

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 : Brief of Appellant

Utah Court of Appeals

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Val R. Antczak; Parsons Behle & Latimer; Attorneys for Appellees.

Larry R. Keller; Keller & Lundgren; Attorney for Appellant.

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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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Upon remand for further proceedings from the Utah Supreme Court.

-----00000-----

Val R. Antczak
PARSONS, BEHLE & LATIMER
P.O. Box 11898
Salt Lake City, UT 84147
Attorneys for Foothills and
J. Rodney Dansie

Larry R. Keller, #1785
KELLER & LUNDGREN, L.C.
257 East 200 South, #340 - 10
Salt Lake City, UT 84111
Attorneys for Appellant

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

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DOCKET NO. 920450-CA

IN THE UTAH STATE COURT OF APPEALS

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ASSOCIATION, a Utah corporation,

Plaintiff/Appellant and
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: Case No. 920450-CA
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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 :
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Val R. Antczak
PARSONS, BEHLE & LATIMER
P.O. Box 11898
Salt Lake City, UT 84147
Attorneys for Foothills and
J. Rodney Dansie

Larry R. Keller, #1785
KELLER & LUNDGREN, L.C.
257 East 200 South , #340 - 10
Salt Lake City, UT 84111
Attorneys for Appellant

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JURISDICTION AND NATURE OF PROCEEDINGS

The Utah Court of Appeals has jurisdiction over this matter pursuant to U.C.A. § 78-2-2(3)(a).

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW

1. This Court should reverse the trial judge's determination as to the value of the water system on grounds other than those impermissible by the Utah Supreme Court. The standard of review is an abuse of discretion standard.

2. This Court should reverse the trial court's finding that the 1977 Well Lease and Water Transportation Agreement was a valid encumbrance on the water system on grounds other than the PSC Order of March 17, 1986. The standard of review is a legal correctness standard.

CONSTITUTIONAL, PROVISIONS, STATUTES AND RULES

Any relevant text of constitutional provisions, statutes, or rules pertinent to the resolution of the issues presented on appeal is contained in the body of this brief.

STATEMENT OF THE CASE

This case involves a lawsuit originally filed by Plaintiff Hi-Country Estates Homeowners Association on March 8, 1985. After convoluted proceedings in the lower court, Homeowners appealed certain decisions by the trial judge as outlined more specifically in the Statement of Facts, *infra*. After proceedings before the Utah Court of Appeals, and subsequently the Utah Supreme Court, the appeal was referred back to this Court by the Utah Supreme Court.

Homeowners subsequently filed their "Plaintiff/Appellant's Motion to Decide Certain Appeal Issues on Other Grounds" on December 7, 1995. Foothills Water Company (hereafter "Foothills") filed a response to Homeowners' Motion, and Homeowners subsequently filed a reply to Foothills' response. This Court then subsequently issued an Order requiring full briefing of the issues involved in Homeowners' Motion. See greater details in Statement of Facts, *infra*.

STATEMENT OF FACTS

1. On March 8, 1985, Homeowners filed the instant action (R. 2-17). Homeowners subsequently filed a Second Amended Complaint (March 16, 1987) asking the Court to quiet title and/or issue a declaratory judgment declaring the rights and responsibilities of Homeowners with respect to ownership of a water system, water lots, a water right and the real estate and easements related thereto, which serves Hi-Country Estates Subdivision Phase I in southwestern Salt Lake County. (R. 296-304).

2. Defendant-Appellees Foothills Water Company (hereafter "Foothills") and Dansie answered Homeowners' Second Amended Complaint on March 21, 1987, and counter-claimed against Counter-Claim Defendants Sims and Turner for slander of title and against Homeowners to quiet title to the water right, water system and components in Foothills Water Company. Dansie and Foothills also filed a Cross-Claim against Defendants Spencer and Lewton for slander of title (R. 341-352).

3. Homeowners replied to the Dansie and Foothills Counterclaims on July 9, 1987 (R. 371-373).

4. Charles E. Lewton and Keith Spencer, two of the original developers of Hi-Country Estates Subdivision Phase I, having chosek to disclaim their interest in any of the property involved, allowed judgment to be taken against them. (R. 897, 902, 904). The same was true of Defendants Hi-Country Estates, Inc., and Hi-Country Estates Second (R. 897, 902, 903). No appeals were taken by any of these parties. Defendant J. Rodney Dansie participated in the lower court but failed to appeal from any of the Court's Orders in this case. 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.

5. Trial began on August 25, 1988. On that date, the Court entered a Minute Entry stating:

"This matter comes on before the Court for trial, with appearances as shown above. The Plaintiff's and Defendants' counsel meet with the Court in chambers, and opening remarks are therefore waived. Thereupon, the Plaintiff calls Marge Tempest and she is sworn and examined. The respective counsel then agreed to submit the matter via written proffer. The matter will be further argued on September 9, 1988, at 1:00 p.m." (Emphasis supplied).

(R. 452).

6. The Court's decision of October 25, 1988, was embodied in an "Order on Ownership Issues" signed by Judge Brian on October 20, 1989 (R. 895-898). At that time,

the Court also signed Findings of Fact and Conclusions of Law (R. 899-904), but left open the issue of fair compensation for the water system.

7. On December 1, 1989, Homeowners filed a "Trial Brief and Motion for Summary Judgment on Valuation Issue", claiming that the Court was bound by the determination of the Public Service Commission of Utah as to the improvements to the subject water system between 1974 and 1985, which the Court ruled was the period of time for which improvements to the system should be valued. (R. 1023-1043).

8. In a Minute Entry of January 31, 1990, the Court denied Homeowner's Motion for Partial Summary Judgment on the valuation issue and scheduled a trial to "determine fair compensation" (R. 1228).

9. Trial was held on the valuation issue on July 30, 31, and August 1, 1990 (R. 1358-1362; R. 1953-2404). Several expert witnesses on valuation were called by both parties.

10. On August 16, 1990, the Court issued its Memorandum Decision (R. 1538-1543), which was embodied in formal Findings of Fact, Conclusions of Law and "Order Regarding Amount Payable by Plaintiff for Subject Water System" dated October 31, 1990 (R. 1620-1628).

11. At that time, and not on the record, despite a request for the matter to be on the record by the parties, Judge Brian granted the oral motion of Foothills and Bagley to amend his previous Order dated October 31, 1990, with a ruling that if Homeowners failed to pay the sum of \$98,500.00 by August 15, 1991, an Order Quieting Title to the water system would be entered in the name of Foothills Water Company (R. 1647).

12. On February 5, 1991, the trial judge signed the document entitled "Order on Motions to Certify Order as Final and Clarification of Order" in which he ruled among other things:

If the sum of \$98,500.00 required to be paid to Foothills Water Company in paragraph 3 of the Order Regarding Amount Payable by Plaintiff for subject water system, dated October 31, 1990, is not paid in full to Foothills Water Company on or before August 15, 1991, 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 the Utah State Department of Natural Resources, Division of Water Rights, and the Utah State Engineer's Office, in Foothills Water Company shall be entered forthwith.

(R. 1647-1649).

13. On August 20, 1991, Judge Brian issued his "Quiet Title Order in Favor of Foothills Water Company", finding that Homeowners had failed to pay the \$98,500.00 on or before August 15, 1991, as required by his Order of October 31, 1990 (R. 1931-1936).

14. On August 22, 1991, Homeowners filed its Notice of Appeal in this matter (R. 1944-46).

15. Foothills and Bagley filed their Notice of Cross-Appeal in this matter on September 18, 1991 (R. 1947-48).

16. After a full hearing and oral argument in the Utah Court of Appeals, the Court of Appeals issued its Opinion in this matter on September 22, 1993. That opinion was a unanimous decision written by the Honorable Regnal W. Garff, Judge. The opinion ruled in Respondent Homeowners Association's favor on every single issue. The Court stated in its "Conclusion":

In conclusion, we (1) affirm the district court's initial conclusion that Homeowners Association holds legal title to the water right, lots and system; (2) remand for the court to issue a quiet title order in Homeowners Association's favor with no contingencies; (3) affirm the court's conclusion that Bagley is not entitled to any damages; (4) affirm the court's conclusion that Foothills Water Company's claim for slander of title be dismissed; (5) reverse the court's order denying summary judgment on the issue of compensation, acknowledging the PSC's order that the amount of \$16,334.99 is includable in the rate base; (6) reverse the district court's order regarding the validity of the well lease agreement; and (7) reverse the court's order regarding distribution of water to outsiders, acknowledging the PSC's jurisdiction over that issue.

Slip Op. at 18, 19. (See Addendum 1).

17. Foothills petitioned the Utah Court of Appeals for Rehearing pursuant to the provisions of Rule 35 of the Utah Rules of Appellate Procedure on October 13, 1993.

18. The Utah Court of Appeals denied Foothills' Petition for Rehearing on December 7, 1993.

19. Foothills was the only Defendant which petitioned the Utah Supreme Court for certiorari. The decision of the Utah Court of Appeals issued September 22, 1993, is final as to all parties except Homeowners and Foothills.

20. The Utah Supreme Court granted Foothills' Petition for Writ of Certiorari in part on June 13, 1994. The Supreme Court entry related the following simple single sentence "[T]he petition for writ of certiorari is granted only as to the jurisdiction of the Public Service Commission." See Addendum 2. In doing so, the Utah Supreme Court, of necessity, upheld this Court's decision of September 22, 1993, as that decision related to this Court's determinations as follows: (1) affirming the district court's initial conclusion that Homeowners Association holds legal title to the water right, lots and system; (2) remanding

the case for the trial court to issue a Quiet Title Order in Homeowners' favor with no contingencies; (3) affirming the district court's conclusion that Bagley was not entitled to any damages; and (4) affirming the district court's conclusion that Foothills Water Company's claim for slander of title should be dismissed. (See Addendum 2).

21. The Utah Supreme Court issued its opinion after briefing and oral argument on July 20, 1995, (1) reversing the Court of Appeals reversal of the district court's denial of Homeowners' Motion for Summary Judgment on the issue of the amount of reimbursement owed to Foothills Water Company (which had been based on the PSC's decision); (2) reversing the Court of Appeals' determination that the Public Service Commission's Order of March 17, 1986, invalidated the 1977 Well Lease Agreement between Bagley and Dansie; (see Addendum 3 pg. 10); (3) ruled that the Court of Appeals' reversal of an Order of the district court which permitted Foothills to transfer water through the system to customers within its service area, but outside of the subdivision, was moot based upon the subsequent decertification of Foothills by the Public Service Commission. (See Addendum 3 pg. 4, n. 3).

22. This matter was remitted to the Utah Court of Appeals on September 26, 1995, for further proceedings consistent with the Supreme Court opinion. (See Addendum 4).

23. Homeowners filed its Motion to Decide Certain Appeal Issues on Other Grounds on December 7, 1995. Foothills responded to Plaintiff's Motion with its Memorandum on January 5, 1996. Homeowners then filed its Reply to Foothills Response to Plaintiff/Appellant's Motion to Decide Certain Appeal Issues on Other Grounds on January 18, 1996.

24. This Court issued its "Order on Briefing" on February 8, 1996, requiring the parties to address the issues of (1) whether the district court correctly determined the fair market value of the water right, system and lots was \$98,500.00 under the theory of unjust enrichment, and (2) whether the district court correctly held that the Well Lease Agreement was a valid and binding encumbrance on the water system. The Court also asked the parties to address subissues which included whether the Utah Supreme Court's opinion required affirmance of the district court's ruling on fair market value of the water right, system and lots, and the validity of the Well Lease as an encumbrance on the system, and whether the Well Lease Agreement is a valid and binding encumbrance on the system, and in conjunction therewith, whether the Well Lease Agreement has lapsed. (See Addendum 9).

SUMMARY OF THE ARGUMENT

1. While it is true that the Utah Supreme Court has reversed this Court's determination that the trial judge should have granted the valuation urged upon it by Homeowners as found by the Public Service Commission, Homeowners urge this Court to consider the other issues presented in its original briefs before this Court, and in the instant brief, as to why Homeowners should not be required to pay the sum of \$98,500.00 as compensation to Foothills for the water system, water right, and water lots in question. This water system was paid for by Homeowners when they purchased their lots in the subdivision and was a legitimate part of the purchase price for those lots. Homeowners should thus be required to pay nothing to Foothills, but if they were required to pay anything, Homeowners

assert that they should pay no more than the sum of \$27,650.00 as testified to by its expert in this case.

2. Homeowners further urge this Court to reverse the decision of the trial judge regarding the eternal encumbrance on this water system found to be valid by the trial judge based upon the 1977 Well Lease and Water Transportation Agreement. That Agreement expired on its face on April 10, 1987, and cannot possibly constitute a valid and legal encumbrance on this water system. Furthermore, Homeowners were not a party to this agreement and have never been consulted regarding it, yet they are the ones who eternally must bear the burden of this agreement by providing free water to the Dansie family pursuant to the trial judge's initial decision. This decision by the trial judge should be reversed on these grounds, rather than the grounds originally found by the Court in this case, which was subsequently reversed by the Utah Supreme Court.

ARGUMENT

POINT I

THIS COURT SHOULD 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.

Although the Utah Supreme Court found that this Court's determination that the value of the water system, water right and lots in this case could not be based upon a decision by the Public Service Commission (which occurred March 17, 1986), it is the position of Homeowners that this Court should reverse the trial judge's determination that Homeowners should pay \$98,500.00 for the water system, water right and lots in question on other grounds as argued in its original brief before this Court. In that brief, dated

August 10, 1992, and which is a part of the appellate record in this matter, Homeowners argued that the Public Service Commission Order regarding the valuation of the water system should have been adopted by the trial court. Although this Court agreed, the Utah Supreme Court has reversed on that issue and held simply that ". . . 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 P.S.C." (See Addendum 3, pg. 7, 8). The Utah Supreme Court did not hold that the amount of \$98,500.00 was the amount which Homeowners should be required to pay in this matter, but only found that the amount of \$16,334.99, ordered by this Court, could not be upheld on the basis upon which this Court upheld it, i.e., a decision by the Public Service Commission of March 17, 1986. The Supreme Court found that the Public Service Commission's Order only determined the value of the water system for purposes of rate-making and not for any other purpose.

In its initial brief before this Court, Homeowners argued not only that the value should be set at no more than \$16,334.99 pursuant to the Public Service Commission determination, but also argued that the amount of \$98,500.00 was an unfair and arbitrary amount chosen by the trial judge. Homeowners argued on pages 12-25 of its opening brief to the Court of Appeals in this matter that (1) Homeowners should not have been required to pay for the water right; (2) Homeowners have already paid for the water system and should not be required to pay a second time; (3) the water system in this case has little value to anyone but Homeowners, but at any rate is worth no more than \$27,650.00. Homeowners' arguments in that regard are reproduced in Addendum 5 attached to this

brief. Those arguments are not repeated, but the Court is requested to review those arguments and use them as a basis for reversing the trial court's determination that Homeowners should pay Foothills \$98,500.00 as compensation in this matter.

