

1992

Hi-Country Estates Homeowners Association v.  
Bagley & Company, et al; Foothills Water  
Company v. Hi-Country Estates Homeowners  
Association, W. Norman Sims, and William P.  
Turner : Reply Brief

Utah Court of Appeals

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IN THE UTAH STATE COURT OF APPEALS

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HI-COUNTRY ESTATES HOMEOWNERS, :  
ASSOCIATION, a Utah corporation,

Plaintiff/Appellant and  
Cross-Appellee

vs.

BAGLEY & COMPANY, a Utah  
corporation; J. RODNEY DANSIE;  
GERALD BAGLEY; HI-COUNTRY  
ESTATES, INC., a dissolved  
Utah corporation; KEITH  
SPENCER; CHARLES E. LEWTON;  
and unknown persons claiming  
an interest in Hi-Country  
Estates Subdivision,

Defendants/Appellees  
and Cross-Appellants

FOOTHILLS WATER COMPANY, a Utah  
corporation,

Defendant/Appellee  
and Cross-Appellant

v.

HI-COUNTRY ESTATES HOMEOWNERS :  
ASSOCIATION, a Utah corporation, :  
W. NORMAN SIMS, and WILLIAM :  
P. TURNER, :

Plaintiff/Appellant and  
Cross-Appellee.

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APPELLANT'S REPLY BRIEF

Upon remand for further proceedings from the Utah Supreme Court.

-----00000-----

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APPEALS

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DOCKET NO.

920450-CA

Case No. 920450-CA

(S.Ct. No. 940046

Remanded to C.A.)

C85-1465 (Third D.C.)

Priority No. 15

IN THE UTAH STATE COURT OF APPEALS

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HI-COUNTRY ESTATES HOMEOWNERS, :  
ASSOCIATION, a Utah corporation,

Plaintiff/Appellant and  
Cross-Appellee

: Case No. 920450-CA  
: (S.Ct. No. 940046  
: Remanded to C.A.)  
: C85-1465 (Third D.C.)

vs.

BAGLEY & COMPANY, a Utah :  
corporation; J. RODNEY DANSIE; :  
GERALD BAGLEY; HI-COUNTRY :  
ESTATES, INC., a dissolved :  
Utah corporation; KEITH :  
SPENCER; CHARLES E. LEWTON; :  
and unknown persons claiming :  
an interest in Hi-Country :  
Estates Subdivision, :

Defendants/Appellees :  
and Cross-Appellants

FOOTHILLS WATER COMPANY, a Utah :  
corporation, :

Defendant/Appellee :  
and Cross-Appellant :

v.

HI-COUNTRY ESTATES HOMEOWNERS :  
ASSOCIATION, a Utah corporation, :  
W. NORMAN SIMS, and WILLIAM :  
P. TURNER, :

Plaintiff/Appellant and :  
Cross-Appellee. :

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**APPELLANT'S REPLY BRIEF**

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### NATURE OF BRIEF

This brief is a Reply Brief conforming to the requirements of Utah R.App.P. 24(c). This Rule requires that this Reply Brief contain only a table of contents, a table of authorities, an argument, and a short conclusion stating the precise relief sought.

### REPLY TO PRELIMINARY MATTERS

Appellant Hi-Country Estates Homeowners Association (hereafter "Homeowners") feels the need to briefly reply to preliminary matters raised in Appellee Foothills Water Company's (hereafter "Foothills") responsive brief. Homeowners, in its initial brief in this matter, stated in paragraph 4 on page 3 that "... The only parties against whom title was not quieted in this case were Foothills and Gerald H. Bagley and Bagley & Company." The section of Foothills' brief entitled "Statement of the Case," alleges that "Any order quieting title in this action which purports to extinguish interests under the well lease agreement cannot bind individual members of the Dansie family who were persons with a known interest in the well lease agreement, but were not named or served in this action." (Foothills Br. p. 2).

However, as recited in the Statement of Facts in Homeowners' opening brief:

All unknown persons claiming an interest in Hi-Country Estates Subdivision were served pursuant to an Order authorizing service of summons by publication entered on March 23, 1987, by the Honorable David B. Dee (R. 312, 313). Proof of publication was presented to the Court on or about May 1, 1987 (R. 340). Therefore, the only parties against whom title was not quieted in this case were Foothills and Gerald H. Bagley and Bagley & Company.

Homeowners' opening brief p. 3.

Since the decision of the Utah Court of Appeals ruling that Gerald H. Bagley and Bagley & Company had no interest in the water system in question, and were not entitled to damages of any kind as a result of their association with the water system, and since Gerald H. Bagley and Bagley & Company failed to petition the Utah Supreme Court for certiorari, their interests have been extinguished as well. *See* U.C.A. § 78-40-12 (1953). Foothills Water Company was the successor in interest to Bagley & Company and Gerald H. Bagley with regard to the 1977 Well Lease Agreement (R. 576-577, 647). In his Findings of Fact and Conclusions of Law dated October 31, 1990, the trial judge found that Defendants Gerald H. Bagley and Bagley & Company had transferred all claims, rights, title and interest in the water system and water right to Defendant J. Rodney Dansie by agreement of October 31, 1985, and that all such claims, rights, title, and interest in said water system and water right merged with those of Defendant J. Rodney Dansie and Defendant Foothills Water Company as of that date. *See* Add. 5 at p. 4 C. of L. of Appellant's first round opening Brief in this matter (as opposed to this second round of briefing on remand from the Supreme Court).

