the existing home.

The District's historical interest in the Subject Property is as follows:

1. On February 4, 1946, the District was granted a one hundred twenty-five foot wide perpetual easement by Warranty Deed of Easement, recorded on February 8, 1946 as Entry No. 1028090, in Book 457, at Page 221 to 222, books and records of the Salt Lake County Recorder.
2. On August 22, 1952, the District transferred its easement to the United States of America, Bureau of Reclamation ("USBR") by Warranty Deed of Easement, recorded on September 11, 1962, in Book 953, at Pages 55 to 56, books and records of the Salt Lake County Recorder.
3. On October 2, 2006, USBR transferred its interests in the easement back to the District via Quit Claim Deed recorded on October 2, 2006, as Entry No. 9862736, in Book 9359, Pages 6770 to 6929, books and records of the Salt Lake County Recorder. That transfer by USBR was pursuant to the terms of the Provo River Project Transfer Act, 118 Stat. 2212, Pub. Law. 108-382, and the contract authorized by the Provo River Project Transfer Act, Contract No. 04-WC-40-8950.

DATED this 28th day of June, 2011.

METROPOLITAN WATER DISTRICT
OF SALT LAKE & SANDY

By: _____

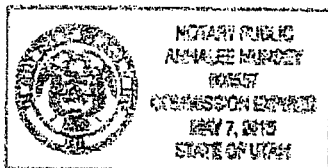
Michael L. Wilson, General Manager

STATE OF UTAH)

: ss.

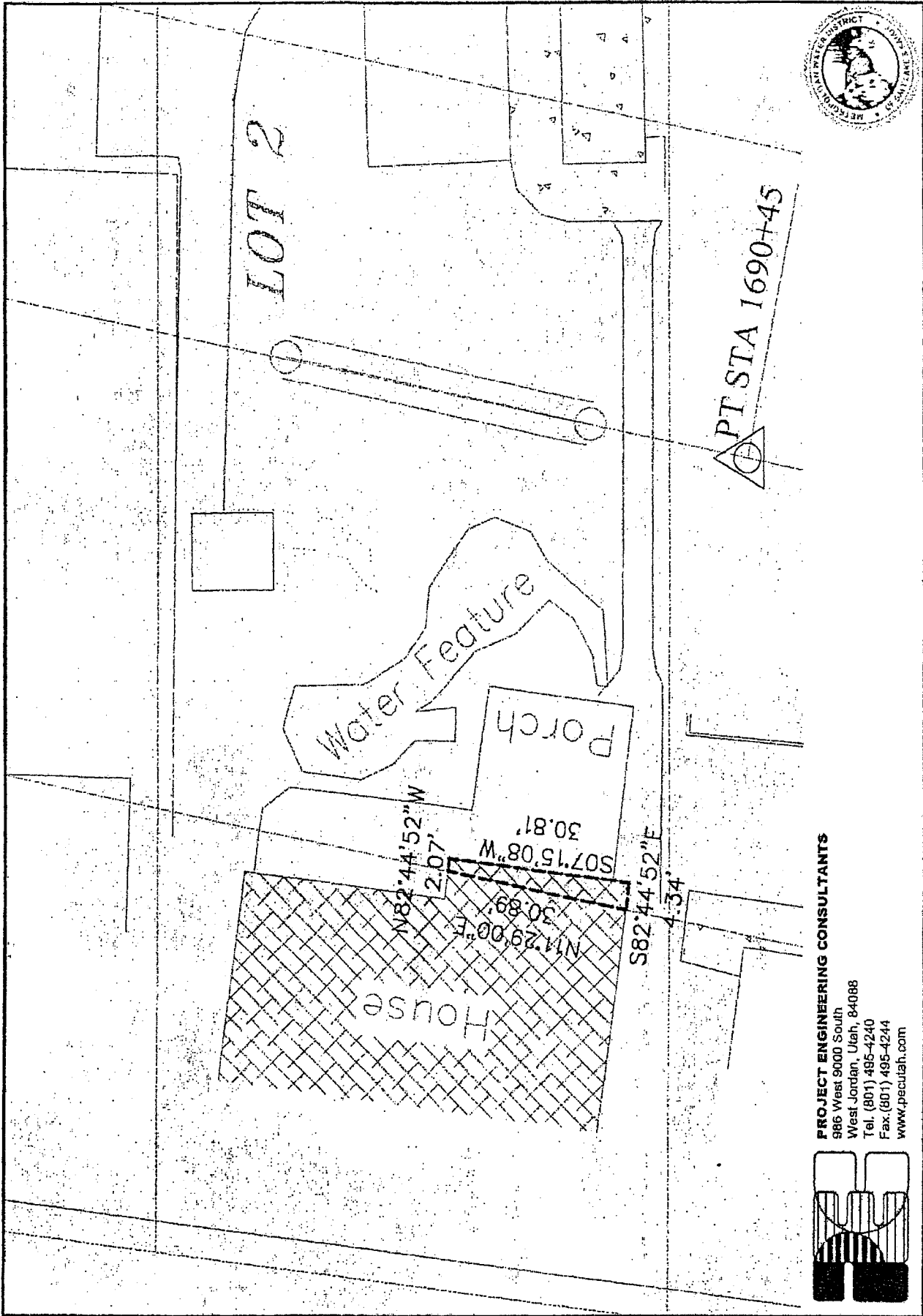
COUNTY OF SALT LAKE)

