2016

Salt Lake City Corporation, Petitioner-Plaintiff-Appellee, v. Mark C. Haik, Respondent-Defendant-Appellant

Utah Supreme Court

Appellate Case No. 20160019-SC

State of Utah

In Supreme Court

SALT LAKE CITY CORPORATION,
Petitioner-Plaintiff-Appellee,

v.

MARK C. HAIK,
Respondent-Defendant-Appellant.

An Appeal from the Third Judicial District Court
Case No. 140900915
The Honorable Andrew Stone, presiding

APPELLANT'S BRIEF AND ADDENDUM

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STATEMENT OF JURISDICTION

This appeal is from certified orders dismissing (on motion to dismiss) counterclaims of Appellants in Case No. 140900915 in the Third Judicial District Court in and for of Salt Lake County, State of Utah; the Honorable Andrew H. Stone. Jurisdiction is pursuant to Utah Code § 78A-3-102 (3)(e)(v).

STATEMENT OF ISSUES

a. BY FAILING TO INDEPENDENTLY ANALYZE STATE CONSTITUTIONAL GUARANTEES, CONTRARY TO JENSEN V. CUNNINGHAM, 2011 UT 17; DID THE DISTRICT COURT ERR IN DISMISSING BASED ONLY UPON PRECLUSION STATE LAW COUNTERCLAIMS BECAUSE A FEDERALCOURT HAD PREVIOUSLY FOUND UNDISPUTED FACTS DID NOT GIVE RISE TO A FEDERAL CONSTITUTIONAL VIOLATION?

i. Most apposite law: Jensen v. Cunningham, 2011 UT 17.

ii. Standards of review:

"Interpretation of the Utah Constitution and the application of collateral estoppel are both questions of law that we review for correctness." Jensen v. Cunningham, 2011 UT 17, ¶ 37, 250 P.3d 465, 476. "When reviewing a motion to dismiss, 'we view the facts and construe the complaint in the light most favorable to the plaintiff and indulge all reasonable inferences in his favor.'" Energy Claims Ltd. v. Catalyst Inv. Grp. Ltd., 2014 UT 13, ¶ 2 n.1.

iii. Citation to record showing preservation:

Haik filed Answer and Counterclaims. (R2724-2783) City moved dismissal (R3008-3043) Haik opposed dismissal. (R3461-3492) The City replied. (R3880-3897) The District Court dismissal read on the record. (R4159) Written order was subsequently entered. (R4299-4304) Haik filed for entry of judgment and certification. (R4160-4171) The City opposed. (R4187-4191) Haik replied. (R4195-4197) The Court entered order granting the motion for entry of judgment and certification. (R4397; ADD3-ADD11) Haik filed notice of appeal. (ADD1-ADD2)

STATEMENT OF CASE

The City sought judicial review after the State Engineer approved two of six change applications title to which was adjudicated in Haik v. Sandy City, 2011 UT 26. (R1-63) The City requested the District Court quiet title and declare against the water rights underlying the six applications adjudicated in Haik v. Sandy City, 2011 UT 26; contending that decision does not affect the validity of the conveyance to Sandy City. (R2011, ¶69). The City also requested declaration against the State Engineer regarding his approvals. (R8-11)

Haik and Butler answered (R741-776 and R1296-1330) and moved dismissal. (R1387-1408) Dismissal was granted dismissal with leave to amend. (R1969-1974) Amended petition was filed. (R1997-2023) Haik and Butler moved dismissal (R2191-2195) which was denied. (R2689 and R2963-2966) Haik and Butler answered and counterclaimed. (R2724-2783) The counterclaims ask the court declare the City's authority and responsibility to furnish water, and the validity of the City's water rights upon which alleged were injured. The counterclaims contend the City's duties and rights derive from Utah Constitution Article XI, § 6, as well as other constitutional duties or restraints imposed by Article I, § 7, or Article I, § 24; when wielded unreasonably and discriminatorily or in a procedurally deficient manner. (R2756-81)

The City moved dismissal. (R3008-3043) Haik and Butler opposed. (R3461-3492) The City replied. (R3880-3897) The Court denied dismissal ruling on the record.

(R4159) Haik and Butler moved for entry of judgment and certification. (R4160-4171) The City opposed. (R4187-4191) Haik and Butler replied. (R4195-4197) The Court granted certification (R4397) and filed order granting dismissal and certification. (ADD3-ADD11; R4429-4432) Appeal followed. (ADD1-ADD2; R4435-4436)

SUMMARY OF ARGUMENT

By alleging injury to all its water rights, the City presents new material operative facts never previously or finally adjudicated. (R1997-2023) By alleging injury to all its water rights within Little Cottonwood Canyon, the City changed the circumstances thereby barring preclusion. (R2001, ¶19; R2002, ¶24; R2003, ¶29; R2004-2006, ¶¶31-38)

The alleged cause of the City's injury is the State Engineer's approved use and the proposed use of water drawn from the Murray penstock through a 6 inch pipe based upon rights adjudicated in Haik v. Sandy City. The City does not allege any particular quantity of use causing injury, disclosing: "The 6 inch meter on the 6 inch pipe was sized for the summer flow of 0.25 cfs and does not record the low flows of 0.0116 cfs during the winter months." (R2472-2473) And, "Also, the meter is buried under snow much of the winter months and cannot be read." (R2473) The alleged injury is not particular as the City says: "So we are about death by a thousand cuts, both with respect to quantity and respect to quality." (R5323, ll. 21-22)

Little Cottonwood creek runs westerly down Little Cottonwood Canyon through the mountains southeast from the City. See Little Cottonwood Water Co. v. Sandy City,

123 Utah 242 (1953). The creek veers north upon emerging from the Canyon across the Wasatch fault line and enters Salt Lake Valley. Id. The Canyon provides access to several of Utah's largest ski resorts. See Winkler v. Utah, 2014 UT App 141.

The State Engineer oversees distribution of water through the Little Cottonwood Creek Distribution system; previously the Court oversaw that distribution. (R2427) Water is diverted from the Murray penstock at point "4. 6" pipeline to So. Despain Ditch". (ADD18) Branch lines from the 6" line carry the water to users. (ADD20 and ADD21) The State Engineer issued the Little Cottonwood Creek Flow Diagram showing this diversion. (ADD19) The distribution committee includes the City as part of the municipal group (R2430-34) and its Director of Public Utilities is City representative. (R2435)

The "Salt Lake City Service Area" encompasses the Little Cottonwood Creek Distribution System including Albion Basin Subdivision in the Town of Alta. (R2760-61, ¶¶21-29; ADD29) The State Engineer approved the City's appropriation to supply homes in Albion Basin Subdivision, application a16846. (ADD35-ADD37) The State Engineer also approved the City's application to supply the Little Cottonwood Canyon ski resorts. (ADD40 and ADD41; R1533-74; R1575-1653)

When seeking approval to supply Albion Basin Subdivision, the City explicitly intended to deny the appropriated water: "Salt Lake City promised Mayor Levitt that it would gain control of the Albion Basin contracts in order to protect the area from

development by using Salt Lake City's watershed management muscle to deny them water." (R2770-71, ¶85; ADD38-ADD39) The City planned to deny the appropriated water: "Once the City has the contracts we will not certify for water service for new building permits." (R2770, ¶83; ADD30-ADD34)

The City acted on its intent by sending a letter[1] to Salt Lake Valley Health Department and the Town of Alta. (R2737-2738, ¶¶69-76; R2765, ¶56; R1214) On one hand the City asserts "amount of water allowed under the contract cannot exceed 50 gallons per day per connection" (R1214); and on the other asserts: "The only thing that has changed since 1997 is that the 1963 Agreement has been abandoned." (R2765, ¶53) The City admits approved "application a16846 allows the City to use more than the amount of water described in the 1963 Agreement in Albion Basin" and the City asserts it

[1] Salt Lake Valley Board of Health adopted Health Regulation #14 as of December 3, 1981 and amendments as of July 12, 1984; November 1, 1990; December 3, 1992; May 5, 1994; and, December 7, 2006. Section 4.1.1 of Health Regulation #14 states the Director of the Salt Lake Valley Health Department and the Director of Public Utilities have joint enforcement. Section 2.4 of Health Regulation #14 states "Director of Public Utilities" shall mean the Director of the Salt Lake City Department of Public Utilities, or his or her designee. Sections 2.1.1 and 2.1.1.4 of Health Regulation #14 provides "Salt Lake City Watershed Area" shall mean watershed area within Little Cottonwood Canyon. Section 4.5.3 of Health Regulation #14 provides "Applicants for building permits within the Salt Lake City Watershed Area shall also submit to the Department a letter from the Director of Public Utilities stating that the applicant has received water available through a water sales agreement with Salt Lake City for the project."

is supplying water to the homes in the same subdivision pursuant to that water right. (R2765, ¶54; R2764, ¶50; R1184-1198)

The City's letter prompted the Salt Lake Valley Board of Health to deny approval. (R2005, ¶35; R2726, ¶14) As a result of the City's letter, Salt Lake Valley Health Department asserts "…failure to attach the required documentation of a letter from the City indicating his access to water, the sole basis for the summary judgment decision of the Health Department's hearing Officer" led to denial of approval of sewerage for homes in the Albion Basin Subdivision. (Appellate Case 14-4074 Doc. 01019325972 pp. 36-37)". (R2766, ¶64)

The City now alleges lawful use of private water (ADD22-ADD25) the City contracted to deliver (ADD13-ADD17) injures public water the City appropriated (ADD35-ADD37) while intending and planning to deny the stated beneficial use to the same homes. (ADD30-ADD34; ADD38-ADD39). The City alleges "As a matter of law, any use of LCC water by the Defendants … under their respective claimed water rights … would impair and interfere with essentially all LCC water rights, including SLC LCC water rights, to the damage of the Plaintiffs." (R2001, ¶¶18-19) Haik filed change application "seeking State Engineer approval to move the point of diversion and place of use for their claimed water rights to the Albion Basin" for the "purpose of use to the domestic use of one residence". (R2014, ¶¶95-96) Haik's application for use of private

water has been pending for more than a decade. (Haik v. Sandy City, 2011 UT 26; R2014, ¶100)