Furthermore, at the time Homeowners filed their lawsuit on March 8, 1985, and subsequently, Homeowners were unaware, and remain unaware to this day, of what persons or entities might be claiming to be the successor of Jesse H. Dansie, with regard to the Well Lease and Water Line Extension Agreement. Homeowners had every reason to believe that J. Rodney Dansie was the successor to his father Jesse H. Dansie's interest in the Well Lease and Water Line Extension Agreement, and this Court upheld the trial judge's initial decision to quiet title to the water system and water right in Homeowners as against all

parties to the action. It is significant that Defendant J. Rodney Dansie did not appeal from any of the Court's Orders in this case (R. 1947-48). That being the case, and J. Rodney Dansie having been personally sued in this action, the interest of J. Rodney Dansie has thus been extinguished by the Quiet Title Order issued by Judge Brian after remand from the Court of Appeals on February 11, 1994. This understanding of J. Rodney Dansie's interest in succeeding his father Jesse H. Dansie with regard to the 1977 Well Lease Agreement is supported by the Responsive brief filed in this instant appeal by Appellee Foothills Water Company. In a footnote on page 15 of its responsive brief, Foothills states "In April of 1987, Foothills and Dansie agreed to continue the Well Lease on a month-to-month basis, and continued that arrangement until March of 1993." Although much more will be said about this particular statement *infra* in this brief, Jesse H. Dansie, the original party to the Well Lease Agreement, died on March 8, 1987 (*see* Addendum 1), and, therefore, the only other Dansie involved in this lawsuit is J. Rodney Dansie and must be the "Dansie" that is referred to in Foothills' initial brief in the instant matter.

Furthermore, due to the fact that Homeowners was having trouble determining who may claim an interest in the water system, Homeowners chose to sue "unknown persons claiming an interest in Hi-Country Estates Subdivision." These unknown persons were served pursuant to an Order Authorizing Service of Summons by Publication entered on March 23, 1987, by the Honorable David B. Dee (R. 313, 313). Proof of Publication was presented to the Court on or about May 1, 1987 (R. 340). Thus, the Court's Quiet Title Order in favor of Homeowners extinguished the claims of any and all persons not directly



involved in the lawsuit who had an opportunity to present their interest in this lawsuit, but failed to do so. See U.C.A. § 78-40-12 (1953) and U.R.C.P. 4.

Therefore, it is indeed true that the only party to whom title has not been quieted in this case is Foothills Water Company.

### ARGUMENT

#### POINT I

**THE SUPREME COURT OPINION ALLOWS THIS COURT TO REVERSE THE TRIAL JUDGE'S DETERMINATION AS TO THE VALUE OF THE WATER SYSTEM ON GROUNDS OTHER THAN THOSE FOUND IMPERMISSIBLE BY THE UTAH SUPREME COURT.**

Foothills argues in its responsive brief that the Utah Supreme Court's opinion compels affirmance of the district court's ruling. However, Foothills is incorrect when it alleges that the Supreme Court's opinion "compels affirmance of the district court's ruling." In its opinion (found at Add. 3 to Homeowners' opening brief), the Utah Supreme Court simply ruled ". . . The Court of Appeals erred in reversing the district court's denial of the Homeowners Association's Motion for Summary Judgment on the issue of the amount of reimbursement owed to the water company and in ordering the district court to defer to the PSC." 901 P.2d 1017 at 1022. The Court went to great lengths to point out that the Public Service Commission did not have the power and authority to determine fair market value of the water system for all purposes, but only for rate-making purposes. *Id.*

Thus, a reading of the Supreme Court's opinion clearly shows that that Court did not consider the additional issues raised by Homeowners before this Court in the initial first round appeal. Those additional issues were: Homeowners should not have been required

to pay for the water right; Homeowners have already paid for the water system and should not be required to pay a second time; and the water system in this case has little value to anyone but Appellant, but at any rate is worth no more than \$27,650.00.

In fact, the Utah Supreme Court's Order granting certiorari specifically stated "The Petition for Writ of Certiorari is granted only as to the jurisdiction of the Public Service Commission." (See Add. 2 to Appellant's opening brief). The only conclusion that can be reached is that the Supreme Court's ruling stands for the proposition that this Court cannot base a reversal of the trial court's decision to order Homeowners to pay \$98,500.00 for the water right and water system upon any decision made by the Public Service Commission. Therefore, the statement of Foothills in its responsive brief in the instant matter that "The Utah Supreme Court rejected the arguments advanced by Homeowners for reversal of the issues remaining in this case and remanded the case to this Court to complete the appeals process" is false and misleading. The only argument advanced by Homeowners which was considered by the Utah Supreme Court was the argument relating to the Public Service Commission. It is the province of this Court to determine whether or not the decision of the trial judge should be reversed on other grounds presented to this Court in the initial appeal, but not presented to the Supreme Court due to the restrictions created in the grant of certiorari.

Finally on this point, Homeowners would have this Court note that the Utah Supreme Court has the power to remand any case it reviews on certiorari directly back to the trial court for judgment or proceedings consistent with its opinion. *See, e.g. Crookston v. Fire Ins. Exchange*, 817 P.2d 789 (Utah 1991); U.R.C.P. 30. The fact that the Utah

Supreme Court chose to remand this matter to the Utah Court of Appeals is clearly a basis for concluding that it was the intent of the Court to have the Court of Appeals entertain further proceedings consistent with its opinion. Such further proceedings would include a determination by this Court that the prior basis it used for reversing the trial judge's decision to require Homeowners to pay \$98,500.00 for the water right and water system was erroneous; but would also include this Court's further review of other bases originally presented by Homeowners in its first appeal to the Utah Court of Appeals for reversing the trial judge's determination.

