

2016

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

Utah Supreme Court

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State of Utah  
**In Supreme Court**

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SALT LAKE CITY CORPORATION,

*Petitioner-Plaintiff-Appellee,*

v.

MARK C. HAIK,

*Respondent-Defendant-Appellant.*

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An Appeal from the Third Judicial District Court

Case No. 140900915

The Honorable Andrew Stone, presiding

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**APPELLANT'S BRIEF AND ADDENDUM**

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FILED  
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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)(c)(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<sup>1</sup> 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

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<sup>1</sup> 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)<sup>2</sup> 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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<sup>2</sup> 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).

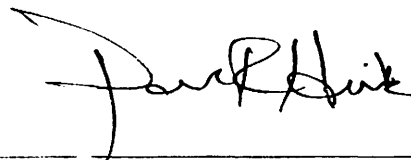
This Court seeks fundamental justice. If, then, the Federal Courts erred in interpreting Article XI, § 6, too narrowly or strictly, erred in opining nothing in municipal appropriation requires intent to use and actual use, erred in recognizing municipal election triggering a duty to treat nonresidents 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

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

PAUL R. HAIK  
Attorney of Record

## 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).

Dated: August 1, 2016.

Respectfully submitted,



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IN THE TRIAL COURT  
OF THE THIRD JUDICIAL DISTRICT  
FOR THE STATE OF UTAH

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SALT LAKE CITY CORPORATION,

Plaintiff and Appellee,

vs.

THE BUTLER MANAGEMENT GROUP

AND MARK C. HAIK,

Defendants and Appellants.

**NOTICE OF APPEAL**

Trial Court No.: 140900915

Judge: Andrew H. Stone

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Notice is hereby given that Defendants and Appellants The Butler Management Group and Mark C. Haik through counsel, Paul R. Haik, appeal to the Utah Court of Appeals the certified final orders of the Honorable Andrew H. Stone entered in this matter January 7, 2016. The appeal is taken from the entire certified judgment.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of January 2016.

*/s/ Paul R. Haik*

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PAUL R. HAIK  
Attorney of Record Attorney for Defendants  
The Butler Management Group  
And Mark C. Haik

## CERTIFICATE OF FILING

I hereby certify that I caused to be sent a true and correct copy of **NOTICE OF APPEAL** to be e-filed this 8<sup>th</sup> day of January, 2016. The court system in turn serves the following attorneys who have appeared and have e-file access.

Shawn E. Draney

*Attorneys for Plaintiff Salt Lake City Corp. and Metropolitan Water District*

Patrick A. Shea

*Attorney for Plaintiff Friends of Alta*

Patrick R. Casaday

*Attorney for Plaintiff in Intervention Sandy City*

Julie I. Valdes

*Attorney for Defendant State Engineer*

Christopher M. Von Maack

*Attorneys for Defendants Judith Maack and Kevin D. Tolton*

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of January 2016.

*/s/ Paul R. Haik*

---

PAUL R. HAIK

Attorney of Record Attorney for  
Defendants/Appellants

The Butler Management Group And Mark C. Haik

The Order of the Court is stated below:

Dated: January 07, 2016

03:14:39 PM

/s/ ANDREW H STONE

District Court Judge

PAUL R. HAIK (10897)  
KREBSBACH AND HAIK, LTD.  
100 South Fifth Street, Suite 1900  
Minneapolis, MN 55402  
Telephone: (612) 333-7400  
Attorney for Defendants The Butler Management Group and Mark Haik

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

SALT LAKE CITY CORPORATION, a  
Utah municipality, METROPOLITAN  
WATER DISTRICT OF SALT LAKE &  
SANDY, a political subdivision of the  
State of Utah, SANDY CITY, a Utah  
municipality, FRIENDS OF ALTA, a  
Utah Not for Profit 501(c)(3) Land Trust  
Corporation,

Petitioner-Plaintiff-  
Counterclaim Defendant and  
Petitioners-Plaintiffs,

vs.

KENT L. JONES, the Utah State  
Engineer, KEVIN D. TOLTON, JUDITH  
MAACK, MARK C. HAIK, and THE  
BUTLER MANAGEMENT GROUP,

Respondents-Defendants  
and Respondents-  
Defendants-Counterclaim  
Plaintiffs.

~~(PROPOSED)~~ ORDER GRANTING  
MOTION FOR RULE 54(b)  
CERTIFICATION OF  
ORDERS DISMISSING  
COUNTERCLAIMS OF  
BUTLER MANAGEMENT GROUP  
AND MARK C. HAIK

Case No. 140900915  
Judge: Andrew Stone

ADD3

January 07, 2016 03:14 PM

04429

1 of 4

This matter comes before the Court on Motion for Rule 54(b) Certification filed by Defendants-Counterclaimants Butler Management Group and Mark C. Haik. Based on the record before the Court, the Court hereby ORDERS, ADJUDGES AND DECREES AS FOLLOWS:

1. That the motion of Defendants-Counterclaimants Butler Management Group and Mark C. Haik for Rule 54(b) Certification is GRANTED as there are (1) multiple claims for relief or multiple parties to the action; (2) the dismissal of counterclaims would be appealable but for the fact that other claims or parties remain in the action, and (3) there is no just reason for delay of the appeal of the dismissal.

2. That as of the date this Order is signed and docketed, the following prior Orders issued in compliance with requirements of Rule 7(f)(2) are considered FINAL JUDGMENTS for purposes of appeal as described in Ut. R. Civ. P. 54(b):

- a. Order filed September 30, 2015 dismissing the Counterclaims of Butler Management Group and Mark C. Haik; and,
- b. Supplemental Ruling on Motion to Dismiss filed November 12, 2015.

**THE COURT'S ELECTRONIC SIGNATURE APPEARS  
AT THE TOP OF THE FIRST PAGE OF THIS DOCUMENT**

**ADD4**

January 07, 2016 03:14 PM

**04430**

2 of 4

APPROVED AS TO FORM:

SNOW, CHRISTENSEN & MARTINEAU

---

Shawn E. Draney

*Attorneys for Plaintiff Salt Lake City Corp. and Metropolitan Water District*

PATRICK A. SHEA

---

Patrick A. Shea

*Attorney for Plaintiff Friends of Alta*

PATRICK R. CASSADY

---

Patrick R. Casaday

*Attorney for Plaintiff in Intervention Sandy City*

UTAH ATTORNEY GENERAL'S OFFICE

---

Julie I. Valdes

*Attorney for Defendant State Engineer*

MAGELBY Cataxinos & GREENWOOD

---

Christopher M. Von Maack

*Attorneys for Defendants Judith Maack and Kevin D. Tolton*

ADD5

January 07, 2016 03:14 PM

04431

3 of 4

# CERTIFICATE OF FILING

I hereby certify that I caused to be sent a true and correct copy of **(PROPOSED) ORDER GRANTING MOTION FOR RULE 54(b) CERTIFICATION OF ORDERS DISMISSING COUNTERCLAIMS OF BUTLER MANAGEMENT GROUP AND MARK C. HAIK**, by United States Mail postage prepaid, on December 15, 2015, to the following attorneys who have appeared.

Shawn E. Draney  
SNOW, CHRISTENSEN & MARTINEAU  
10 Exchange Place, 11<sup>th</sup> Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145  
*Attorneys for Plaintiff Salt Lake City Corp. and Metropolitan Water District*

Patrick A. Shea  
252 South 1300 East, Suite A  
Salt Lake City, UT 84102  
*Attorney for Plaintiff Friends of Alta*

Patrick R. Casaday  
10000 Centennial Pkwy  
Sandy, UT 84070  
*Attorney for Plaintiff in Intervention Sandy City*

Julie I. Valdes  
UTAH ATTORNEY GENERAL'S OFFICE  
1594 West North Temple, #300  
Salt Lake City, UT 84116  
*Attorney for Defendant State Engineer*

Christopher M. Von Maack  
MAGLEBY & GREENWOOD, P.C.  
170 So. Main Street, Suite 1100  
Salt Lake City, UT 84101-3605  
*Attorneys for Defendants Judith Maack and Kevin D. Tolton*

*/s/ Paul R. Haik*

Dated: December 15, 2015 \_\_\_\_\_  
Paul R. Haik

ADD6

04432

SHAWN E. DRANEY (4026)  
SCOTT H. MARTIN (7750)  
DANI CEPERNICH (14051)  
SNOW, CHRISTENSEN & MARTINEAU  
10 Exchange Place, 11<sup>th</sup> Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145  
Telephone: (801) 521-9000  
e-mail: [scd@scmlaw.com](mailto:scd@scmlaw.com)  
[shm@scmlaw.com](mailto:shm@scmlaw.com)  
[dnc@scmlaw.com](mailto:dnc@scmlaw.com)  
*Attorneys for Salt Lake City Corporation and  
Metropolitan Water District of Salt Lake & Sandy*

The Order of Court is stated below:

Dated: September 30, 2015 /s/ ANDREW H. STONE  
08:18:48 AM District Court Judge



IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SALT LAKE CITY CORPORATION, a  
Utah municipality, METROPOLITAN  
WATER DISTRICT OF SALT LAKE &  
SANDY, a political subdivision of the  
State of Utah, SANDY CITY, a Utah  
municipality, FRIENDS OF ALTA, a  
Utah Not for Profit 501(c)(3) Land Trust  
Corporation,

Petitioner–Plaintiff–  
Counterclaim Defendant and  
Petitioners–Plaintiffs,

vs.

KENT L. JONES, the Utah State  
Engineer, KEVIN D. TOLTON, JUDITH  
MAACK, MARK C. HAIK, and THE  
BUTLER MANAGEMENT GROUP,

Respondents–Defendants  
and Respondents–  
Defendants–Counterclaim  
Plaintiffs.

**ORDER**

(1) GRANTING SLC'S MOTION TO  
DISMISS MR. HAIK'S AND THE  
BUTLER MANAGEMENT GROUP'S  
COUNTERCLAIMS;  
(2) GRANTING IN PART AND  
DENYING IN PART SLC'S AND  
MWDSLS'S MOTION TO STRIKE MR.  
HAIK'S AND THE BUTLER  
MANAGEMENT GROUP'S  
AFFIRMATIVE DEFENSES;  
(3) DENYING SLC'S AND MWDSLS'S  
MOTION TO STRIKE DR. TOLTON'S  
AND MS. MAACK'S AFFIRMATIVE  
DEFENSES; AND  
(4) DENYING AS MOOT MR. HAIK'S  
AND THE BUTLER MANAGEMENT  
GROUP'S MOTION FOR LEAVE TO  
SUPPLEMENT AND FOR INQUIRY  
AND TO STAY PROCEEDINGS

Case No. 140900915

Judge: Andrew Stone

ADD7

04299

September 30, 2015 08:18 AM

On August 12, 2015, the Court heard argument on several pending motions in this case. Having reviewed the parties' briefing and considered their arguments from the hearing, the Court **ORDERS** as follows:

**Salt Lake City's Motion to Dismiss Mr. Haik's and the Butler Management Group's Counterclaims**

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.”). **As to the counterclaims of Defendant Butler Management Group, the parties are directed to simultaneously submit additional memoranda within 14 days of the date of this order, not to exceed five pages of argument, regarding that Defendant's standing to assert such claims. A suggestion has been raised that Butler Management Group no longer holds the rights in question. The Court will schedule additional argument if requested or deemed necessary.**

**SLC and MWDSLS's Motion to Strike Mr. Haik's and the Butler Management Group's Affirmative Defenses**

SLC's and the Metropolitan Water District of Salt Lake & Sandy's (MWDSLS) Motion to Strike Mr. Haik's and the Butler Management Group's Affirmative Defenses is **GRANTED IN PART AND DENIED IN PART**. Specifically, the Court **STRIKES** Mr. Haik's and the Butler Management Group's first affirmative defense, that Plaintiffs failed to exhaust their administrative remedies; their second affirmative defense, that the Court lacks jurisdiction due to a lack of a justiciable controversy; their third affirmative defense, that the Court lacks jurisdiction due to a lack of a legally cognizable injury; and the portion of their fourth affirmative

ADD8

04300



defense asserting that Plaintiffs' claims are barred by the statute of limitations. The Court previously rejected each of these arguments in ruling on Mr. Haik's and the Butler Management Group's Motion to Dismiss the Amended Petition.