This Court ruled "the Haik Parties were the first to record their deed to the disputed water right in good faith". Haik v. Sandy City, 2011 UT 26. Pursuant to Utah's Recording Act and Utah's Water and Irrigation Act, Sandy City's deed is void. Utah Code §§ 57-3-103 and 73-3-12. Yet, the City alleges:

> 68. The Bentleys and Saunders and Sweeney, Inc. sold any water rights they had relating to lands under the South Despain Ditch to Sandy City in 1977. Any adjudication in which it was concluded otherwise is not binding upon Plaintiffs, as Plaintiffs were not parties to that proceeding. (R2011, ¶68)
>
> 69. The Haik v. Sandy City decision does not affect the validity of the conveyance from the Bentleys and Saunders and Sweeney to Sandy City. (R2011, ¶69)
>
> 70. One requirement for water rights to pass as an appurtenance is unity of title. Ownership of the water rights in question and the land in question must be the same. After the conveyance to Sandy City, no conveyance of land by Saunders and Sweeney or the Bentleys could carry by appurtenance any part of the South Despain first primary award. (R2011, ¶70)

The City premises injury upon a void deed even though "A contract or a deed that is void cannot be ratified or accepted". Ockey v. Lehmer, 2008 UT 37

The District Court dismissed without independently analyzing State Constitutional protections put at issue by the City thereby clearly erring. The City premises its alleged injury upon the validity of the City's water rights derived from Article XI, § 6, and subject to it. Utah Constitution Article XI, § 6 provides:

> No municipal corporation, shall directly or indirectly, lease, sell, alien or dispose of any waterworks, water rights, or sources of water supply now, or hereafter to be owned or controlled by it; but all such waterworks, water rights and sources of water supply now owned or hereafter to be acquired by any municipal corporation, shall be preserved, maintained and operated by it for supplying its inhabitants with water at reasonable charges: Provided, That nothing herein contained shall be construed to prevent any such municipal corporation from exchanging water-rights, or sources of water supply, for other water-rights or sources of water supply of equal value, and to be devoted in like manner to the public supply of its inhabitants.

The City's injury ignores restraints imposed by Article I, § 7 and Article I, § 24. Utah Constitution Article I, §7, provides: "No person shall be deprived of life, liberty or property, without due process of law." Utah Constitution Article I, § 24, provides: "All laws of a general nature shall have uniform operation." The District Court did not abide by Jensen v. Cunningham, 250 P.3d 465 (Utah 2011) by failing to analyze these State constitutional guarantees.

District Courts are charged to declare what the rights at issue are; and equally important, what those rights are not; in view of the vital importance of water. The counterclaims ask the Court declare five aspects of defining mutual rights and obligations given their substantial public importance.

First, beginning with Article XI, § 6, (R2756-2781). As interpreted and applied by the City, the words "all such waterworks, water rights and sources of water supply now owned or hereafter to be acquired by any municipal corporation, shall be preserved, maintained and operated by it for supplying its inhabitants with water at reasonable" are

causing uncertainty and insecurity and controversy. In state constitutional law analysis Article XI, § 6, calls out for different analysis than under the federal constitution. There is no similitude in fundamental principles nor overlap in concepts between the state and federal constitutions. The unique language of Article XI, § 6, its distinct context within State constitutional debate, and differing jurisprudential considerations lead to different results in applying principles under Article I, § 7 and § 24 than under federal constitutional law.

Objectively analyzed as to its original plain meaning in historical perspective; the text and structure of Article XI, § 6, develops the legal framework for delineating the defining mutual rights and obligations: "It was meant to secure to communities their water systems and prohibit any sale or lease to private parties. This is one project which the Constitution decreed should be kept in social ownership by the community." Genola Town v. Santaquin City, 96 Utah 88. It "evinces a state policy of displacing competition with regulation in the area of municipal control over water and water rights." Salt Lake City Corp. v. Big Ditch Irrigation Co., 2011 UT 33.

Record of constitutional debates extrinsically evidence the framers' intent municipal rights be construed "as a trust for the benefit of the inhabitants to supply them with water, the courts will always construe the question of a reasonable charge, because it will be a trust fixed and form by the Constitution for the purpose of supplying the people with water, and they will have no right to charge more than a reasonable amount". 1

Proceedings and Debates of the Constitutional Convention for the State of Utah 672 (1898).

Second, Article I, § 24, the focus of the second counterclaim (R2779); expresses settled concern for restraining municipal officials from fundamentally unfair practice of classifying persons so as to treat similarly situated persons differently to the detriment of some of those so classified. Blue Cross & Blue Shield of Utah v. State, 779 P.2d 634, 637 (Utah 1989). A fundamentally unfair practice of detrimentally classifying some homes as water worthy while denying water to other homes in the same approved subdivision is at issue. (See, R2764-65, ¶¶49-71; R1098-1126; R1127-1149; R1219-1247; R1184-1198) The mapping of lots receiving and not receiving water shows stark disparity. (ADD42) This disparity implicates an unconstitutional singling out.

Justification for singling out some homes is tenuous as municipal officials promising one another to use "muscle" to deny water held in trust violates "the requirement of reasonableness, which attends all actions by municipalities" and does "not cease at the city limits." Platt v. Town of Torrey, 949 P.2d 325, 330 (Utah 1997). Promising to use "muscle" to deny appropriated water cannot be imputed to any legitimate purpose. The City's inconsistent positions regarding the abandoned contract noted above evidence unreasonableness. (R2765-2766, ¶¶53-62)

Third, Article I, § 7, the subject of the third counterclaim (R2780, ¶127); seeks to understand the purview of procedures of due process protections referenced in Rupp v.

Grantsville City, 610 P.2d 338 (Utah 1980). Utah Code § 10-8-15 does not confer authority upon Salt Lake City to "control development"; that power is conferred by Utah Code § 10-9a-102(2) and does not extend to the controlling development in Albion Basin within the Town of Alta. Singling out has led to denial of building permit. (R2766-77, ¶¶63-65) The memoranda of the City's Director of Public Utilities are not passed or enacted by the governing body of the City; are not in the mandated form of an ordinance, Utah Code § 10-3-704 and §10-3-705; and do not include disclosure of publication or posting, Utah Code § 10-3-711. (R2773, ¶96) The City can only "exercise its legislative powers through ordinances." (R2773, ¶95) Failure to strictly follow the statutory requirements in enacting the ordinance renders it invalid." Call v. West Jordan, 727 P.2d 180, 183 (Utah 1986). (R2773, ¶97)

Appropriating with actual intent to deny the state beneficial use violates long-standing precedence: "He may not file his application, construct his works, and then hold the water and wait for something to happen. He cannot withhold the water from the proposed beneficial use." Sowards v. Meagher, 37 Utah 212, 225 (1910). Such intent defies elements essential to lawfully appropriating. Id.

Fourth, prospect of differing standards between constitutional law and Utah appropriative law is the subject of the fourth counterclaim; given expressed intent to deny and denial of appropriated water to approved beneficial use can the City allege injury? (R2781, ¶¶129-30) By law, if the City unlawfully appropriated declaring that invalidity

returns wrongfully appropriated waters to the public or prior appropriators entitled to its use. Utah Code § 73-1-4. Given "[a]n appropriative water right depends on beneficial use for its continued validity," In re Bear River, 819 P.2d 770, 775 (Utah 1991), there is real question whether the City can appropriate to supply homes then deny that supply to sue asserting that appropriative right. (R.2778, ¶¶116-19)

A remedy for declaratory relief should exist because (given citizens' ready willingness to bear the burdens of extension), the City's duty is "a ministerial act about which it would have no discretion" as opined in Rose v. Plymouth Town, 110 Utah 358 (1946). If the City can sue over one cut in one thousand, then citizens sued are entitled to declaration of the validity of the City's water rights about which it sued and its duties to serve within its establish service area.

Fifth, the subject matter of the fifth counterclaim (R2781, ¶132); is the question whether the "state policy of displacing competition with regulation in the area of municipal control over water and water rights" articulated in Salt Lake City Corp. v. Big Ditch Irrigation Co., 2011 UT 33, 258 P.3d 539, has now led to the City rendering a utility service outside its city limits to such an extent as to be "subject to some public regulation" particularly given the disparity in treatment of inhabitants of the approved municipal service area outside the corporate boundaries of the City. Salt Lake County v. Salt Lake City, 570 P.2d 119, 122 (Utah 1977). (R2775, ¶108)

The City asserts it is the largest retail water provider in Utah and holds the vast majority of water rights in Little Cottonwood Creek, providing nearly all the in-canyon usage of water. (R2774-75, ¶¶103-07) The City asserts, between itself and Sandy City, they collectively own the rights to use 99.65% of the first 94.79 cfs of LCC (the "first and second primary" rights), 99.55% of the flow rights up to 111.86 cfs (the combined "first and second primary" and "first surplus" rights), approximately 88% of the flow rights up to 159.09 cfs (the combined "first and second primary" and "first surplus" and "second surplus" rights), and approximately 78% of the flow rights up to 398.36 cfs (the combined rights including "third surplus" rights)." (R2774, ¶103) "On a volume basis based on average annual hydrology, Plaintiffs and Sandy City collectively own the rights to use more than 95% of the first and second primary rights, and more than 92% of the overall LCC annual volume." (R2774, ¶103)

When the City's exemption was recognized, this Court acknowledged "the fears expressed by plaintiffs that cities will engage in the utility business on a broad scale in competition with and destructive of regularly authorized privately owned utilities does not seem to be justified". County Water Sys. v. Salt Lake City, 3 Utah 2d 46, 52 (Utah 1954). The state policy against alienation founded in Article XI, § 6, means wrongfully appropriated water should not be displacing competition within in the area of municipal control over water and water rights; in this instance, the watershed of Little Cottonwood Creek. The City mapped the entirety of that watershed as part of its service area.