On the 28 day of June, 2011, personally appeared before me Michael L. Wilson, the General Manager of the Metropolitan Water District of Salt Lake & Sandy, who duly acknowledged to me that he signed the foregoing Notice of Partial Abandonment of Easement on behalf of the Metropolitan Water District of Salt Lake & Sandy, and that he signed the same for the purposes stated therein.



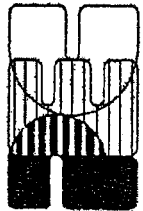
NOTARY PUBLIC

1773543



PROJECT ENGINEERING CONSULTANTS

986 West 9000 South
 West Jordan, Utah, 84088
 Tel. (801) 495-4240
 Fax. (801) 495-4244
www.pcutah.com



ADDENDUM “10”

CHAPTER 16
REGULATIONS FOR NON-DISTRICT USE OF
SALT LAKE AQUEDUCT AND
POINT OF THE MOUNTAIN AQUEDUCT
RIGHTS OF WAY

Last Updated: June 14, 2010

PREFACE

This chapter of the P&P contains regulations governing the use of the Salt Lake Aqueduct (SLA) and Point of the Mountain Aqueduct (POMA) rights of way, construction, excavation, removal and/or placement of materials, or other earth work, on SLA and POMA rights of way, and construction near enough to SLA and POMA rights of way to potentially adversely impact those rights of way, by persons or entities other than the District.

16-1 GENERAL BACKGROUND

(1) SLA. The SLA is critical to the water supply of Salt Lake City's retail water service area, Sandy City's retail water service area, and other areas of Salt Lake County and Utah County. The U.S. Department of the Interior, Bureau of Reclamation (Reclamation) designed and constructed the SLA under authority of the Reclamation Act of 1902 and the Public Works Administration Appropriation Act of 1938. Since 1938, the District has been responsible for the operation and maintenance of the SLA, has been repaying to the United States all costs incurred in constructing the SLA, and has been entitled to the use of the SLA. Pursuant to the Provo River Project Transfer Act, Pub.Law. 108-382, and a title transfer agreement among the District, the Provo River Water Users Association and the United States, title to the SLA was transferred to the District on October 2, 2006.

(2) POMA. POMA is a pipeline and associated facilities constructed by the District to convey water to the District's member cities. The District owns POMA facilities and is responsible for the operation and maintenance of all POMA facilities. POMA is critical to the water supply of Salt Lake City's retail water service area, Sandy City's retail water service area, and other areas of Salt Lake County and Utah County.

(3) The intent of this Chapter is to provide guidelines and authorization to staff for the licensing of uses of District corridors. Licenses should reasonably accommodate other uses of District corridors so long as it is clear that such uses will not materially interfere with the District's interests in the use, operation, maintenance, repair and replacement of District facilities. Except as otherwise directed by the Board, fees for

licenses should be reasonably calculated to generally recover direct and indirect District costs associated with evaluating, approving, and administering such licenses. The Engineering Committee or Board may authorize licenses in addition to those the staff is authorized to issue by this chapter, or make exceptions to the regulations, where doing so would serve the interests of the District and the public.