POINT II

THIS COURT SHOULD REVERSE THE TRIAL COURT'S FINDING THAT THE 1977 WELL LEASE AND WATER TRANSPORTATION AGREEMENT WAS A VALID ENCUMBRANCE ON THE WATER SYSTEM ON GROUNDS OTHER THAN THE PSC ORDER OF MARCH 17, 1986.

In its decision reversing this Court with regard to the 1977 Well Lease Agreement, the Supreme Court again focused on the jurisdiction of the Public Service Commission and ruled that ". . . The PSC did not have jurisdiction to invalidate the 1977 Well Lease Agreement as long as that agreement did not impact the rates paid by the Homeowners Association. Although the PSC has power to construe contracts effecting matters within its jurisdiction such as rate-making, ordinary contracts unrelated to such matters are outside of the purview of PSC jurisdiction." (See Addendum 3, pg. 10).

Therefore, although the Utah Supreme Court reversed this Court's decision reversing the trial court in finding that 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. It is the argument of Homeowners that this Court should now proceed to determine whether or not the 1977 Well Lease Agreement should be invalidated on other grounds argued originally by Homeowners in its briefs before this Court, which resulted in this Court's September 22, 1993, opinion.

Homeowners argued on pages 42 through 47 of its initial brief (See Addendum 7) and pages 40 through 43 of its Consolidated Reply Brief and Cross-Appellee's Brief (See Addendum 8) before this Court that this 1977 Well Lease and Water Transportation Agreement, attached as Addendum 15 to its opening brief before this Court and admitted into evidence in the trial of the matter as Plaintiff's Exhibit 11 (R. 1359, 1857-1867) (See Addendum 6 to this Memorandum), was invalid not only because the Public Service Commission found that it was "grossly unreasonable" and "showering virtually limitless benefits on Jessie Dansie and the members of his immediate family," but also because this agreement terminated on its face on April 10, 1987, and was never renewed. Since the agreement terminated by its own terms on that date, and no extensions of the agreement were ever submitted, it cannot be a valid basis for an encumbrance upon this water system "for time and all eternity" as essentially ruled by the trial judge in this case.

Furthermore, Homeowners argued before this Court that they were not parties to this agreement; and to impose its "grossly unreasonable" terms upon them would be unfair and unjust, because they are the persons the Agreement was supposed to have benefited in the first place.

Homeowners also argued that the Well Lease and Water Line Extension Agreement itself provides in paragraph F.2 "Bagley will be personally responsible for lease terms and conditions if Assignee fails to meet the terms and conditions of the lease. No assignment, conveyance or sublease shall release Bagley from liabilities and obligations under this agreement." (See Addendum 7 pg. 45).

Homeowners also argued in its opening and reply briefs in this matter that the trial court had failed to enter adequate findings regarding its decision that the 1977 Well Lease Agreement should be a valid and fully binding encumbrance on the water system as long as the water system "exists and is operative." Homeowners pointed out that the Court had also indicated in its Finding of Fact on this issue that "that encumbrance does not in any way legally burden the water system or the owner or operator of the water system." Homeowners argued that this Finding of Fact is internally inconsistent and thus incomprehensible. Furthermore, Homeowners argued that Finding of Fact No. 5 (the Finding of Fact referred to herein) is not a legitimate Finding of Fact, but constituted a Conclusion of Law. Homeowners pointed out that the Conclusion of Law reached by the Court on this subject seemed inconsistent with its Finding of Fact No. 5. In that Conclusion of Law, the judge referred to a water right, but the 1977 Well Lease Agreement nowhere mentions a water right. It is the lease of a well! (See Addendum 7 and 8).

CONCLUSION

While it is true that the Utah Supreme Court has reversed this Court's determination that the trial judge should have granted the valuation urged upon it by Homeowners as found by the Public Service Commission, Homeowners urge this Court to consider the other issues presented in its original briefs before this Court as to why Homeowners should not be required to pay the sum of \$98,500.00 as compensation to Foothills for the water system, water right and water lots in question. This water system was paid for by homeowners when they purchased their lots in the subdivision and was a legitimate part of the purchase price for those lots. Homeowners should thus be required to pay nothing to Foothills, but if they

were required to pay anything, Homeowners assert that they should pay no more than the sum of \$27,650.00 as testified to by its expert in this case.

Furthermore, Homeowners urge this Court to reverse the decision of the trial judge regarding the eternal encumbrance on this water system found to be valid by the trial judge based upon the 1977 Well Lease and Water Transportation Agreement. That agreement expired on its face on April 10, 1987, and cannot possibly constitute a valid and legal encumbrance on this water system. Furthermore, Homeowners were not a party to this agreement and have never been consulted regarding it, yet they are the ones who eternally must bear the burden of this agreement by providing free water to the Dansie family pursuant to the trial judge's initial decision. This decision by the trial judge should be reversed on these grounds, rather than the grounds originally found by this Court in this case.

It is to be emphasized that the Utah Supreme Court, in reversing this Court's opinion, dealt only with two issues relating to the jurisdiction of the Public Service Commission. The Supreme Court did not uphold the trial judge's decision, but merely reversed this Court's basis for reversing the trial judge as to the two issues discussed herein. This Court must make a decision, before it remands the case to the trial court, as to whether or not the other grounds presented by Homeowners for invalidation of this Well Lease Agreement are valid before it can uphold the trial judge's decision.

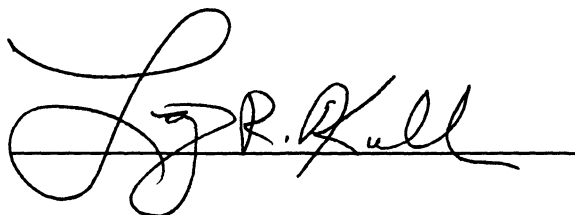
RESPECTFULLY SUBMITTED this 8 day of April, 1996.


LARRY R. KELLER
Attorney for Plaintiff/Appellants

CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing was mailed, by first class postage prepaid, on this 8 day of April, 1996, to:

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

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

ADDENDUM 1

This opinion is subject to revision before
publication in the Pacific Reporter.

SEP 22 1993

IN THE UTAH COURT OF APPEALS

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Mary T. Noonan
Clerk of the Court

Hi-Country Estates Homeowners)
Association, a Utah)
corporation,)
Plaintiff, Appellant, and)
Cross-Appellee,)

v.)
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,)
Counterclaimant,)
Appellee, and Cross-)
Appellant,)

v.)
Hi-Country Estates Homeowners)
Association, a Utah)
corporation; W. Norman Sims;)
and William P. Turner,)
Counterclaim Defendants,)
and Appellees.)

Third District, Salt Lake County
The Honorable Pat B. Brian

Attorneys: Larry R. Keller, Salt Lake City, for Appellants
Ralph J. Marsh, Val R. Antczak, and T. Patrick Casey,
for Appellees

OPINION
(For Publication)

Case No. 920450-CA

F I L E D
(September 22, 1993)

Before Judges Garff,¹ Greenwood, and Orme.

GARFF, Judge:

Appellant Hi-Country Estates Homeowners Association (Homeowners Association) appeals from a final order, which ultimately granted quiet title to a water system, water right, and property lot in favor of appellee Foothills Water Company. We affirm in part, reverse in part, and remand in part.

FACTS

We draw the facts from the parties' stipulated statement of facts, which the court adopted in its findings of fact.

In 1970, appellee, Gerald H. Bagley purchased the undeveloped real property involved in this action from Tony and Betta Lou Nicoletti pursuant to a deferred-payment contract. Also in 1970, Bagley, Charles E. Lewton, and others formed Hi-Country Estates, Inc., a Utah corporation. This corporation, which was involuntarily dissolved in 1976, was the general partner for Hi-Country Estates, Second. Bagley later assigned his contract with the Nicolettis to Hi-Country Estates, Second, a limited partnership, in which he was one of the partners. Later in 1970, the Hi-Country Estates, Second partnership, along with Zions First National Bank Trust Department and the Nicolettis, entered into an agreement under which the bank would take title to the property, remit payment on the contract to the Nicolettis, and thereafter deed the property to purchasers of lots within the subdivision. The partnership subdivided the property into the Hi-Country Estates Subdivision. The partnership installed a water system to supply water to the subdivision, and then commenced to sell lots to the public.

In 1971, Bagley and the other partners sold their interests in the project to Lewton and withdrew from the project. Keith Spencer later joined Lewton as an owner and manager of the project.

In 1973 and 1974, Lewton and Spencer sold the water system, along with all unsold lots in the subdivision, back to Bagley, who then resumed operation of the water system. Bagley made substantial repairs and capital improvements to the system, including constructing a second storage tank, adding pumps and lines, replacing booster lines, and in 1977, connecting the

1. Senior Judge Regnal W. Garff, sitting by special appointment pursuant to Utah Code Ann. § 78-3-24(10) (1992).

system to an additional well leased from Jesse J. Dansie (the Glazier Well Water Right).

From 1973 to October 1985, Bagley operated and maintained the water system in the capacity of (1) an individual, or (2) a general partner of Bagley and Company, or (3) a limited partner of Foothills Water Company. During those years, he incurred total cash losses of \$487,510.00 in operating, maintaining, and improving the water system. In 1976, Hi-Country Estates, Inc. was involuntarily dissolved.

In 1977, Bagley entered into a well lease agreement with Jesse J. Dansie to supply water from the Dansie well to the water system. This lease provided that Dansie and his family would continue to receive water from the well, as long as the system was operable. The lease provided that it could be renewed on April 10, 1987 "on terms to be agreed to by Bagley and Dansie."

In 1982, Homeowners Association received tax notices from Salt Lake County requesting payment of delinquent and current taxes on the water system. Homeowners Association forwarded these notices to Bagley with a letter stating it did not own the water system and thus Bagley was responsible for the taxes. In 1984, Bagley paid \$15,000.00 in delinquent taxes to redeem the system, after the county had scheduled a tax sale. Even though Bagley paid the taxes, the county issued the tax deed to the two water tank lots in the name of Homeowners Association.

In March 1985, Homeowners Association brought an action to quiet title in the water system, the Glazier Well Water Right, and the two water tank lots. Bagley counterclaimed, praying for reimbursement of all sums expended in the construction and installation of the water system and all costs and expenses incurred in the operation and maintenance of the water system "in the event [Homeowners Association] is found to be the owners of the water system." Bagley adopted one of the association's alternative theories: that he acted as a constructive trustee or resulting trustee of the disputed property.

In the same action, Foothills Water Company sought damages for slander of title from Spencer, Lawton, Homeowners Association, and from W. Norman Sims and William P. Turner, members of the association. It also sought damages similar to those sought by Bagley. The trial court dismissed Foothills Water Company's claim for slander of title on October 20, 1989, for "lack of proof."

In June of 1985, Turner asked J.R. Moss, a trust officer of Zions Bank to prepare a quit-claim deed to the two water tank parcels on the property with Homeowners Association as a grantee.

He also asked Moss to request quit-claim deeds from Spencer and Lewton, former officers of the defunct Hi-Country Estates, Inc. and of Hi-Country Estates, Second. Moss prepared the deeds for the tank lots for Zions's signature and had them recorded. Moss prepared other quit-claim deeds and forwarded them to Spencer and Lewton, who signed them on behalf of Hi-Country Estates, Inc. and Hi-Country Estates, Second, and returned them to Moss, who had them recorded.

On October 31, 1985, Bagley transferred ownership of the water system to Dansie in lieu of payment of sums due him on a previous obligation. This transfer was made via Bagley executing an assignment transferring all the outstanding stock of Foothills Water Company to Dansie.

In January 1986, in a Public Service Commission (PSC) hearing regarding rate base, Homeowners Association argued that Foothills Water Company should not include the cost of the water system as a capital investment in its rate base. The PSC determined that only a small portion of the water company's capital investment could be included in the utility's rate base, pending resolution of the ownership dispute in district court. At the same time, Homeowners Association agreed to pay the property taxes on the water system directly, in part to avoid those taxes being included as an expense in setting water rates.²

On March 17, 1986, the PSC issued a final report and order, determining the extent to which the improvements in the water system could be included in the rate base. Those findings included: (1) "Bagley was selling lots at a profit until 1976;" (2) "the improvements made between 1977 and 1980 were to have been provided by Bagley as part of the original system;" and (3) only \$15,334.99 of the improvements were includable in the rate base as legitimate costs of improvement to the system.

Trial in the district court on the issue of ownership began August 25, 1988. The court conferred with counsel off the record, asking them to stipulate to some of the facts and proffer evidence pertaining to the disputed issues.

The parties then agreed to brief the issues and submit them for decision. The court set the due date for briefs for noon on September 9, 1988, and it set oral argument on the matter for

2. The Utah Supreme Court has previously affirmed that local taxes may be passed on to consumers by way of the rate base. See Mountain States Tel. and Tel. Co. v. Salt Lake City, 596 P.2d 649, 651 (Utah 1979).

1:00 p.m. the same day. This hearing was continued several times. It was finally held October 25, 1988.

At the August 25, 1988 hearing, Foothills Water Company's counsel mentioned a "potential need for witnesses." The court responded that counsel should notify the court "by a telephonic conference if it appears that there are proffered facts that cannot be stipulated to." The court noted it would render an "opinion on the record, not in the form of a memorandum decision." It then released all witnesses. The court noted that counsel should contact the court via telephonic conference in the event "problems arise in any way."

On October 14, 1988, Homeowners Association, Foothills Water Company, and Bagley filed a stipulated statement of undisputed facts and disputed contentions. To support its position regarding the disputed issues, Foothills Water Company prepared and submitted an extensive set of proffers of witness testimony. The other parties did not file any proffers.

After several postponements, hearing on the issue of ownership was held October 25, 1988. The court determined that Homeowners Association "is the legal owner of the disputed water system." The court made findings supporting this conclusion based on the parties' stipulated statement of facts and the exhibits attached thereto. The court's findings did not adopt any of the facts or theories set forth in Foothills Water Company's proffers. The court concluded that it would quiet title in favor of the association "only upon payment in full by [Homeowners Association] to [Foothills Water Company] of the Court's reimbursement order for improvements by [Foothills Water Company] to [Homeowners Association's] water system for the years 1974 to 1985."

In determining that Homeowners Association owned the water system, rights, and lot, the court relied on the following documents:

Two 1975 quitclaim deeds from Hi-Country Estates, Inc., and Hi-Country Estate Second, to [Homeowners Association], those deeds conveying all common areas in the subdivision to [Homeowners Association].

A 1984 recorded tax deed from Salt Lake County to [Homeowners Association] conveying all the water tank lots in the disputed subdivision to [Homeowners Association].

A 1985 recorded deed from Hi-Country Estates, Inc., to [Homeowners Association], conveying the water tank lots to [Homeowners Association].

A 1985 recorded deed from Hi-Country Estates Second to [Homeowners Association], conveying the water tank lots to [Homeowners Association].

Two 1985 recorded quitclaim deeds from Zions Bank and Trust, trustee for the property in the subdivision, to [Homeowners Association], conveying the water tank lots to [Homeowners Association].