(R2760-61, ¶¶21-29; ADD29) The City asserts it holds and exercised extra-territorial jurisdiction pursuant to Article XI, § 6, and Utah Code §10-8-15 (R2762, ¶32) and defined it by ordinance as the Salt Lake City Watershed Area. (R2769, ¶78) The stated beneficial use for which the City appropriated but denies to inhabitants (thereby displacing that water from private markets) is a matter of substantial public importance.

The District Court did not question there was a genuine justiciable controversy. The fact the City sued shows the interests of the parties involved are adverse. Having been sued, and owning private water already adjudicated, the use of which is alleged to injury public water rights; Haik has or asserts bona fide claims of a legally protectable interest to know the force and the effect of Utah Constitutional provisions and related questions. Given the City sued asserting lawful private water use is injuring alleged public water rights; the mutual rights and obligations associated with them are ripe for judicial determination. Either there is actual controversy, or there is a substantial likelihood that one will develop, such that there is a useful purpose served in resolving the issues or avoiding future controversy or further litigation.

What is then left, and the sole reason given, is preclusion. The applied preclusion defies the recent, compelling precedence that a Utah District Court errs in applying preclusion "because the legal standard for state and federal constitutional violations is not identical". Jensen v. Cunningham, 250 P.3d 465, 489 (Utah 2011). The foundational point of Jensen is that the District Court must actually analyze the differing constitutional

principles. The absence of analysis of the independent protections afforded by the Utah Constitution necessitates reversal and remand.

STATEMENT OF FACTS

City Sues Alleging Injury to All Water Rights

In December 2014, Salt Lake City ("City") sued Mark C. Haik ("Haik"). (R1997-2023) The City alleges "The water rights claims of Defendants currently and materially injure Plaintiffs by placing a cloud of record on SLC's title to LCC water rights." (R2002, ¶24)

This Court previously held Haik recorded his deed first and in good faith and therefore affirmed the district court's entry of summary judgment quieting title to Haik's water right. Haik v. Sandy City, 254 P.3d 171, 180 (Utah 2011). Haik purchased through Biddulph who "filed an application with the Utah State Engineer for a permanent change of water, which was approved". Id. at 174. (ADD22-ADD25; ADD27-ADD28) The City alleges this approval and that the "approved change application gave State Engineer approval to return to the stream as a source". (R2013, ¶¶88 and 89)

The State Engineer approved Biddulph's application August 4, 2000. (ADD22-ADD25) Contrary to the plain meaning of State Engineer's approval to using the stream source; the City alleges: "At the time of the purported conveyance, WRN 57-7800 was a certificated well right, Certificate a702". (R2013, ¶87; R2102) At the time of conveyance, WRN 57-7800 was an approved stream source not the well. (ADD22-

ADD25) The State Engineer had explicitly addressed certificate a702: "By this application, Applicant is merely correcting the State Engineer records to show that Applicant is still taking water from the Salt Lake City line and is, in fact, abandoning the well constructed under Change Application No. a4178."(ADD22) Even so, the City alleges: "As a matter of law, from May 24, 1971 to August 8, 2000, no one claiming an interest in WRN 57-7800 had any right to divert any LCC water under WRN 57-7800, as that right had been converted to a well water right by Certificate a702." (R2013, ¶91)

In June 2003 Biddulph requested from the City all flow measurements as to her right. (R2472) The City replied in July 2003 writing: "I understand that you need the following information for filing your proof due for water right 57-7800 (a24463) with the Utah State Engineer." (R2473) The City now alleges there has been no use since 2000. (R2002, ¶21) Biddulph applied on August 15, 20013 to the State Engineer to extend her time to construct two additional residences and fully place the water to beneficial use. (R2492) The State Engineer approved Biddulph's extension. (R2493-2494) After the State Engineer's approval, the Haik Parties recorded their deed on December 10, 2003. Haik v. Sandy City, 254 P.3d 171, 174 (Utah 2011). No one appealed the State Engineer's approval. (R2727, ¶18)

Now the City alleges "The Bentleys and Saunders and Sweeney, Inc. sold any water rights they had relating to lands under the South Despain Ditch to Sandy City in 1977." (R2011, ¶68) The City then continues: "After the conveyance to Sandy City, no

conveyance of land by Saunders and Sweeney or the Bentleys could carry by appurtenance any part of the South Despain first primary award." (R.2011, ¶70) Despite the State Engineer's approvals, the City alleges "As a matter of law, any use of LCC water by the Defendants under their respective claimed water rights has a priority date of 2000 at the earliest" and "Given that 2000 priority, any use of LCC water would impair and interfere with essentially all LCC water rights, including SLC LCC water rights, to the damage of the Plaintiffs." (R2001, ¶¶18 and 19) The Amended Petition "does not expressly allege a reasonable probability of future injury": The words "reasonable probability are never used. (R1997-2023)

Dismissal Sought Due to Lack of Jurisdiction and *Stare Decisis*

Haik moved to dismiss for because of failure to allege any distinct and palpable injury of demonstrable or measurable harm as mandated by Washington County Water Conservancy District v. Morgan, 2003 UT 58, 82 P.3d 1125; and no reasonable probability of future injury mandated by Brown v. Division of Water Rights of the Dep't of Natural Resources of Utah, 2010 UT 14, 228 P.3d 747. (R2191-2195) Haik also answered asserting stare decisis barred overturning of Haik v. Sandy City, as that ruling was not erroneous, remains sound, and more harm will come by departing from that precedent. (R2755, ¶177) Haik further asserted claim or issue preclusion barred the City's claims. (R2755, ¶176)

Haik contended the City's direct challenge to voiding of Sandy City's deed rendered *stare decisis* applicable. (R3513-3514) Haik contends that voided deed can only be treated set forth in Haik v. Sandy City, particularly as the City alleged no conveyance to it nor alleged any particular water right title that was clouded. (R3514) As to res judicata, Haik contends the City exercised "some control over the litigation" in Haik v. Sandy City, as set forth in Baxter v. Utah Dep't of Transp., 705 P.2d 1167, 1169 (Utah 1985). (R3506)

Haik contended Statements of Accounts submitted by the City's attorneys evidence the City exercised control sufficient for privity with Sandy City thereby rendering Haik v. Sandy City binding upon Salt Lake City. (R3507-3513) Haik contended the Statements of Account (R3509) detailed Salt Lake City's attorney, Shawn Draney, repeatedly telephoned, emailed, and met with Sandy City's attorney, David Wright, regarding strategy (R3562, R3564, R3566, R3569, R3570, R3595), and participated in expert report and deposition matters (R3561-3562), motion preparation (3562, R3564, R3568, R3569), and assisted with affidavit (R3569), evidence for defense of slander of title (R3572), and appeal, appellate argument, and appellate briefs. (R3570, R3574, R3578, R3584, R3592) Haik also proffered Sandy City's answers attesting to his role (R4028) as well as deposition testimony concerning it. (R4049-4050; R4053-4054) Sandy City's attorney actually invoked an attorney-client privilege pertaining to the communications between Sandy City and Draney:

> MR. WRIGHT: Ron, just so you know, Bryce and I discussed this. We knew these questions would come up, conversations between Shawn and Bryce. And Shawn at the time was representing the City and still does on a couple of things. And we're willing to waive the attorney-client privilege with respect to these particular communications, but as to no others.

(R4050, ll. 13-20) Dismissal was denied. (R2963-2966)

City's Canyon Water and Approval to Supply Albion Basin Subdivision

The City alleges owning "a majority of the rights to the use of LCC" (R2003, ¶7, ¶27) and being "the largest retail water provider in the State". (R1773); having over the course of more than a century, "acquired the majority of the water rights of Little Cottonwood Creek to serve public needs." (R1780) The City asserts "SLC water rights provide for nearly all the in-canyon usage of water". (R1774) The City explains:

> On a flow basis, Plaintiffs and Sandy City collectively own the rights to use 99.65% of the first 94.79 cfs of LCC (the "first and second primary" rights), 99.55% of the flow rights up to 111.86 cfs (the combined "first and second primary" and "first surplus" rights), approximately 88% of the flow rights up to 159.09 cfs (the combined "first and second primary" and "first surplus" and "second surplus" rights), and approximately 78% of the flow rights up to 398.36 cfs (the combined rights including "third surplus" rights). On a volume basis based on average annual hydrology, Plaintiffs and Sandy City collectively own the rights to use more than 95% of the first and second primary rights, and more than 92% of the overall LCC annual volume.