16-2 GENERAL INTENT OF REGULATIONS

(1) District Assumption of Reclamation Agreements. Reclamation has historically provided, by agreement, underlying fee owners, adjoining landowners, and others, the right to use portions of the SLA right of way pursuant to 43 United States Code, Section 387; 43 Code of Federal Regulations, Part 429, and Reclamation Manual/Directives and Standards LND 08-01. As a condition of title transfer, the District assumes all of the rights and responsibilities of Reclamation under validly existing Reclamation agreements for use of the SLA right of way.

(2) District's Proprietary and Regulatory Interests. Portions of the SLA and POMA rights of way are held in fee, and portions are held under easement. Portions of the POMA right of way are located under roads or city parks pursuant to license or franchise agreements. The application of these regulations will necessarily vary depending upon the nature of the ownership interest of the District. Regardless of the nature of the District's ownership interest in the right of way, the District has regulatory authority as a subdivision of the State of Utah to protect District facilities.

(3) Fair Market Value of Use of District Fee Lands. The District is generally obligated by state law to charge fair market value for use of fee lands. *E.g., Salt Lake Co. Comm'n v. Salt Lake Co. Attorney*, 985 P.2d 899 (Utah 1999); *Municipal Building Authority of Iron Co. v. Lowder*, 711 P.2d 273 (Utah 1985); *Sears v. Ogden City*, 533 P.2d 118 (Utah 1975). The District's policy is that it will make reasonable efforts to comply with this requirement, and also reasonably recover the estimated actual costs to the District of processing and administering Encroachment Agreements, but will otherwise attempt to minimize charges.

(4) SLA Rights Reserved by the United States. Pursuant to the Provo River Project Transfer Act, Pub.Law. 108-382, and a title transfer agreement among the District, the Provo River Water Users Association and the United States, the United States transferred the title of the SLA to the District and the United States reserved an easement for the continued, lawful, non-motorized public access across the SLA to adjacent public lands. The United States also reserved an easement for Central Utah Project facilities within Utah County. All uses of the SLA right of way are subject to these easements. The District's General Manager may deny a new or renewed encroachment agreement if the District or other agency has any outstanding encroachment issues with the applicant or related persons or entities.

(5) Security. The SLA and POMA are critical public infrastructure, and as such the use of SLA and POMA rights of way will be subject to federal, state, local and District statutes, regulations, rules, ordinances, policies and procedures designed to protect public health, safety and welfare.

(6) Non-motorized Public Trail Development. The District believes that public, non-motorized recreational trail use of portions of the SLA and POMA rights of way can be developed in a manner that does not adversely impact the security of the SLA or POMA, and does not adversely impact the District's ability to use, operate, repair, inspect, maintain or improve SLA or POMA facilities. The District may allow such recreational trail development.

(7) Non-licensed Encroachments. The District may periodically review its rights of way to identify non-licensed encroachments. The District may take action to remove such encroachments or bring encroachments in compliance with these regulations, including payment of all required fees and charges as applicable.

16-3 DEFINITIONS

(1) "Applicant" - A person or entity who applies for issuance of an Encroachment Agreement by the District.

(2) "District" - The Metropolitan Water District of Salt Lake & Sandy.

(3) "Encroachment Agreement" - The Agreement issued to a Grantee who has successfully completed the application process.

(4) "Grantee" - The person or entity applying for and receiving an Encroachment Agreement from the District for use of SLA or POMA rights of way. Any reference in these regulations to "Grantee" should also be interpreted as referring to Grantee's contractors, subcontractors, employees, agents or representatives.

(5) "Hazardous Materials" include:

(a) Those substances included within the definitions of "hazardous substances", "hazardous materials", "toxic substances", or "solid waste" pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. Section 9601, et seq., the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. Section 6901, et seq., the Hazardous Materials Transportation Act, as amended, 49 U.S.C. Section 1981, et seq., and the regulations promulgated pursuant to such statutes.