An assignment from Hi-Country Estates, Inc., to [Homeowners Association], of the disputed water rights.

An acknowledgment by the State Engineer's Division of Water Rights that [Homeowners Association] is owner of the water rights, more specifically, water right referred to in this action as the Glazier Well Water Right.

After ruling from the bench, the court suggested that the parties attempt to stipulate to the amount due Foothills Water Company. "If you are unable to do that, the court will schedule an evidentiary hearing, take testimony, and make the decision on the matter."

When asked about unaddressed issues such as the counterclaims, attorney fees, and other issues, the court responded that it would take such issues under advisement, hoping that in the mean time, the parties would attempt to resolve those issues "with the umbrella issue of reasonable reimbursement." The court then set a time for an evidentiary hearing for the issue of reimbursement.

The court's ruling from the October 25, 1988 hearing was set forth in findings of fact and conclusions of law, signed October 20, 1989 by the court and approved by counsel for the parties. Regarding the October 25, 1988 hearing on the issue of ownership, the court noted that "any objections to the content of the Court's ruling on the resulting findings, conclusions and order shall be addressed in a motion for reconsideration of such ruling, findings, conclusions and order and not as objections to form."

Accordingly, on October 30, 1989, Foothills Water Company moved the court to reconsider, or to set aside the order on the basis that the proceedings did not afford it due process, did not present it with an opportunity to properly present its position according to the rules of civil procedure and of evidence, and did not comport with the method agreed upon. Foothills Water Company also claimed that the findings and order were not supported by sufficient evidence.

Further, on December 1, 1989, Homeowners Association moved that the court recognize and be bound by the PSC's determination regarding the value of the improvements to the water system made between 1974 and 1985.

The court heard Foothills Water Company's motions on December 28, 1989, and issued an order denying them and restating that its October 20, 1989 order would be the final order of the court regarding ownership. The court held that Foothills Water Company had waived its right to an evidentiary hearing on the issue of ownership because it never contacted the court to arrange such a hearing as contemplated in the court's directive from the bench during the August 25, 1988 hearing.

On January 8, 1990, Foothills Water Company and Dansie again moved for reconsideration or for amendment of the court's previous findings, conclusions, and order. On January 17, 1990, the court again reiterated its prior order of October 20, 1989.

On January 31, 1990, the court scheduled a trial to "determine fair compensation." After several delays, an evidentiary hearing was held July 30, 31, and August 1, 1990, to determine the amount of reimbursement due Foothills Water Company. Evidence was submitted showing that Bagley, since taking the water system back in 1974, had spent \$227,851.00 on capital improvements to the water system and had incurred \$250,659.00 in operating losses while operating the system for the benefit of Homeowners Association. The evidence regarding the present value of the system was disputed.

On August 16, 1990, the court issued its memorandum decision, later embodied in formal findings of fact, conclusions of law, and order "regarding amount payable by [Homeowners Association] for subject water system," dated October 31, 1990. The court ruled that the Dansie well lease agreement was a valid and binding encumbrance on the water system. The court also held that Bagley was not entitled to any compensation for operating losses and capital improvements relating to the water system, primarily because he had assigned all his rights to Foothills Water Company.

The court found that the "water system . . . and the water right at issue . . . , including improvements made, property taxes paid, repairs to the system and operating losses, have a combined net value of \$98,500." The court ordered Homeowners Association to pay Foothills Water Company \$98,500.00 for the value of the water system before it would enter the quiet title order. The court ordered the association to pay the sum by no later than August 15, 1991, with the unpaid balance being interest free.

On October 31, 1990, the parties met with the judge for an informal conference regarding a motion to certify the court's orders as final. At that time, and not on the record, despite the parties' request for the matter to be on the record,³ the judge granted the oral motion of Foothills Water Company and Bagley to amend its previous order dated October 31, 1990. The court ruled that in the event Homeowners Association failed to pay the sum of \$98,500.00 by August 15, 1991, the court would then enter an order quieting title to the water system in favor of Foothills Water Company. The court formally entered this amended order February 5, 1991.

On May 23, 1991, Homeowners Association filed a "Motion to Pay \$98,500.00 into an Interest-Bearing Account Under Control of the Court," which motion was granted. The court denied the association's other motion to enter an order requiring that the \$98,500.00 be returned to it in the event the appellate court reversed the trial court's quiet title order in its favor. Because it did not want to risk the money, Homeowners Association refused to pay the \$98,500.00.

On August 20, 1991, after being notified by Foothills Water Company that the \$98,500.00 had not been paid to it as provided, the court entered a quiet title order in favor of Foothills Water Company.

Homeowners Association appeals, seeking reversal of the quiet title order in favor of Foothills Water Company, and reversal of the determination that it was required to pay \$98,500.00 as a condition precedent to receiving quiet title. It also seeks an order requiring the trial court to quiet title in its favor without the encumbrance (the well lease) referred to in its final order.

3. District courts are courts of record. Utah Const. art. VIII, § 1. We are perplexed at the court's refusal to make a record of this motion and decision. See Bridges v. Holcomb, 740 P.2d 281, 282-83 (Utah App. 1987).

Bagley also appeals, claiming the trial court should have apportioned part of the reimbursement damages to him because he expended money for capital improvements to the water system, along with costs of operation and maintenance. He also claims entitlement to a security interest in the water system.

The initial issues are: (1) whether the trial court abused its discretion in disallowing an evidentiary hearing on the issue of ownership; (2) whether the court erred in initially quieting title in favor of Homeowners Association; including (3) whether the court was empowered to make its order contingent on the association paying \$98,500.00 to Foothills Water Company; (4) whether the court correctly determined that Bagley was not entitled to damages; and (5) whether the court correctly determined that Foothills Water Company had not presented a prima facie case to establish slander of title.

The remaining issues involve the jurisdiction of the PSC vis a vis the jurisdiction of the district court. We review those issues after we dispose of the initial issues.

PROCEDURE

The posture of this case, at least regarding the issue of ownership, is similar to that of a summary judgment because the court had no evidence before it other than the parties' stipulated statement of facts. While the court also had before it Foothills Water Company's proffers, the court never considered them because Foothills Water Company failed to timely request a hearing on the disputed issues. The court had ordered, pursuant to the parties' agreement, that the parties attempt to submit the matter via stipulation and proffer. The parties agreed to submit a statement of stipulated facts and contentions, to proffer disputed issues, and to request an evidentiary hearing, if any of them felt one was warranted. They agreed to submit their stipulation and to argue their positions on a date certain, which date was postponed several times. The parties finally argued the matter on October 25, 1988.

While the court never set a deadline for requesting an evidentiary hearing on the issue of ownership, logic dictates that the deadline could be no later than argument and submission of the issue. In other words, the fact that none of the parties requested an evidentiary hearing prior to October 25, 1988, the date of oral argument, suggests that, as of that date, they saw no need for such a hearing and thus waived it.

Thus, when Foothills Water Company moved the court to reconsider its refusal to grant an evidentiary hearing, the court

did not err in denying the motion because the parties, by their inaction, had waived their right to a hearing.

QUIET TITLE TO HOMEOWNERS ASSOCIATION

Foothills Water Company claims the trial court erred in its October 25, 1989 order granting quiet title in favor of Homeowners Association. It also claims the court erred in issuing a ruling entirely independent of its proffers.

The parties stipulated that, prior to 1985, title to the water right and to the water tank lots "could still be considered to be in the name of Zions Bank or Hi-Country Estates, Inc." Given this stipulation, and given that quit-claim deeds were executed in favor of Homeowners Association by the principals of Hi-Country Estates, Inc. on behalf of those entities, and by trust officers of the bank, the court did not err in concluding that Homeowners Association held legal title to the water right, lots, and system.

CONTINGENT QUIET TITLE ORDER

Homeowners Association claims the trial court erred in conditioning its quiet title upon its paying \$98,500.00 to Foothills Water Company. It also claims the court erred in issuing a quiet title in favor of Foothills Water Company upon the association's failure to pay the amount set.

Utah's quiet title statute requires a court to allow as a setoff or counterclaim the value of the improvements provided by one, who in good faith, is "holding under color of title adversely to the claims of the [owner]." Utah Code Ann. § 78-40-5 (1992). It does not provide for a contingent quiet title. Moreover, a contingent quiet title is antithetical to the nature of the action because a court issues a quiet title by virtue of the claimant's strength of title rather than by reason of the weakness of the opponent's title. Church v. Meadow Springs Ranch Corp., 659 P.2d 1045, 1048-49 (Utah 1983).

Here, the court first quieted title in Homeowners Association and then took title away from it by making the association's quiet title contingent on its paying a set amount to Foothills Water Company. We find no legal justification or authority for the court setting such a contingency on Homeowners Association's quiet title. Further, the court did not allow Foothills Water Company a mere setoff or counterclaim for the value of its good faith improvements. Thus, the court erred in

quieting title in Foothills Water Company's favor as a default position for the association's refusal to pay the amount set.

We therefore reverse the contingent quiet title order and remand for the court to issue a quiet title order in favor of Homeowners Association. We next address whether the quiet title may be subject to a setoff or counterclaim as a result of Bagley's claim. Later in this opinion, we address the general issue of Foothills Water Company's award as we discuss the role of the Public Service Commission.

BAGLEY'S DAMAGES

Bagley cross appeals, claiming the trial court erred in ordering reimbursement to Foothills Water Company, but not to him. Bagley claims no evidence supported excluding him from the reimbursement award.

The parties stipulated that on October 31, 1985, Bagley, pursuant to an assignment, transferred to Dansie all of his stock in Foothills Water Company. The stipulation, which incorporated Bagley's assignment, noted that Bagley transferred "all right, title and interest in any and all water rights, equipment, easements, rights of way or property they have or may have in or to or associated with the water system . . . "

"An assignment merely sets over or transfers the interest of one party in certain property to another." Tanner v. Lawler, 6 Utah 2d 84, 305 P.2d 882, 885 (1957). Accord Wiscombe v. Lockhart Co., 608 P.2d 236, 238 (Utah 1980) ("an assignee takes nothing more by his assignment than his assignor had").

Given the parties' stipulation regarding the terms of the assignment, we affirm the trial court's conclusion that "all [of Bagley's] 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." Thus, because Bagley had no rights in the system after October 31, 1985, he is not entitled to compensation for amounts paid by him prior to his transfer.

SLANDER OF TITLE

Foothills Water Company, in its cross-appeal, claims the trial court erred in dismissing its claims for slander of title because it had proffered to the court that Homeowners Association's agents, Turner and Sims, sought and obtained deeds to the "water tank lots" and an assignment of the water right,

and attempted to use the documents to illegally obtain control and ownership of the system.

An action for slander of title "consists of the willful recordation or publication of untrue material that is disparaging to another's title." Jack B. Parson Cos. v. Nield, 751 P.2d 1131, 1134 (Utah 1988). Accord First Sec. Bank v. Banberry Crossing, 780 P.2d 1253, 1257 (Utah 1989); Bass v. Planned Management Servs., Inc., 761 P.2d 566, 568 (Utah 1988).

Here, the trial court, on October 20, 1989, concluded that the "counterclaim by Foothills Water Company is hereby dismissed for lack of proof." Given that the court had granted Homeowners Association title, it implicitly ruled that the association acted under color of title, and therefore acted without malice. That is, by determining that Homeowners Association had title, which determination we affirm, the court could not have also ruled that the association had committed an act that was "disparaging to another's title." Jack B. Parson, 751 P.2d at 1134 (emphasis added). Thus the trial court correctly dismissed the claim.

REMAINING ISSUES

The remaining issues involve the jurisdiction of the Public Service Commission vis a vis the jurisdiction of the district court. These issues include (1) whether the court erred in refusing to grant summary judgment on the issue of Foothills Water Company's compensation; (2) whether the court erred in determining the well lease was valid and binding on the owner of the water system; and (3) whether the court erred in requiring Homeowners Association to allow Foothills Water Company to transport water through its system to customers outside the subdivision.

Homeowners Association claims the court erred in refusing to summarily rule on these issues. In the alternative, the association argues that this court should remand these issues to the PSC for determination.

PUBLIC SERVICE COMMISSION JURISDICTION

The parties dispute whether the PSC and not the district court should properly determine the value of the system payable by Homeowners Association and the value of improvements made between 1974 and 1985. Because the issue of the jurisdiction of the PSC vis a vis the jurisdiction of the district court is crucial to several issues in this case, we discuss it at length.

In an order dated March 17, 1986, the PSC determined that Foothills Water Company had been operating an uncertified public utility.⁴

The PSC is empowered to "ascertain the value of the property of every public utility in this state and every fact which in its judgment may or does have any bearing on such value." Utah Code Ann. § 54-4-21 (1990). Moreover, the PSC's valuation of a public utility "shall be considered the actual value of the properties of said public utilities in Utah unless otherwise changed after hearings by order of the commission." *Id.* Likewise, the PSC may hold hearings to determine the value of public utility properties and improvements. Utah Code Ann. § 54-7-19(1)(a) and (2)(a).

The essential objectives of the PSC's supervision are twofold: (1) to assure a public utility's "continued ability to be able to serve the customers who rely upon [it] for essential services and products"; and (2) to balance "the interest of having financially sound utilities that provide essential goods and services against the public interest of having goods and services made available without discrimination and on the basis of reasonable costs." Garkane Power Ass'n v. Public Serv. Comm'n, 681 P.2d 1196, 1207 (Utah 1984) (per curiam).

The PSC is empowered to set utility rates following hearings. Utah Code Ann. §§ 54-4-4(1) and 54-7-12(1) and (2);

4. Utah Code Ann. § 54-2-1 (Supp. 1993) provides that public utilities include water systems and water corporations. The term "water corporation" includes

every corporation and person, their lessees, trustees, and receivers, owning, controlling, operating, or managing any water system for public service within this state.

Utah Code Ann. § 54-2-1 (34). The term "water system" includes all reservoirs, tunnels, shafts, dams, dikes, headgates, pipes, flumes, canals, structures, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing, carriage, appointment, apportionment, or measurement of water for power, fire protection, irrigation, reclamation, or manufacturing, or for municipal, domestic, or other beneficial use.

Utah Code Ann. § 54-2-1(35).

Department of Bus. Reg. v. Public Serv. Comm'n, 720 P.2d 420, 420 (Utah 1986). "In determining an appropriate rate, the PSC considers the utility's historical income and cost data, as well as predictions of future costs and revenues, and arrives at a rate which is projected as being adequate to cover costs and give the utility's shareholders a fair return on equity." Id.