(R2593)

The City previously appeared in the Utah District Court arguing about its "LCC water rights" in Salt Lake County, State of Utah, Case 920900820, that its application filings in Little Cottonwood Canyon were to cure its default. (R2743-44, ¶103) The City

was alleged to have "sold water to Alta and Snowbird without filing change applications as required by law". (R2742-43, ¶99) The City filed permanent change applications pertaining to Little Cottonwood Creek water. (R2743, ¶100) These Little Cottonwood Creek applications were seven of 34 applications filed by the City, in part, seeking to remedy its alleged default and avoid defeasance as pled in Cahoon and Maxfield v. Salt Lake City, Utah Third District Court, Civil No. 920900820. (R2742, ¶96) The State Engineer's segregation history identifies the City's applications in Little Cottonwood Creek as numbered 57-10009 through 57-10015; and appropriate approximately 2,686.0 ac-ft. (R2422) Plan and profile mappings are provided. (ADD40 and ADD41)

The memoranda decisions of the State Engineer approving the City's applications noted five of the City's applications stated historic uses were municipal but that the underlying water rights held by the irrigation companies and utilized by exchange agreement were for irrigation such that the City's application actually converted the nature of use from irrigation to municipal use. (R1415, R1448, R1506, R1661, R1699) The State Engineer approved year-round municipal use for domestic requirements and incidental uses of Alta Peruvian Lodge, and for 13 homes (R1414-1416); use by the United States Forest Service in Little Cottonwood Canyon for recreational and incidental purposes (R1447-1448); domestic requirements for a duplex (R1505-1507); resort use at Snowbird including snow making (R1545-1547); municipal purposes in the Town of Alta and snow making (R1579-1581); for John D. Cahill's home (R1660-1663); and 15.75 ac-

ft for year-round municipal use for "domestic requirement for 35 homes in the Albion Basin Subdivision" (ADD35-ADD37; ADD42). Court appointed commissioner Higbee testified the City's applications for 2,500.0 ac-ft per year would not impair rights of the ditch companies or other users. (R1603)

The City submitted a map of the Salt Lake City Service Area and separately designated areas within and without its corporate boundaries. (ADD29) The City mapped Albion Basin Subdivision as within the City's service area outside its corporate boundaries. (ADD29; ADD40; ADD42; R2736, ¶64) Utah Laws 1973 Chapter 190, entitled "Notice Concerning Proof of Appropriation", approved by the Utah Legislature on March 2, 1973, related to the manner in which notice of proof of change was to be given. (R2736, ¶60) As part of an application a municipal applicant was to file proof by a description by configuration on a map of the place of use of water and a statement of the purpose, and method of use. This obligation was codified in Utah Code § 73-3-16 (R2736, ¶61) and explained in official publication entitled "The Utah Water Rights Adjudication". (R2736, ¶¶63; R2793)

The week before submitting its exchange applications, the City wrote: "Once the City has the contracts we will not certify for water service for new building permits." (R2746, ¶113; ADD30-ADD34) Just after hearing on the Snowbird and Alta applications, the City wrote: "Salt Lake City promised Mayor Levitt that it would gain control of the Albion Basin contracts in order to protect the area from development by using Salt Lake

City's watershed management muscle to deny them water." (R2747, ¶119; ADD38-ADD39)

The State Engineer approved the City's applications to supply Salt Lake County Service Area No. 3 – Snowbird (2000.0 ac-ft) and the Town of Alta (500.0 ac-ft). (R1547, R1581) Shortly after, while the City's application to supply Albion Basin Subdivision was pending; Haik purchased his lots. (R1795)

First Federal District Court Action (Haik I)

Shortly after the Snowbird and Alta approvals, Haik inquired about water supply but the City declined consent to Alta extending water supply, relying on Paragraph 8 of a 1976 Water Supply Agreement between the City and the Town of Alta and the 1991 Watershed Ordinance, § 17.04.020 of the Salt Lake City Ordinances. (R1795)

Haik filed suit asserting five claims: (1) inverse condemnation against Alta under Article I, § 22 of the Utah Constitution (R0356-57); (2) relief pursuant to 42 U.S.C. §1983 against Alta for denial of equal protection (R3057-59); (3) relief pursuant to Article I, sections 7 and 24, of the Utah Constitution against Alta for deprivation of substantive due process and equal protection (R3059); (4) declaratory relief as to the Water Supply Agreement between Alta and the City (R3060); and (5) injunctive relief pursuant to 42 U.S.C. § 1983 and other applicable laws barring the Water Supply Agreement as a defense and requiring Alta to make available municipal services upon payment of connection fees and costs (R3060-62): The complaint asserted no due process

claims under either the Federal or the State constitutions. (R3046-66) Utah Constitution Article I, § 22, provides "Private property shall not be taken or damaged for public use without just compensation."

Haik moved for Motion for Partial Summary Judgment. (R1789) While this motion was pending, the State Engineer approved the City's other applications including approval for municipal supply to 35 homes in the Albion Basin Subdivision. (R1416, R1449, R1507, R1662, R1700) Pursuant to Utah Code § 73-3-10, the City was authorized to proceed with the construction of the necessary works; take any steps required to apply the water to the use named in the application; and perfect the proposed use of 15.75 acre feet annually for supplying the homes. (R2734, ¶47; ADD35-ADD37) More than 400 gallons per day was available for each home in Albion Basin Subdivision; exceeding culinary water requirements. (R2734, ¶49)

Just after State Engineer's approval; Alta and the City opposed Haik's motion (Dkt. nos. 19, 22), and filed cross motions for summary judgment (Dkt. nos. 18, 21), accompanied by supporting affidavits (Dkt. nos. 20, 23, 24). (R1789-90) The affidavits did not disclose the State Engineer's approval. Id. Haik responded and Alta and the City replied with a supplemental affidavit. (Dkt. nos. 31, 32, 33, 34, 36), together with a supplemental affidavit (Dkt. no. 35). (R1790)

At hearing (R1790); Judge Jenkins asked:

> THE COURT: Looking at Albion, the dry cabin area up there, it is your position that Salt Lake City would never, as the result of the water

> management plan, ever be in a position to authorize the extension of water or sewer into that area?
>
> MR. BRAMHALL: I'm reluctant to fall into the trap never or ever, Your Honor. I think we could say, at some point in time, maybe the Forest Service says: We are not going to allow any recreational purposes up there. We are going to close the canyon down. And all of a sudden, any degradation of water that relates to that comes off the scale, and we find new water shed management techniques that maybe get into place, as we do every decade, new water shed management techniques. So, to say never, I think would be difficult. To say, under our current understanding of the system, I think it would be very difficult for us to ever consider that.

(R2751, ¶148) Bramhall appeared on behalf of the City during the State Engineer's hearing on the City's applications including that for supplying Albion Basin Subdivision. (R2751, ¶149; R1690) Bramhall withheld approval to supply Albion Basin Subdivision and its mapping within the Salt Lake City Service Area. (R2751, ¶150; (R6136; R6079)

Judge Jenkins requested additional City data concerning water availability. (R1790). The City submitted. (R2752, ¶152; R1171-83) The City admits it "did not list SLC's many approved change applications". (Case 2:12-cv-00997-PMW Document 27 Filed 11/16/12 Page 24 of 53)(R2752, ¶153; R1171-83) The City did not disclose un-metered water sales to Lots 9, 13, and 21. (R2752, ¶154; R922-50 (Lot 9); R951-88 (Lot 13); R989-1011 (Lot 21)) GRAMA response by the City discloses these un-metered water sales are pursuant to the water right approved for Albion Basin Subdivision. (R2752, ¶157; R1184-96)

Unaware, Judge Jenkins ruled referencing Article XI, § 6. (R1805, n. 13; R1806, n. 14) Judge Jenkins wrote: "If a duty to supply water exists, that duty must devolve upon the entity with legal right to, and lawful control of the water that may be physically available to the Haiks' property – Salt Lake City." (R1805) Judge Jenkins further wrote: "The general duty imposed upon municipalities by Article XI, §6 of the Utah Constitution, viz., that 'all such waterworks, water rights, and sources of water supply now owned or hereafter to be acquired by any municipal corporation, shall be preserved, maintained and operated by it for supplying its inhabitants with water at reasonable charges,' presupposes that the water to be supplied to inhabitants has already been lawfully acquired by the municipality." (R1806, p. 18, n. 13)

The City admits: "Judge Jenkins did not directly address the claim that Art. XI, § 6, of the Utah Constitution requires the City to provide water". (App. Case 13-4050 Doc 01019097685, p. 26) As to equal protection pertaining to the City, Judge Jenkins wrote only:

> As noted above, however, Salt Lake City has no legal duty to furnish water to users outside its own city limits, be they 'similarly situated' or not. As an owner of water rights, Salt Lake City's role in this instance is proprietary rather than administrative. The equal protection yardstick is simply not available to measure Salt Lake City's exercise of its contractual powers to consent pursuant to Paragraph 8 of the Water Supply Agreement.

(R1809-10) Judge Jenkins opined Haik lacked "'one 'strand' of the bundle'." (R1812)

Little Cottonwood Creek Distribution System Established

The month after the City's submission; the State Engineer issued notice to establish a distribution system organization for Little Cottonwood Creek. (R2427) Appointed commissioners are to obtain flow data, determine deliveries to each diversion; coordinate closely with municipalities (especially Salt Lake City); and annually report. (R2428-29) The City is part of the municipal group and "responsible for selecting its representative to the committee". (R2430-34) The established distribution system is mapped and its flows diagramed including the diversion for Biddulph's water right, WRN 57-7800; now owned by Haik. (ADD29; ADD18; ADD19) The branch lines used for WRN 57-7800 are mapped. (ADD20; ADD21)

First Tenth Circuit Opinion (Haik I)

After the State Engineer approved Albion Basin Subdivision water supply, the Tenth Circuit issued its first opinion. The opinion notes the dissimilarity between the language of Article I, § 24, and its federal counterpart (R3238-43; R3241) and that "It is unclear whether the district court considered their equal protection claim under both state and federal law or solely under state law." (R3242, n. 3) After noting dissimilarity there's only brief comment: "Alta consistently refused to extend its water lines outside its 1976 city limits without Salt Lake City's permission. Thus, Alta treats all persons in the class of property owners outside its 1976 city limits, including the Haiks, the same. Furthermore, Alta's and Salt Lake City's actions were reasonable." (R3241) Neither

Article XI, § 6; the State Engineer's approval; nor supply to other homes are considered. (R3239-42) The City admits Water Right 57-10015 "application a16846 allows the City to use more than the amount of water described in the 1963 Agreement in Albion Basin". (R2765, ¶54)

Instead the Tenth Circuit Court opined there was no taking under Article I, § 22. (R3241-42) The opinion expressed: "The Haiks cannot maintain a taking claim because they did not have a protectable interest in property that was taken or damaged by Alta's denial of a building permit." (R3242) Without reference to Article XI, § 6, the Tenth Circuit opined: "Furthermore, mere expectation of municipal water service in the future is not a legal right that constitutes property subject to taking. See Bagford, 904 P.2d at 1099 (expectation of renewal of lease not property subject to taking)." (R3242) Bagford v. Ephraim City, 904 P.2d 1095, 1096 (Utah 1995) pertained to whether a municipal garbage collection ordinance resulted in a taking of a private garbage collection business.