At this stage in the proceedings, the Court is unable to strike Mr. Haik's and the Butler Management Group's remaining affirmative defenses. *See Wells v. Hi Country Auto Grp.*, 982 F. Supp. 2d 1261, 1263-64 (D.N.M. 2013) ("To strike a defense, its legal insufficiency must be clearly apparent. [The] court must be convinced that there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances could the defenses succeed." (Internal quotation marks and citations omitted)). These are the portion of their fourth affirmative defense asserting SLC's and MWDSLS's claims are barred by laches; their fifth affirmative defense of waiver; their sixth affirmative defense of unclean hands; their seventh affirmative defense of equitable estoppel; their eighth affirmative defense of *res judicata*; their ninth affirmative defense of *stare decisis*; and their tenth affirmative defense of illegality. Mr. Haik and the Butler Management Group are cautioned, however, that the Court's refusal to strike these affirmative defenses, and particularly the equitable affirmative defenses, should not be taken as an invitation to relitigate issues that were litigated in the two federal cases. The Court's dismissal of the Counterclaims precludes Mr. Haik and the Butler Management Group from doing so, even if their arguments are characterized as affirmative defenses.

#### **SLC's and MWDSLS's Motion to Strike Dr. Tolton's and Ms. Maack's Affirmative Defenses**

SLC's and MWDSLS's Motion to Strike Dr. Tolton's and Ms. Maack's Affirmative Defenses is **DENIED**. At this stage in the proceedings, the Court is unable to strike Dr. Tolton's affirmative defenses. *See Wells*, 982 F. Supp. 2d at 1263-64.

#### **Mr. Haik's and the Butler Management Group's Motion for Leave to Supplement and Inquiry and to Stay**

Mr. Haik's and the Butler Management Group's Motion is **DENIED**. ~~AS MOOT~~. Having denied SLC's and MWDSLS's Motion to Strike Mr. Haik's and the Butler Management Group's affirmative defense of *res judicata*, the Court need not decide whether to allow Mr. Haik and the Butler Management Group an

ADD9

04301

opportunity to file a surreply-**the Court has considered the issues raised in Haik's and Butler's request for Surreply, and no further briefing is necessary at this stage.** While the Court is skeptical of the *res judicata* argument based on *Haik v. Sandy City* that Defendants have advanced, the Court recognizes that there is a factual component to this claim that will need to be resolved at a later stage in the proceedings. In light of the Court's denial of SLC's and MWDSL's motion to strike the *res judicata* affirmative defense, there is no need to stay the case to **stay other proceedings in the matter** to allow for immediate discovery on SLC's involvement, if any, in *Haik v. Sandy City*.

To the extent Mr. Haik and the Butler Management Group have sought a stay to allow the State Engineer to issue a report, that request is moot in light of the Court's prior denial of Mr. Haik's and the Butler Management's Group Motion to Designate the State Engineer as and Aid to the District Court.

**THE COURT'S ELECTRONIC SIGNATURE APPEARS  
AT THE TOP OF THE FIRST PAGE OF THIS DOCUMENT**

**CERTIFICATE OF SERVICE**

I hereby certify that on the 2<sup>nd</sup> day of September, 2015, I served a true and correct copy of the foregoing **[PROPOSED] ORDER (1) GRANTING SLC'S MOTION TO DISMISS MR. HAIK'S AND THE BUTLER MANAGEMENT GROUP'S COUNTERCLAIMS; (2) GRANTING IN PART AND DENYING IN PART SLC'S AND MWDSL'S MOTION TO STRIKE MR. HAIK'S AND THE BUTLER MANAGEMENT GROUP'S AFFIRMATIVE DEFENSES; (3) DENYING SLC'S AND MWDSL'S MOTION TO STRIKE DR. TOLTON'S AND MS. MAACK'S AFFIRMATIVE DEFENSES; AND (4) DENYING AS MOOT MR. HAIK'S AND THE BUTLER MANAGEMENT GROUP'S MOTION FOR LEAVE TO SUPPLEMENT AND FOR INQUIRY AND TO STAY PROCEEDINGS** via the Court's greenfiling system, which sent notification to the following:

James E. Magleby  
Christopher M. Von Maack  
MAGLEBY & GREENWOOD, P.C.  
170 So. Main Street, Suite 1100

**ADD10**

**04302**

September 30, 2015 08:18 AM

Salt Lake City, UT 84101-3605  
*Attorneys for Kevin D. Tolton, Judith Maack*

Paul R. Haik  
KREBSBACH AND HAIK, Ltd.  
100 South Fifth Street, Suite 1900  
Minneapolis, MN 55402  
*Attorneys for Mark C. Haik and Butler Management Group*

Julie I. Valdes  
Norman K. Johnson  
UTAH ATTORNEY GENERAL'S OFFICE  
1594 West North Temple, #300  
Salt Lake City, UT 84116  
*Attorneys for Kent L. Jones, the Utah State Engineer*

Patrick A. Shea  
252 South 1300 East, Suite A  
Salt Lake City, UT 84102  
*Attorneys for Friends of Alta*

Patrick R. Casaday  
10000 Centennial Pkwy  
Sandy, UT 84070  
*Attorneys for Sandy City*

/s/ Linda St. John

3353590

**ADD11**

September 30, 2015 08:18 AM

**04303**

5 of 5



**18090**

**SURVEYOR'S CERTIFICATE**

I, S. J. HARRIS, do hereby certify that I am a Registered Land Surveyor, and that I have made a survey of the land shown on this plat, and that the same is correctly and lawfully shown on this plat.

**OWNER'S DECLARATION**

Know all men by these presents that the undersigned, the owners of the above described tract of land, having agreed and divided into lots hereinafter described, do hereby declare for perpetual use of the whole or any part thereof shown on this plat as intended for public use.

**OWNERS' DECLARATION**

Know all men by these presents that the undersigned, the owners of the above described tract of land, having agreed and divided into lots hereinafter described, do hereby declare for perpetual use of the whole or any part thereof shown on this plat as intended for public use.

**SAUNDERS AND SWEENEY, INC.**

**THE BOYER COMPANY**

**ACKNOWLEDGMENT**

STATE OF UTAH, ss.  
County of Salt Lake, ss.  
On this 3rd day of March, A.D. 1924, personally appeared before me, the undersigned Notary Public in and for said County, the persons whose names are subscribed to the foregoing instrument, acknowledged to me that they executed the same for the purposes and consideration therein expressed, and for the same and purposes aforesaid.

**LITTLE COTTONWOOD**

**3 ACRES**

**A SUBDIVISION IN SEC. 1, T. 3 S., R. 1 E.,**

**PLANNING COMMISSION**

APPROVED THIS 10th DAY OF MARCH, A.D. 1924, BY THE PLANNING COMMISSION OF SALT LAKE COUNTY, UTAH.

**BOARD OF HEALTH**

APPROVED THIS 10th DAY OF MARCH, A.D. 1924, BY THE BOARD OF HEALTH OF SALT LAKE COUNTY, UTAH.

**CLERK OF DISTRICT COURT**

APPROVED THIS 10th DAY OF MARCH, A.D. 1924, BY THE CLERK OF DISTRICT COURT OF SALT LAKE COUNTY, UTAH.

**NOTARY PUBLIC**

APPROVED THIS 10th DAY OF MARCH, A.D. 1924, BY THE NOTARY PUBLIC OF SALT LAKE COUNTY, UTAH.

**DETAIL A**

SCALE 1" = 50'

**ACNOWLEDGMENT**

STATE OF UTAH, ss.  
County of Salt Lake, ss.  
On this 10th day of March, A.D. 1924, personally appeared before me, the undersigned Notary Public in and for said County, the persons whose names are subscribed to the foregoing instrument, acknowledged to me that they executed the same for the purposes and consideration therein expressed, and for the same and purposes aforesaid.

**SAUNDERS AND SWEENEY, INC.**

**THE BOYER COMPANY**

**ACKNOWLEDGMENT**

STATE OF UTAH, ss.  
County of Salt Lake, ss.  
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**BOARD OF HEALTH**

APPROVED THIS 10th DAY OF MARCH, A.D. 1924, BY THE BOARD OF HEALTH OF SALT LAKE COUNTY, UTAH.

**CLERK OF DISTRICT COURT**

APPROVED THIS 10th DAY OF MARCH, A.D. 1924, BY THE CLERK OF DISTRICT COURT OF SALT LAKE COUNTY, UTAH.

**NOTARY PUBLIC**

APPROVED THIS 10th DAY OF MARCH, A.D. 1924, BY THE NOTARY PUBLIC OF SALT LAKE COUNTY, UTAH.

**DETAIL A**

SCALE 1" = 50'



977 22

A G R E E M E N T.

THIS AGREEMENT Entered into this 8th day of August, 1934, by and between SALT LAKE CITY, a municipal corporation, party of the first part, and L. E. DESPAIN and ANNIE BUTLER DESPAIN, his wife; ALVA J. BUTLER and ANNA LAURA BUTLER, his wife; GEORGE F. DESPAIN and PRUDENCE B. DESPAIN, his wife; De BART DESPAIN and BERTHA K. DESPAIN, his wife; and CLARENCE L. GILES and LAURA SUE GILES, his wife; parties of the second part, WITNESSETH:

THAT WHEREAS, the parties of the second part are the owners of primary water rights in Little Cottonwood Creek, Salt Lake County, and said primary water rights comprise the total primary rights decreed to the South Despain Ditch in that certain decree of the Third Judicial District Court of Utah, signed by the Honorable C. W. Morse, Judge, on June 16th, 1910.

AND WHEREAS, the party of the first part is desirous of acquiring a portion of the above mentioned primary waters during the winter or non-irrigation season.

NOW, THEREFORE, in consideration of the premises and the agreements herein contained, party of the first part hereby agrees to construct and maintain a main pipe line for the conveyance of the primary waters above mentioned from the Murray City Power Pipe Line at a point near where said pipe line crosses the center of Section 12, T. 3 S., R. 1 E., S. L. B. & M., to the South Despain Ditch, at a point near the east line of the N. W. 1/4 of Section 12 above mentioned, and to construct a branch pipe line of first grade galvanized pipe, said branch line to be

maintained by the parties of the second part, running westerly from the pipe line above described to a convenient location near the residence of Geo. F. Despain and will provide service pipes from said branch line to convenient points on De Bart Despain's, L. E. Despain's, Alva J. Butler's and Clarence L. Giles' property and will provide an outlet at the crossing of the North Despain Ditch of sufficient size to discharge that portion of the Primary water now owned by L. E. Despain; and furthermore a metered service pipe will be laid from the above mentioned branch line to a point on L. E. Maxfield's property which point will be located as near to the house on said property as the present ditch is located.

IT IS FURTHER AGREED that Salt Lake City is to install a meter in the pipe system between the Murray Power Pipe Line and the North Despain Ditch and will deliver the decreed primary waters into said pipe system as measured through said meter and the responsibility for the distribution of the water among the parties of the second part shall rest with the parties of the second part.

IT IS FURTHER AGREED THAT permission is hereby granted to Salt Lake City to enter upon the premises of each of the parties of the second part to construct the pipe system and to maintain the main pipe line and said parties of the second part hereby grant unto Salt Lake City an easement for the construction and maintenance of said main pipe line and reserve unto themselves the surface rights to the land traversed by said pipe line.

Said parties of the second part hereby grant, bargain, sell and convey unto party of the first part the right to the use of the primary waters aforementioned during the winter or non-irrigation season from October 1st to April 1st of the following year, excepting therefrom a culinary reserve of 7,500 gallons per day which is to be delivered into said pipe system during such winter or non-irrigation season, together with 500 gallons per day which the parties of the second part agree to allow to flow through the branch line for delivery to L. E. Maxfield, his successors assigns.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

S E A L

SALT LAKE CITY,

Ethel Macdonald  
City Recorder.