Utah courts have long held that the PSC may regulate public utility rates, even when doing so requires altering contractual relationships. Utah Hotel Co. v. Public Utilities Comm'n, 204 P. 511, 516 (1922); Utah Copper Co. v. Public Utilities Comm'n, 203 P. 627, 631 (Utah 1921). The public interest in access to utilities, and in fair and just rates, justifies such regulation and justifies the altering of contractual relationships. Arkansas Natural Gas Co. v. Arkansas R.R. Comm'n, 261 U.S. 379, 383, 43 S. Ct. 387, 388 (1923). "It is the intervention of the public interest which justifies and, at the same time conditions [the PSC's] exercise." Id.⁵

Thus, to determine whether the district court or the PSC should properly determine the value of capital improvements during the relevant period, we analyze whether such a determination invokes the public interest and serves the objectives of the PSC. See id.

SUMMARY JUDGMENT

Homeowners Association claims the trial court erred by not granting summary judgment on the issue of the amount owed to Foothills Water Company. The association claims summary judgment was appropriate because (1) the PSC is uniquely qualified and has jurisdiction to value the system in this instance where the dispute involves the ratepayers; (2) the PSC has already determined that the association paid for the value of the utility at the time the individual members purchased their lots; and (3) the PSC has already determined the degree to which the value of improvements made between 1974 and 1985 could be included in the rate base.

Here, the trial court, using a theory of unjust enrichment, found that Homeowners Association should reimburse Foothills

5. We acknowledge that "not every contract entered into by a public utility is subject to the jurisdiction of the PSC." Garkane Power, 681 P.2d at 1207. For example, "contracts dealing with the ordinary conduct of a business, are contracts that could be litigated only in a district court and not before the PSC." Id.

Water Company \$98,500.00 for the value of the "entire water system, the improvements made thereon from 1974 to 1985 and the water right." In other words, the trial court not only evaluated improvements, but it evaluated the entire system and imposed payment for the whole system.

Here, the valuation of the system and its capital improvements invokes the public interest of the ratepayers (in this case, the individual ratepayers who comprise the association) and their access to utilities and fair and just rates. See Arkansas Natural Gas Co. v. Arkansas R.R. Comm'n, 261 U.S. 379, 383, 43 S. Ct. 387, 388 (1923). Moreover, this case is not confined merely to "the ordinary conduct of a business . . . that could be litigated only in a district court and not before the PSC." Garkane Power Ass'n v. Public Serv. Comm'n, 681 P.2d 1196, 1207 (Utah 1984) (per curiam). In short, the public interest of the ratepayers and their fair access to utilities justifies the exercise of the PSC's jurisdiction. See Arkansas Natural Gas, 261 U.S. at 383, 43 S. Ct. at 388.

The PSC determined that "the improvements made between 1977 and 1980 were to have been provided by Bagley as part of the original system." In Re Foothills Water, Case No. 85-2010-01 (Utah PSC 1986). The PSC concluded that only \$16,334.99 was allowable as legitimate costs of improvements to the system that were not recovered in the sale of lots originally.

"In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." Utah Code Ann. § 54-7-14 (1990); accord North Salt Lake v. St. Joseph Water & Irrigation Co., 223 P.2d 577, 585 (Utah 1950).

We therefore hold that the PSC determination regarding the amount Foothills Water Company could recover for its improvements is binding. Accordingly, we agree with the PSC that the \$16,334.99 is includable in the rate base.

WELL LEASE ENCUMBRANCE

Homeowners Association claims the trial court erred in determining that the well lease entered into between Bagley and Dansie was a valid and binding encumbrance. The association claims the court had no jurisdiction to determine the validity of an encumbrance on a public utility. In a similar vein, Homeowners Association claims the court erred in failing to hold that the PSC's determination precludes Foothills Water Company from asserting the validity of the well lease agreement. In the

alternative, the association claims the lease did not constitute an encumbrance because it had lapsed.

The PSC is empowered to "ascertain the value of the property of every public utility in this state and every fact which in its judgment may or does have any bearing on such value." Utah Code Ann. § 54-4-21 (1990). Moreover the PSC's valuation of a public utility "shall be considered the actual value of the properties of said public utilities in Utah unless otherwise changed after hearings by order of the commission." Id.

"Any transfer of a utility asset should be for fair market value so an appropriate benefit therefrom will redound to the credit of the ratepayers." Committee of Consumer Servs. v. Public Serv. Comm'n, 595 P.2d 871, 878 (Utah 1979), cert. denied, sub nom. Mountain Fuel Supply Co. v. Committee of Consumer Servs., 444 U.S. 1014, 100 S. Ct. 664-65 (1980). The PSC must approve any such transfer based upon a determination as to "whether the transaction is detrimental to the ratepayer, and whether it is in the public interest." Id.

The issue of whether the well lease is a valid encumbrance on the property is one which has "bearing on such value [of a public utility]." Utah Code Ann. § 54-4-21. The issue is also one of fact regarding whether the Dansie family has been granted "any preference or advantage" and whether Homeowners Association has been subjected to "any prejudice or disadvantage." Utah Code Ann. § 54-3-8. In short, this issue is within the PSC's exclusive jurisdiction. Moreover, it is one the PSC has already determined.

The PSC determined, in an order dated March 17, 1986, that the well lease agreement was "grossly unreasonable" and that it had the effect of "showering virtually limitless benefits on Jesse Dansie and the members of his immediate family." The PSC found the agreement "makes Bagley personally responsible to fulfill the terms and conditions of the lease, whether or not a water company is created to which Bagley conveys or assigns the Well Lease Agreement." The PSC found it "unjust and unreasonable to expect Foothills' 63 active customers to support the entire burden of the Well Lease Agreement." Based on these findings, the PSC ordered Foothills Water Company to "obtain approval from this Commission before entering into any future lease or sales agreements for the provision of water to Foothills's service area or any amendment to or assignment of any lease or sales agreement that is now in force or effect." The PSC then held that its statutory duty prevented it from imposing the terms of the lease upon Homeowners Association and other present and future customers.

The PSC's 1986 order allowed Foothills Water Company to continue to supply water to the Dansie family conditioned upon payment of the cost of delivery by someone other than the customers in Foothills Water Company's service area. The order also required that Foothills Water Company bring any subsequent lease to the Commission for approval.⁶

Despite these orders of the PSC, the district court found that the 1977 well lease between Bagley and Dansie was a valid and binding encumbrance on the water system, and thus the Dansie family was entitled to draw, without charge, water from the system's Dansie well, "in the amount of either twelve million gallons per year or such larger amount as the excess capacity of the system shall permit, as long as the system exists and is operative." The court found that such encumbrance "does not in any way legally burden the water system or the owner or operator of the water system."

Given the PSC's jurisdiction to determine whether a public utility may be so encumbered, and given the PSC's March 17, 1986 order requiring Foothills Water Company to obtain PSC approval to obtain any extension of the well lease agreement, we reverse the district court's order insofar as it pertains to the validity of the well lease agreement.

TRANSPORTATION OF WATER TO OUTSIDERS

Homeowners Association claims the trial court erred in issuing an order requiring it to allow Foothills Water Company to transport water through its system to customers outside the subdivision.

The district court issued an interlocutory order permitting Foothills Water Company to transfer water through the system to its customers within its service area but outside the subdivision, so long as these customers pay a fair use fee. This order was based on a single finding: "Foothills Water Company and its predecessors have used the system throughout its existence to serve customers outside the Hi-Country Estates Phase

6. Foothills Water Company has never sought Commission approval of the terms of the well lease. More recently, on November 30, 1992, the PSC determined that all costs of the well lease agreement, which exceed the costs of the alternative source, are unreasonable and must be carried by Foothills Water Company if it decides to continue the lease. The record shows that even though the lease provided that the parties could extend it, they did not do so.

I Subdivision." Apparently the court based this "finding" on the parties' stipulation that "Foothills is, and has been since 1985, the current certificated utility serving the Subdivision (and certain other surrounding properties)."

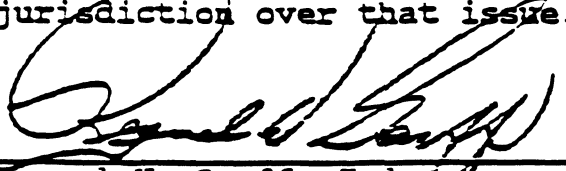
First, this stipulated fact does not necessarily support the legal conclusion that Foothills Water Company may transport water outside the subdivision. More importantly, the issue involves the essential objectives of the PSC's supervision. Those objectives are: (1) to assure a public utility's "continued ability to be able to serve the customers who rely upon them for essential services and products;" and (2) to balance "the interest of having financially sound utilities that provide essential goods and services against the public interest of having goods and services made available without discrimination and on the basis of reasonable costs." Garkane Power Ass'n v. Public Serv. Comm'n, 681 P.2d 1196, 1207 (Utah 1984) (per curiam). See also Arkansas Natural Gas Co. v. Arkansas R.R. Comm'n, 261 U.S. 379, 383, 43 S. Ct. 387, 388 (1923); North Salt Lake v. St. Joseph Water & Irrigation Co., 118 Utah 600, 223 P.2d 577, 583 (Utah 1950) (the PSC is empowered to determine relative rights and obligations between utility and consumer).

Thus, the issue of whether or not a utility is entitled to provide water to a group of customers falls within the jurisdiction of the PSC.

CONCLUSION

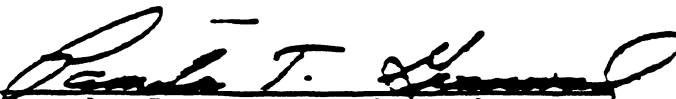
In conclusion we (1) affirm the district court's initial conclusion that Homeowners Association holds legal title to the water right, lots and system; (2) remand for the court to issue a quiet title order in Homeowners Association's favor with no contingencies; (3) affirm the court's conclusion that Bagley is not entitled to any damages; (4) affirm the court's conclusion that Foothills Water Company's claim for slander of title be dismissed; (5) reverse the court's order denying summary judgment on the issue of compensation, acknowledging the PSC's order that the amount of \$16,334.99 is includable in the rate base; (6) reverse the district court's order regarding the validity of the

well lease agreement; and (7) reverse the court's order regarding distribution of water to outsiders, acknowledging the PSC's jurisdiction over that issue.



Regnal W. Garff, Judge

WE CONCUR:



Pamela T. Greenwood, Judge



Gregory A. Orme, Judge

ADDENDUM 2

IN THE SUPREME COURT OF THE STATE OF UTAH

-----oo0oo-----

Hi-Country Estates Homeowners
Association,
Plaintiff and Respondent,
v.
Bagley & Company, et al.,
Defendant and Respondent,
and,
Foothills Water Company,
Counterclaimant and
Petitioner.

No. 940046
920450-CA
C85-1464

The petition for writ of certiorari is granted only as to the
jurisdiction of the Public Service Commission.

For the Court

6/13/84
Date


Michael D. Zimmerman
Chief Justice

ADDENDUM 3

*This opinion is subject to revision before final
publication in the Pacific Reporter.*

IN THE SUPREME COURT OF THE STATE OF UTAH

-----oo0oo-----

Hi-Country Estates Homeowners
Association, a Utah corporation,
Plaintiff,

v.

No. 940046

F I L E D
July 20, 1995

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.

Foothills Water Company, a
Utah corporation,
Counterclaimant and
Petitioner,

v.

Hi-Country Estates Homeowners
Association, a Utah corporation;
W. Norman Sims; and William P.
Turner,
Counterclaim Defendants
and Respondents.

Geoffrey J. Butler, Clerk

Third District, Salt Lake County
The Honorable Pat B. Brian

Attorneys: Larry R. Keller, Salt Lake City, for Hi-Country
Estates Homeowners Association
Ralph J. Marsh, Salt Lake City, for Bagley and
Bagley & Company
Val R. Antczak, Salt Lake City, for Dansie and
Foothills Water Co.

On Certiorari to the Utah Court of Appeals

RUSSON, Justice:

We granted certiorari for the narrow purpose of reviewing the court of appeals' decision concerning the jurisdiction of the Public Service Commission (the PSC) as it relates to issues in this case. We reverse and remand.

FACTS

Because the issues involved on certiorari relate solely to the PSC's jurisdiction, we recite only the facts that are pertinent to that issue. A full discussion of the facts concerning other issues raised before the court of appeals in this matter can be found in Hi-Country Estates Homeowners Ass'n v. Bagley & Co., 863 P.2d 1, 2-7 (Utah Ct. App. 1993), cert. granted, 879 P.2d 266 (Utah 1994).

This case involves a controversy between Foothills Water Company (the Water Company) and the Hi-Country Estates Homeowners Association (the Homeowners Association) concerning the ownership of a water system, two lots upon which the system's water tanks are located, and a well water right related to the water system.

In March 1985, the Homeowners Association, which is comprised of the owners of lots in the Hi-Country Estates subdivision, brought this action in district court, seeking to quiet title to the subdivision's water system, the two lots upon which the system's water tanks are located, and the related well water right, in the name of the Homeowners Association. The Water Company responded by filing a counterclaim, seeking to quiet title to the water system, the water lots, and the water right in its name.¹ Gerald H. Bagley, a former owner and operator of the water system, also counterclaimed, arguing that if the court determined that the Homeowners Association owned the water system, it should be required to reimburse him for the cost of improvements he made to the water system, as well as for all expenses related to the operation and maintenance of the water system.²

¹ The Water Company additionally sought damages for slander of title from the Homeowners Association and several individuals who are not parties to this appeal. However, this claim was dismissed by the district court for "lack of proof" and is not before this court on certiorari.

² Although Bagley originally brought the counterclaim for reimbursement, the district court determined that the Water Company was the party properly entitled to reimbursement because Bagley had assigned all his rights to the Water Company.

While this matter was pending before the district court, a dispute arose between the Water Company and the Homeowners Association concerning increases in the rates charged by the Water Company. At a rate-setting hearing before the PSC in January 1986, the Homeowners Association argued that the Water Company should not be allowed to include the cost of the water system as a capital investment in its rate base. The PSC ruled that, pending resolution of the ownership dispute in district court, only a small portion of the Water Company's capital investment could be properly included in its rate base. On March 17, 1986, the PSC issued its final report and order, finding that only \$16,334.99 of the improvements to the water system could be included in the rate base as legitimate costs thereof.

Trial on the quiet title action began in district court on August 25, 1988. At that time, the parties agreed to stipulate to certain facts, proffer evidence on the remaining facts, brief all issues, and submit them to the court for decision. On October 14, 1988, the parties filed a stipulated statement of undisputed facts and disputed contentions.

Following a hearing on October 25, 1988, the district court entered its findings of fact, conclusions of law, and judgment declaring that the Homeowners Association "is the legal owner of the disputed water system, which includes the water rights, the water lots, the water tanks, and the water lines." However, the court conditioned its ruling upon payment by the Homeowners Association to the Water Company of an amount to be determined at a later evidentiary hearing for improvements made to the water system.

The Homeowners Association subsequently moved for summary judgment on the issue of the amount of reimbursement it owed to the Water Company. The association asserted that the district court was bound by the PSC's determination that only \$16,334.99 of the improvements to the water system could be included in the rate base. The court denied the motion.