The reasoning presented above also applies to the issue of whether or not this Court has the right to determine that the Well Lease was a valid and binding encumbrance on the water system. Foothills states in its responsive brief that ". . . The Utah Supreme Court pointed out that the district court ruled that the Well Lease was a valid and binding encumbrance on the water system notwithstanding the PSC's order." Homeowners would say "so what?". The Supreme Court was merely stating the district court's ruling. Fortunately, Foothills is honest enough to admit that the Utah Supreme Court "did not expressly mandate affirmance of the district court's ruling." However, Foothills goes on to claim that the Supreme Court's decision invalidates Homeowners' additional arguments for reversal and compels affirmance of the trial judge's decision. Such a statement by Foothills is a *non sequitur*. As stated above, the only thing the Supreme Court did was remand the case to this Court for further proceedings consistent with its opinion. Therefore, as with the valuation issue, this Court is compelled only to conclude that the Public Service Commission's determinations regarding the Well Lease Agreement cannot be a basis for invalidating

the Agreement. It clearly leaves open, however, the issue of whether or not this Court should reverse the trial judge on other grounds raised by Homeowners in their original appeal to this Court. Homeowners ask this Court to reject the conclusion that this Court has no power to do anything but affirm the district court's ruling based upon the Supreme Court's opinion.

## **POINT II**

### **THE DISTRICT COURT'S DETERMINATION REGARDING FAIR MARKET VALUE OF THE WATER SYSTEM AND WATER RIGHT IS CLEARLY ERRONEOUS.**

In its responsive brief, Foothills argues that Homeowners have failed to show that the decision of the district court in setting the amount of value for the water system and water right at \$98,500.00 is clearly erroneous. Foothills goes on to talk about the various experts that were called at the trial of this case, and that the range of opinion of those experts was from some \$600,000.00 to zero.

Foothills fails to address Homeowners' argument that it should not have been required to pay for the water right. Homeowners argued on page 13 in its brief filed in the first round of this case, and reiterated in Addendum 5 of its initial brief in the instant appeal, that the trial court had originally indicated Homeowners would be required to reimburse Foothills for improvements by Foothills to the water system for the years 1974 to 1985 (R. 896). Nevertheless, at the valuation portion of the trial, the court expanded its inquiry, without expressly overruling its original decision, and allowed and required the parties to present evidence regarding the value of the water right in question, Application No. 33130 (59-1608) also referred to as the "Glazier Well Water Right." This was true,

despite the Court's having previously entered its Findings of Fact and Conclusions of Law dated October 20, 1989 (R. 899-904; Homeowners first round brief Add. 4) in which it ruled that Homeowners had previously obtained the right, title, and interest in the disputed water right due to an Assignment from Hi-Country Estates, Inc. to Homeowners and an acknowledgement by the State Engineer's Division of Water Rights that the Homeowners were the owner of the water right referred to as the Glazier Well Water Right.

Foothills does not say one single word about this inconsistency in the trial court's ruling in its brief in the instant matter, but simply ignores it altogether. It is the position of Homeowners that if it was found to be the owner of the water right based upon historical assignments and acknowledgements by appropriate entities and authority, it should not be required to pay anything for the water right in question. Even if this Court were to determine that the trial court was correct in finding that Homeowners would be unjustly enriched by virtue of the improvements made in the water system itself by Foothills while Foothills was unlawfully in control of Homeowners' water system, that same reasoning cannot apply to the water right itself. Foothills did not present any evidence in the lower court, and has not advanced any arguments before this Court as to how Homeowners have been unjustly enriched as a result of Foothills' actions with regard to the water right itself.

At the very least then, this Court should remand the case to the trial court for a determination of what portion of the \$98,500.00 the Court intended to assign as unjust enrichment with regard to the water right itself. We know that the Court assigned some portion of the \$98,500.00 as value for the water right because the Court entered a finding of fact in its October 31, 1990, Findings of Fact and Conclusions of Law as follows:

9. The Homeowners Association will be unjustly enriched unless they reimburse Foothills Water Company as successor-in-interest to Bagley & Company for the fair amount of the entire water system, the improvements made thereon from 1974 to 1985 and the water right.

R. 1623; Add. 5 p. 4, Homeowners' opening brief in the first round (emphasis supplied).

Furthermore, Homeowners pointed out that in its Conclusions of Law of the same date, the trial court ruled:

2. The Homeowners Association must pay Foothills Water Company the total sum of \$98,500.00 for the value of the water system and water right.

R. 1624; Add. 5 p. 5, Homeowners' opening brief in the first round (emphasis supplied).

As pointed out previously, in the Court's final "Order Regarding Amount Payable by Plaintiff for the Subject Water System" issued October 31, 1990, the Court ruled:

The Plaintiff is entitled to an Order Quieting Title to the water system within the boundaries of Hi-Country Estates Subdivision Phase I, and the water right represented by Application No. 33130 (59-1608) on file with Utah State Department of Natural Resources, Division of Water Rights and the Utah State Engineer's Office, upon payment of the sum of \$98,500.00 to Foothills Water Company . . .