By Louis Marcus  
Mayor

L. E. Despain

Annie Butler Despain

Alva J. Butler

Anna Laura Butler

George F. Despain

Prudence B. Despain

De Bart Despain

Bertha K. Despain

Clarence L. Giles

Laura Sue Giles

Parties of the Second Part.

STATE OF UTAH )  
( SS.  
COUNTY OF SALT LAKE )

On the 8th day of Aug., 1934, personally appeared before me Louis Marcus and Ethel Macdonald, who, being by me duly sworn, did say that they are the Mayor and City Recorder, respectively, of Salt Lake City, and that the name of Salt Lake City was attached to the foregoing instrument by Louis Marcus as Mayor and signed by him and countersigned by Ethel Macdonald

ADD15

02098

as City Recorder, by authority of a resolution of the Board of Commissioners of Salt Lake City on the 8th day of Aug., A. D. 1934, and the said persons acknowledged to me that said corporation executed the same.

Frank A. Shields  
Notary Public, residing at  
Salt Lake City, Utah.

S E A L  
My commission expires Feb. 14, 1936

STATE OF UTAH                    )  
                                  ( SS.  
COUNTY OF SALT LAKE)

On the 16th day of July, 1934, personally appeared before me L. E. Despain, Annie Butler Despain, his wife; Alva J. Butler, Anna Laura Butler, his wife; George F. Despain and Prudence B. Despain, his wife; some of the signers of the foregoing instrument, who duly acknowledged to me that they executed the same.

S E A L  
My commission expires  
September 4, 1935

Laura Sue Giles  
Notary Public, residing at  
Salt Lake City, Utah.

STATE OF UTAH                    )  
                                  ( SS.  
COUNTY OF SALT LAKE )

On the 18th day of July, 1934, personally appeared before me CLARENCE L. GILES and Laura Sue Giles, his wife, some of the signers of the foregoing instrument, who duly acknowledged to me that they executed the same.

L. E. Haynes  
Notary Public, residing at  
Salt Lake City, Utah.

S E A L  
My commission expires March 12, 1938



STATE OF CALIFORNIA     )  
                                  ( SS.  
COUNTY OF LOS ANGELES )

On the 20 day of July, 1934, personally appeared before me De Bart Despain and Bertha K. Despain, his wife, some of the signers of the foregoing instrument, who duly acknowledged to me that they executed the same.