An evidentiary hearing was held in late July and early August 1990 to determine the amount of reimbursement owed by the Homeowners Association to the Water Company. Applying a theory of unjust enrichment, the district court determined that the Homeowners Association owed the Water Company \$98,500 for the "entire water system, the improvements made thereon from 1974 to 1985, and the water right." In an order dated October 31, 1990, the court directed the association to pay the sum of \$98,500 to the Water Company no later than August 15, 1991. The court additionally ruled that a 1977 well lease agreement between Bagley, who owned and operated the water system at that time, and Jessie J. Dansie, the owner of the well in question, in which Dansie agreed to supply water from the Dansie well to the water system, was a valid and binding encumbrance on the water system.

and required the association to permit the Dansies to receive and transport water through the subject water system free of charge as long as the system is operative.

At a subsequent informal conference between the district judge and counsel for the parties, the Water Company and Bagley orally moved that the district court clarify its October 31, 1990, order to provide that if the Homeowners Association failed to pay the Water Company by August 15, 1991, the court would enter a judgment quieting title to the water system in the Water Company. The district court granted this motion and entered an order clarifying its prior order on February 5, 1991.

On August 20, 1991, after being notified by the Water Company that the Homeowners Association had not paid the reimbursement sum of \$98,500 as required by the court's February 5 order, the district court entered a judgment quieting title in the Water Company.

On appeal to the Utah Court of Appeals, the Homeowners Association asked the court to (1) reverse the district court's judgment quieting title in the Water Company and quiet title in its favor, (2) reverse the district court's denial of its motion for summary judgment on the issue of the amount it owed to the Water Company for improvements to the water system for the years 1974 to 1985, and (3) reverse the district court's conclusion that it was required to reimburse the Water Company as a condition precedent to quieting title.

The court of appeals (1) reversed the district court's judgment quieting title in the Water Company, holding that legal title was rightfully in the Homeowners Association; (2) reversed the district court's denial of summary judgment on the issue of the compensation owed to the Water Company, deferring to the PSC's determination that only \$16,334.99 of the improvements to the water system were includable in the rate base, and (3) reversed the district court's judgment addressing the validity of the 1977 well lease agreement on the ground that the PSC had previously invalidated that agreement.³

³ In the same opinion, the court of appeals also reversed an interlocutory order of the district court which permitted the Water Company to transfer water through the system to customers within its service area but outside of the subdivision, provided that these customers pay a fair use fee. Hi-Country Estates Homeowners Ass'n v. Bagley & Co., 863 P.2d 1, 12 (Utah Ct. App. 1993), cert. granted, 879 P.2d 266 (Utah 1994). However, subsequent to the issuance of that opinion, the Water Company has been decertified as a public utility by the PSC. Accordingly, its rights to transfer water are now moot.

The Water Company filed a petition for a writ of certiorari with this court. We granted the said writ only for the narrow purpose of reviewing the court of appeals' decision concerning the PSC's jurisdiction as it relates to the issues in this case.

On certiorari, the Water Company raises the following two arguments in response to the court of appeals' opinion: First, it asserts that the PSC did not determine the fair market value of the property in question for all purposes, including unjust enrichment, nor did it have the power to do so; and second, it claims that the PSC did not invalidate the 1977 well lease agreement and did not have the power to do so. The Homeowners Association responds that (1) the PSC has the power to determine the fair market value of property for all purposes and therefore the court of appeals correctly ruled that the district court was bound by the PSC's determination that only \$16,334.99 of the improvements to the water system were includable in the rate base, and (2) the PSC has the power to invalidate the 1977 well lease agreement and did invalidate that agreement.

SUMMARY JUDGMENT

In its motion for summary judgment on the issue of the amount of reimbursement owed to the Water Company, the Homeowners Association asserted that the district court could award the Water Company only \$16,334.99, the amount that the PSC determined could be included in the rate base as legitimate costs of improvements to the system. Specifically, the association argued that the PSC had the power to determine the fair market value of the water system for all purposes and therefore the district court was bound by the PSC's determination. The district court denied the motion and, using a theory of unjust enrichment, determined that the association owed the Water Company \$98,500 for the "entire water system, the improvements made thereon from 1974 to 1985, and the water right." The court of appeals reversed, holding that the PSC's rate base determination compelled the district court to limit its reimbursement award to \$16,334.99.

The PSC has only the rights and powers granted to it by statute. Williams v. Public Serv. Comm'n, 754 P.2d 41, 50 (Utah 1988). Utah Code Ann. § 54-4-1 states in pertinent part:

The commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in this state, and to supervise all of the business of every such public utility in this state, and to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction[.]

In keeping with this general grant of power, Utah Code Ann. § 54-4-21 specifically provides:

The commission shall have power to ascertain the value of the property of every public utility in this state and every fact which in its judgment may or does have any bearing on such value. The commission shall have power to make revaluations from time to time and to ascertain the value of new construction, extensions, and additions to the property of every public utility; provided, that the valuation of the property of all public utilities doing business within the state located in Utah as recorded in accordance with Section 54-4-22 of this chapter shall be considered the actual value of the properties of said public utilities in Utah unless otherwise changed after hearings by order of the commission. In case the commission changes the valuation of the properties of any public utility said new valuations found by the commission shall be the valuations of said public utility for all purposes provided in this chapter.

Utah Code Ann. § 54-4-21 (emphasis added); see also Utah Code Ann. § 54-4-4 (granting PSC broad discretion in establishing rates for public utilities).

"It is well established that the Commission has no inherent regulatory powers other than those expressly granted or clearly implied by statute." Mountain States Tel. & Tel. Co. v. Public Serv. Comm'n, 754 P.2d 928, 930 (Utah 1988) (citing Basin Flying Serv. v. Public Serv. Comm'n, 531 P.2d 1303, 1305 (Utah 1975)). When a "specific power is conferred by statute upon a tribunal, board, or commission with limited powers, the powers are limited to such as are specifically mentioned." Union Pac. R.R. v. Public Serv. Comm'n, 103 Utah 186, 197, 134 P.2d 469, 474 (1943) (quoting Bamberger Elec. R.R. v. Public Utils. Comm'n, 59 Utah 351, 364, 204 P. 314, 320 (1922)); accord Williams, 754 P.2d at 50. "All powers retained by the PSC are derived from and created by statute. The PSC has no inherent regulatory powers and can only assert those which are expressly granted or clearly implied as necessary to the discharge of the duties and responsibilities imposed upon it." Williams, 754 P.2d at 50 (citing Basin Flying Serv., 531 P.2d at 1305). Accordingly, "[t]o ensure that the administrative powers of the PSC are not overextended, 'any reasonable doubt of the existence of any power must be resolved against the exercise thereof.'" Id. (quoting Public Serv. Comm'n v. Formal Complaint of WWZ Co., 641 P.2d 183, 186 (Wyo. 1982)).

Despite its broad language, section 54-4-1 does not confer upon the Commission a limitless right to act as it sees fit, and this court has never interpreted it as doing so. Mountain States Tel. & Tel. Co., 754 P.2d at 930. "Explicit or clearly implied statutory authority for any regulatory action must exist." Id. (citing Utah Dep't of Business Regulation v. Public Serv. Comm'n, 720 P.2d 420, 423 (Utah 1986); Kearns-Tribune Corp. v. Public Serv. Comm'n, 682 P.2d 858, 859 (Utah 1984)). Accordingly, the sections cited above clearly do not give the PSC absolute power to determine fair market value for all purposes, but merely for the purposes outlined in that chapter, that is, the purposes necessary to regulate and supervise public utilities. In fact, were we to hold otherwise and determine that the PSC can value property for all purposes, as the Homeowners Association would have us do, we would render the Utah Code internally inconsistent since the tax commission has the power to assess public utilities for the purposes of taxation. See Utah Code Ann. § 59-2-204.

The district court's valuation of the property and water right in question did not involve the fair market value of the water system for rate-making purposes but, rather, involved the actual fair market value of the property for the purpose of determining the amount of unjust enrichment. Accordingly, the court of appeals erred in holding that the PSC has the authority to determine the fair market value of the property for all purposes and declaring deference to the PSC as to the value of the property in question for purposes of determining the amount of unjust enrichment.

Moreover, even if the PSC had the power and authority to determine fair market value of the water system for all purposes, it did not do so in the present case. It is clear from the PSC's March 17, 1986, order that it was determining the value of the water system only for the purposes of rate-making. In fact, the first sentence of that order states, "Pursuant to notice duly served, this matter came on for general rate hearing on January 22, 23, 24, [27,] and 28, 1986, before Kent Walgren, Administrative Law Judge for the Utah Public Service Commission." (Emphasis added.) Furthermore, the PSC did not find that \$16,334.99 was the fair market value of the improvements to the system, but simply found that that figure represented "[the Water Company's] total allowable rate base." Finally, the findings of fact and conclusions of law supporting the PSC's order exclusively address the PSC's determination of the fair rate that the Water Company may charge its customers. Since (1) any order of the PSC must be narrowly construed as passing only upon the issues before it, White River Shale Oil Corp. v. Public Serv. Comm'n, 700 P.2d 1088, 1093 (Utah 1985), and (2) the PSC's March 17, 1986, order addressed the value of the water system solely for rate-making purposes, it was error for the court of appeals to order the district court to defer to this figure for purposes of unjust enrichment. Accordingly, 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.

WELL LEASE AGREEMENT

In 1977, Bagley, the owner and operator of the subject water system at that time, and Dansie, the owner of the well in question, entered into a well lease agreement under the terms of which water from the Dansie well was supplied to the Hi-Country Estates subdivision water system. The lease stated that it had a ten-year term but could be renewed on April 10, 1987, "on terms to be agreed to by Bagley and Dansie." Subsequently, in 1980, Bagley transferred his interest in the water system to Jordan Acres, a limited partnership of which Bagley was a general partner. On June 7, 1985, this interest was transferred from Jordan Acres to the Water Company. In its March 17, 1986, order, the PSC found that the well lease agreement was "grossly unreasonable" and refused to impose its terms upon the Homeowners Association. The district court, on the other hand, ruled that the 1977 well lease agreement was a valid and binding encumbrance on the subdivision's water system. On appeal to the court of appeals, the Homeowners Association argued that the district court lacked jurisdiction to determine the validity of an encumbrance on a public utility and that the PSC's determination precluded the Water Company from asserting the validity of the well lease agreement. The court of appeals agreed and reversed the district court's order.

On certiorari, the Water Company argues alternatively that (1) the PSC's March 17, 1986, order did not invalidate the 1977 agreement, and (2) even if the PSC's order did purport to invalidate that agreement, the PSC did not have jurisdiction to do so. The Homeowners Association responds that the PSC's order did invalidate the 1977 agreement between Dansie and Bagley and therefore the court of appeals was correct in reversing the district court's order directing the association to provide the Dansies water as long as the system is operative.

The PSC's March 17, 1986, order specifically found:

11. On April 7, 1977, Jesse Dansie, as lessor, and Bagley as lessee, entered into a "Well Lease and Water Line Extension Agreement" (hereafter "Well Lease Agreement") for Well No. 1 Under this ten-year lease (which expires in April 1987), in return for the use of the well and water therefrom, Bagley agrees to the following:

a. To pay \$5,100 plus \$300 per month for the first five years and \$600 per month for the next five years.

. . . .

12. In 1980, the Subdivision water company was transferred from Bagley to another limited partnership, Jordan Acres ("Jordan Acres"), of which Bagley was a general partner. On June 7, 1985, . . . the water company assets were transferred from Jordan Acres to [the Water Company], in return for all of [the Water Company's] outstanding shares.

On the basis of these and other findings, the PSC concluded:

The Commission finds that it is unreasonable to expect [the Water Company] to support the entire burden of the Well Lease Agreement. This Agreement, insofar as it relates strictly to benefits received by [the Water Company] . . . is grossly unreasonable, requiring not only substantial monthly payments, but also showering virtually limitless benefits on Jessie Dansie and the members of his immediate family. . . .

. . . .

. . . While no one can blame Mr. Dansie for desiring to provide free water to his children in virtual perpetuity, this Commission would be abrogating its statutory duty were it to impose such a burden on [the Water Company's] present and future customers.

. . . .

. . . We find that it would be unjust and unreasonable to expect [the Water Company's] 63 active customers [i.e., the Homeowners Association] to support the entire burden of the Well Lease Agreement. . . .

. . . .

. . . The Commission has no objection to the Dansies continuing to obtain their water from Well No. 1, provided the actual pro-rata

(not incremental) costs for power, chlorination and water testing involved in delivering that water are paid for by someone other than customers in [the Water Company's] service area [i.e., the members of the Homeowners Association].

Under the plain language of the PSC's order, the effect of that order was to prohibit the 1977 well lease agreement from affecting the rates paid by the Homeowners Association, not to invalidate the agreement altogether. In other words, the PSC's order did not purport to invalidate the 1977 agreement, it merely limited the amount that the Homeowners Association would pay for it, a matter clearly within the PSC's rate-making authority. Thus, the court of appeals incorrectly held that the PSC's order invalidated the 1977 well lease agreement.

In any event, the PSC did not have jurisdiction to invalidate the 1977 well lease agreement as long as that agreement did not impact the rates paid by the Homeowners Association. Although the PSC has power to construe contracts affecting matters within its jurisdiction such as rate-making, ordinary contracts unrelated to such matters are outside of the purview of PSC jurisdiction. See Kearns-Tribune Corp. v. Public Serv. Comm'n, 682 P.2d 858, 860 (Utah 1984) ("Any activities of a utility that actually affect its rate structure would necessarily be subject to some degree to the PSC's broad supervisory powers in relation to rates. The question, then, is whether the activity the Commission is attempting to regulate is closely connected to its supervision of the utility's rates and whether the manner of the regulation is reasonably related to the legitimate legislative purpose of rate control for the protection of the consumer."); see also Garkane Power Ass'n v. Public Serv. Comm'n, 681 P.2d 1196, 1207 (Utah 1984) (per curiam) (holding that not every contract entered into by a public utility is subject to the jurisdiction of the PSC; contracts such as those concerning the ordinary conduct of a business can be litigated only in district court and not before the PSC). See generally Williams v. Public Serv. Comm'n, 754 P.2d 41, 50 (Utah 1988) (stating that "'any reasonable doubt of the existence of any power [of the PSC] must be resolved against the exercise thereof'" (quoting Public Serv. Comm'n v. Formal Complaint of WWZ Co., 641 P.2d 183, 186 (Wyo. 1982))).

CONCLUSION

On the basis of the foregoing, the court of appeals' reversal of the district court's denial of the Hi-Country Estates Homeowners Association's motion for summary judgment on the issue of the amount of reimbursement owed to Foothills Water Company is reversed. The court of appeals' determination that the PSC's order invalidated the 1977 well lease agreement between Bagley and Dansie is also reversed, and this matter is remanded to the

court of appeals for further proceedings consistent with this opinion.