R. 1627; Add. 6 p. 2, Homeowners opening brief in the first round (emphasis supplied).

It is unfair and unjust that Homeowners should be found to have owned the water right and yet be required to pay Foothills in order to obtain a quiet title order to said water right. Foothills has never advanced an argument as to how Homeowners have been unjustly enriched with regard to this water right. Homeowners acknowledge that Foothills at least made an effort in the lower court to show the amounts expended for improvements on the water system itself, but no evidence was ever introduced in the lower court as to how

Homeowners had been unjustly enriched with regard to this water right that they were found to have owned since 1985. *See* Assignment of Application of Water Right 33130 (59-1608) from Hi-Country Estates, Inc. to Hi-Country Estates Homeowners Association, Add. 7 Homeowners opening brief in the first round.

Homeowners would also ask the Court to consider carefully the evidence that it presented in the lower court with regard to the value of improvements to the water system which the trial judge felt created an unjust enrichment type situation. This Court needs to understand first and foremost that the trial judge found as a matter of fact and concluded as a matter of law that Plaintiff was the legal owner of the disputed water system, which includes the water rights, the water lots, the water tanks, and the water lines. In its Conclusions of Law dated October 20, 1989, the Court ruled: "Plaintiff is the legal owner of the disputed water system, which includes the water right, the water lots, the water tanks, and the water lines (R. 899-904; Add. 4, Homeowners opening brief in the first round).

Having so concluded, the trial judge's inquiry regarding what amount should be paid by Homeowners to Foothills should have focused on improvements to the water system made prior to the time that the Homeowners obtained title to the water system. Indeed, this was the initial conclusion of law of the Court on this issue in that same document of October 20, 1989, where the Court stated in Conclusion of Law No. 7:

Defendants Foothills Water Company and/or Bagley & Company, by virtue of several legal and equitable principals are entitled to reasonable reimbursement for improvements made by them to Plaintiffs' water system from 1974 to 1985.

R. 904; Add. 4, Homeowners opening brief in the first round.

Perhaps this Court can now see why it is so significant that when the trial judge decided to determine the value of the water system without overruling this prior order at the valuation portion of the trial held on July 30, 31 and August 1, 1990, the lower court had significantly expanded its inquiry to include a determination of the general value of the water system. In doing so, the Court went beyond the concept of unjust enrichment based upon improvements to the water system and now created a circumstance where it was requiring Homeowners to pay once again for a water system and water right the Court had determined it already owned. This is why it was clearly erroneous for the Court to have based its decision on the amount to be paid by Homeowners for this water system on anything other than the value of the improvements themselves.

Homeowners presented the testimony of Jon Strawn, former Chief Rate Engineer for the Division of Public Utilities, who testified that Foothills' operation of the water system (which actually belonged to Homeowners according to the trial judge's ruling) had shown a substantial loss every year between 1985, when it first began operating the water system, and the time of his testimony (1990). Furthermore, Mr. Strawn went on to state that as a result of the significant losses in the water system, it had no value to anyone other than the people who were served by the water system itself. These were the homeowners of Hi-Country Estates Homeowners Association, Plaintiffs and Appellants in this matter (R. 2047, 2055, 2057). Mr. Strawn went on further to testify that his opinion of the value of improvements between 1974 and the time of his testimony (1990) was \$13,376.69 (R. 2052). However, Mr. Strawn further testified that it would cost a new owner \$160,300.00 to bring this antiquated water system up to appropriate standards (R. 2053, 2055).



Apparently, the trial judge totally disregarded the opinion of Mr. Strawn, who was the only witness that specifically testified regarding improvements to the water system between 1974 and 1990. Two expert witnesses called by Foothills in the trial, Stanley S. Postma and Seth Schick, testified as to their opinion of the value of the water system and water right as a whole. They gave no opinion as to the value of improvements with regard to the water system between 1974 and 1985, or 1990.

Therefore, it is the position of Homeowners that the decision of the trial judge in reaching the conclusion that Homeowners would be unjustly enriched to the tune of \$98,500.00 if they were to be awarded the water system was clearly erroneous. The trial judge should have based his decision on the opinion of Mr. Jon Strawn, who had testified that he had worked with the water system continuously as Chief Rate Engineer for the Division of Public Utilities between 1985 and 1990. Mr. Strawn testified that he had personally gone out and reviewed the water system on numerous occasions during that five-year period in his official capacity, and was intimately familiar with it (R. 1995-1999).

In its brief in the instant appeal, Foothills totally disregards Homeowners' argument in its opening brief regarding the importance of the testimony of Jon Strawn.

Homeowners also argued in its opening brief in the instant matter, as well as in the first round, that they had already paid for the water system and should not be required to pay a second time. Foothills gives this argument short shrift by simply concluding that there was no evidence cited by Homeowners to support or compel a conclusion that the developers ever intended or agreed that Homeowners would be given title or control of the water system. Yet in making this argument, Foothills would have had to completely

overlook Homeowners' argument in its initial brief in the instant matter, and also its opening brief in the first round, that one of the original developers, Mr. Gerald H. Bagley, testified at a deposition on April 12, 1988, that it was his understanding he would recover his investment in the water system through the sale of the lots. He also testified that method of recovering the cost of the water system was consistent with other projects he had developed (R. 1650 pp. 29, 30).