H. E. Nightingale  
Notary Public, residing at  
Los Angeles, California

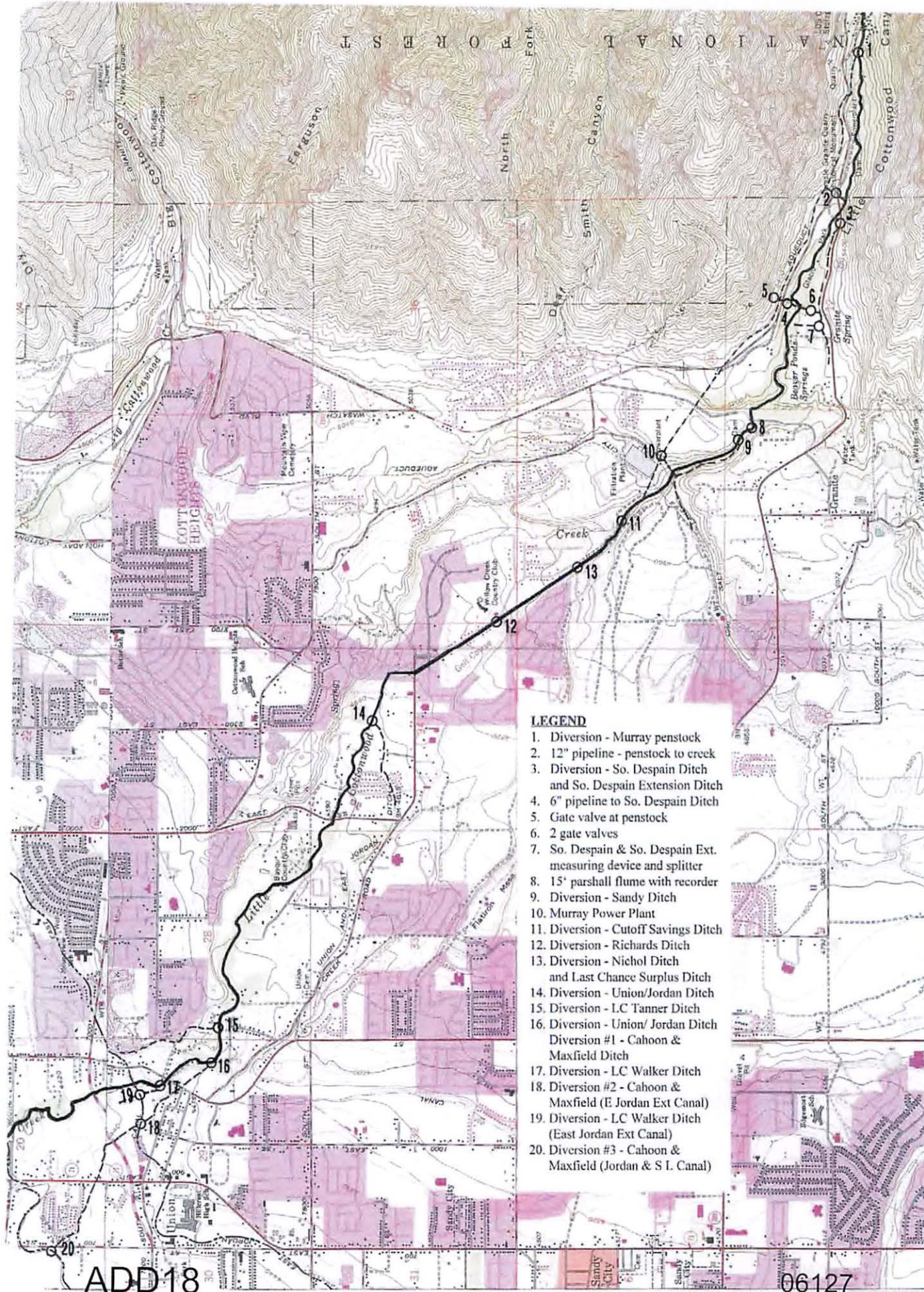
S E A L

My commission expires July 10, 1938

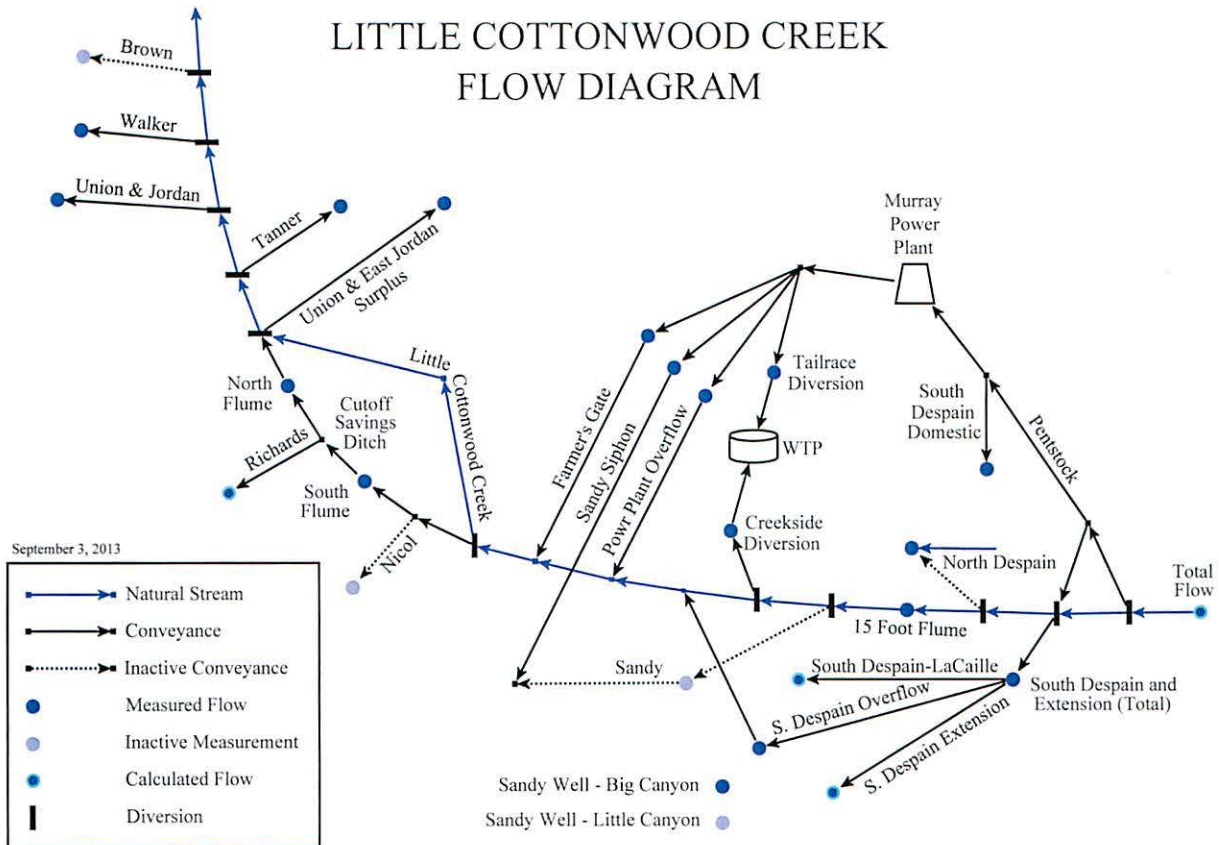
ADD17

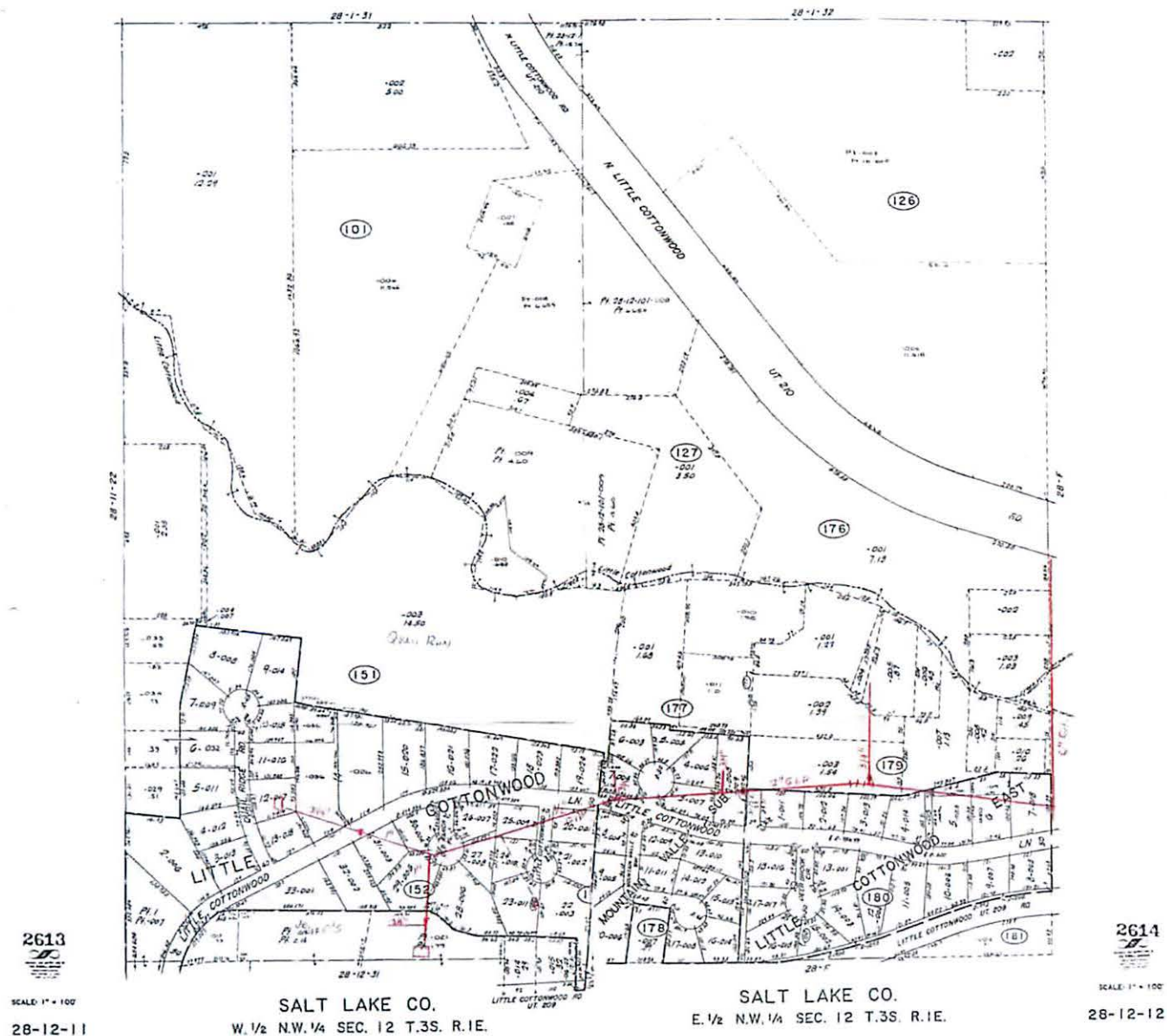
02100

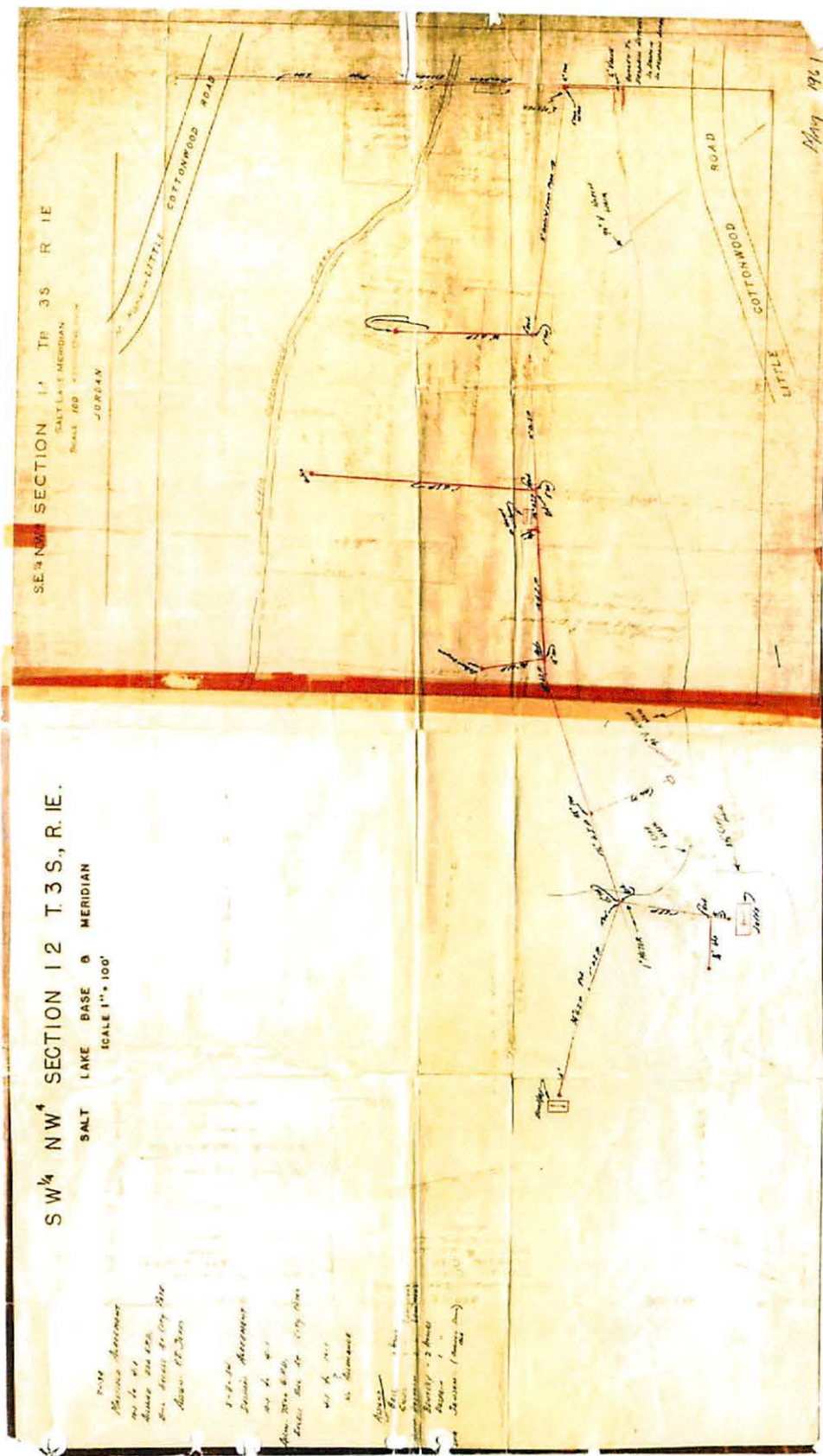












ADD21

06125



State of Utah  
DEPARTMENT OF NATURAL RESOURCES  
DIVISION OF WATER RIGHTS

Michael O. Leavitt  
Governor  
Kathleen Clarke  
Executive Director  
Robert L. Morgan  
State Engineer

1594 West North Temple, Suite 220  
PO Box 146300  
Salt Lake City, Utah 84114-6300  
801-538-7240  
801-538-7467 (Fax)

August 4, 2000

Lynn Christensen Biddulph 57-7800  
3515 East Little Cottonwood Lane  
Sandy, UT 84092

Dear Applicant:

RE: APPROVED CHANGE APPLICATION  
NUMBER 57-7800 (a24463)

This is your authority to proceed with the actual construction work under the above referenced application which under Sections 73-3-10 and 73-3-12, Utah Code Annotated, 1953, as amended, must be diligently prosecuted to completion. The water must be put to beneficial use and proof of beneficial use be made to the State Engineer on or before August 31, 2003; otherwise, the application will be lapsed.

Proof of beneficial use is evidence to the State Engineer that the water has been placed to its full intended beneficial use. By law, it must be prepared by a registered engineer or land surveyor, who will certify to the location and the uses for the water. Your proof of change will become the basis for the extent of your water right.

Utah water law provides that to maintain a water right's validity, the water must be beneficially used. The filing of a change application does not excuse placing the water to beneficial use or protect the right from challenge of partial or total forfeiture.

Failure on your part to comply with the requirements of the statutes may result in forfeiture of this application. **It is the applicant's obligation to maintain a current address with this office. Please notify this office immediately of any change.**

Your contact with this office, should you need it, is with the Utah Lake/Jordan River Regional Office. The telephone number is (801) 538-7421.

Sincerely,

Robert L. Morgan, P.E.  
State Engineer

RLM:et  
Encl.: Memorandum Decision

ADD22

02246



BEFORE THE STATE ENGINEER OF THE STATE OF UTAH

IN THE MATTER OF CHANGE APPLICATION     )  
   )  
NUMBER 57-7800 (a24463)                     )     MEMORANDUM DECISION

Change Application Number 57-7800 (a24463), in the name of Lynn Christensen Biddulph, was filed on May 8, 2000, to change the point of diversion and place of use of 0.0625 cfs of water. Heretofore, the water has been diverted from an 8-inch diameter well, 143 feet deep, located North 242 feet and East 770 feet from the W¼ Corner of Section 12, T3S, R1E, SLB&M, and used for the irrigation of 0.73 acre from April 1 to October 31, the watering of 15 cattle or equivalent, and the domestic purposes of three families in the SW¼NW¼ of Section 12, T3S, R1E, SLB&M.

Hereafter, it is proposed to divert 0.0625 cfs of water from Little Cottonwood Creek at a point located South 318 feet and West 408 feet from the E¼ Corner of Section 12, T3S, R1E, SLB&M, and from the South Despain Ditch at a point located South 836 feet and East 4518 feet from the W¼ Corner of Section 7, T3S, R2E, SLB&M. The water is to be used for the irrigation of 0.73 acre from April 1 to October 31, the watering of 15 cattle or equivalent, and the domestic purposes of three families in the SW¼NW¼ of Section 12, T3S, R1E, SLB&M.

The application was advertised in the Deseret News on June 1, 2000, and June 8, 2000, and was protested by Salt Lake City Corporation and Sandy City. In the written protests it is stated that the water right is encumbered by an agreement with Salt Lake City, and that the property has been subdivided into several properties and the applicant may only be part owner of the water right.

The State Engineer has reviewed the change application, the underlying water right, and the protests and notes that in the explanatory of the change application it states, "Applicant is simply returning to her original decreed point of diversion and thereby correcting the State Engineer's files to conform to existing and historical practice. That is, Applicant and Applicant's predecessors never stopped taking water from the pipeline constructed by Salt Lake City under Agreement dated August 8, 1934. Applicant's predecessor completed Change Application No. a4178 (57-7800) in anticipation of using a separate water well for a residential development project but never completed its project plan. 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. Applicant will continue using water as originally decreed and as modified by its Agreement with Salt Lake City dated August 8, 1934." The applicant has stated that the water right never was changed to the well as certificated, even though the prior owner had submitted proof and been issued a

ADD23

02247

**MEMORANDUM DECISION**  
**CHANGE APPLICATION NUMBER**  
**57-7800 (a24463)**  
**PAGE 2-**

certificate. The demand on the water has continued to be on the tap that is on the Murray City penstock, not on the well. Based on documents filed with the State Engineer, title to the underlying water right appears to be in the name of the applicant. If any other party submits different title evidence, ownership may be changed. It appears that the change application can be approved provided conditions are imposed.

In evaluating the various elements of the underlying rights, it is not the intention of the State Engineer to adjudicate the extent of these rights, rather to provide sufficient definition of the rights to assure that other vested rights are not impaired by the change and no enlargement occurs. If, in a subsequent action, the court adjudicates that this right is entitled to either more or less water, the State Engineer will adjust the figures accordingly.

It is, therefore, **ORDERED** and Change Application Number 57-7800 (a24463) is hereby **APPROVED** subject to prior rights and the following conditions:

1. This change application is approved subject to the conditions and provisions of the Little Cottonwood Creek Decree as modified by the August 8, 1934 agreement between Salt Lake City and the Despains, Butlers, and the Gills.
2. The well drilled under the prior change shall be sealed from bottom to top by a licensed well driller in the State of Utah and in accordance with state rules and regulations for well abandonment.
3. No agency of the state guarantees title to certain water rights. In the event of title conflicts, the involved parties may require court action or stipulation between entities to resolve disputes.

This Decision is subject to the provisions of Rule R655-6-17 of the Division of Water Rights and to Sections 63-46b-13 and 73-3-14 of the Utah Code Annotated, 1953, which provide for filing either a Request for Reconsideration with the State Engineer or an appeal with the appropriate District Court. A Request for Reconsideration must be filed with the State Engineer within 20 days of the date of this Decision. However, a Request for Reconsideration is not a prerequisite to filing a court appeal. A court appeal must be filed within 30 days after the date of this Decision, or if a Request for Reconsideration has been filed, within 30 days after the date the Request for Reconsideration is denied. A Request for Reconsideration is considered denied when no action is taken 20 days after the Request is filed.

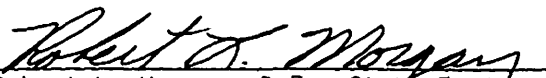
**ADD24**

**02248**



**MEMORANDUM DECISION**  
**CHANGE APPLICATION NUMBER**  
**57-7800 (a24463)**  
**PAGE 3-**

Dated this 4<sup>th</sup> day of August, 2000.