(b) Those substances listed in the United States Department of Transportation Table (49 CFR 172.101 and amendments thereto) or by the United States

Environmental Protection Agency as hazardous substances (40 CFR Part 302 and amendments thereto).

(c) Such other substances, materials and wastes which are or become regulated or which are classified as hazardous or toxic under federal, state, or local laws, statutes, ordinances or regulations. This does not include public sewers.

(6) "POMA" or "Point of the Mountain Aqueduct" - A large transmission pipeline that provides municipal and industrial water to the District's member cities. The District owns, operates and maintains POMA.

(7) "Reclamation" or "Bureau of Reclamation" - A bureau of the United States Department of the Interior that designed and constructed the SLA and originally held title to the SLA.

(8) "SLA" or "Salt Lake Aqueduct" - The SLA is a large transmission pipeline that provides municipal and industrial water to the District's member cities. Title to the SLA was transferred to the District on October 2, 2006 pursuant to the Provo River Project Transfer Act, Pub. Law. 108-382, and a title transfer agreement among the District, the Provo River Water Users Association and the United States.

16-4 WRITTEN ENCROACHMENT AGREEMENT REQUIRED

(1) Vehicle Access. Except where SLA or POMA is located under a validly existing public road, street or highway, a valid Encroachment Agreement is required for any vehicle access on or over the SLA or POMA. Weight restrictions for SLA and POMA pipe must be strictly observed.

(2) Excavation, Earthwork, Construction, Etc. Any excavation, removal of material, placement of material or other earth work, or construction work on SLA or POMA rights of way where the District holds fee title or easement requires a valid Encroachment Agreement.

(3) Improvements to Previously Approved Encroachments. Any improvement to a previously approved encroachment on District rights of way requires a new Encroachment Agreement.

(4) Form of Encroachment Agreement. Encroachment Agreements shall be specifically tailored to reflect the proposed use by the Grantee and, therefore, may contain terms, conditions and/or limitations that are not reflected in previous or sample Encroachment Agreements. The District's General Manager is authorized to execute Encroachment Agreements that are consistent with these regulations and applicable law on behalf of the District. All activities conducted on SLA or POMA rights of way

pursuant to an Encroachment Agreement shall be in strict conformity with these regulations.

(5) Encroachment Agreement Time Periods. The Encroachment Agreement is valid for the time period specified in the Encroachment Agreement. The maximum time period for an Encroachment Agreement is 25 years if the Encroachment Agreement is issued to a public agency or utility. If the Encroachment Agreement is issued to a private organization or home owner, the maximum time period is 15 years.

(6) Encroachment Agreement Renewal. At the end of the effective time period, the Grantee shall remove the encroaching facility or renew the Encroachment Agreement. The Grantee shall pay all required fees and charges as applicable to renew the Encroachment Agreement.

(7) Grantees Responsible for Employees, Contractors. Grantees are strictly liable for failure of their employees, agents, contractors or subcontractors to perform in strict conformity with the Encroachment Agreement and these regulations.

(8) Public Use of District Rights of Way. Use of District rights of way by the public will not be permitted without a separate easement agreement requested by the Grantee and granted by the District prior to issuance of the Encroachment Agreement.

16-5 APPLICATION PROCEDURES, FEES

The District's General Manager is authorized to develop application forms, instructions, and procedures to guide the Grantee through the application process. The District's Board of Trustees shall adopt a fee schedule for application fees, processing fees, right of use fees, and any other fees consistent with these regulations. The Board may delegate to the General Manager the ability to establish appropriate fees for use of fee title lands. Fees for use of fee title lands may be waived in whole or in part by the General Manager to the extent that the licensed use is determined to be beneficial to the District (e.g., landscaping is developed and maintained by others).

16-6 GENERAL REQUIREMENTS

(1) Service Interruption. The SLA and POMA are pipelines that remain in service year-round and are critical to the water supply of hundreds of thousands of people. Service interruptions of either the SLA or POMA must be expressly authorized by the District's General Manager, and are not permitted except in very extraordinary circumstances. Unauthorized interruptions to pipeline service of the SLA or POMA will not be tolerated and could result in the responsible party paying any and all incidental and consequential damages including, but not limited to:

- (a) Lost revenue from water sales;

- (b) Engineering personnel time;
- (c) Operation and maintenance personnel time;
- (d) All costs required to return the affected pipeline back to its full service capacity;
- (e) Any costs incurred by the District's member cities that are over and above the normal costs associated with the affected pipeline;
- (f) The value of the water which could not be used due to the interruption; and
- (g) Third party claims tied to lack of water.