Homeowners also presented in the lower court the testimony of John Thomas, a real estate agent who had resided in Hi-Country Estates Subdivision Phase I for 19 years at the time of trial, and was originally employed by the other two developers of the Subdivision (along with Mr. Bagley), Mr. Spencer and Mr. Lewton, as project manager for the development beginning in appropriately 1971 (R. 2087, 2088). Mr. Thomas testified further that he had been authorized by Mr. Spencer and Mr. Lewton (who had bought out Mr. Bagley at the time and were responsible for the development of the Subdivision) to inform potential lot purchasers ". . . The property owners association was to own the water system, at the time that the developers turned it back or over to them, and activated the property owners association. . . ." (R. 2090). Mr. Thomas further testified that the lots would have been worthless to a prospective purchaser without the water system (R. 2091).

Homeowners also called other witnesses, including the former president of the Homeowners Association, to testify that in their opinions they had paid for the water system when they bought their lots, and that it had been represented to prospective purchasers that the water system would be turned over to the Homeowners Association. The testimony of

one of the other developers, Charles Lewton, was presented to the Court as part of a deposition Mr. Lewton originally provided. Mr. Lewton testified that the reason the Homeowners Association was created by the developers in the first place was so they could take over the "amenities" that would service all of the lot owners. He testified that the water system was one of the amenities (R. 1655 p. 39).

Although original developer Gerald H. Bagley changed his testimony between the deposition and the trial with regard to his intent as to the water system, he was substantially impeached by the additional testimony presented by Homeowners, and by his prior deposition stating otherwise (R. 2239, 2240).

Therefore, the conclusion must be reached by this Court that the trial judge's determination of the amount of \$98,500.00 to be paid by Homeowners for purposes of unjust enrichment was clearly erroneous. This Court is asked to reverse the findings of the trial court with instructions that the trial court enter an order finding that Homeowners would not be unjustly enriched if it were not required to pay any monies to Foothills with regard to this water system.

### POINT III

**THIS COURT SHOULD REVERSE THE TRIAL JUDGE'S  
DETERMINATION THAT THE 1977 WELL LEASE AGREE-  
MENT IS A VALID AND BINDING PERPETUAL ENCUM-  
BRANCE ON THE WATER SYSTEM.**

In its initial brief in this matter, Homeowners argued that although the Utah Supreme Court reversed this court's decision reversing the trial court in finding the 1977 Well Lease Agreement was a valid encumbrance on the water system, it did so only on the

basis that this Court relied on the March 17, 1986, decision of the Public Service Commission as grounds for such invalidation. This Court should now proceed, Homeowners argued, to determine whether or not the 1977 Well Lease Agreement should be invalidated on other grounds argued originally by Homeowners in its first round briefs before this Court, which resulted in this Court's September 22, 1993, opinion. Homeowners argued that this Court should invalidate the Well Lease Agreement not only on the equitable grounds that it was grossly unreasonable and showered virtually limitless benefits on Jesse Dansie and the members of his immediate family, but also because this agreement terminated on its face on April 10, 1987, and was never legally renewed. Homeowners argued that no extensions of the agreement were ever submitted as evidence to the Court, and therefore it could not be used as a valid basis for an eternal encumbrance upon the water system as essentially ruled by the trial judge in this case.

Incredibly, Foothills responds in its brief by making the following statement in a footnote on page 15: "The Well Lease provides that the parties to the agreement could renew the Well Lease on terms to be agreed to by the parties. In April of 1987, Foothills and Dansie agreed to continue the Well Lease on a month-to-month basis, and continued that arrangement until March of 1993." Of course, Foothills makes no citation to the record for this proposition and Homeowners challenges its veracity entirely. Homeowners maintain that not one single shred of documentary evidence or otherwise was presented to the trial judge with regard to any extensions of this Well Lease Agreement! Homeowners challenge Foothills at oral argument of this matter, if such is allowed, to cite a single page of the record in which a document showing an extension of this Well Lease Agreement alleged to

have occurred in April of 1987, and apparently continuing until March of 1993, was ever presented to the trial court. Furthermore, since the trial of this case was concluded on July 30, 31, and August 1, 1990, at the very least, any statement by Foothills in its brief that something has occurred since the date of trial is not part of the record and should be stricken by this Court. This statement is entirely inappropriate and should subject Foothills' and its attorneys to sanctions pursuant to Rule 33 of the Utah Rules of Appellate Procedure.

Even if some testimony had been elicited at trial from J. Rodney Dansie indicating the Well Lease Agreement had somehow been extended, such testimony should have been totally disregarded by the trial judge, and should be disregarded by this Court. This is true because the Well Lease Agreement itself specifically provides: "Bagley shall have the right to renew this Well Lease on terms to be agreed to by Bagley and Dansie at the termination of this Lease on April 10, 1987." Foothills places great importance on the fact that Jesse H. Dansie, the original party who leased the well to Gerald H. Bagley and the developers of Hi-Country Estates Subdivision Phase I, had filed a "Notice of Interest in Real Property" regarding this Well Lease Agreement. More will be said about this Notice of Claim argument later, but it should be important to this Court to know that if Foothills is going to rely on the Notice of Claim argument for the fact that somehow this Well Lease Agreement should "run with the land" and the owners of the water system should be perpetually responsible to comply with this agreement, no statement or claim is made that these alleged extensions were filed with the appropriate County Recorder's Office. Since the 1977 Well Lease Agreement expired on its face by its own terms on April 10, 1987 (a

fact not disputed by Foothills in its responsive brief), then any extension, to be valid, should have also been recorded with the County Recorder's Office. No evidence of such extension was ever presented to the lower court, nor has any motion to supplement the record been made in this Court to establish that such extensions had been recorded.