  
Robert L. Morgan, P.E., State Engineer

RLM:JER:et


Mailed a copy of the foregoing Memorandum Decision this 4<sup>th</sup> day of August, 2000.  
to:

Lynn Christensen Biddulph  
1045 Tuomppian Court  
Kayenta, UT 84738

John W. Anderson  
Pruitt, Gushee and Bachtell  
Suite 1850 Beneficial Life Tower  
Salt Lake City, UT 84111-1495

Salt Lake City Corporation  
c/o LeRoy W. Hooton  
1530 South West Temple  
Salt Lake City, UT 84115

Sandy City  
c/o Mike Wilson  
10000 Centennial Parkway  
Sandy, UT 84070

BY:   
Eileen Tooke, Secretary

ADD25

02249

IN THE OFFICE OF THE STATE ENGINEER OF THE STATE OF UTAH

REQUEST FOR REINSTATEMENT AND EXTENSION OF TIME

RECEIVED

(Before Fourteen Years)

AUG 15 2003

WATER RIGHTS  
SALT LAKE

WATER RIGHT NO. 57-7800 (a24463) APPLICANT: LYNN CHRISTENSEN BIDDULPH

1045 TUOMPPIAN COURT

KAYENTA, UTAH 84738

STATE OF UTAH

COUNTY OF

Salt Lake

LYNN CHRISTENSEN BIDDULPH

, being first duly sworn that he or she is the (agent of the) owner of the above number application; that the information given is true and correct to the best of his or her knowledge.

Describe briefly the type, extent, and cost of construction completed to date, and the estimated cost of any remaining construction to complete the project and to submit PROOF of BENEFICIAL USE. Give reasons why the work could not be completed and water put to beneficial use within the time allowed.

Applicant has constructed diversion works and distribution

works necessary to place the water to beneficial use. Applicant

has been consistently diverting and using water under the application for the use of one of the three residences authorized

under the change application and has been diverting and using water for irrigation. Applicant requests additional time under

the application to construct the two additional residences and

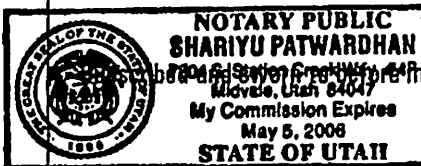
fully place all of the water to beneficial use in accordance with her development plans. In the meantime, applicant has been leasing

water to a neighboring property consistent with the change application approval.

Pursuant to Section 73-3-12, Utah Code Annotated 1953 (as amended), request is made for REINSTATEMENT and EXTENSION OF TIME for filing proof from

AUGUST 31, 2003, 19-- to AUGUST 31, 2007, 20

APPLICANT (if a corporation, give title of officer signing)



Subscribed and sworn to before me this

25 day of JUNE, 2003.

Shariyu Patwardhan  
NOTARY PUBLIC

FOR OFFICE USE ONLY

\$25 FEE REC'D.

\$25

BY

JS

RECEIPT NO.

03-03744 COMPUTER JS

PROOF DUE DATE:

14 YEAR PERIOD ENDS:

REMARKS

PLEASE RETURN TO: DIVISION OF WATER RIGHTS-WEBER RIVER OFFICE-1594 West North Temple-Salt Lake City, Utah 84114-(801)538-7240.

Extension 02482

BEFORE THE STATE ENGINEER OF THE STATE OF UTAH

IN THE MATTER OF CHANGE APPLICATION

) MEMORANDUM DECISION

NUMBER 57-7800 (a24463)

)

Change Application Number 57-7800 (a24463), in the name of Lynn Christensen Biddulph, was filed on May 8, 2000, and approved August 4, 2000 to divert 0.0625 cfs of water from Little Cottonwood Creek at a point located South 318 feet and West 408 feet from the E½ Corner of Section 12, T3S, R1E, SLB&M, and from South Despain Ditch at a point located South 836 feet and East 4518 feet from the W¼ Corner of Section 7, T3S, R2E, SLB&M. The water is to be used for irrigation of 0.7300 acre from April 1 to October 31, watering of 15 cattle or equivalent and domestic purposes of three families. Proof was last due on August 31, 2003.

The applicant has filed a request for extension of time within which to submit proof with the State Engineer stating that she has constructed diversion and distribution works to place the water to beneficial use. The water is currently being utilized in one residence. Additional time is needed to construct the two remaining residences.

Approximately three years have passed since the application was approved. However, the applicant's affidavit in support of the application may justify reasonable cause for delay.

The applicant is placed on notice that future extension requests must comply with the provisions of Section 73-3-12, Utah Code Annotated 1953. The State Engineer may grant extensions of time only "on proper showing of diligence or reasonable cause for delay". The applicant in future extension requests must satisfy Section 73-3-12 by providing detailed efforts of due diligence or reasonable cause for delay, or the requests will be denied.

It is, therefore, **ORDERED** and an extension of time within which to submit proof is **GRANTED** on Change Application Number 57-7800 (a24463) to and including August 31, 2007, but with the condition that further requests for extension of time will be critically reviewed. Unless substantial progress is made in the form of actual physical development to place the water to full beneficial use within the time hereby granted, the State Engineer will deny any further request for extension of time and the application shall lapse.

This extension is granted in accordance with the law which states: "The construction of the works and the application of water to beneficial use shall be diligently prosecuted to completion within the time fixed by the State Engineer. Extensions of time ... may

ADD27

02493

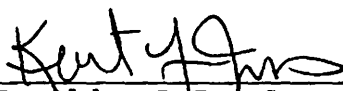
MEMORANDUM DECISION  
CHANGE APPLICATION NUMBER  
57-7800 (a24463)  
PAGE -2-

be granted by the State Engineer on proper showing of diligence or reasonable cause for delay ... In the consideration of an application to extend the time in which to place the water to beneficial use under an approved application, ... the State Engineer shall deny such extension and declare the application lapsed, unless the applicant affirmatively shows that he has exercised or is exercising reasonable and due diligence in working toward completion of the appropriation."

This Decision is subject to the provisions of Rule R655-6-17 of the Division of Water Rights and to Sections 63-46b-13 and 73-3-14 of the Utah Code Annotated, 1953, which provide for filing either a Request for Reconsideration with the State Engineer or an appeal with the appropriate District Court. A Request for Reconsideration must be filed with the State Engineer within 20 days of the date of this Decision. However, a Request for Reconsideration is not a prerequisite to filing a court appeal. A court appeal must be filed within 30 days after the date of this Decision, or if a Request for Reconsideration has been filed, within 30 days after the date the Request for Reconsideration is denied. A Request for Reconsideration is considered denied when no action is taken 20 days after the Request is filed.

Your contact with this office, should you need it, is with the Utah Lake/Jordan River Regional Office. The telephone number is (801) 538-7240.

Dated this 13<sup>th</sup> day of November, 2003.

  
\_\_\_\_\_  
Jerry D. Olds, P.E., State Engineer  
BY: Kent L. Jones, P.E. Assistant State  
Engineer for Appropriation

JDO:MBH:dd

Mailed a copy of the foregoing Memorandum Decision this 13<sup>th</sup> day of November, 2003, to:

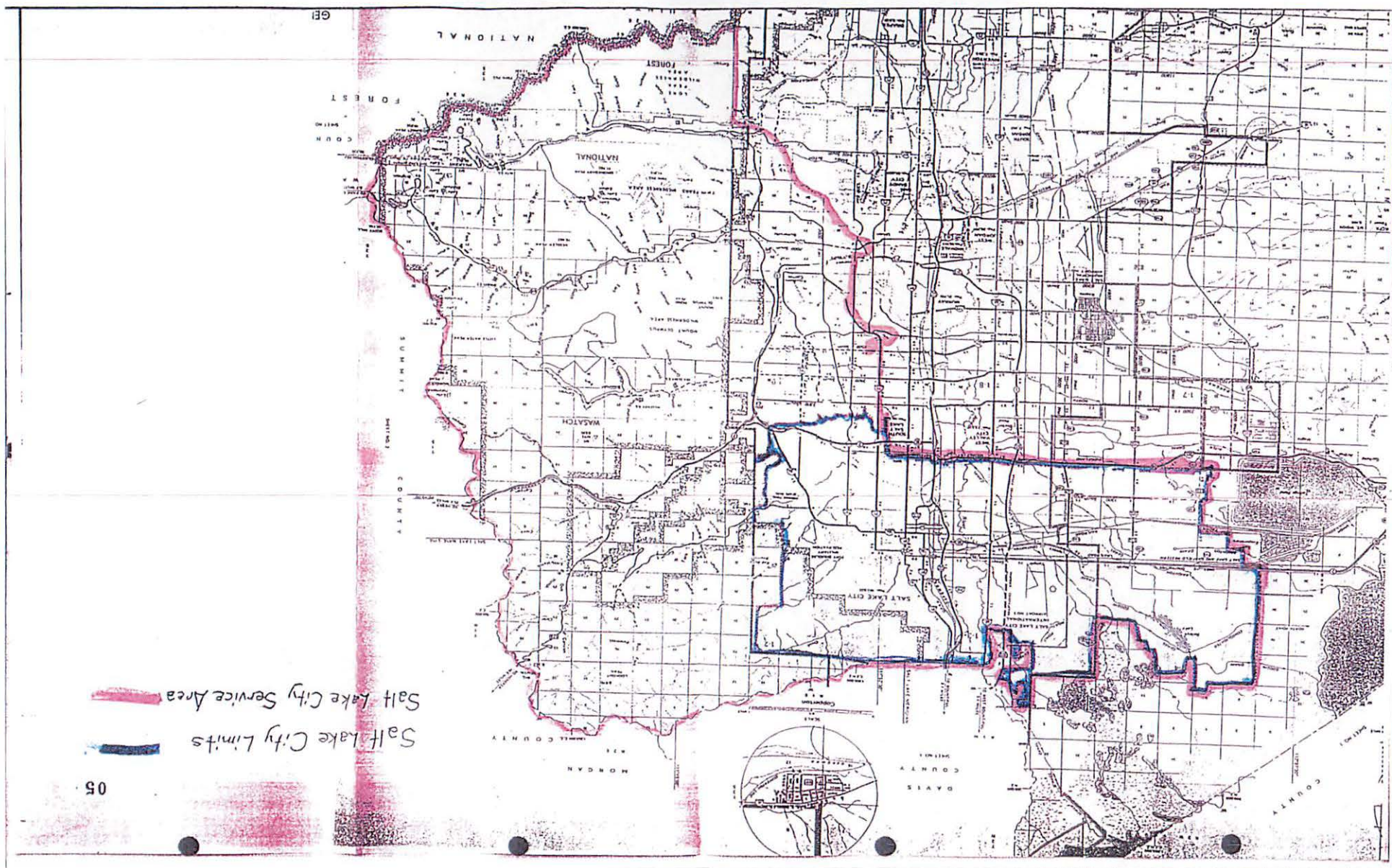
Lynn Christensen Biddulph  
1045 Tuomppian Court  
Kayenta, UT 84738

BY:   
\_\_\_\_\_  
Dana Dredge, Extension Secretary

ADD28

02494







MAY 29 2014

Salt Lake County

By: \_\_\_\_\_  
Deputy Clerk

05

*Salt Lake City Limits*  
*Salt Lake City Service Area*



ADD29

01213

JEFFRY T. NIERMEYER  
DIRECTOR

# **SALT LAKE CITY CORPORATION**

DEPARTMENT OF PUBLIC UTILITIES  
WATER SUPPLY AND WATERWORKS  
WATER RECLAMATION AND STORMWATER

RALPH BECKER  
MAYOR

**FILED DISTRICT COURT**  
Third Judicial District

**MAY 29 2014**

Salt Lake County

By: \_\_\_\_\_ Deputy Clerk

## **CERTIFICATION OF RECORD**

STATE OF UTAH

County of Salt Lake

I, Karryn Greenleaf, on August 30, 2011, as an employee of Salt Lake City Corporation, Department of Public Utilities, Salt Lake City, Utah, do hereby certify that the following attached document, is a true and correct copy of document copied from files held by Salt Lake City Department of Public Utilities.