WE CONCUR:

Michael D. Zimmerman, Chief
Justice

I. Daniel Stewart, Associate
Chief Justice

Richard C. Howe, Justice

Christine M. Durham, Justice

ADDENDUM 4

SUPREME COURT OF

332 STATE CAPITOL

SALT LAKE CITY, UTAH 84114

September 26, 1995

OFFICE OF THE CLERK

Larry R. Keller
KELLER & LUNDGREN, L.C.
Attorneys at Law
257 East 200 South, Box 10
Salt Lake City, UT 84111

Hi-Country Estates Homeowners
Association,
Plaintiff and Respondent,
v.
Bagley & Company, et al.,
Defendant and Respondent,
and,
Foothills Water Company,
Counterclaimant and
Petitioner.

No. 940046
920450-CA
C85-1464

THIS DAY, this case remitted to Utah Court of Appeals.

Geoffrey J. Butler
Clerk

ADDENDUM 5

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DETERMINING THAT THE HOMEOWNERS SHOULD PAY FOOTHILLS \$98,500.00 TO OBTAIN A QUIET TITLE ORDER TO THE WATER SYSTEM AND WATER RIGHT.

The trial judge issued its "Order on Ownership Issues" on October 20, 1989, and ruled that "(P)laintiff is the legal owner of the disputed water system, which includes the water rights, the water lots, the water tanks, and the water lines." (Add. 1). The Court went on in paragraph 2 to order an evidentiary hearing ". . . to establish the amount of reimbursement due to Defendants Bagley & Company and/or Foothills Water Company for the reasonable value of improvements made by Defendant Bagley & Company." (R. 896).

Finally, in paragraph 3, the Court stated "(A)n Order Quieting Title to the water system, in the name of Plaintiff, will issue upon payment in full by Plaintiff to Defendant of the Court's Reimbursement Order for Improvements by the Defendant to the Plaintiff's water system for the years 1974 to 1985." (Emphasis supplied) (R. 896).

A. The Homeowners should not have been required to pay for the water right.

Although ruling initially in its "Order on Ownership Issues" that the Homeowners would be given a Quiet Title Order to the water system upon reimbursement to Appellees Bagley & Company and/or Foothills Water Company for the reasonable value of improvements made by Appellee Bagley & Company, the Court caused great confusion by expanding its inquiry at the time of the valuation portion of the trial (July 30, 31, and August 1, 1990). The Court 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".

After the parties had submitted the ownership portion of the trial to the Court by stipulation (R. 452), the Court entered its Findings of Fact and Conclusions of Law dated October 20, 1989 (R. 899-904). Finding of Fact No. 4 as it related to the water right in this case reads as follows:

"4. Plaintiff, Hi-Country Estate Homeowners Association, obtained legal right, title and interest in the disputed water system from the following sources:

. . .

(f) An Assignment from Hi-Country Estates, Inc., to Plaintiff, of the disputed water rights.

(g) An acknowledgment by the State Engineer's Division of Water Rights that the Plaintiff is owner of the water rights, more

specifically, water right referred to in this action as the Glazier Well Water Right."

Add. 4 p. 4 (R. 901, 902).

Despite this clear finding by the Court that the Appellant was the legal owner of this disputed water right and a recitation of the chain of ownership, the Court expanded its inquiry at the valuation portion of the trial to include the value of the water right. In its Findings of Fact and Conclusions of Law after the valuation portion of the trial, the Court found as a matter of fact:

"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. (Emphasis supplied).

Add. 5 p. 4; R. 1623.

Furthermore, in its Conclusions of Law, the Court stated:

"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." (Emphasis supplied).

Add. 5 p. 5; R. 1624.

Finally, in the Court's "Order Regarding Amount Payable by Plaintiff for Subject Water System", the Court ruled:

"The Plaintiff is entitled to an Order Quiet-ing 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. Such amount shall be payable in full no later August 15, 1991. The unpaid balance is interest free." (Emphasis supplied).

Add. 6 p. 2; R. 1627.

It seems incredible to the Homeowners that they 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.

Appellant clearly established title to the water right in question by presenting documents showing the chain at trial. Plaintiff's Trial Exhibit 15 (Add. 7; R. 1359, 1400) is a certified copy of a document on file with the Department of Natural Resources, Division of Water Rights, showing a transfer of the water right in question from Joseph Butterfield to Hi-County Estates, Inc., in May of 1971. Hi-Country Estates, Inc., was stipulated by the parties to be the general partner of the limited partnership known as Hi-Country Estates Second in the development of Hi-Country Estates Subdivision Phase I (R. 569).

Plaintiff's Trial Exhibit 16 (Add. 8; R. 1359, 1402) is an Assignment of Application for the same water right showing a transfer by Charles E. Lewton, one of the original developers of the subdivision and principal of Hi-Country Estates, Inc., to the Hi-Country Estates Homeowners Association dated June 28, 1985. Plaintiff's Trial Exhibit 17 (Add. 9; R. 1359, 1404) is a letter from Marge Tempest in the title section of the State Department of

Natural Resources, Division of Water Rights, indicating that the Hi-Country Estates Homeowners Association does in fact own the water right in question according to their office's records.

Although a subsequent Assignment of Application of the same water right was apparently prepared by Appellee Gerald H. Bagley allegedly on behalf of Hi-Country Estates, Inc., assigning the water right in question to Foothills Water Company, said document was not signed until February 25, 1987, almost two years after Hi-Country Estates, Inc., had made the Assignment in question to the Hi-Country Estates Homeowners Association (Add. 10; R. 1359, 1406). Said document was admitted at trial as Plaintiff's Exhibit 21 with a letter from the same Marge Tempest of the State Department of Natural Resources, Division of Water Rights, rejecting Foothills' effort to file this Assignment of Application with their department due to the fact that a previous Assignment had been made by Hi-Country Estates, Inc. to Hi-Country Estates Homeowners Association of the same water right (Add. 11; R. 1359, 1407).

Therefore, by awarding Foothills some portion of the \$98,500.00 as value for the water right, the Court made a very unfair and unjust decision. It awarded Appellees value for something they did not own according to the official public records of ownership in the Utah State Engineer's Office, and the Assignment of Application by Hi-Country Estates, Inc. in 1985 to the Homeowners.

Furthermore, this water right was paid for by the Homeowners through their purchase of lots, since the original developers have admitted they recovered the value of the water system through the sale of the lots. Plaintiff's Exhibit 20, Add. 12; R. 1359, 1650 pp. 29, 30; R. 1409-1411. Although Appellee Gerald H. Bagley testified differently at trial, his deposition was taken prior to trial on April 12, 1988. The following exchange took place:

"Q. But it was your understanding that ultimately the money that was recovered, you would recover your investment in the water system by selling lots; is that correct?

A. Yes.

Q. You've been involved in other real estate development; is that correct?

A. Yes.

Q. Is that consistent with what we've just discussed with the way you funded the cost of what I'll call common improvements, water systems, roads, etc., in those other projects?

A. I would say it is consistent, yes, except we did it differently on the Jeremy Ranch, but in that case the people had to go separately, buy a share of water.

Q. Was that a mutual stock?

A. It's a mutual stock company.

R. 1650 pp. 29, 30.

Mr. Bagley admitted his memory was better during his deposition on April 12, 1988, than it was during trial on July 31, 1990, when he said he did not intend to recover the cost of the water system in the sale of lots (R. 2242). In addition, Mr. Bagley was

one of only three developers of the subdivision, and he indicated at trial that he didn't know if the other two developers, Lewton and Spencer, had built in the cost of the water system in lot sales during the period of time he had sold out to them and they had established the costs to be recovered in the sale of lots (R. 2244, 2245).

Therefore, it seems incomprehensible that the Court required the purchasers of the lots (who are shareholding members of the Appellant) to pay any value a second time for the water right, and indeed the component parts of the water system in general. (See infra subpoint B). Appellant respectfully requests that the Court's Order requiring whatever portion of the \$98,500.00 was allocated by the trial judge to the water right (and this is unknown from the Court's Orders), be reversed.

B. The Homeowners have already paid for the water system and should not be required to pay a second time.

It is the Homeowners' position that the original developers recovered the value of the water system through the sale of lots in Hi-Country Estates Subdivision Phase I. The testimony by deposition of Mr. Gerald H. Bagley on April 12, 1988, cited supra thoroughly supports this position. The testimony in that deposition was elicited by attorney T. Patrick Casey representing Appellees Foothills Water Company and J. Rodney Dansie.

Mr. Bagley's opposite testimony at trial is a clear example of how unbelievable and incredible Appellees' witnesses were in this

matter. Appellant submits that this clear reversal of testimony by Mr. Bagley shows the lengths to which Appellees went to have the Court place a high value on this water system, when they have already been compensated for the system through the sale of the lots.

Of course, Mr. Bagley had a very specific interest in seeing that this Court awarded a high value with regard to the water system. He testified he satisfied debts and obligations to J. Rodney Dansie by ostensibly transferring this water system to him in October of 1985 (during the pendency of this lawsuit), and would stand to be liable to Mr. Dansie for some \$80,000.00 to \$148,000.00 (depending upon which Appellee is believed) if this Court had issued a Quiet Title Order to the Homeowners (R. 2251, 2252).

John Thomas, a real estate agent who had resided in Hi-Country Estates Subdivision Phase I for 19 years at time of trial, testified he was originally employed by Mr. Spencer and Mr. Lewton as project manager for the development in approximately 1971 (R. 2087, 2088). Mr. Thomas testified he sold approximately 90 of the 121 lots available in Phase I of the subdivision himself (R. 2088). Mr. Thomas further testified that he was the manager of the water system employed by the original developers (R. 2088, 2089). Mr. Thomas testified 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 through Hi-Country Estates Second, and its general partner, Hi-Country

Estates, Inc.), to inform potential lot purchasers ". . . that the property owners association was to own the water system, at the time that the developers turned the property back or over to them, 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).

William Turner was called by Appellant and testified that he was a member of the Homeowners Association and had first bought his lot in 1972 from Mr. Thomas. He testified that he understood when he purchased the lot that the water system " . . . belonged to the Association. . ." and that the value of the water system was recovered by the original developer in the price of the lot that he paid (R. 2101, 2102).

Mr. W. Norman Sims was called to testify at the trial. He stated that he was president of Appellant Homeowners Association and a member of the Board of Directors. He testified he purchased two lots in Hi-Country Estates Subdivision Phase I in 1980 (R. 2105). He further testified that it was his opinion that the lot owners had paid for the water system when they bought their lots, and that "the expenditure for a water system was paid for once. Everyone else buying that understood and it was represented that the water system is theirs." (R. 2135, 2136). More specifically, Mr. Sims testified:

"We paid for the (water) system when we bought our property, and this would go with the land, and once it is paid for, every time that this

land would change hands, when I bought my property, it had been sold once previously, on both lots that I had, one which I still maintain. (sic) It was my understanding that the water system had been paid for, and was in place, and the only additional cost of that type would be whatever that hook-up cost would be to tie into that system itself."

R. 2143.

Other than the trial testimony of Mr. Bagley, which was impeached by his April 12, 1988, deposition testimony as aforementioned, counsel does not recall that any additional evidence whatsoever was presented by Appellees to contradict the clear evidence presented that the value of the water system had been built into the price of the lots when originally sold by the developers. In fact, in the deposition of Charles Lewton, one of the original developers and a principal in Hi-Country Estates, Inc., Mr. Lewton testified that the reason the Homeowners Association was created by the developers originally was so that they could take over the "amenities" that would service all of the lot owners. When asked what the types of amenities were he was referring to, Mr. Lewton responded:

"Well, I know the roads and the gate and the water system. And I don't know how it was left when we left here. I personally don't know. I do know that since day one, we'd intended for Salt Lake City Conservancy, and I know that they were to come in, and what that means, I don't know at this point. I know they were to take the system over."

R. 1655 p. 39.

This testimony by one of the original developers seems to be a clear impeachment of the trial testimony of Mr. Bagley. See R. 2239, 2240.

The conclusion that must be drawn from this is that the Court originally made the right decision in finding that Appellant Homeowners were "the legal owners of the disputed water system, which includes the water rights, the water lots, the water tanks, and the water lines" (Add. 1). However, when the Court made the further determination that the Homeowners would not be given an order quieting title to the water system and the water right until such time as they had paid \$98,500.00 to Foothills Water Company, the Court was clearly requiring the Homeowners to pay twice for this water system (R. 1627). The order of the Court should be reversed and the case remanded with instructions to the lower court to issue a Quiet Title Order without the requirement of a payment of additional monies by the Homeowners.

C. 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.

Appellant introduced at trial the testimony of Jon Strawn, former Chief Rate Engineer for the Division of Public Utilities, who testified Foothills Water Company has reported a substantial loss every year between 1985 and the present to the Public Service Commission (R. 1995, 1996). Further, Appellant admitted stipulated Exhibit CCC as Plaintiff's Exhibit 13 in the trial, which was a document summarizing the net operating losses incurred by Foothills

Water Company (submitted by Appellee originally to the Court), as showing a total net loss between 1985 and September 1, 1988, of \$250,004.00 for that period of time (Add. 13; R. 1359, 1454). In addition, stipulated Exhibit AAA admitted as Plaintiff's Exhibit 12 shows the losses incurred by Bagley & Company between 1975 and 1984 to have been \$271,717.00 (Add. 14; R. 1359, 1456).

Mr. Strawn went on to testify at trial as follows:

"Q. . . . Does the system have any value on the open market to anyone, in light of the fact that its expenses far exceed its revenues?

A. Not in my opinion. As I said before, it would have a negative net present value. Therefore, anybody that would invest in that, if it was a private investor, would be regulated by the public utility -- by the Public Service Commission. There would be a non-allowance of rate base. Therefore, there would be no rate of return on any rate base. Therefore, in my opinion, it would have negative net present value, and not be worth anything on the market, because its expenses exceed its revenues, and that gives you a negative net present value.

Q. So the Court will understand this, what you are saying is if anyone purchased this water system on the open market, they would never be able to recover the cost of their purchase price from the Public Service Commission; is that correct?

A. That's correct.

Q. They could not build that into rate base, and the purchase price would simply be lost; is that correct?

A. That's correct. Plus, in my opinion, Foothills Water Company has reached its price inelasticity, which means when the rates were

set on 60 customers and now we only have 48, basically the -- you are losing revenues. They are in what we call a death spiral, a downward spiral. No matter what prices you raise the rates to, people would simply leave the system. It has been shown through various complaints to me that people can go out and drill their own well out there, and take a loan from the bank, and pay that back at cheaper rates than what they can purchase water from Foothills Water Company. That is what has caused people to jump to basically get off the system and drill their own wells." (Emphasis supplied).

R. 1998, 1999.

Apparently, the Court in this case completely disregarded Mr. Strawn's opinion; yet as Chief Rate Engineer for the Division of Public Utilities, his opinions should have been carefully considered by the Court.

Appellant called Mr. John Probasco, the civil engineer from Busch & Gudgeon, Inc., who originally designed and installed the first phase of the water system in Hi-Country Estates Subdivision, who testified "the system has little value if any, to anybody but the homeowners in Hi-Country" (R. 2047, 2055, 2057). He testified his opinion of the value of the improvements between 1974 and the present is \$13,376.69 (R. 2052); but that it would cost a new owner \$160,300.00 to bring this antiquated water system up to appropriate standards (R. 2053, 2055).