Foothills and its attorneys know well that no such written extensions even exist, let alone have been recorded, and this is why they have not cited to the record regarding these alleged extensions, nor attempted to present any evidence to the lower court or this Court as to the recording of such alleged extensions.

In addition, it is the apparent allegation of Foothills that "Foothills and Dansie" agreed to continue the Well Lease on a month-to-month basis. The Court should understand that, like the original agreement, this agreement was intended to benefit the Homeowners of Hi-Country Estates Homeowners Association who were being served by the water system Foothills Water Company was illegally operating. We say illegally because the trial judge found that Homeowners had owned that water system since at least 1985. Therefore, basic contract law suggests that Homeowners should have had an opportunity to be a party to the alleged extension of this agreement, which they did not have. No evidence was presented in the lower court whatsoever regarding this alleged extension of the agreement and this is how the Court should know that Homeowners were not a party to the agreement.

Finally, the Court should note that although Foothills was the successor-in-interest of Bagley & Company, having taken over the water system from Bagley in approximately 1985, there was no evidence presented to the lower court with regard to who the successor-

in-interest to Jesse H. Dansie was. Jesse H. Dansie became deceased on March 8, 1987, (*see* Addendum 1), over a month prior to the agreement's expiration on April 10, 1987; and so when Foothills states in its brief that "Foothills and Dansie" had agreed to continue the Well Lease in April of 1987, it is unclear as to which Dansie Foothills is referring to. If it was J. Rodney Dansie, he was president of Foothills Water Company by his own testimony in the lower court, and based upon several documents admitted in the case. *See, e.g.* R. 1052; Add. 2 p. 9 Homeowners opening brief in the first round.

Therefore, it ought to be readily seen by this Court that Mr. Dansie, as owner and president of Foothills Water Company is alleged to have made an agreement in April of 1987 with himself in what could not possibly have been an arms length transaction to continue this Well Lease Agreement on a month-to-month basis as claimed by Foothills in its brief on page 15. This claim by Foothills is absolutely outrageous! This Court should demand appropriate proof that a legally valid extension was presented to the trial court before it even considers upholding this perpetual encumbrance on the water system found by the trial judge to be owned by Homeowners.

Foothills also makes the untenable argument that because Jesse H. Dansie filed a "Notice of Interest in Real Property" with the County Recorder of Salt Lake County, the terms of the Well Lease Agreement should be applied in perpetuity, for time and all eternity, to anyone who purchases property in Hi-Country Estates Subdivision and uses the water system there. This argument is ludicrous at best! Foothills seems to be arguing that the fact that this Notice of Interest was recorded should somehow have given appropriate notice to all purchasers of lots in Hi-Country Estates Subdivision that the water system they

were counting on to provide them water was encumbered by a perpetual encumbrance. Homeowners would present the clear fact that the purpose and effect of recording is to give rise to certain presumptions pursuant to the provisions of Utah Code Annotated § 57-4a-4 (as amended 1989). However, it should be understood by the Court that the 1977 Well Lease and Water Line Extension Agreement in question was not itself recorded. All that was recorded was a "Notice of Interest in Real Property" which referred to the Well Lease Agreement. Therefore, Utah's Recording Act provides no presumptions for the Well Lease Agreement itself.

Furthermore, Foothills seems to be arguing that the fact of recordation of this "Notice of Interest in Real Property" somehow amended the specific terms of the Lease Agreement itself which provided as follows: "4. Bagley shall have the right to renew this Well Lease on terms to be agreed to by Bagley and Dansie at the termination of this Lease on April 10, 1987." If this Court can find no valid extension of this Well Lease Agreement by appropriate parties under appropriate circumstances, the mere fact that the "Notice of Interest in Real Property" was recorded in 1985 by Jesse H. Dansie is totally irrelevant to the Court's inquiry. This recorded Notice of Interest does nothing more than a Notice of Lis Pendens pursuant to Utah Code Annotated § 78-40-2. The lis pendens simply gives parties notice of a lawsuit regarding real property. In and of itself, it conveys no interest and does not alter any terms of the lawsuit it gives notice of. Likewise, this "Notice of Interest in Real Property" does not alter the terms of the underlying agreement; and thus it cannot act as an extension of the contract provision which provides for expiration on April 10, 1987.



In its "Order on Briefing" dated February 8, 1996, this Court specifically ruled that its original opinion holding that Appellant Hi-Country Estates Homeowners Association holds legal title to the water right, lots, and system was unaffected by the opinion of the Utah Supreme Court on certiorari and, accordingly, has been affirmed. This being the case, the Court needs to view this 1977 Well Lease and Water Line Transportation Agreement from the standpoint of the parties involved in that agreement. Even if it is presumed that it was appropriate for Gerald H. Bagley to have entered into this agreement with Jesse H. Dansie to provide a benefit to the Homeowners and lot owners who own property within Hi-Country Estates Subdivision Phase I, Mr. Bagley transferred whatever interest he had in that regard to J. Rodney Dansie and Foothills Water Company on October 31, 1985 (R. 1623; Add. 5, p. 4, Homeowners opening brief in the first round). Since Homeowners must be presumed, as a result of the final decision of the trial court, affirmed by this Court on appeal, that it owned the water system by virtue of an assignment from Hi-Country Estates, Inc. to Hi-Country Estates Homeowners Association dated June 28, 1985 (R. 1359, 1402), only Homeowners would have the authority to be an appropriate party to extend the Well Lease Agreement when it expired on April 10, 1987. Instead, what Foothills claims happened was that Foothills itself entered into that extension, even though this Court has now affirmed the ruling that Foothills was unlawfully in control of the water system at that time. Therefore, as legitimate successor to the original developer, Gerald H. Bagley, only the Hi-Country Estates Homeowners Association Phase I representatives would have had the authority to have extended that Well Lease Agreement. Since there is no evidence that

it did so, this Court must conclude the Well Lease Agreement terminated on April 10, 1987, and no longer acts as an encumbrance on the water system.