- Memorandum to Anne Quinn from Mr. LeRoy W. Hooton, Jr., Director dated March 23, 1992. (4 sheets)

  
Karryn Greenleaf

1330 SOUTH WEST TEMPLE, SALT LAKE CITY, UTAH 84115

TELEPHONE: 801-483-6900 FAX: 801-483-6818

WWW.SLCGOV.COM



ADD30

01150

FILE

Sent 3/24/92

LEROY W. HOOTON, JR.  
DIRECTOR

E. TIM DOXEY  
DEPUTY DIRECTOR

JAMES M. LEWIS C.P.A.  
FINANCE ADMINISTRATOR

W. WILLIAMS FARMER P.E.  
TREATMENT & ENVIRONMENTAL  
ADMINISTRATOR

CHARLES CALL, JR. P.E.  
CHIEF ENGINEER

CRAIG HANSEN  
MAINTENANCE ADMINISTRATOR

FLORENCE P. REYNOLDS  
WATER QUALITY ADMINISTRATOR

## SALT LAKE CITY CORPORATION

### DEPARTMENT OF PUBLIC UTILITIES

Water Supply & Waterworks  
Water Reclamation & Stormwater

1530 SOUTH WEST TEMPLE  
SALT LAKE CITY, UTAH 84115

### M E M O R A N D U M

DEEDEE CORRADINI  
MAYOR

TO: Anne Quinn, Administrative Assistant for  
Intergovernmental Affairs

FROM: LeRoy W. Hooton, Jr., Director *LWH*

DATE: March 23, 1992

RE: ALBION BASIN

#### Background

In 1988, Mayor Leavitt approached Salt Lake City about his concerns over development within the Albion Basin. Specifically, he had a problem with a single family cabin that was being rented to skiers as it was a commercial establishment. Notwithstanding the commercial renting issue, Mayor Leavitt expressed his concern over the long term development of the Albion Basin.

There are three approved subdivisions in the Albion Basin with 21 homes built and 40 lots remaining to be built on. Also, there are various other parcels of private land that have development potential. Through Mayor Leavitt's efforts COG, the USFS and Salt Lake City all took positions that the Albion Basin should be protected and preserved for watershed.

#### Existing Water Contract for the Town of Alta

The Town of Alta receives its water supply through a 1976 surplus sales contract with Salt Lake City. The contract specifically states that the Town of Alta cannot expand its water system into areas outside of the Town's limits (at the time of the contract) without consent of Salt Lake City. On March 11, 1988, I confirmed that SLC would not approve any expansion of Alta's water system to serve the Albion Basin. Further, we agreed that the Albion Basin should be acquired as part of the City's Watershed Acquisition Plan.

ADD31

01151



MEMORANDUM

Anne Quinn

March 23, 1992

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Albion Basin Water Service Contracts

The three Albion Basin subdivisions receive water service from the Little Cottonwood Water Company through separate contracts.

The three subdivisions are:

- 1) Cecret Lake Subdivision (limited to 50 gpd/lot)
- 2) Albion Basin Subdivision (limited to 50 gpd/lot)
- 3) Albion Alps Subdivision (no limit specified)

The Little Cottonwood Water Company was formed in 1911 and stock issued to various ditch companies and individuals using water from Little Cottonwood Creek. Their primary water rights were acquired by saving water in Little Cottonwood Creek by constructing the cutoff ditch amounting to 3.03 cfs. They have water rights in Red Pine Lake and Cecret Lake both located in Little Cottonwood Canyon. Salt Lake City has exchange agreements with many of the stockholders in the Company.

The Company entered into various water contracts between 1945 and 1981 and of particular concern were the contracts for lots in the Albion Basin. When this area was annexed into the Town of Alta, there was pressure for Alta to provide them culinary water as two of the Little Cottonwood Company contract's are limited in volume and under current health requirements insufficient to allow a building permit (requirement is now 400 gpd). The third contract with Albion Alps does not specify the amount of water, but the source of water dries up and does not provide adequate water to serve the lots.

Efforts to Purchase Albion Basin

In 1989 the Town of Alta made a study of the Albion Basin properties as part of an acquisition plan. The total appraised value amounted to \$2.8 million; however both Salt Lake City and the USFS could not accept the appraisals as public entities. We could only pay the valued amount (appraisal without sufficient water) not what the property owners felt their properties were worth. On several occasions when we have talked to property owners about purchasing their lots we have been far apart on the value.

Other efforts to acquire the Albion Basin were taken through the U.S. Congress Forest Service funds, National Land and Conservation funds and the Trust For Public Lands without success.

Salt Lake City Agrees to Take Over Little Cottonwood Water Company Water Sales Contracts

In 1990 as a means of controlling development in the Albion Basin and to protect the watershed the City agreed to take over from the Little Cottonwood Water Company all of its water sales contracts. Salt Lake

MEMORANDUM  
Anne Quinn  
March 23, 1992  
Page -3-

City as a first class City has extraterritorial jurisdiction, federal legislation and the organization to enforce the terms of the contracts. At first we tried to dissolve the Little Cottonwood Water Company and take over its assets. This failed because of the City's exchange contracts. It was later decided to keep the company in tact, but have the water sales contracts conveyed to the City. We are currently in the process of completing the agreement between Salt Lake City and the Little Cottonwood Water Company to accomplish this. Once the City has the contracts we will require metering and further will not certify for water service for new building permits. We may have litigation over this issue as the property owners will disagree with our position. The City should acquire the contracts within the next several months.

Other Alternatives

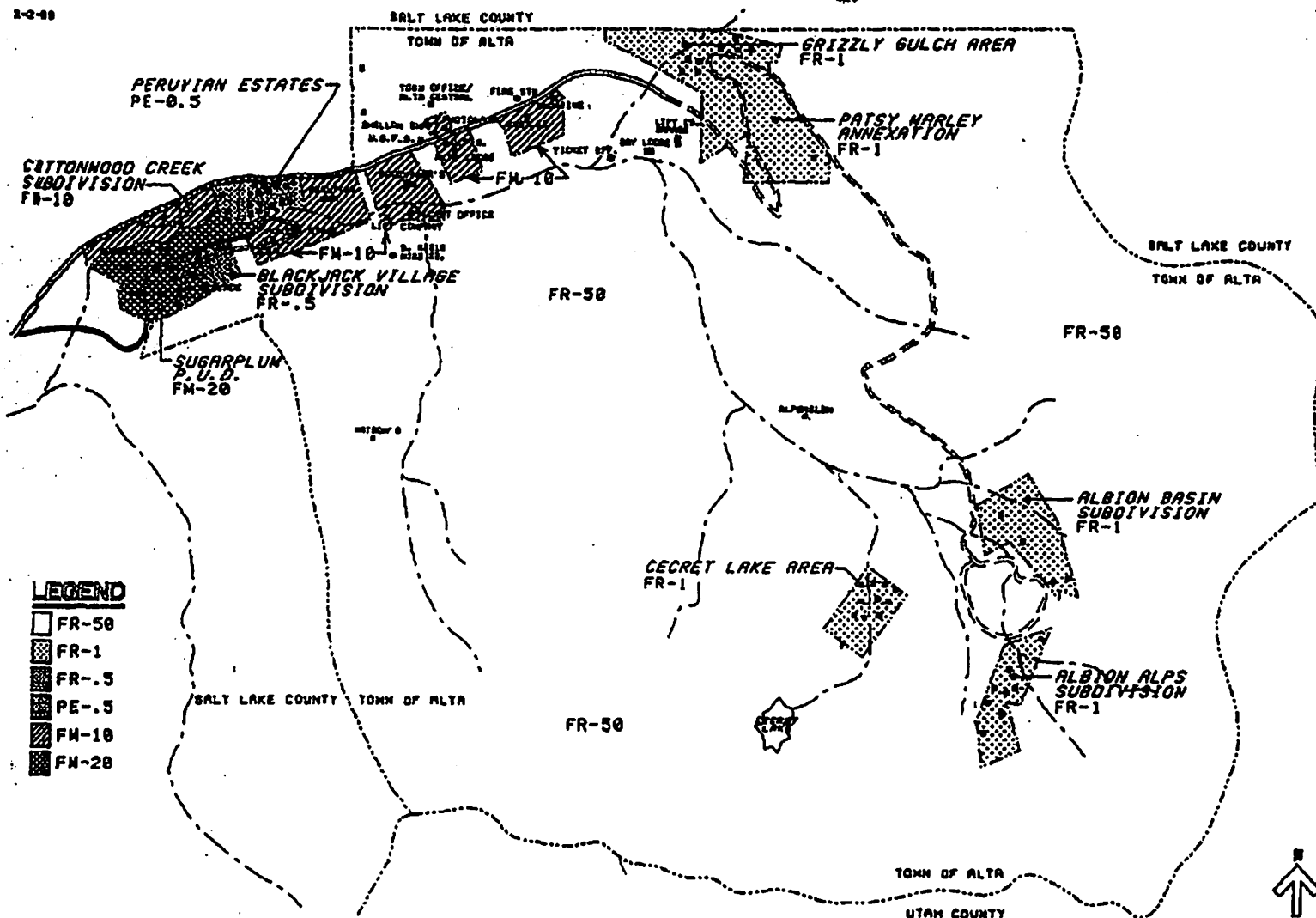
Under the Central Utah Project Completion Act, Section 313(b) there is \$4 million for, among other things, land acquisition in the Albion Basin. Perhaps with the passage of this legislation funds will be available to purchase the property (including existing structures) in the Albion Basin. This assumes that the appraisal problem can be overcome.

LWH/db

cf: Brian Hatch

ADD34

01154



# **EXISTING ZONING MAP**

**ALTA, UTAH**

0 500 1000 1500

FILED DISTRICT COURT  
Third Judicial District

MAY 29 2014

BEFORE THE STATE ENGINEER OF THE STATE OF UTAH

By: \_\_\_\_\_

Salt Lake County

Deputy Clerk

IN THE MATTER OF CHANGE APPLICATION )  
 )  
NUMBER 57-10015 (a16846) )

MEMORANDUM DECISION

Change Application Number 57-10015 (a16846), in the name of Salt Lake City Corporation, was filed on June 24, 1992, to change the point of diversion and place of use of 15.75 acre-feet of water. Heretofore, the water has been diverted from Little Cottonwood Creek at the following locations: Tanner Ditch at South 234 feet and East 102 feet from the W $\frac{1}{4}$  Corner of Section 28, T2S, R1E, SLB&M; Cahoon and Maxfield Ditch at North 77 feet and West 663 feet from the E1/4 Corner of Section 29, T2S, R1E, SLB&M; Walker Ditch at North 1363 feet and West 1143 feet from the E $\frac{1}{4}$  Corner of Section 29, T2S, R1E, SLB&M; Richards Ditch at South 1800 feet and East 707 feet from the N $\frac{1}{4}$  Corner of Section 34, T2S, R1E, SLB&M; Little Cottonwood Creek Diversion Dam at North 2309 feet and West 743 feet from the E $\frac{1}{4}$  Corner of Section 11, T3S, R1E, SLB&M; and Murray City Power Plant Diversion Dam at South 838 feet and East 4512 feet from the W $\frac{1}{4}$  Corner of Section 7, T3S, R2E, SLB&M. The water has been used for municipal purposes in Salt Lake City.

Hereafter, it is proposed to divert 15.75 acre-feet of water from a spring and Mine Tunnel, located: (1) South 230 feet and West 900 feet; and (2) North 412 feet and West 833 feet both from the NE Corner of Section 9, T3S, R3E, SLB&M. It is proposed to use the water for same purposes as heretofore in the N $\frac{1}{4}$ NE $\frac{1}{4}$  and the SE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 9, T3S, R3E, SLB&M. It is further stated in the application that a contract has been made between the Little Cottonwood Water Company and Canyonlands Inc., for the Canyonlands to divert up to 15.75 acre-feet of water annually for only domestic requirement for 35 homes in the Albion Basin Subdivision.