Appellant called Mr. Richard Ellis, assistant treasurer for the Salt Lake County Water Conservancy District, who has been involved in negotiations with Foothills to purchase the water

system. He testified that in his opinion the whole system, tanks, lines, lots and all is worth a maximum of \$27,650.00 (R. 2080). His valuation was accepted by the Board of Directors of the District (Add. 16; Trial Exhibit 10; R. 1359).

Foothills called two witnesses to establish value. Stanley S. Postma placed the value of the system (combining three different valuation methods) at between \$409,000.00 and \$482,000.00 (R. 2173) and he valued the water right at between \$149,000.00 and \$182,000.00 (R. 2171).

Seth Schick, hired a week prior to trial by Foothills, is an engineer who testified he thought the value of the water system was \$110,000.00 to \$115,000.00 more than Postma's value (therefore between \$524,000.00 and \$607,000.00) (R. 2288). Mr. Schick valued the water right at \$359,000.00 (R. 2275).

These bloated values of the system and water right (disagreed upon by Foothills' own witnesses) had to clearly have been rejected by the trial judge when he reached the combined value of the water right and water system at \$98,500.00.

Appellant submits that the judge, while merely plucking a figure out of the air, was not about to be persuaded by the outrageous estimates of Foothills' experts for a water system that has never shown a net profit. (See Point II, subpoint C supra).

Appellant believes the judge's conclusion was clearly erroneous and should be reversed.

ADDENDUM 6

WELL LEASE AND WATER LINE EXTENSION AGREEMENT

THIS AGREEMENT made and entered into this 2nd day of April, 1977, by and between JESSE H. DANSIE, hereinafter referred to as "Dansie", and GERALD H. BAGLEY, hereinafter referred to as "Bagley",

W I T N E S S E T H :

WHEREAS, Dansie is the owner of property located in Sections 33, 34 and 35, Township 3 South, Range 2 West, Salt Lake Base and Meridian, and is also the owner of water rights evidenced by Certificate No. 8212 Application No. 26451, and the rights to water therefrom and a water distribution system located on such property; and

WHEREAS, Bagley is the owner of property located in Section 33, Township 3 South, Range 2 West, and Sections 1, 2, 4, 5, and 11, Township 4 South, Range 2 West Salt Lake Base and Meridian, and is also the owner of a water distribution system located on part of the property owned by him; and

WHEREAS, Dansie and Bagley desire to connect their water systems and make use of the Dansie well and water for their mutual benefit, upon the terms and conditions provided herein:

NOW, THEREFORE, in consideration of the mutual covenants hereinafter provided, the parties hereto agree as follows:

A. WELL LEASE

1. Dansie hereby leases to Bagley the well located South 758 Feet and East 1350 Feet from the West quarter corner of Section 33, Township 3 South, Range 2 West, Salt Lake Base and Meridian, identified by Certificate No. 26451 issued by the Utah State Engineer's Office, hereinafter referred to as "Dansie Well No. 1", including the equipment for operation of such well and the rights to all of the water therefrom, for a period of ten (10) years from the date of this Agreement.



2. Bagley shall pay to Dansie Five Thousand One Hundred Dollars (\$5,100.00) the receipt of which is hereby acknowledged, and as rental for such lease, Bagley shall pay to Dansie \$300.00 each month during the first five years of this lease commencing April 10, 1977, provided the monthly rental shall be increased to \$600.00 per month at such time as thirty (30) additional hook-ups are installed on the Hi-Country Water Company Distribution System operated by Bagley. As of the date of this Agreement, there are 28 hook-ups, such hook-ups being detailed in Exhibit #1.

3. Commencing April 10, 1982, the monthly rental payments shall be increased to \$600.00 per month unless they have already been increased to that amount pursuant to Paragraph 2 above.

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.

5. Bagley agrees to provide and install a seal around the well pipe of Dansie Well No. 1 as required to meet the Utah State Division of Health standards and to install a new pump on the well within the first five (5) years of this lease and shall be responsible for all maintenance of Dansie Well No. 1 during the term of this lease.

6. Bagley agrees to pay all pumping costs, repairs, and maintenance of said well for the period of this Agreement. Bagley agrees to maintain the said well, and electric motor in good operating condition. Any changes or modifications to said well, motor and pumping equipment shall be paid for by Bagley and will become the property of Dansie at the termination of this Agreement.

7. The existing pump, electric motor and transformers will remain the property of Dansie and will be delivered to Dansie if removed from said well. Any new equipment to be installed in said well such as an electric motor, pumps and transformers and

pipng shall become the property of Dansie and shall be free and clear of any mortgages, liens or encumbrances at the termination of this Agreement.

8. Bagley agrees for himself, his successors, and assigns to be responsible for and to indemnify Dansie, his successors and assigns, against any and all liability, losses and damages, of any nature whatever, and charges and expenses, including court costs and attorneys' fees that Dansie may sustain or be put to and which arise out of the operations, rights and obligations of Bagley pursuant to this Agreement whether such liability, loss, damage charges or expenses are the result of the actions or omissions of Bagley, his employees, agents or otherwise.

9. Dansie does not warrant that the water from Dansie Well No. does now or at any time during the term of this Agreement, and any extension thereof, will meet any standards for culinary water as required by the Utah State Division of Health. However, a letter of approval of the water by the Utah State Board of Health is attached (Exhibit #2) and the requirements are set forth in said letter.

B. EXTENSION NO. 1

1. Within one year from the date hereof, Dansie shall with his equipment perform all labor required to excavate for and install a 6-inch D.V.C. Class 200 pipeline connecting the Dansie Well No. 1 to the existing Hi-Country Water Company water system owned by Bagley at a point in Lot #9 as referenced by the map in Exhibit #1. Bagley shall purchase and furnish all permits, pipe, materials and supplies required for this connection and shall obtain an easement across Lot #9 at his expense.

2. Dansie shall own the line upon completion of the work and Bagley shall be able to use said line during the term of this Agreement. Bagley shall have a right to enter the property upon which the pipeline and connection is located for the purpose

of installing, maintaining and using the water line to be installed thereon pursuant to Paragraph B (1) above. Bagley hereby grants and conveys to Dansie an easement and right-of-way over and across property in the Hi-Country Estate Subdivision for the same purpose. Dansie shall have a right to take water from the line at points that may serve the property along the line of Extension No. 1. Dansie shall own and Bagley will be responsible for maintenance of the extension during the life of this Agreement.

C. EXTENSION NO. 2

1. Within one year from the date hereof, Dansie shall, with his equipment and at his expense, perform all labor required to excavate for and install a 6-inch P.V.C. Class 200 pipeline connecting the Hi-Country Estates Water Company water system, from its most Easterly point at approximately 7350 West and 13300 South in Salt Lake County, to the Dansie water line at approximately 7200 West and 13300 South, including a pressure-reducing valve at the point of connection with the Hi-Country Estates Water Company system at 7350 West 13300 South. Dansie shall purchase and furnish all pipe, materials and supplies required for this connection.

2. Dansie shall obtain and provide all easements and permits and pay all fees required for this connection and extension, except as for such line that may be on property of Hi-Country Homeowners Association or Bagley.

3. Dansie shall own and be responsible for all maintenance of this Extension No. 2.

4. Bagley shall have the right, at all times during the term of this Agreement or any extension thereof, to run water from the Hi-Country Estates Water Company system through the Dansie water system and Extension No. 1 and No. 2 and No. 3 to property owned by Bagley in Sections 1, 2, and 11, Township 4 South, Range 1 West, Salt Lake Base and Meridian.

D. EXTENSION NO. 3

1. Within one year from the date hereof, Dansie shall, with his equipment perform all labor required to excavate for and install a 6-inch P.V.C. Class 200 pipeline connecting to the Dansie water system at 6800 West and 13000 South in Salt Lake County and extending along 6800 West to 13400 South. Bagley shall purchase and furnish all permits, pipe, materials and supplies required for this connection and extension.

2. Dansie shall own and Bagley shall be responsible for all maintenance of this Extension No. 3 during the life of this Agreement.

E. OTHER WELLS AND HOOK-UPS

1. Dansie shall have the right, at his expense, to connect any additional wells owned by him, located in Section 33, 34 and 35, Township 3 South, Range 2 West, Salt Lake Base and Meridian identified by Certificate No. _____ issued by the Utah State Engineers Office, hereinafter referred to as "Dansie Wells" and by change application No. 9-8635 (59-3879) issued by the Utah State Engineers Office, hereinafter referred to as "Dansie Well No. 3," to the water system owned by Dansie, including Extension No. 2, and to commingle the water from these wells with that in the system from other sources so long as the water from such wells at all times meet all standards for culinary water required by the Utah State Division of Health.

2. Dansie shall have the right to receive up to five (5) residential hook-ups onto the water system on the Dansie property for members of his immediate family without any payment of hook-up fees and shall further have the right to receive reasonable amounts of water from the system through these five (5) hook-ups for culinary and yard irrigation at no cost.

3. Dansie shall further have the right to receive up to fifty (50) residential hook-ups onto the water system on the Dansie property for which no hook-up fees will be charged. Water service

charges shall be charged to the recipients thereof of which Dansie shall receive fifty percent (50%) of the water service billings paid by those recipients in consideration for Dansie's maintenance of his part of the water system.

4. Dansie shall receive not less than \$4,000.00 or One Hundred percent (100%) of all of the hook-up fees to the water system on the Leon property located between the Hi-Country Estates property in Sections 33, Township 3 South, Range 2 West, and the Dansie property in Section 34, Township 3 South, Range 2 West, Salt Lake Base and Meridian and shall receive fifty percent (50%) of the revenues from water service charges to such property.

5. Dansie shall have the right to use for any purposes and at no cost, any excess water from the Hi-Country Estates Water Company system Well No. 1, not required or being used by Bagley or customers of the Hi-Country Estates Water Company. Any power or other costs of pumping such excess water shall be paid by Dansie.

F. MISCELLANEOUS

1. It is understood that Bagley intends to use the entire water system formed by the extensions and connections provided for herein, including the present systems owned by Bagley and Dansie, for the purpose of providing water to users in the area covered by this system or which can be reached by extensions and connections to this system, that Bagley intends to charge hook-up and water service fees to water users, that Bagley is entitled to all such fees and other charges except as otherwise provided in this Agreement, and that Bagley is responsible for all costs of other extensions and connections except as otherwise provided in this Agreement.

2. Dansie agrees that Bagley may form a water company, using such entity or form of organization as Bagley desires, and may convey all his rights to the water system referred to in this Agreement and assign his interest in this Agreement to any such

entity or organization. Bagley will be personally responsible for lease terms and conditions if assignee fails to meet the terms and conditions of the lease. No assignment, conveyance or sublease shall release Bagley from liabilities and obligation under this Agreement.

3. Dansie further agrees that Bagley may apply to the Utah Public Service Commission for such permits or approvals as may be required and Dansie shall cooperate fully in all respects as may be required to obtain such permits or approvals as may be required by the Public Service Commission. Bagley agrees to pay all costs incurred in obtaining such approval, including but not limited to, legal and engineering fees.

4. Bagley and Dansie each agree to execute and deliver any additional documents and/or easements which may be necessary to carry out the provisions and intent of this Agreement.

5. Non-payment of any monthly installment will, at the option of Dansie, automatically terminate this Agreement. All remaining lease payments, in the event of termination for non-payment of any monthly installment, shall become immediately due and payable to Dansie. If it becomes necessary for Dansie to sue for the liquidated damages (remaining lease payments), Bagley shall pay attorneys' fees and costs incurred by Dansie.

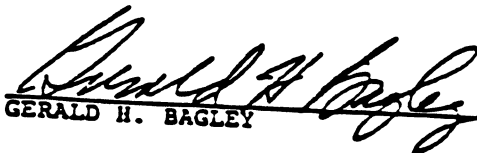
6. Dansie shall have first right of refusal to purchase the entire Hi-Country water system if it is to be sold or assigned to a third party.

7. Bagley, and his assigns or successors, agree to supply water to the Dansie property as provided for in this Agreement and for such time beyond the expiration or termination of this Agreement as water is supplied to any of the Hi-Country properties or that the lines and water system referred to in this Agreement are in existence and water is being supplied from another source such as Salt Lake County Conservancy District. Such water as is provided subsequent

to the expiration or termination of this Agreement shall be made available upon the same terms, conditions and rates as are set forth in this Agreement.

DATED this 2nd day of April, 1977.


JESSIE H. DANIE


GERALD H. BAGLEY

AMENDMENT TO WELL LEASE AND WATER LINE EXTENSION AGREEMENT

This Amendment made and entered into this 3rd day of July, 1985, by and between Jesse H. Dansie, hereinafter referred to as "Dansie," and Gerald H. Bagley, hereinafter referred to as "Bagley."

W I T N E S S E T H

WHEREAS, Dansie and Bagley, on April 7, 1977, entered into a Well Lease and Water Line Extension Agreement (hereinafter "Well Lease Agreement"); and

WHEREAS, Dansie and Bagley are concerned about possible ambiguities in Paragraph E. 2. of the Well Lease Agreement; and

WHEREAS, the Hi-Country Estates Homeowners Association has filed a lawsuit based in part on interpretation of the Well Lease Agreement; and

WHEREAS, Bagley is delinquent in the payment of his monthly rental payments, but desires to continue the Well Lease Agreement;

NOW, THEREFORE, in consideration of \$10.00 (Ten) and other good and valuable consideration, the sufficiency of which is hereby admitted, Dansie and Bagley agree as follows:

1. Paragraph E. 2. of the April 7, 1977 Well Lease Agreement is amended to read as follows:

2. Dansie shall have the right to receive up to five (5) residential hook-ups on to the water system on the Dansie property for

members of his immediate family without any payment of hook-up fees and shall further have the right to receive up to 12 million (12,000,000) gallons of water per year from the combined water system at no cost for culinary and yard irrigation use on the Dansie property described herein plus Lot 51 of Hi-Country Estates. Any meters required at any time by any person or entity for metering of Dansie's water shall be purchased and installed by Bagley at no cost to Dansie. Any use of water for the fighting of fires, or losses caused by breaks or line ruptures shall not be charged against the 12,000,000 gallons to which Dansie is otherwise entitled.

2. Paragraph E.5. of the April 7, 1977 Well Lease Agreement is amended to read as follows:


5. Dansie shall have the right to use for any purpose and at no cost, any excess water from the High Country Estates Water Company System Well No. 1, not required or being used by Bagley or customers of the High Country Estates Water Company. Dansie shall pay only the incremental pumping power costs associated with producing such excess water.

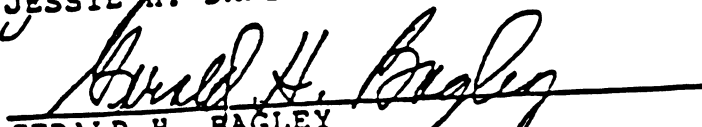
3. All other provisions of the Well Lease Agreement shall remain in full force and effect.