The City Extends Approval to Supply Albion Basin Subdivision

About one year after the Tenth Circuit opinion, the City applied to extend the State Engineer's approval for the City to supply Albion Basin Subdivision. (R1157) The City attested "Salt Lake City is currently working with the Canyonlands to have a water meter installed as part of the City's Canyon meter installation project." (R1157) The City attested it was "holding this right to meet future requirements of the public, which under Section 73-3-12(2)(j) Utah Code Annotated constitutes reasonable and due diligence".

(R1199) As of that attestation, Canyonlands had been dissolved for more than 27 years. (R1200-01) The City admits it has no record of compliance with the referenced metering requirements. (R1205)

Haik Purchases Missing "Strand"

After the State Engineer approved the City extending its right to serve Albion Basin Subdivision; Biddulph conveyed her water right title quieted to Haik. Haik v. Sandy City, 254 P.3d 171, 174 (Utah 2011). Before Biddulph conveyed, the City wrote to her:

> We appreciated the time that you have taken to resolve the South Despain Water Users issue regarding Salt Lake City supplying water to the South Despain users under the agreement with the Despain's dated January 3, 1913. It is Salt Lake City's intent to comply with the agreement.
>
> Salt Lake City has installed a meter on the 6-inch pipeline which is connected to the Murray City penstock pipe. To be in compliance with the 1913 agreement, please be advised that during the summer months Salt Lake City intends to throttle the valve to the 6-inch meter in a manner which will only allow the South Despain users to receive .25 cfs. The distribution of water to the users beyond the 6-inch meter is the responsibility of the South Despain water right owners. … During the winter months, the meter will be restricted to provide the users a maximum of 7500 gallons per day as stipulated in the contract.

(R3797) The City also disclosed: "The 6 inch meter on the 6 inch pipe was sized for the summer flow of 0.25 cfs and does not record the low flows of 0.0116 cfs during the winter months." (R2472-2473) And, the City further disclosed "Also, the meter is buried under snow much of the winter months and cannot be read." (R2473)

The City had previously prepared a report explaining this connection to the Murray City penstock pipe and its advantages to the City. (R2346-49; R2096-2100) The branch service lines and tap outlets are mapped and remain in operation. (ADD20 and ADD21) These branch service lines and tap outlets are not connected with Sandy City water distribution. (R6108) The branch service lines and tap outlets properties lie within the Little Cottonwood Subdivision. (R6081)

Biddulph filed to extend approval of her right. (R2492) The City knew the information was "for filing your proof due for water right 57-7800 (a24463) with the Utah State Engineer". (R2473) Biddulph's extension was approved. (R2493-2494) After that approval, Haik obtained his "missing strand" based upon Haik v. Sandy City and applied for use in Albion Basin Subdivision. Id.

City Opposes Use of the "Missing Strand"

The City protested asserting it "holds more rights to beneficially use the water of Little Cottonwood Creek and its tributaries than any other entity or individual". (R1076) The City claimed its "water rights in Little Cottonwood Creek include … 57-10009 through 57-10015". (R1076-77; see also 1086-87) Sandy City then recorded its deed leading to the quieting of title in Haik v. Sandy City in May 2011.

Within two weeks, the City sent its letter to Salt Lake Valley Health Department and the Town of Alta. (R2737-2738, ¶¶69-76; R2765, ¶56; R1214) On one hand the City asserts "amount of water allowed under the contract cannot exceed 50 gallons per

day per connection" (R1214); and on the other asserts: "The only thing that has changed since 1997 is that the 1963 Agreement has been abandoned." (R2765, ¶53) Years earlier, in May 2008; the City filed an affidavit attesting to abandonment. (R2765-66, ¶¶59-61; R1215-18) The City admits approved "application a16846 allows the City to use more than the amount of water described in the 1963 Agreement in Albion Basin" and the City asserts it is supplying water to the homes in the same subdivision pursuant to that water right. (R2765, ¶54; R2764, ¶50; R1184-1198)

The City's letter prompted permit denial. (R2005, ¶35; R2726, ¶14)[2] SLVHD asserts "…failure to attach the required documentation of a letter from the City indicating his access to water, the sole basis for the summary judgment decision of the Health Department's hearing Officer" led to denial of approval of sewerage for homes in the Albion Basin Subdivision. (Appellate Case 14-4074 Doc. 01019325972 pp. 36-37)". (R2766, ¶64) Before the City's letter, water certification letters issued for other landowners in the City's service area outside its corporate boundaries. (R2810-74) The City filed reports showing deliveries to Haik's formerly Biddulph's right. (R2474-82) The City entered into new water supply permit and agreements. (R2767, ¶67; R2875-80; R2881-86; R2887-92) The City obtained approval for other domestic water users

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[2] The Salt Lake County Service Area #3 determined Haik's "plans would implement an acceptable engineered and/or construction control and land management strategy for these lots." (R2913; R2912-2914; R2772, ¶94) The Town Building Official issued notice of intent to issue the building permit for this residence once Salt Lake Valley Health Department issues were addressed. (R2800-2808; R2766-2767, ¶65)

inhabiting the City's service area outside the corporate boundaries to comply with current conditions. (2767-68, ¶¶68-69; R2893-2911) The City gave approval to water supply and permit agreements to supply construction of new single-family dwellings and demolition and reconstruction of single-family dwellings outside the municipal corporate boundaries. (R2768, ¶¶70-71)

Second Federal District Court Action (Haik II)

Haik filed a complaint in Haik v. Salt Lake City (2012) Case No. 2:12-cv-00997-TS (R3068-3182; particularly R3181-82) Seven counts are alleged: Count I sought to set aside the prior judgment for after-discovered fraud upon the court. (R3155-57). Count II sought relief pursuant to 42 U.S.C. §1983 for denial of equal protection by the Fourteenth Amendment to the United States Constitution by the City. (R3158-64) Count III sought relief pursuant to 42 U.S.C. §1983 for denial of equal protection in a personal capacity by Niermeyer, who signed the City's May 2011 letter. (R3164-69) Count IV sought relief pursuant to 42 U.S.C. §1983 for denial of substantive due process by the City. (R3169-71) Count V sought relief pursuant to 42 U.S.C. §1983 for denial of procedural due process by the City. (R3171-74) Count VI sought relief for misrepresentation. (R3175-79) Count VII sought relief for civil conspiracy between the City and Alta. (R3179-81)

Within the complaint there are only 14 paragraphs citing to the Utah Constitution. (R3079, ¶62; R3082, ¶78; 3135, ¶363; R3137, ¶373; R3143, ¶407; R3144, ¶417; R3151, ¶459; R3158, ¶¶494, 496, and 497; R3159, ¶500; R3166, ¶543; and R3172, ¶574) Those

allegations pertain to showing falsity of statements, distinguishing issues not litigated; change in material operative facts; clearly established law pertinent to immunity; and legal claim of entitlement arising under State law. (Case 2:12-cv-00997-TS, Doc. 38, pp. 9, 11, 16; Doc. 39, pp. 9-11, 18; Doc. 40, pp. 7, 10, 13, 21, 23-24, 27, 57) (Case 2:12-cv-00997-TS, Doc. 38, pp. 9, 11, 16, 24-25, 46, 61-62; Doc. 39, pp. 9-11, 18, 46, 48-49, 50-51; Doc. 40, pp. 7, 10, 13, 21, 23-24, 27, 46, 52, 55, 57-59)

Without hearing, the Federal District Court dismissed the action. (R3203) Only brief discussion is given of Article XI, § 6. (R3202). As to res judicata, the District Court decision is similarly brief. (R3200) No consideration is expressed as to the City's the 1963 Agreement was abandoned or the State Engineer's approval of water supply allowing use of more water than prescribed by the 1963 Agreement. (R3199-3203)

Second Tenth Circuit Opinion (Haik II)

The Tenth Circuit Court recognized the City did not argue issue preclusion applied as to due process claims. (R3187) The Tenth Circuit acknowledged due process claims were not raised against the City in the case before Judge Jenkins in Haik I. (R3188) In reviewing Federal Due Process claims, the Tenth Circuit *sua sponte* gave preclusive effect relying upon Article I, § 22. (R3187-89) The Tenth Circuit saw denial of a building permit and denial of water supply as a difference without a distinction. (R3188) The Tenth Circuit opined as to municipal appropriation that "Nothing about this process requires the successful applicant to perfect or to use the water in the manner approved."