The application was advertised in the Deseret News from April 15, 1993, to April 29, 1993, and was protested by Cahoon and Maxfield Irrigation Company, Robert J. Murdock et al, Salt Lake County, and Harvey Stauffer. In the protests it is stated that the approval of the change application will impair the rights of the protestants and a surplus sales contract does not guarantee that water will be available for the people who are using the water.

A hearing was held on August 28, 1996, in Salt Lake City, Utah. At the hearing the applicant explained the history of the underlying water rights and the nature of the contracts by which the change is based. The protestants in attendance reiterated their protests.

The State Engineer has reviewed the change application, the underlying water rights, the protests, the information submitted at the hearing, and other associated water rights, and has noted and the following:

- A. It appears that the applicant, by virtue of the exchange agreements, is entitled to the use of water and has the right to file the change application.
- B. The question of water contracts with county residents is not within the purview of the State Engineer. Should those residents or entities deem that those contracts are not substantial to satisfy their needs, they can obtain other water rights and file the appropriate change applications for

ADD35

01206

MEMORANDUM DECISION  
CHANGE APPLICATION NUMBER  
57-10015 (a16846)  
PAGE -2-

the proposed uses.

- C. The State Engineer is of the opinion that certain conditions will have to be imposed to ensure that the rights of the others are not impaired by this change application. The exchange agreements between the irrigation companies and Salt Lake City for replacement water from Utah Lake will lessen the likelihood of any such impairment. The total flow of all change applications filed by the applicant in Little Cottonwood Canyon and the diversions by Salt Lake City at the mouth of the canyon cannot exceed the total of the water rights owned by the city.
- D. The applicant has stated in the application that the historic uses are municipal. It appears that the underlying water rights held by the irrigation companies and utilized by exchange agreement by the applicant are for irrigation. This change application converts the nature of use from irrigation to municipal for 15.75 acre-feet only as addressed in this change.

In evaluating the various elements of the underlying rights, it is not the intention of the State Engineer to adjudicate the extent of these rights, rather to provide sufficient definition of the rights to assure that other vested rights are not impaired by the change and no enlargement occurs. If, in a subsequent action, the court adjudicates that this right is entitled to either more or less water, the State Engineer will adjust the figures accordingly.

It is, therefore, ORDERED and Application Number 57-10015 (a16846) is hereby APPROVED subject to prior rights and the following conditions:

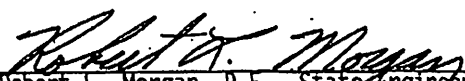
1. The applicant shall install permanent measuring devices to measure both the instantaneous flow rate and the total volume of water diverted. Records shall be kept at least monthly of all water diverted. These measuring devices and the records shall be made available to the State Engineer at all reasonable times to regulate this change.
2. The applicant shall submit on an annual basis by January 31 of each year for the prior calendar year a summary of all water diverted from each source in Little Cottonwood Canyon.
3. Upon submittal of proof of change, the applicant shall provide information on how much water by use has been diverted from each source along with evidence that the total of all water rights in Little Cottonwood Canyon under the applicants control have not been exceeded.
4. The historic water diversion would have irrigated 3.15 acres. About 50% of the water would have been consumed and 50% would have returned to the system. To prevent enlargement, depletion under this change cannot exceed 7.875 acre-feet of water.

This Decision is subject to the provisions of Rule R655-6-17 of the Division of Water Rights and to Sections 63-46b-13 and 73-3-14 of the Utah Code Annotated, 1953, which provide for filing either a Request for Reconsideration with the State Engineer or an appeal with the appropriate District Court. A Request for

MEMORANDUM DECISION  
CHANGE APPLICATION NUMBER  
57-10015 (a16846)  
PAGE -3-

Reconsideration must be filed with the State Engineer within 20 days of the date of this Decision. However, a Request for Reconsideration is not a prerequisite to filing a court appeal. A court appeal must be filed within 30 days after the date of this Decision, or if a Request for Reconsideration has been filed, within 30 days after the date the Request for Reconsideration is denied. A Request for Reconsideration is considered denied when no action is taken 20 days after the Request is filed.

Dated this 15th day of January, 1997.

  
Robert L. Morgan, P.E., State Engineer

RLM:JER:et

Mailed a copy of the foregoing Memorandum Decision this 15th day of January, 1997, to:

Salt Lake City Corporation  
Department of Public Utilities  
1530 South West Temple  
Salt Lake City, UT 84115

Cahoon and Maxfield Irrigation Company,  
c/o Anton P. Rezac  
5668 South Bullion  
Murray, UT 84123

Murdock, Robert J., et al  
2964 East 3135 South  
Salt Lake City, UT 84109

Salt Lake County  
c/o David E. Yocom  
2001 South State Street, #S3600  
Salt Lake City, UT 84190-1200

Harvey Stauffer  
#8 Stauffer Lane  
Murray, UT 84107

BY:   
Eileen Tooke, Secretary

ADD37

01208

LEROY W. HOOTON, JR.  
DIRECTOR

## **SALT LAKE CITY CORPORATION**

DEPARTMENT OF PUBLIC UTILITIES  
Water Supply & Waterworks  
Water Reclamation & Stormwater

### Memorandum

TO: Brian Hatch, Deputy to the Mayor  
FROM: LeRoy W. Hooton, Jr. *LWH*  
DATE: August 30, 1993  
SUBJECT: Little Cottonwood Water Company

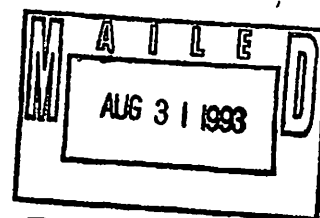
### Introduction

In order to protect the Albion Basin in Little Cottonwood Canyon, it was decided that Salt Lake City would acquire the water contracts between lot owners in the Albion Basin and the Little Cottonwood Water Company and/or gain control of the company and dissolve it.

### Background

The Little Cottonwood Water company was formed in 1911 and stock issued to various ditch companies and individuals using water from Little Cottonwood Creek including four companies which have exchange agreements with Salt Lake City. Their primary water right of 3.03 cfs was acquired by saving water in Little Cottonwood Creek by constructing the cutoff ditch just below what is now the Metropolitan Water District of Salt Lake City's Little Cottonwood Water Treatment Plant. They also have water rights in Red Pine and White Pine Lakes and Cecret Lake located in Little Cottonwood Canyon. Salt Lake City has exchange agreements with many of the stockholders in the Company and manages/owns the water in the lakes as well as their rights in the creek through exchange agreements. By virtue of the exchange contracts the City has liability for the actions of the Little Cottonwood Water Company but no control over their actions.

The Company entered into various water sales contracts between 1945 and 1981, and of particular concern were the contracts for lots in the Albion Basin. The contracts are for less than the 400 gpd required to develop a lot. When this area was annexed into Alta City, there was pressure for Alta to provide them culinary water as the Little Cottonwood Company contracts were inadequate. Salt



# FILE

DEEDEE CORRADINI  
MAYOR

FILED DISTRICT COURT  
Third Judicial District

MAY 29 2014

Salt Lake County

By: \_\_\_\_\_  
Deputy Clerk



21

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. Also, the City would not fold under pressure to increase the volume under the contracts, whereas the Little Cottonwood Water Company would.

During the latter part of 1992, the Company became uncooperative and aggressive in its attitude toward the City, led primary by Tony Rezack, President of the Cahoon Maxfield Irrigation Company, who along with the three other irrigation companies holding rights in Little Cottonwood Creek, initiated a law suit against Salt Lake City entitled Cahoon Maxfield Irrigation Co. et al vs Salt Lake City. Judge Rigtrup dismissed the law suit.

In accordance with the exchange contracts with the Richards Ditch, Walker Ditch and Little Cottonwood Tanner Ditch Companies their stock in the Little Cottonwood Water Company was transferred to Salt Lake City in the 1930s. This spring I requested the Company secretary to transfer the stock certificates into the name of Salt Lake City, thus eliminating eligibility of the exchange companies' members to sit on the Board of Directors. With this action, Salt Lake City and Sandy City control the company.

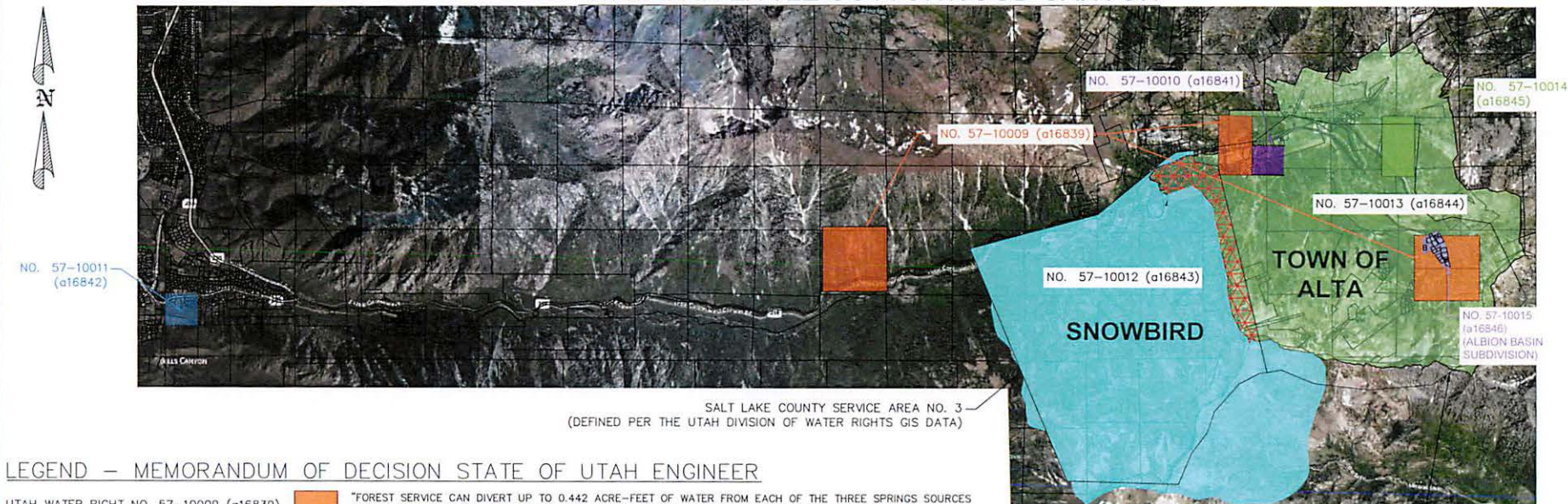
#### Action

Salt Lake City and Sandy City are moving forward to dissolve the company. The strategy is to meet with the individual irrigation companies to inform them of our intent, hold a board meeting, elect new officers consisting of Sand City and Salt Lake City members, and set forth a plan to dissolve the corporation. We hope to do this in such a way that the City's and Companies' relationship is not damaged too severely, but meet our goal of eliminating the Company.

cc: Roger Black

Scale 1" = 4,000 ft

# APPROVED SALT LAKE CITY APPLICATIONS TO SUPPLY WATER IN LITTLE COTTONWOOD CANYON



## LEGEND — MEMORANDUM OF DECISION STATE OF UTAH ENGINEER

- UTAH WATER RIGHT NO. 57-10009 (a16839) "FOREST SERVICE CAN DIVERT UP TO 0.442 ACRE-FEET OF WATER FROM EACH OF THE THREE SPRINGS SOURCES (FOR A TOTAL OF 1.326 ACRE-FEET) IN LITTLE COTTONWOOD CANYON FOR RECREATION AND INCIDENTAL PURPOSES."
- UTAH WATER RIGHT NO. 57-10010 (a16841) "DIVERT UP TO 167.9 ACRE-FEET OF WATER ANNUALLY FOR DOMESTIC REQUIREMENTS AND INCIDENTAL USE OF ALTA PERUVIAN LODGE, AND FOR 13 HOMES"
- UTAH WATER RIGHT NO. 57-10011 (a16842) "DIVERT 0.442 ACRE-FEET OF WATER ANNUALLY FOR DOMESTIC REQUIREMENTS ONLY, FOR USE IN A DUPLEX."
- UTAH WATER RIGHT NO. 57-10012 (a16843) "(2000.0 ACRE-FEET OF WATER) IT IS PROPOSED TO USE THE WATER FOR THE SAME USES AS HERETOFORE, AND ADDING MUNICIPAL USES IN SALT LAKE COUNTY SERVICE AREA NO. 3, AND RESORT USE AT SNOWBIRD INCLUDING SNOW MAKING"
- UTAH WATER RIGHT NO. 57-10013 (a16844) "(500.0 ACRE-FEET OF WATER) IT IS PROPOSED TO USE THE WATER FOR THE SAME MUNICIPAL USE AS HERETOFORE, AND FOR FOR MUNICIPAL PURPOSES IN THE TOWN OF ALTA, AND SNOW MAKING."
- UTAH WATER RIGHT NO. 57-10014 (a16845) "0.221 ACRE-FEET OF WATER ANNUALLY FOR DOMESTIC REQUIREMENTS OF ONE FAMILY."
- UTAH WATER RIGHT NO. 57-10015 (a16846) "DIVERT UP TO 15.75 ACRE-FEET OF WATER ANNUALLY FOR ONLY DOMESTIC REQUIREMENT FOR 35 HOMES IN ALBION BASIN SUBDIVISION."