Unauthorized interruptions of service will likely result in criminal and civil actions, particularly if determined to be willful or negligent. The District will participate in, and direct vigorous enforcement activities against, any persons who cause, or who are associated with causing, any unauthorized interruptions in service of the SLA or POMA.

(2) Contamination of Water Supply. Water conveyed by the SLA and POMA is used in a municipal and industrial water supply. The Grantee shall not introduce pollutants or place foreign materials of any kind in water conveyance facilities. In the event of a hazardous material spill, or if there is any release of materials into the water that may affect the operation of the SLA or POMA, the Grantee shall notify the District immediately.

(3) Prior Notice

(a) Following the issuance of an Encroachment Agreement, the Grantee shall invite the District to any Pre-Construction Meeting.

(b) The Grantee shall contact the District either in writing or by phone at least one week in advance of any planned test excavation or construction activities within District rights of way.

(4) Construction Activities

(a) The Grantee shall designate a representative for field operations who shall be the sole representative of the Grantee and the Grantee's contractors in dealings with the District, and shall provide their name, address, and telephone number to the District prior to commencement of construction.

(b) The Grantee shall limit its construction to the approved encroaching facilities and construct the improvements strictly in accordance with the approved plans or specifications.

(c) The Grantee shall notify the District upon completion of construction.

(d) Within sixty (60) days after conclusion of construction operations, all construction materials and related litter and debris, including vegetative cover accumulated through land clearing, shall be disposed of in an appropriate manner.

(5) Storage of Equipment or Materials. Equipment or materials shall not be stored on access roads, or other access areas, unless specific written approval is given by the District. All persons or entities using access roads shall coordinate with the District to allow District personnel access to any access roads.

(6) Hazardous Materials, Pesticides, Pollutants

(a) Storage, handling, use, or transportation of hazardous materials is strictly forbidden on or adjacent to any District right of way without the prior written permission of the District. All state, federal and local statutes, rules, regulations and ordinances concerning the use of hazardous materials, insecticides, herbicides, fungicides, rodenticides, and other similar substances shall be strictly observed.

(b) Prior to the use of hazardous materials, insecticides, herbicides, fungicides, rodenticides, and other similar substances on or adjacent to District rights of way, the Grantee shall obtain, from the District, approval of a written plan for such use. The plan shall state the type and quantity of material to be used, the pest to be controlled, the method of application, and such other information as may be required. All use of such substances on or near the District rights of way shall be in accordance with the approved plan. If the use of a substance is prohibited by the Environmental Protection Agency, it shall not be used. If use of a substance is limited by the Environmental Protection Agency, it shall be used only in accordance with that limitation.

(7) Vegetation, Restoration and Reseeding

(a) Except as otherwise agreed by the District in writing, ground surfaces within District rights of way must be restored to a condition equal to that which existed before the encroachment work began, or as shown on the approved plans or specifications.

(b) The Grantee shall exercise care to preserve the natural landscape and shall conduct its construction operation so as to prevent any unnecessary destruction,

scarring, or defacing of the natural surroundings in the vicinity of the work. Except where clearing is required for permanent works, all trees, native shrubbery, and vegetation shall be preserved and shall be protected from damage that may be caused by the Grantee's construction operations and equipment unless otherwise directed by the District. Movement of crews and equipment within the rights of way and over routes provided for access to the work shall be performed in a manner to prevent damage to roadways, grazing land, crops, or property.

(c) Plans for restoration of District rights of way areas where soils and surface materials are disturbed through actions incident to construction, operation, and maintenance shall be approved by the District.

(d) The Grantee shall be responsible for prevention and suppression of all uncontrolled fires that are caused by the Grantee, its agents, or assigns. The Grantee shall be responsible for restoration of damaged areas.