Furthermore, Homeowners ask the Court to consider that, at the very least, this was an unconscionable agreement since it purported to provide water in perpetuity, as long as the water system in Hi-Country Estates Subdivision Phase I exists, to the Dansie family. This is true despite the fact that Foothills itself concedes that the Homeowners no longer use water from the well which was the subject of this 1977 Well Lease Agreement. This can be determined from the statement of Foothills indicated previously on page 15 of their brief that the month-to-month tenancy allegedly agreed to and extended by "Foothills and Dansie" continued only until March of 1993. This was because of the fact that Homeowners drilled their own well and began pumping their own water at that time. This fact, in and of itself, makes the alleged contract extension unconscionable, not to mention the other reasons cited in this brief. The Utah Supreme Court and this Court have held in numerous cases that Utah courts will refuse to enforce any contract if it appears to be clearly unconscionable. *See In re Hansen*, 586 P.2d 413 (Utah 1978); *Bekins Bar V Ranch v. Huth*, 664 P.2d 455 (Utah 1983); *Jones v. Johnson*, 761 P.2d 37 (Utah App. 1988). Homeowners submit that this contract, or at least its alleged extension providing water in perpetuity to the Dansie family, is clearly unconscionable and simply should not be enforced by this Court.

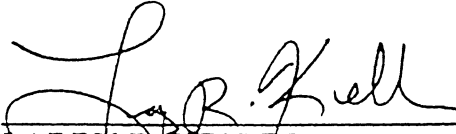
Finally, Homeowners reassert the fact that the decision of the trial judge in this case was inconsistent in that the trial judge found in his Findings of Fact and Conclusions of Law dated October 31, 1990, in Finding of Fact No. 5 that the Well Lease and Water Line Extension Agreement, which is the subject of this lawsuit, "was and is a valid and fully

binding encumbrance on the subject water system." Despite this statement, the Court goes on to state within this same Finding of Fact No. 5: "That encumbrance does not in any way legally burden the water system or the owner or operator of the water system." Homeowners have continually argued that this Finding of Fact is internally inconsistent. How can the Court find that an agreement is a valid and fully binding encumbrance on the water system and yet in the same breath state that such encumbrance does not in any way legally burden the water system or the owner or operator of the water system? Judge Brian has created a *non sequitur*. It is simply not logical for the Court to have concluded that Homeowners must obey the terms of an agreement they were not even a party to, and yet the requirement to obey those terms is not a legal burden on the water system.

### CONCLUSION

Homeowners respectfully request that the Utah Court of Appeals find and conclude that they should not have been required to pay the sum of \$98,500.00 for their water system on grounds other than the determination of the Public Service Commission found to be impermissible by the Utah Supreme Court. Furthermore, Homeowners respectfully request that this Court completely invalidate the 1977 Well Lease and Water Line Extension Agreement which the trial judge found to be a perpetual encumbrance on the water system on equitable and legal grounds as indicated herein. Fundamental fairness requires a finding by this Court that that agreement is invalid, and it is respectfully requested that this Court enter such an Order.

RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of August, 1996.

  
LARRY R. KELLER  
Attorney for Plaintiff/Appellant

CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing was mailed, by first class postage prepaid, on this 9<sup>th</sup> day of August, 1996, to:

Val R. Antczak  
PARSONS BEHLE & LATIMER  
Attorneys for Foothills Water Company  
201 South Main Street, Suite 1800  
P.O. Box 11898  
Salt Lake City, UT 84147-0898