(R3188-3189) This reasoning does not square with prior precedence of this Court that valid appropriation requires: (1) intent to apply the water to beneficial use; (2) a diversion from the natural channel by means of a ditch, canal, or other structure; and (3) an application of it within a reasonable time to useful industry. Sowards v. Meagher, 37 Utah 212 (1910)." (R2759-60, ¶19)

The Tenth Circuit rejected contention Article XI, § 6, applied determining, even assuming the lots were within the City's service area; people "beyond the limits of the city" were not protected inhabitants. (R3188) Yet, this Court when interpreting Article XI, § 6, previously rejected a narrow or strict reading, Genola Town v. Santaquin City, 80 P.2d 930, 936 (Utah 1938). (R2762, ¶37) A "reasonableness requirement" articulated in County Water System v. Salt Lake City, 278 P.2d 285 (Utah 1954), and Platt v. Town of Torrey was also rejected as applying "only after a municipality elected to supply water to nonresidents". (R3189) The Tenth Circuit rejected any preclusive effect as to equal protection because "new allegations are enough to make the Haiks' equal-protection … claims different for purposes of claim preclusion". (R3187; R3190)

Having Been Sued Haik Counterclaimed

The City sued Haik alleging his claim to water "will interfere with the Plaintiffs' respective rights to divert, treat and provide LCC water to the members of the public served by Plaintiffs". (R2017, ¶119) Having been sued and denied dismissal, Haik counterclaimed. (R2963-65; R724-83) The Counterclaims ask the District Court declare

the rights of the parties as to five aspects of the City's water rights allegedly injured. (R2782)

First Counterclaim: Proper Interpretation of Article XI, § 6

The first legal question presented was whether Utah Constitution Article XI, § 6, is properly interpreted to give property owners a constitutionally protected right to water when a change application is approved designating their subdivision as a permissible place of use of water. (R2757-58, ¶9) The City asserts it holds and exercised extra-territorial jurisdiction pursuant to Article XI, § 6, and Utah Code § 10-8-15. (R2762, ¶32)

Haik contends the phrase "shall be preserved, maintained and operated by it for supplying its inhabitants with water" imposes a requirement that water be supplied given the State Engineer's approval. (R2758, ¶13) They contend exercise of jurisdiction should encompass duty to serve within that jurisdiction. (R2763, ¶44) The City exercised extra-territorial jurisdiction over Counterclaim Plaintiffs' properties by expressly defining the Salt Lake City Watershed Area as including "all of the watershed area east of the Little Cottonwood Canyon Road and North Fork of Little Cottonwood Road". (Salt Lake City Code §17.04.010) (R2769, ¶78)

The City has contended that construing "the constitution in that manner would be a significant perversion of the constitutional language and indeed the entire legal and administrative process governing the ownership and use of water". (R2758, ¶15) The City has also contended that, even if a duty to supply were recognized, non-residents of

Salt Lake City would not fall within the parameters of the constitutional duty because the constitutional claim "depends on the location of the property". (R2760, ¶20)

Second Counterclaim: Article I, § 24 Mandates

The second legal question presented is whether Article I, § 24, mandates water supply through revocable contracts, as evidenced by the water sales records, approval letters, and water permit and supply agreements provided to others including homes in the same subdivision; in order to uniformly provide to inhabitants who reside within the City's municipal service area though outside the municipal corporate boundaries. (R2769, ¶76) Haik contends the different treatment given he as opposed to other inhabitants within the City's municipal service area, though residing outside the municipal corporate boundaries, in receiving approvals or supply are not based upon differences that have a reasonable tendency to further the objectives of Article XI, § 6 and are so discriminatory as to violate uniformity required by Article I, § 24. (R2769, ¶77)

Haik stands ready, willing and able to finance the costs of extension and to accept water at the prescribed payment rates as afforded other inhabitants without the City's municipal service area though outside the municipal corporate boundaries. (R2769, ¶80) He contends a remedy should lie because, given ready responsibility and willingness to bear the burdens of extension, the City's duty is "a ministerial act about which it would

have no discretion" as opined in Rose v. Plymouth Town, 110 Utah 358, 173 P.2d 285, 286 (Utah 1946). (R2769-70, ¶81)

Third Counterclaim: Article I, § 7 and LUDMA

The third legal question presented was whether promising to deny water "as a means of controlling development in the Albion Basin" violates rights afforded under the provisions of the Municipal Land Use, Development, and Management Act, Utah Code §§ 10-9a-101 et seq.; thereby denying due process of law protected by Article I, §7, of the Utah Constitution. (R2771, ¶87) Utah Code §10-8-15 does not confer authority upon Salt Lake City to "control development"; that power is conferred by Utah Code 10-9a-102(2) and does not extend to Salt Lake City controlling development in Albion Basin, particularly Albion Basin Subdivision. (R2771, ¶88)

Salt Lake City can only "exercise its legislative powers through ordinances." Utah Code § 10-3-701. (R2773, ¶95) The expressed intent of denying new water certifications evidenced in the City's memoranda do not disclose passage or enactment by the governing body of the City; are not in the mandated form of an ordinance, Utah Code §§ 10-3-704-05; and do not include disclosure of publication or posting, Utah Code § 10-3-711. (R2773, ¶96) "Failure to strictly follow the statutory requirements in enacting the ordinance renders it invalid." Call v. West Jordan, 727 P.2d 180, 183 (Utah 1986). (R2773, ¶97) Promising to deny water violates "the requirement of reasonableness,

which attends all actions by municipalities" and which does "not cease at the city limits." Platt v. Town of Torrey, 949 P.2d 325, 330 (Utah 1997). (R2773, ¶98)

Fourth Counterclaim: Validity of Denying Stated Beneficial Use

The fourth legal question seeks declaration determining the validity of appropriation by the City in Water Right 57-10015 (a16846) or Water Right 57-10013 (a16844) due to an expressed intent and promise not (1) to apply the appropriated water to the stated beneficial use; and (2) refusal and failure to supply appropriated water within a reasonable time to the stated beneficial use. (R2781, ¶129) This question includes declaration determining the continued validity of appropriation by the City as expressed in Water Right 57-10015 (a16846) or Water Right 57-10013 (a16844) due to failure to apply the appropriated water to the stated beneficial use. (R2781, ¶130)

Fifth Counterclaim: Effect of State Policy of Displacing Competition

The fifth legal question seeks declaration determining whether the "state policy of displacing competition with regulation in the area of municipal control over water and water rights" articulated in Salt Lake City Corp. v. Big Ditch Irrigation Co., 2011 UT 33, has now led to the City rendering a utility service outside its city limits to such an extent as to be "subject to some public regulation" as recognized in Salt Lake County v. Salt Lake City, 570 P.2d 119, 122 (Utah 1977), and if so, the extent of the regulation and rights, status, and other legal relations of Counterclaim Plaintiffs as to the City arising from or relating to that regulation. (R2781, ¶132)

Preclusion Applied To Counterclaims

The District Court, Judge Stone, applied claim preclusion stating:

> Salt Lake City's (SLC) Motion to Dismiss is GRANTED in its entirety as to Defendant Haik, and the ` Haik's Counterclaims are DISMISSED. As to Mr. Haik, the Counterclaims are barred by res judicata. While Utah courts are not bound by prior federal court interpretations of the Utah Constitution, parties to those prior federal court cases are. During argument, counsel for Mr. Haik and the Butler Management Group conceded that the claims and issues asserted in the first, second, and third Counterclaims were presented in one or both of the prior federal cases—Haik v. Town of Alta (1996) and Haik v. Salt Lake City (2012). And, while the fourth and fifth Counterclaims were not asserted in those cases, they could have been. As such, they are barred by claim preclusion. Macris & Assocs., Inc. v. Neways, Inc., 2000 UT 93, ¶ 19, 16 P.3d 1214 ("Claim preclusion involves the same parties or their privies and also the same cause of action, and . . . precludes the relitigation of all issues that could have been litigated as well as those that were, in fact, litigated in the prior action.").

(R4300) A brief exchange occurred as to the prior actions:

> MR. HAIK: Which allegations?
>
> THE COURT: The disparate treatment and these permits being granted to other people in the plat.
>
> MR. HAIK: No. The -- for Judge Jenkins, Judge Jenkins was back in -- that lawsuit was basically about 1994 to 1996. Some of these –
>
> THE COURT: Hadn't happened at that point.
>
> MR. HAIK: -- hadn't happened yet, so he couldn't deal with that. The third counterclaim –
>
> THE COURT: And the Stewart?
>
> MR. HAIK: They were raised in the Stewart matter. And I understand the underlying principle is they're saying, well, you don't have a federal

> constitutional right pertaining to those. But that's where the Jensen decision to which I referenced you, and it's cited in the brief, where the Utah Supreme Court explains the fact that the same facts are material both weighs under the federal constitutional claim and the state constitutional claim.
>
> THE COURT: I understood that –
>
> MR. HAIK: Okay.
>
> THE COURT: -- but I gotta tell you, I have a little problem with the notion that federal courts can't also decide state constitutional questions if they have jurisdiction over the whole.
>
> MR. HAIK: Oh, and I understand that, Your Honor.
>
> THE COURT: And so I guess the question I -- is, was this disparate treatment under the state constitution raised in Stewart 1?
>
> MR. HAIK: We did -- in the first Stewart, yes, there were equal protection, disparate treatment. And these were the same facts that were at issue.
>
> THE COURT: Okay.
>
> MR. HAIK: Okay.

(R4227, p. 18, ll. 6-25; R4228, ll. 1-20)

Third Tenth Circuit Opinion Reversing and Remanding State Law Issues

Judge Stone did not address the most recent opinion of the Tenth Circuit reversing dismissal based upon preclusion by Judge Stewart of the appeal of the denial by Salt Lake County Board of Health ("SLVHD"); Case 2:13-cv-01051-TS in the United States District Court for the District of Utah. (Case 2:13-cv-01051-TS Doc 25)

SLVHD had removed the case and moved dismissal under Federal Rule of Civil Procedure 12(b)(6), arguing claims were barred by the doctrine of issue preclusion because of the same actions preceding this dispute. (App. Case 14-4074 Doc. 01019397152 pp. 1-2) Haik moved to remand to state court, claiming his complaint raised issues primarily of state law, but the district court denied his motion and summarily dismissed the case. (App. Case 14-4074 Doc. 01019397152 pp. 2) The Tenth Circuit reversed the dismissal and remanded the State law questions to the State Court. (App. Case 14-4074 Doc. 01019397152 pp. 8)

ARGUMENT

Essential Elements of Claim Preclusion Are Missing

None of the alleged counterclaims are barred by claim preclusion. The second or third of the three essential elements is missing as to each counterclaim. "All three elements must be established for claim preclusion to apply." Miller v. Usaa Cas. Ins. Co., 2002 UT 6, ¶ 58. Those latter elements being:

> Second, the claim that is alleged to be barred must have been presented in the first suit or be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits.