(8) Damage to District Facilities. All damage to District facilities shall be repaired by the Grantee to the satisfaction of the District. If emergency repair work is necessary, or the Grantee fails to complete all work covered by the applicable agreement with the District in a reasonable time as determined by the District, any remaining or incomplete work will be performed by the District and the Grantee will be required to reimburse the District for all expenses incurred by the District in completing the work.

(9) Unanticipated Conditions. If unanticipated field conditions are encountered while a project is being undertaken, the District reserves the right to impose additional or more stringent requirements than may be generally described in this Chapter 16. The District may also issue a written amendment to the Encroachment Agreement.

(10) Record Drawings. Within 30 days of completion of construction, the Grantee shall provide to the District three (3) copies of record drawings. The record drawings shall include, but not be limited to, X,Y,Z, GPS coordinates of District facilities, utility crossings, manholes, drains, power poles, etc. A topographic survey shall be completed to document any changes to grade. Electronic files of record drawings shall be submitted to the District in a format acceptable to the District.

16-7 PROTECTION STANDARDS

(1) Surface Structures

(a) Surface structures are allowed within District rights of way so long as construction and use of those surface structures do not alter or interfere with the use, operation, maintenance, repair, replacement or improvement of any District facilities. Approved surface structures include asphalt roadways (without utilities), parking lots,

curbs, gutters, sidewalks, walkways, driveways and patios that are non-reinforced and not connected to buildings. All surface structures are subject to approval by the District on an individual basis.

(b) Surface structures located over District pipelines shall be designed to meet maximum allowable loading restrictions and minimum cover requirements as determined by the District.

(c) Except as otherwise expressly agreed in writing by the District, if the District determines that it is necessary to remove or damage surface structures for the use, operation, maintenance, repair, replacement, or improvement of any District facilities, repair or replacement of the removed or damaged surface structures will be the responsibility of the Grantee and its successors.

(2) Buildings, Other Structures. Buildings and other permanent structures are not allowed to be constructed within or overhanging District rights of way. The following types of structures are not allowed: buildings, footings, foundations, retaining walls, block or concrete slab walls, decks, carports, trailers, light poles, flag poles, trampolines, motor cross facilities, power poles, swimming pools, wading pools or ponds, decorative pools or ponds, or similar water features. Other types of permanent structures not listed will be evaluated by the District for approval.

(3) Vehicle Access Weight Restrictions

(a) No vehicular traffic will be allowed over Type A SLA pipe unless adequate protection is provided and specifications approved by the District. No vehicular traffic exceeding HS-20 loading will be allowed over Type B, C, and D SLA pipe unless adequate protection is provided and specifications approved by the District.

(b) No vehicular traffic exceeding HS-20 loading will be allowed over the POMA unless adequate protection is provided and specifications approved by the District.

(4) Reasonable and Efficient District Access

(a) The District shall have reasonable and efficient access to all portions of District rights of way and facilities. No fences or similar barrier will be allowed within District rights of way except as consistent with these regulations.

(b) Except for District purposes, installation of new or replacement fences is not allowed on District fee title property. Existing fences, previously authorized by agreement prior to October 2, 2006, on or across District fee title property may, by agreement, remain until District activities require removal. Other uses of District fee title property will be allowed as set forth in other sections of this chapter of the P&P. Fences

without footings or foundations may be allowed on property encumbered by District easements on a case by case basis. Concrete walls and masonry block walls will not be allowed. Grantee shall permit reasonable and efficient access to enclosed portions of District rights of way.

(c) Fences enclosing District structures or rights of way shall provide gated openings large enough to permit reasonable and efficient access by District maintenance vehicles without damaging the fence and improvements of the District rights of way user. Grantee shall allow District to install District locks on access gates.

(d) All fences within District rights of way are subject to removal by District as required to maintain or replace pipe or structures. Except as otherwise expressly agreed in writing by the District, removal and replacement of fences shall be the responsibility of the Grantee and its successors.

(5) Trees and Vines

(a) No new trees or vines will be allowed within District rights of way. Existing trees and vines within 20 feet of centerline of District pipelines or on access paths and roads used by District are not allowed. Existing trees and vines outside 20 feet of centerline of District pipelines or on access paths and roads used by District may remain until removal is required for safe operation or replacement of the pipeline or access paths and roads at the sole discretion of the District.