## **ADDENDUM 1**

# STATE OF UTAH — DEPARTMENT OF HEALTH

LOCAL FILE NUMBER		CERTIFICATE OF DEATH		STATE OF UTAH - DEPARTMENT OF HEALTH		STATE FILE NUMBER	
18-869				143 87 001800			
NAME OF DECEDENT		FIRST	MIDDLE	LAST	SEX	RACE (White, Black, Am Indian, etc.)	DATE OF DEATH (Month, Day, Year)
JESSE		HOMER	DANSIE	Male	White	March 8, 1987	
WAS DECEDENT OF SPANISH ORIGIN? YES <input type="checkbox"/> NO <input checked="" type="checkbox"/> If yes, indicate type		DATE OF BIRTH (Month, Day, Year)		AGE (Last Birthday)	IF UNDER 1 year		IF UNDER 24 HOURS
Mexican <input type="checkbox"/> Puerto Rican <input type="checkbox"/> Cuban <input type="checkbox"/> Other <input type="checkbox"/> (If other, specify)		April 29, 1910		76 Yrs.	Months Days		Hours Minutes
BIRTHPLACE (State or foreign country)		CITIZEN of what country		EDUCATION—(Specify only highest grade completed)		SOCIAL SECURITY NUMBER	
Utah		USA		11. 14		12. 528-05-9496	
USUAL OCCUPATION (Give kind of work done during most of working life, even if retired)		KIND OF BUSINESS OR INDUSTRY		NAME of surviving spouse (If, wife, enter maiden name)			
13a. Farmer		13b. Farming		14. Ruth Martha Butikofer			
NAME OF FATHER		MAIDEN NAME OF MOTHER		Was decedent ever in U.S. Armed Forces?			
15. Alma H. Dansie		16. Agnes Ruth Kunz		17. YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>			
USUAL RESIDENCE—(Street address or location)		INSIDE CITY LIMITS? YES <input checked="" type="checkbox"/> NO <input type="checkbox"/>		NAME, RELATIONSHIP AND MAILING ADDRESS OF INFORMANT			
18a. 7005 West 13090 South		18b. X		Ruth B. Dansie (wife)			
CITY OR TOWN		COUNTY		7005 West 13090 South			
18c. Herriman		18d. Salt Lake		18. Herriman, Utah 84065			
NAME of hospital, nursing home or other institution where death occurred (If outside an institution, give street address or location.)		CITY OR TOWN		COUNTY			
20a. 7005 West 13090 South		20b. Herriman		20c. Salt Lake			
MEDICAL EXAMINER: I hereby certify that to the best of my knowledge the death occurred at the hour, date and place stated above from the causes stated below based on examination of the body and/or investigation of the circumstances.		PHYSICIAN OR MEDICAL EXAMINER SIGNATURE		TIME OF DEATH (24 hr. clock)			
21a. Decedent was pronounced dead at: HOUR DATE		21b. John H. Holbrook MD		21c. 0530			
PHYSICIAN: I hereby certify that to the best of my knowledge the death occurred at the hour, date and place stated above from the causes stated below that I attended the decedent, and I last saw the decedent alive on		CERTIFIER'S name and title (Type or print)		DATE SIGNED (Month, Day, Year)			
21d. month day year		21e. John Holbrook, M.D.		21f. 3/9/87			
If not certified by medical examiner, was death reported to him? YES <input type="checkbox"/> NO <input checked="" type="checkbox"/> If yes, enter the date and hour reported M.E. Case No.		CERTIFIER'S address and zip code		UTAH PHYSICIAN LICENSE NUMBER			
22. HOUR MO DAY YEAR		22g. 50 N Medical Drive, S.L.C. Utah 84132		22h. 3961			
Burial <input checked="" type="checkbox"/> Entombment <input type="checkbox"/> Other <input type="checkbox"/> DATE		SIGNATURE OF Funeral Director		FUNERAL HOME—Name, address and license number			
23a. Mar. 12, 1987		23b. [Signature]		23c. Goff Mortuary #61 Midvale, Utah 84047			
NAME AND LOCATION OF CEMETERY OR CREMATORY		LOCAL REGISTRAR—Signature		Date accepted for registration by local registrar			
24. Herriman Cemetery Herriman, Utah		24b. [Signature]		24c. March 10, 1987			
PART I. DEATH WAS CAUSED BY: IMMEDIATE CAUSE (A)		(Enter only one cause per line for A, B and C)		Interval between onset and death			
CONDITIONS IF ANY WHICH GAVE RISE TO THE IMMEDIATE CAUSE (A) STATING THE UNDERLYING CAUSE LAST.		25a. Metastatic Colon Carcinoma		Interval between onset and death			
DUE TO, OR AS A CONSEQUENCE OF (B)				Interval between onset and death			
DUE TO, OR AS A CONSEQUENCE OF (C)				Interval between onset and death			
PART II. OTHER SIGNIFICANT CONDITIONS—CONTRIBUTING TO DEATH, BUT NOT RELATED TO THE IMMEDIATE CAUSE GIVEN IN PART I.		26a. Severe congestive heart failure		AUTOPSY YES <input checked="" type="checkbox"/> NO <input type="checkbox"/> IF YES, were findings considered in determining cause of death? YES <input type="checkbox"/> NO <input type="checkbox"/>			
30. Accident <input type="checkbox"/> Pending Investigation <input type="checkbox"/> Suicide <input type="checkbox"/> Undetermined if Injured <input type="checkbox"/> Homicide <input type="checkbox"/> Accidentally or Purposely <input type="checkbox"/>		DATE of Injury (Month, Day, Year)		TIME OF INJURY (24 Hour Clock)		INJURY AT WORK? YES <input type="checkbox"/> NO <input type="checkbox"/>	
32. LOCATION OF INJURY—STREET AND NUMBER OR LOCATION AND CITY OR TOWN.		33a. Distance from place of injury to usual residence (Item 18)		33b. Miles		33c. Were laboratory tests done for drugs or toxic chemicals? YES <input type="checkbox"/> NO <input type="checkbox"/>	
34. DESCRIBE HOW INJURY OCCURRED (enter sequence of events which resulted in injury, NATURE OF INJURY SHOULD BE ENTERED IN ITEM 25)		35. Were laboratory tests done for alcohol? YES <input type="checkbox"/> NO <input type="checkbox"/>		36. If motor vehicle accident, specify if decedent was driver, passenger or pedestrian.			

This is to certify that this is a true copy of the certificate on file in this office. This certified copy is issued under authority of section 26-2-22 of the Utah Code Annotated, 1953 As Amended.

Date Issued:

AUG 08 1996

John E Brockert

John E. Brockert

DIRECTOR OF VITAL STATISTICS



SL 830238