Snyder v. Murray City Corp., 2003 UT 13, ¶ 34..

Change of Circumstance and Counterclaims Inappropriate to Prior Actions

The alleged counterclaims arise under the Utah Constitution, particularly Article I, § 7 and Article I, § 24, and Article XI, § 6; and prior decisions of this Court. Haik v. Salt

Lake City (2012) did not allege any claims for relief under the Utah Constitution. In this action the State law counterclaims are pled solely for declaratory relief in response to claim of injury and suit by the City. The City having never before asserted injury to its alleged water rights, there was no occasion for counterclaims challenging aspects and validity of the City's water rights.

By alleging claim of injury to the City's water rights, a new event occurred giving rise to the State law counterclaims and facts which differ "in time, space, origin, or motivation". Gillmor v. Fam. Link, LLC, 2012 UT 38, ¶ 13, 284 P.3d 622, 627. As to Haik v. Town of Alta (1996), this point is especially compelling in that the City "did not list SLC's many approved change applications" (Case 2:12-cv-00997-PMW Document 27 Filed 11/16/12 Page 24 of 53) (R2752, ¶153) and did not disclose its un-metered water sales being made to Lots 9, 13, and 21 of Albion Basin Subdivision (the subdivision in which the Haik lots are located). (R2752, ¶154) Haik v. Town of Alta (1996) was decided long before many of the acts underlying the current counterclaims occurred such as issuance of water approval letters, application to allow current compliance, continued issuance of water supply agreements. The City admits: "Judge Jenkins did not directly address the claim that Art. XI, § 6, of the Utah Constitution requires the City to provide water". (App. Case 13-4050 Doc 01019097685, p. 26)

By suing for alleged injury to the City's water rights, the City presented a change of circumstances that takes the counterclaims out of any preclusion:

> Material operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first. See Illustrations 10-12. Where important human values -- such as the lawfulness of a continuing personal disability or restraint -- are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought.

Restat 2d of Judgments, § 24 cmt. f (2nd ed. 1982). Continuing State constitutional guarantees and the duties of municipalities and rights of Utah citizens pertaining to municipal water supply afford "a sufficient basis for concluding that a second action may be brought". Id.

Pragmatically, as to Haik v. Salt Lake City (2012), the counterclaims for declaratory relief present distinctly different questions than claims seeking relief pursuant to 42 U.S.C. § 1983 for denial of Federal Constitutional protections. The question of whether the state policy of displacing private water rights which flows from Article XI, § 6, has led to such extensive water supply outside the City's corporate boundaries (now the largest water retailer in Utah) so as to exceed the exemption from regulation previously recognized does not form a single convenient unit with relief pursuant to 42 U.S.C. § 1983. Question as to the invalidity of municipal appropriation based upon intent to deny and denial of the stated beneficial use contrary Sowards v. Meagher, 37 Utah 212, 108 P. 1112, 1116 (1910) and In re Bear River, 819 P.2d 770 (Utah 1991) again plainly differ from relief under 42 U.S.C. §1983. Question as to when the

"reasonableness requirement" attaches to municipal actions similarly is not in any manner an aspect of relief under 42 U.S.C. § 1983.

Only Utah Supreme Court Finally Interprets State Constitution

This Court steadfastly declares its "authority and obligation to interpret Utah's constitutional guarantees, including the scope of due process, and we owe federal law no more deference in that regard than we do sister state interpretation of identical state language." State v. Tiedemann, 2007 UT 49; Gray v. Dep't of Emp't Sec., 681 P.2d 807 (Utah 1984). Haik contends Federal courts cannot foreclose Utah State Court review of Federal interpretations of Article XI, § 6; and Article I, § 7 and Article I, § 24, of the Utah Constitution as applied to the City's new claims of injury never before pled. Because this Court reserves final interpretation, particularly given the uniqueness of Article XI, § 6, and dissimilarity between Utah Constitution Article I, § 24, and the Federal Constitution; the Utah Courts are available to finally declare State constitutional provisions.

Compelling Need to Finally Interpret State Constitutional Guarantees

Utah law must guide future conduct that is at issue. In this case, there is reason for interpreting unique State constitutional provision at the heart of this dispute. The Tenth Circuit's reasoning introduced clear conflict with prior precedence of this Court and confusion as to the scope and the effect of State constitutional guarantees. The Tenth Circuit began by interpreting denial of a building permit and as denial of water asserting

it was "difference without distinction". This perception runs wholly counter to State constitutional debate of a unique provision.

During debate on amending Article XI, § 6, Mr. Goodwin remarked: "Everyone has his pro rata right to the water, and all charges are for another purpose altogether; that is, when it is carried to a man's house, they charge him for it, and those three words in the article are simply surplusage." 1 Proceedings and Debates of the Constitutional Convention for the State of Utah, 670-71 (1898). Mr. Van Horne similarly remarked "[Section 6] is simply a general declaration that the municipality shall reserve its control over water rights for the supply of its inhabitants." Id. at 671. Samuel R. Thurman further remarked:

> Now I take the position that if we leave the balance of the section stand, requiring cities to hold this property as a trust for the benefit of the inhabitants to supply them with water, the courts will always construe the question of a reasonable charge, because it will be a trust fixed and form by the Constitution for the purpose of supplying the people with water, and they will have no right to charge more than a reasonable amount.

Id. at 672. There is a profound recognition of the vital importance of water in Utah. Delta Canal Co. v. Frank Vincent Family Ranch, LC, 2013 UT 69. Water is not akin to all other property.

The Tenth Circuit *sua sponte* equated claim of entitlement germane to a taking under Article I, § 22, with question whether municipal water services are an "entitlement constituting property under the purview of due process protection of the Constitution of Utah, Article I, Section 7". Rupp v. Grantsville City, 610 P.2d 338, 340 (Utah 1980).

Given the uniqueness of Article XI, §, and the usufructuary character of water this equivalence cannot be said to exist such that independent analysis is necessary. Extending preclusive effect from Article I, § 22, to Article XI, § 6, or Article I, § 7, without independent analysis is inappropriate.

By approaching the question by extension from Article I, § 22, the Tenth Circuit did not consider the language of Article XI, § 6. Instead, focus was upon appropriative law without reference to seminal cases. Those seminal cases are clear: "the three principal elements to constitute a valid appropriation of water" are: "(1) intent to apply it to some beneficial use; (2) a diversion from the natural channel by means of a ditch, canal, or other structure; and (3) an application of it within a reasonable time to some useful industry." Sowards v. Meagher, 108 P. 1112, 1116 (Utah 1910). "An appropriative water right depends on beneficial use for its continued validity." In re Bear, 819 P.2d 770, 775 (Utah 1991). Appropriating water imposes a duty to use:

> He may not file his application, construct his works, and then hold the water and wait for something to happen. He cannot withhold the water from the proposed beneficial use.

Sowards v. Meagher, 37 Utah 212, 225, 108 P. 1112, 1117 (1910). Withholding and denial from the proposed beneficial use is the foundation of the City's intent and actions. Withholding and denial of beneficial use cannot form a legally cognizable basis for the City's alleged injury.

The Tenth Circuit reasoned without reference to this precedence: “Nothing about this process requires the successful applicant to perfect or to use the water in the manner approved.” (App. Case 13-4040 Doc. 01019259740 p. 14) Utah Constitution Article I, § 26, provides the opposite: “The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.” Utah Constitution Article XI, § 6, mandates a municipality "shall be preserved, maintained and operated by it for supplying its inhabitants". The State Constitution and this Court’s precedence and that Federal reasoning do not square.

The Tenth Circuit skirts this mandate to supply evident in the plain language of Article XI, § 6, by distinguishing inhabitant of the municipal corporate boundaries from residents in the municipal service area. Having appropriated to supply and made the lands at issue part of the established municipal service area, Haik contends that municipal function is recognized:

> It is to be kept in mind that the authority of the city to sell its surplus water beyond the city limits is derived in the same manner and from the identical section of the statute which permits it to supply its own inhabitants. Such sale of surplus water, being authorized by law as a municipal function, is as much a municipal function as the supplying of water within the city limits, and disposing of the surplus outside its limits as permitted by statute does not change its character as a municipality; nor does the ownership and management of the necessary facilities beyond the city boundaries change such property to anything other than municipal property.

County. Water Sys. v. Salt Lake City, 3 Utah 2d 46, 53, 278 P.2d 285, 290 (1954).

Having appropriated to provide water for homes in the particular subdivision, and sales of water to some homes in that subdivision; the assertion of what is needed to elect so as to extend reasonableness arises. Does that extension occur upon appropriation, upon sales, or upon some other form of election? Whether "election" occurred raises serious question as to the municipal function at issue as it is clear the municipal function does not stop at the municipal boundary: Municipalities must act reasonably within and without their corporate boundaries. Platt v. Town of Torrey, 949 P.2d 325, 330 (Utah 1997).

This point is especially compelling in that Salt Lake City characterizes itself as the largest water retailer in the State, supplying nearly all of the Little Cottonwood Canyon, and owning or controlling the majority of the water in that canyon; all outside of its municipal boundaries. It is this extensive control and supply outside the City's corporate boundaries which likewise raises the question whether its conduct exceeds the limited exemption recognized from regulation by the Public Utilities Commission.