TOWN OF ALTA LIMITS OF WATER RIGHTS  
(DEFINED PER THE UTAH DIVISION OF WATER RIGHTS GIS DATA)

OVERLAP OF SALT LAKE COUNTY SERVICE AREA NO. 3 AND THE TOWN OF ALTA

### SURVEYORS NOTE:

NO FIELD SURVEY WAS DONE IN PREPARATION OF THIS MAP. THIS SURVEYOR MAKES NO GUARANTY, OR WARRANTY, OF ANY KIND, EXPRESSED OR IMPLIED AS TO THE CONTENT, ACCURACY, TIMELINESS OR THE COMPLETENESS OF ANY OF THE DATA.  
THIS MAP REPRESENTS A ONE TIME CAPTION OF DATA AS IT EXISTS AT THE TIME THIS MAP WAS PREPARED. GIS FILES/DATA PROVIDED BY THE SALT LAKE COUNTY SURVEYOR AND RECORDER, THE UTAH AGRC, AND THE UTAH DIVISION OF WATER RIGHTS. ALL MAPPING WORK WAS PERFORMED UNDER MY DIRECT SUPERVISION.



NO.	REVISION	DATE

DRAWING TITLE  
APPROVED SALT LAKE CITY APPLICATIONS  
TO SUPPLY WATER IN LITTLE  
COTTONWOOD CANYON

LOCATION

LITTLE COTTONWOOD CANYON

PROJECT NAME  
LITTLE COTTONWOOD CANYON

DRAWN DCC CHECKED CJG

FILE NAME:  
G:\DATA\14107...DWG\Water Rights Schematic.dwg

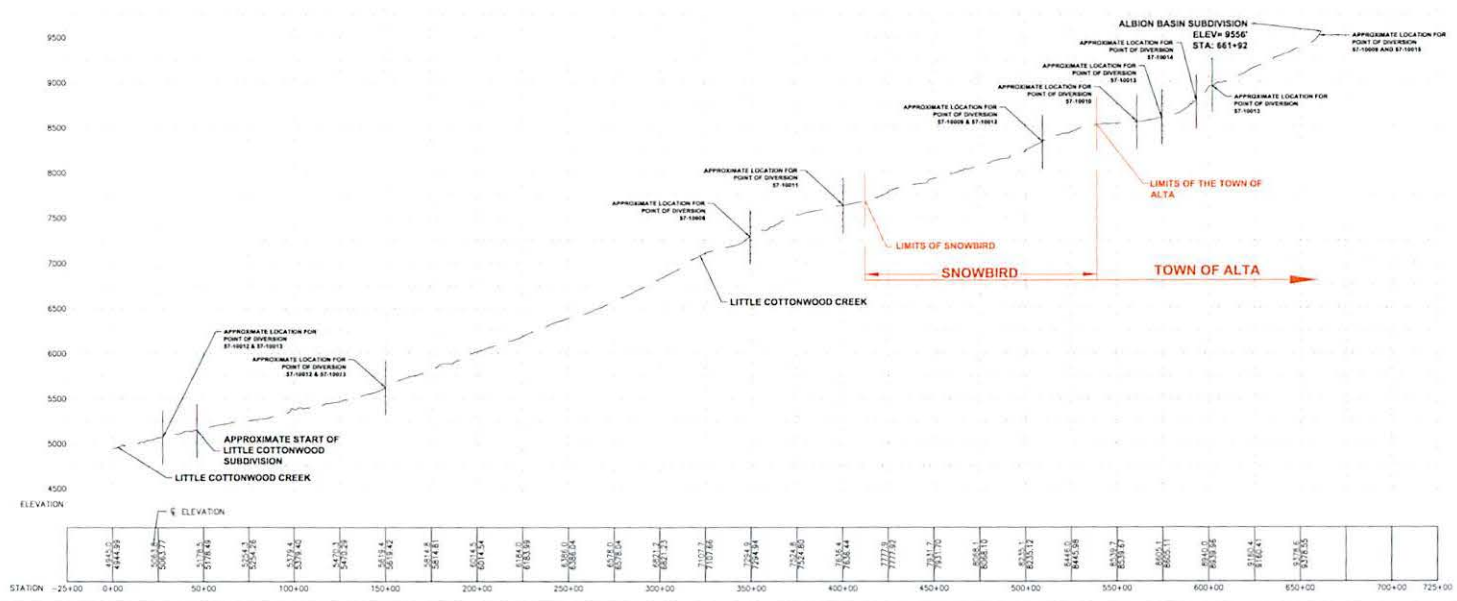
DATE  
07/21/2014

SCALE  
1" = 4,000'

SHEET  
1 OF 1

06078



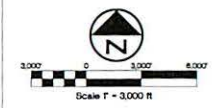


**WILDING ENGINEERING**  
 14751 SOUTH HENRIETTA COURT WAY  
 BLUFF, UTAH 84205  
 801.983.8118  
 WWW.WILDINGENGINEERING.COM

**DRAWING NOTES:**  
 SUBSIDIARY NOTES:  
 NO FIELD SURVEY WAS DONE IN PREPARATION OF THIS MAP. THIS SURVEY WAS BASED ON THE BEST AVAILABLE DATA, INCLUDING THE COMPLETENESS OF ANY OF THE DATA.  
 THE MAP REPRESENTS A LINE THE CAPTION OF DATA AS IT EXISTS AT THE TIME THIS MAP WAS PREPARED.  
 THE FIELD DATA PROVIDED BY THE SALT LAKE COUNTY SURVEYOR AND RECORDS THE UTAH AGRI. AND THE UTAH DIVISION OF WATER RIGHTS. ALL WORKING MAPS AND PERFORMANCE UNDER DIRECT SUPERVISION.

**LEGEND**

EXISTING SPOT ELEVATION	4500.00
1/4 SECTION TOP	(4500)



1	ADDED P.O.D. AND TOWN/SNOWBIRD LIMITS	1/13/25
NO	REVISION	DATE

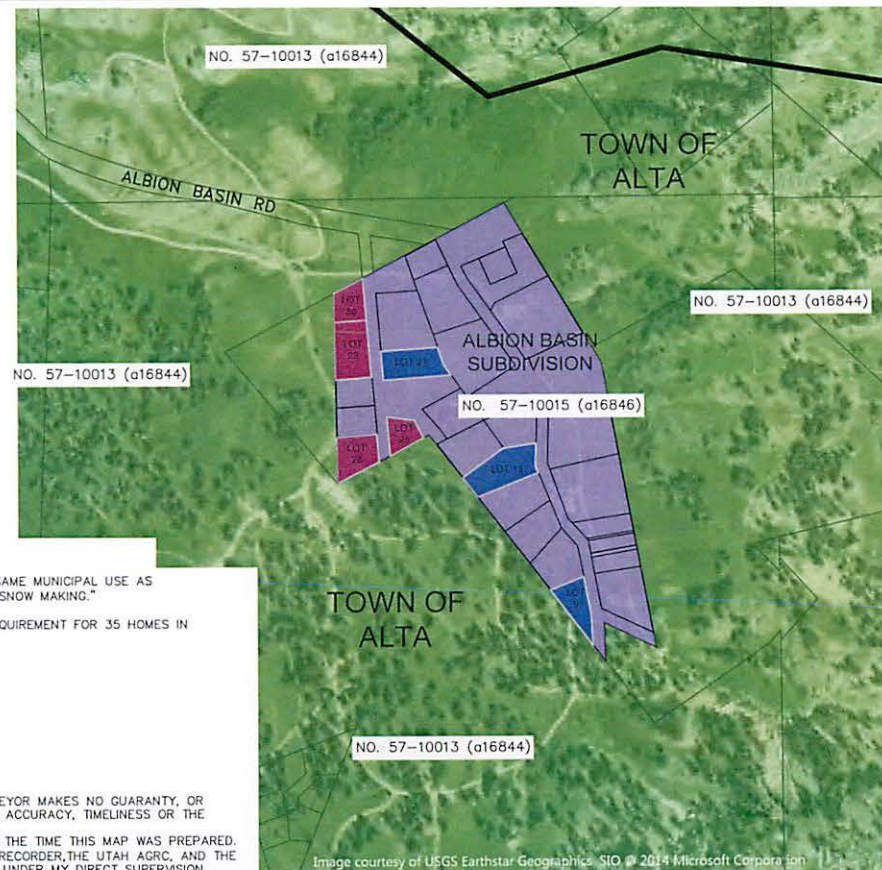
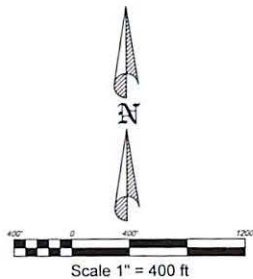
**PROJECT INFORMATION**  
**WATER RIGHTS USE PROFILE OF LITTLE COTTONWOOD CANYON**  
**LITTLE COTTONWOOD CANYON, UTAH**

DRAWN	CHECKED	PROJECT #
DCC	CJG	14107
DATE		1/09/2015
HORIZONTAL SCALE		1" = 3,000'
VERTICAL SCALE		1" = 5'
SHEET		1 OF 1
ENGINEER'S STAMP		

06126

ADD41

# APPROVED SALT LAKE CITY APPLICATIONS TO SUPPLY WATER IN ALBION BASIN SUBDIVISION



## LEGEND – MEMORANDUM OF DECISION STATE OF UTAH ENGINEER

UTAH WATER RIGHT NO. 57-10013 (a16844)		"(500.0 ACRE- FEET OF WATER) IT IS PROPOSED TO USE THE WATER FOR THE SAME MUNICIPAL USE AS HERETOFORE, AND FOR FOR MUNICIPAL PURPOSES IN THE TOWN OF ALTA, AND SNOW MAKING."
UTAH WATER RIGHT NO. 57-10015 (a16846)		"DIVERT UP TO 15.75 ACRE- FEET OF WATER ANNUALLY FOR ONLY DOMESTIC REQUIREMENT FOR 35 HOMES IN ALBION BASIN SUBDIVISION."
SALT LAKE CITY WATER SALES RECORDS		LOTS 9, 13, AND 21 OF ALBION BASIN SUBDIVISION
LOTS OWNED BY HAIK		LOTS 25, 26, 29 AND 30 OF ALBION BASIN SUBDIVISION

### SURVEYOR'S NOTE:

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NO.	REVISION	DATE

DRAWING TITLE	APPROVED SALT LAKE CITY APPLICATIONS TO SUPPLY WATER IN LITTLE COTTONWOOD CANYON
LOCATION	LITTLE COTTONWOOD CANYON

PROJECT NAME	LITTLE COTTONWOOD CANYON
DRAWN	DCC
CHECKED	CJG
FILE NAME:	G:\DATA\14107...DWG\Water Rights Schematic.dwg

DATE	07/21/2014
SCALE	1"= 400'
SHEET	1 OF 1

06079