(b) All vegetation within the District rights of way shall be maintained by the property owner or Grantee, as the case may be. All vegetation within District rights of way is subject to removal by District as required to maintain or replace pipe or structures. Except as otherwise expressly agreed in writing by the District, removal and replacement of vegetation shall be the responsibility of the Grantee and its successors.

(6) Changes in Ground Surfaces, Lateral Support

(a) All temporary or permanent changes in ground surfaces within District rights of way are encroaching structures and require an encroachment agreement. Grantee is required to comply with District requirements for minimum and maximum depths of cover over the SLA and POMA.

(b) Any fills and cuts on properties adjacent to District rights of way shall not encroach onto District rights of way without specific written prior approval by the District. Modifications of properties adjacent to District rights of way shall not reduce lateral support for District rights of way without specific written prior approval by the District.

(7) Drainage From or Onto District Rights of Way. Existing gravity drainage over and from District rights of way must be maintained at all times. Any erosion from construction, operation, maintenance or use activities must be controlled at all times. No new concentration of surface or subsurface drainage may be directed onto or under the District rights of way without a showing of adequate provisions for removal of drainage water, and the specific prior written approval of the District.

(8) Test Excavation. Prior to final design of any structure that encroaches within District rights of way, an excavation must be made to determine the location of existing District facilities. Any such excavation must be made only by, or in the presence of, authorized District personnel.

(9) Bedding for pipe or other District facilities, Compaction. Grantee is required to comply with District requirement related to bedding of pipe and other District facilities and compaction requirements.

(10) Metallic Strip. Any nonmetallic encroaching structure below ground level shall be accompanied with an approved locator wire running through the entire length of the District right of way.

(11) Utility Crossings

(a) Utility crossings of District rights of way will require an encroachment agreement on an individual basis. All applicable state, city, and county regulations shall be adhered to in the construction of utilities. Where utilities will be constructed by or for a developer, but dedicated to a municipality or other local governmental entity or regulated public utility, the District will require the Encroachment Agreement to be signed by that municipality or other local governmental entity or regulated public utility.

(b) All utility crossings shall provide a minimum of eighteen (18) inches of clearance between pipeline or conduit and the SLA or POMA. All sewer lines shall be installed in a carrier pipe extending a minimum of 25 feet each side of SLA or POMA centerline, as directed by the District. All culinary pipeline crossings under the SLA or POMA shall be installed in a carrier pipe extending a minimum of 25 feet each side of SLA or POMA centerline, as directed by the District. Carrier pipes shall consist of either welded steel pipe or welded HDPE. Coating, lining and thickness of carrier pipes shall be approved by the District.

(c) Angles of crossing utilities shall be 90 degrees in relation to the SLA or POMA whenever practicable, and not less than 60 degrees. Parallel utilities are not allowed within District rights of way.

(d) Metal pipes which are in close proximity to and may affect District pipelines shall implement corrosion protection measures that provide adequate protection of the District's pipelines.

(e) Boring of utility crossings may be required by the District. Decisions will be made on an individual basis.

(f) If material from the excavation is not suitable as backfill, it shall be removed from the site by and at the expense of the Grantee.

(g) Any buried utility shall be accompanied with warning tape. This tape shall be located 12 inches above the structure and extend from right of way edge to right of way edge.

16-8 APPEALS

Any decision of the General Manager regarding District rights of way may be appealed to the Engineering Committee. All appeals shall be in writing explaining the reasons for the appeal. In order for appeals to be considered by the Engineering Committee, the written appeal must be received within 30 days following receipt of the decision of the General Manager and at least 10 business days prior to the next scheduled Engineering Committee meeting. Replies will be answered in writing. Any decision of the Engineering Committee regarding District rights of way may be appealed to the District's Board of Trustees. All appeals shall be in writing explaining the reasons for the appeal. In order for appeals to be considered by the District's Board of Trustees, the written appeal must be received within 30 days following receipt of the decision of the Engineering Committee and at least 10 business days prior to the next scheduled Board of Trustees meeting. Replies will be answered in writing.