Essential Elements of Issue Preclusion Are Missing

District Court Failed to Independently Analyze Constitutional Guarantees

Jensen v. Cunningham, 2011 UT 17, is explicit: "Therefore, the state district court's grant of summary judgment to the defendants solely on the basis of collateral estoppel was in error." The reasoning of this Court manifestly applies:

> Without an analysis of the independent protections afforded by our state constitution, the state district court dismissed the Jensens' state law claims

> because a federal court found that the undisputed material facts did not give rise to a federal constitutional violation. This was error. Because the state and federal standards for determining whether a plaintiff is entitled to damages for a constitutional violation are different, a federal court determination that the material undisputed facts do not give rise to a federal constitutional violation does not preclude a state court from deciding whether those same facts will give rise to a state constitutional violation.

Jensen v. Cunningham, 2011 UT 17, ¶¶ 45-49, 250 P.3d 465. That same error occurred here.

This Court charged district courts to independently analyze State Constitutional provisions. That there are over-lapping facts was clearly conceded and Jensen expressly noted. Moreover, damages are not sought only declaration of Utah law to guide future conduct and to rebut new claim of injury. The fact the second Federal complaint included reference to State Constitutional provisions does not alter the fact claims were asserted pursuant to 42 U.S.C. §1983 not State Constitutional claims.

Article XI, § 6, has no comparable Federal constitutional provision or standard. There is no "default" stance in the Federal Courts as to its meaning. This Court indisputably holds the duty and the obligation to interpret Article XI, § 6; particularly as the Federal interpretation is asserted against the interests of Utah citizens. There is no error in this notion.

Issues are Different

The fifth counterclaim as to the effect of the State policy of displacement upon exemption from regulation and the fourth counterclaim legal question seeking declaration

determining the validity of withheld or denied beneficial use, particularly of Water Right 57-10015 (a16846) or Water Right 57-10013 (a16844) plainly lack identity with Haik v. Town of Alta (1996) or Haik v. Salt Lake City (2012). No argument is even asserted to that effect. Similarly, the third counterclaim - whether the City promising to deny water "as a means of controlling development in the Albion Basin" violates rights afforded under the provisions of the Municipal Land Use, Development, and Management Act, Utah Code §§10-9a-101 et seq.- has no identity with either of the earlier actions. The second counterclaim also differs as Article I, § 24, was neither pled nor adjudicated in Haik v. Salt Lake City (2012). Though Article I, § 24, of the Utah Constitution was raised in Haik v. Town of Alta (1996), the issue differed in that it pertained to extension of the Water Supply Agreement between Alta and the City not disparate treatment arising from the City's approved water rights and supply, particularly as the City kept from Judge Jenkins those approved water rights. There is no basis for issue preclusion as to these issues.

Lack of Finality

There is no dispute the Tenth Circuit interpreted Article XI, § 6, of the Utah Constitution. The first counterclaim, however, lacks finality as previously discussed. The Federal Courts cannot foreclose review by this Court or its lesser State courts when exercising "authority and obligation to interpret Utah's constitutional guarantees, including the scope of due process, and we owe federal law no more deference in that

regard than we do sister state interpretation of identical state language." State v. Tiedemann, 2007 UT 49 (2007); Gray v. Dep't of Emp't Sec., 681 P.2d 807 (Utah 1984). In the context of a new claim of injury, there is no finality as to the proper interpretation of Article XI, § 6, particularly as the issue is presented solely for declaration.

By Stare Decisis Sandy's Deed Is Void and Cannot Be Basis of Injury

"The doctrine of stare decisis is crucial to our system of justice because it ensures 'predictability of the law and the fairness of adjudication.'" State v. Mauchley, 67 P.3d 477, 481 (Utah 2003)(quoting State v. Thurman, 846 P.2d 1256, 1269 (Utah 1993)). The import of the doctrine is clear:

> Under the doctrine of stare decisis, once a point of law is decided, that ruling should be followed by a court of the same or a lower rank in subsequent cases confronting the same legal issue. Once the court of last resort makes a legal ruling, decisions on the same issue by courts of a lower rank are superseded. Stare decisis forges certainty, stability, and predictability in the law. It also reinforces confidence in judicial integrity and lays a foundation of order upon which individuals and organizations in our society can conduct themselves. Thus, stare decisis results in adherence to a single rule of law throughout a jurisdiction.

State v. Shoulderblade, 905 P.2d 289, 292 (Utah 1995).

This Court ruled "the Haik Parties were the first to record their deed to the disputed water right in good faith". Haik v. Sandy City, 254 P.3d 171, 180 (Utah 2011). Pursuant to Utah's Recording Act and Utah's Water and Irrigation Act, Sandy City's deed is void. Utah Code §§ 57-3-103 and 73-3-12. Yet, the City's suit alleges:

> 68. The Bentleys and Saunders and Sweeney, Inc. sold any water rights they had relating to lands under the South Despain Ditch to Sandy

> City in 1977. Any adjudication in which it was concluded otherwise is not binding upon Plaintiffs, as Plaintiffs were not parties to that proceeding. (R2011, ¶68)
>
> 69. The Haik v. Sandy City decision does not affect the validity of the conveyance from the Bentleys and Saunders and Sweeney to Sandy City. (R2011, ¶69)
>
> 70. One requirement for water rights to pass as an appurtenance is unity of title. Ownership of the water rights in question and the land in question must be the same. After the conveyance to Sandy City, no conveyance of land by Saunders and Sweeney or the Bentleys could carry by appurtenance any part of the South Despain first primary award. (R2011, ¶70)

The City's allegations defy the point of law clearly applying Utah Recording Act and Utah's Water and Irrigation Act. Sandy City's deed was void whilst Haik's deed conveyed the water at issue and its appurtenance.

A void deed could never clothe the City with any interest upon which to quiet title. "A contract or a deed that is void cannot be ratified or accepted". Ockey v. Lehmer, 189 P.3d 51, 56 (Utah 2008). The City's premise is that the State Engineer's approvals, though never appealed, likewise lack legal effect. (ADD22-ADD25; ADD27-ADD28) That premise is wrong. Utah Code § 73-3-14; Smith v. Sanders, 112 Utah 517, 521 (1948).

Because the City premises its suit upon a void deed and rejects the plain meaning of the State Engineer's approvals, the District Court clearly erred in failing to dismiss the suit. The District Court having though asserted jurisdiction over the City's claims, the City necessarily placed at issue the validity and other aspects upon which the City rests

its allegation of injury. Therefore, Haik is entitled to have the District Court declare the parties' rights as to those issues.

CONCLUSION

The largest water retailer is suing a citizen about "death by a thousand cuts" (R5323, ll. 21-22). The City alleges the proposed lawful use of private water (ADD22-ADD25) for a few single family residences (R2014, ¶96) the City contracted to deliver (ADD13-ADD11) injures public water the City appropriated (ADD35-ADD37) while intending to and denying the stated beneficial use of supplying those very same homes. (ADD30-ADD34; ADD38-ADD39). The City "does not record the low flows" (R2472-2473) yet alleges any lawful use of the private water interferes with approximately 2,686.0 ac-ft. appropriated to supply (R2422) several of Utah's largest ski resorts including the water appropriated to supply the homes but denied to them. It is the City's "muscle" fully applied to "deny" water and "deny" certification. (R2770-71, ¶85; ADD38-ADD39; R2770, ¶83; ADD30-ADD34)

There is a stark inconsistency in the City's positions arising solely from the City's interpretation of Article XI, § 6. Haik contends the phrase "shall be preserved, maintained and operated by it for supplying its inhabitants with water" imposes a requirement that water be supplied given the State Engineer's approval. (R2758, ¶13) The City contends that construing "the constitution in that manner would be a significant

perversion of the constitutional language and indeed the entire legal and administrative process governing the ownership and use of water". (R2758, ¶15)

The City intends and acts to deny the stated beneficial use of supplying those few homes. That intent and those acts cannot be reconciled to the objectively analyzed original plain meaning in historical perspective of the text and structure of Article XI, § 6. The City's intents and acts violate the "trust fixed and form by the Constitution for the purpose of supplying the people with water". 1 Proceedings and Debates of the Constitutional Convention for the State of Utah, 672 (1898).

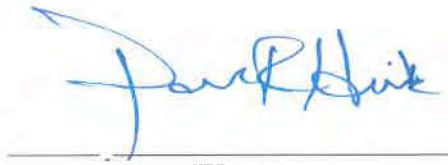
This Court seeks fundamental justice. If, then, the Federal Courts erred in interpreting Article XI, § 6, too narrowly or strictly, erred in opining nothing in municipal appropriation requires intent to use and actual use, erred in recognizing municipal election triggering a duty to treat nonresidents uniformly as provided by Article I, § 24, erred in concluding whether municipal sales to some nonresidents established a municipal utility entitling other nonresidents to water, or erred in not allowing development of a factual record by adjudication, there is risk of fundamental injustice. Utah Citizens seeking State Constitutional protections are faced with two actually divergent and incompatible Federal Court interpretations of the Utah Constitution.

Utah citizens are entitled to seek declaration of Utah law as to public water supply so that they might know how to conduct their future affairs with a definitive interpretation of Utah law applicable to those future efforts. They are entitled to know

Utah law so they can proceed to comply with that Utah law to obtain their building permits for their single-family homes. They are further wholly entitled to defend themselves from claim of injury by the City by showing the invalidity of the City's asserted rights or offsetting duty to actually provide the water thereby rebutting claim of injury.

The District Court was charged to independently analyze State constitutional guarantees in order to apply preclusion based upon prior ruling there was no Federal constitutional protection. The District Court failed to do so. Reversal and remand with guidance must follow.

DATED: August 1, 2016



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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1)(A) because this brief contains 13,907 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(b).

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Respectfully submitted,

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