4. Nothing herein shall relieve Bagley from the obligation to make the monthly payments now delinquent or to become due under the Well Lease Agreement.

4. This Amendment and the Well Lease Agreement as amended herewith, shall be binding upon and inure to the benefit of the respective parties hereto, their successors and assigns.

IN WITNESS WHEREOF, each of the parties has caused
this Amendment to be executed the day and year first above
written.


JESSIE H. DANSIE


GERALD H. BAGLEY

6985C

ADDENDUM 7

POINT IV

THE TRIAL COURT ERRED IN FINDING THAT THE 1977 WELL LEASE
AND WATER TRANSPORTATION AGREEMENT WAS A VALID ENCUM-
BRANCE ON THE WATER SYSTEM.

The Court ruled in its "Order Regarding Amount Payable by
Plaintiff for Subject Water System":

"1. The encumbrance of the water system which is the subject of this action represented by the Well Lease and Water Transportation Agreement entered into in 1977 between Gerald H. Bagley and Jesse Dansie is and remains a valid encumbrance upon the subject water system, and requires the owner of the subject water system to permit the Dansie family to receive and transport, free of charge, water through the subject system in the amount of twelve million gallons per year or such larger amount as shall be permitted by the excess capacity of the system as long as the system exists and is operative."

(R. 1627).

The 1977 Well Lease and Water Transportation Agreement (attached as Add. 15 and admitted into evidence in the trial of this matter as Plaintiff's Exhibit 11, R. 1359, 1857-1867) was construed by the Public Service Commission as outlined in Point III of this brief supra. In addition to the fact that the Public Service Commission in its Report and Order dated March 17, 1986 (Add. 2; R. 1044-1083) found this Agreement to be "grossly unreasonable" and "showering virtually limitless benefits on Jesse Dansie and the members of his immediate family", the P.S.C. found that paragraph F. 2 of this Agreement ". . . makes Bagley personally responsible to fulfill the terms and conditions of the lease, whether or not a water company is created to which Bagley conveys or assigns the Well Lease Agreement." (R. 1056).

Based upon these findings of unreasonableness, the P.S.C. issued its Order dated March 17, 1986, requiring Foothills to ". . . obtain approval from this Commission before entering into

any future lease or sales agreements for the provision of water to Foothills' service area or any amendment to or assignment of any lease or sales agreement that is now in force or effect." (R. 1079). No evidence was presented in the lower court, and it is simply uncontroverted, that Foothills has failed to obtain the approval of the Public Service Commission for any amendment to or extension of this 1977 Well Lease and Water Line Extension Agreement. The Agreement by its own terms in paragraph A. 4 states that it terminates on April 10, 1987. Where the Agreement terminated on that date, and no extensions of the Agreement have been approved by the P.S.C., it is unconscionable for the lower court to have made Homeowners' Quiet Title Order subject to this alleged "encumbrance" on the water system.

Homeowners were not parties to this Agreement; and to impose its "grossly unreasonable" terms upon them would be unfair and unjust, because they are the persons the Agreement was supposed to have benefited in the first place.

In addition to the foregoing, the P.S.C. in its Report and Order of 1986 states that:

"While no one can blame Mr. Dansie for desiring to provide free water to his children in virtual perpetuity, this Commission would be abrogating its statutory duty were we to impose such a burden on Foothills' present and future customers. . .

. . . We find that it would be unjust and unreasonable to expect Foothills 63 active customers to support the entire burden of the Well Lease Agreement . . .

. . . As part of Mr. Dansie's cooperation with the Commission, it is reasonable to expect him to look to Foothills for the \$600.00 monthly lease payment and to Bagley personally for any remaining obligations under the Well Lease Agreement." (Emphasis supplied).

(R. 1056, 1057).

Indeed, the Well Lease and Water Line Extension Agreement itself provides in paragraph F. 2 "Bagley will be personally responsible for lease terms and conditions if Assignee fails to meet the terms and conditions of the lease. No Assignment, conveyance or sublease shall release Bagley from liabilities and obligations under this Agreement." (Add. 15 p. 7; R. 1863).

The trial judge apparently completely ignored this clear evidence when fashioning his "Order Regarding Amount Payable Plaintiff for Subject Water System" dated October 31, 1990. Pursuant to the provisions of Utah Code. Ann. § 54-7-14, the findings of the Public Service Commission regarding this Well Lease Agreement and its grossly unreasonable nature should have collaterally estopped Appellees from arguing that such is a valid encumbrance upon the water system. The trial court's failure to apply collateral estoppel in this case is a legal error which should be corrected by this Court.

The Court's Findings of Fact with regard to the reasons why it fashioned its proposed Quiet Title Order in the name of Homeowners subject to the "encumbrance" of the 1977 Well Lease and Water Transportation Agreement is not supported by sufficient Findings of

Fact, primarily because no evidence was submitted during the trial of this matter by Appellees as to why this Agreement should be an encumbrance on the water system. The failure of a trial court to enter adequate findings requires that the judgment be vacated. Anderson v. Utah County Bd. of County Comm'rs, 589 P.2d 1214 (Utah 1979). There is only a single Finding of Fact relating to the Agreement, and that is Finding of Fact No. 5:

"That certain Well Lease and Water Line Extension Agreement entered into by and between Dr. Gerald H. Bagley and Jesse Dansie in 1977 was and is a valid and fully binding encumbrance on the subject water system, mandating that the owners of the Dansie family property described therein are entitled, without charge, to obtain water from the water system from the Dansie Well located on property adjacent to Hi-Country Estates Phase I Subdivision to the Dansie property, in the amount of either twelve million gallons per year or such larger amount as the excess capacity of the system shall permit, as long as the system exists and is operative. That encumbrance does not in any way legally burden the water system or the owner or operator of the water system." (Emphasis supplied).

(R. 1622).

This Finding of Fact is internally inconsistent. It states that the Agreement is a "valid and fully binding encumbrance on the subject water system", but then in the last sentence suggests that such encumbrance "does not in any way legally burden the water system or the owner or operator of the water system." This Finding of Fact is simply incomprehensible! Furthermore, Finding of Fact

No. 5 is not a legitimate Finding of Fact, but constitutes a Conclusion of Law.

The Conclusion of Law reached by the Court on this issue is "(T)he encumbrance to the subject water system and water right represented by the Well Lease and Water Line Extension Agreement entered into between Gerald H. Bagley and Jesse Dansie, entitles Foothills Water Company to continue to use the system to serve customers within its service area but outside of Hi-Country Estates Phase I" (R. 1624). In light of Finding of Fact No. 5 this Conclusion of Law seems just as inconsistent. What does it mean? The judge refers to "water right" here but the Agreement nowhere mentions "water right". It is the lease of a well! Interestingly enough, with a few minor exceptions, the "Order Regarding Amount Payable by Plaintiff for Subject Water System" paragraph 1, is almost verbatim the same as Finding of Fact No. 5!

ADDENDUM 8

POINT

APPELLEES HAVE FAILED TO SUBSTANTIVELY RESPOND TO HOMEOWNERS' ARGUMENT THAT THE COURT'S ORIGINAL DECISION TO QUIET TITLE IN HOMEOWNERS, BUT SUBJECT TO THE 1977 WELL LEASE AGREEMENT AND CONTINUED TRANSPORTATION OF WATER THROUGH THE SYSTEM BY FOOTHILLS, WAS ERRONEOUS.

In its opening brief Homeowner argued that the lower court's initial decision to enter a quiet title order in its favor but subject to the 1977 well Lease Agreement between Gerald H. Bagley and Jesse Dansie to transport free water through the system to the

Dansie family was unfair, unjust and erroneous. (H.O. Op. Br. at pp. 42-47). Homeowners pointed out that the Public Service Commission in its Report and Order dated March 17, 1986 had found this Agreement to be "grossly unreasonable" and "showering virtually limitless benefits on Jesse Dansie and the members of his immediate family." Homeowners also pointed out that it had not been a party to this Agreement and to impose its grossly unreasonable terms upon them would be unfair and unjust. Furthermore, Homeowners argued that the Agreement expired by its own terms on April 10, 1987 and no document of renewal in any form was presented to the trial court. Finally, Homeowners argued that Finding of Fact No. 5, upon which the court's order was based, was internally inconsistent and ambiguous (R.1622).

Foothills responded to these arguments with less than a half a page in its brief (Cons. In. Br. of Foothills W.C., at pg. 43). Despite the fact that the Public Service Commission in its March 17, 1986 Report and Order had ruled that the Agreement was grossly unreasonable and ordered Foothills Water Company to obtain its approval before entering into any future lease or sales agreement for the provision of water to Foothills' service area (R.1079), Foothills argues that "[T]he encumbrance was, if anything, recognized and validated by the Public Service Commission." This statement is simply false! Foothills' refusal to even respond to

the argument that the Agreement expired on its face on April 10, 1987, shows that it simply has no basis upon which it can argue that the judge's order be upheld with regard to that Agreement.

Furthermore, Homeowners argued in its opening brief that the court's initial decision to provide a quiet title order to the water system to Homeowners but subject to allowing Foothills to continue to transport water through the system to customers outside of Hi-Country Estates Subdivision Phase I, was clearly erroneous. Homeowners argued that no evidence of any kind was presented to the lower court to justify this portion of the order. In addition, Homeowners argued that no appropriate finding of fact or conclusion of law was entered by the court to support this provision, and therefore that portion of the order should be vacated upon remand. (H.O. Op. Br. at 47-49).

Foothills simply argues in its Consolidated Initial Brief that this issue is moot. However, Homeowners are requesting that this Court reverse the lower court's judgment quieting title to the water system and water right in Foothills and remand the case with instructions to enter a quiet title order in favor of Homeowners. Homeowners also ask that this Court invalidate this encumbrance requiring Homeowners to allow Foothills to transport water through its system to outside customers. Only in this way can the court's determination be truly fair and just. Even though an appellate

court may reverse a judgment due to any number of reasons, it does have the power to review and decide matters which may become material when a case is remanded for further proceedings. LeGrand Johnson Corp. v. Peterson, supra; Anderson v. Utah County Board of County Commissioners, supra.

It is to be noted that Appellees Bagleys do not even address the issues contained in this Point.

POINT VI

FOOTHILLS' CLAIMS FOR SLANDER OF TITLE WERE APPROPRIATELY DISMISSED BY THE TRIAL COURT.

In its Consolidated Initial Brief, ~~Foothills argues that there~~ was "undisputed evidence" that the actions of Homeowners, through its president Norman Sims and its agent William Turner, slandered the title of Foothills Water Company to the water system and the water right. The trial court dismissed these allegations outright. In its Findings of Fact and Conclusions of Law dated October 20, 1989, and again in its Order on Ownership Issues dated October 20, 1989, the court states: "The counterclaim by Foothills Water Company is hereby dismissed for lack of proof" (R.897, 904).

The court obviously believed Foothills had failed to present sufficient evidence to make out the elements of an action for slander of title. In Jack B. Parson Companies v. Nield, 751 P.2d 1131 (Utah 1988), the Supreme Court stated the elements of slander of title as follows:

ADDENDUM 9

FILED

FEB 03 1996

IN THE UTAH COURT OF APPEALS

COURT OF APPEALS

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Hi-Country Estates Homeowners
Association, a Utah
corporation,

Plaintiff/Appellant and
Cross-appellee,

v.

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,

Hi-Country Estates Homeowners
Association, a Utah
corporation; W Norman Sims;
and William F Turner,

Plaintiff/Appellant and
Cross-appellee.

ORDER ON BRIEFING

Case No. 94-0450-CA

Before Judges Davis, Billings, and Jackson.

The Court of Appeals issued an opinion herein on September 22, 1993, which is reported at 863 P.2d 1 (Utah App. 1993). Appellee Foothills Water Company filed a petition for writ of certiorari in the Utah Supreme Court. The Supreme Court granted certiorari "for the narrow purpose of reviewing the court of appeals' decision concerning the jurisdiction of the Public

Service Commission (PSC) as it related to issues in this case."

By a published opinion issued July 20, 1995, the Supreme Court reversed and remanded the matter to the court of appeals as follows:

On the basis of the foregoing, the court of appeals' reversal of the district court's denial of the Hi-Country Estates Homeowners Association's motion for summary judgment on the issue of the amount of reimbursement owed to Foothills Water Company is reversed. The court of appeals' determination that the PSC's order invalidated the 1977 well lease agreement between Bagley and Dansie is also reversed, and this matter is remanded to the court of appeals for further proceedings consistent with this opinion.

Hi-Country Estates Homeowners Assoc. v. Bagley & Company et al., 901 P.2d 1017, 1024 (Utah 1995).

The following holdings contained in this court's opinion were unaffected by the opinion on certiorari and, accordingly, have been affirmed:

1. Appellant Hi-Country Estates Homeowners Association holds legal title to the water right, lots and system.
2. The case is remanded to the district court for entry of a quiet title order in the Homeowners Association's favor that is not subject to any contingency.
3. Gerald H. Bagley is not entitled to damages. Id. at 1019 n.2.
4. The trial court's dismissal of Foothills Water Company's claim for slander of title is affirmed. Id. at 1019 n.1.

The Supreme Court's opinion also concluded that the issue of whether this court erred in reversing a district court order permitting the Foothills Water Company to transfer water through the system to customers within its service area but outside of the subdivision is now moot because the water company has since been decertified as a public utility by the PSC. Id. at 1020 n.3.

Accordingly, the only issues before the court on remand to be briefed by the parties and determined by this court are (1)

whether the district court correctly determined the fair market value of the water right, system and lots was \$98,500 under the theory of unjust enrichment, and (2) whether the district court correctly held that the well lease agreement was a valid and binding encumbrance on the water system. This court's opinion held that the PSC's determination bearing on these issues was dispositive and thus binding on the district court. The opinion did not review the evidentiary basis for the district court's valuation of the water right, system and lots and did not determine appellant's claim that the well lease agreement had lapsed. Accordingly, the parties shall address the following sub-issues:

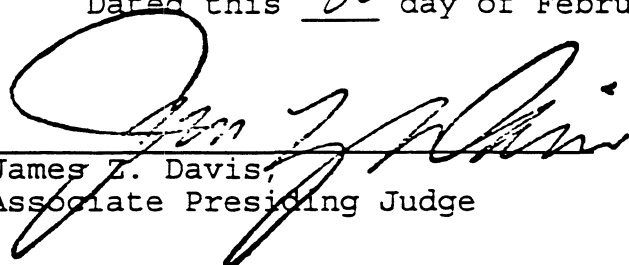
1. Whether the Utah Supreme Court's opinion requires affirmance of the district court's ruling on fair market value of the water right, system and lots and the validity of the well lease as an encumbrance on the system.
2. Whether the district court's finding, under a theory of "unjust enrichment" that the fair market value of the water right, system and lots is \$98,500 is clearly erroneous.
3. Whether the well lease agreement is a valid and binding encumbrance on the system, and in conjunction -- therewith, whether the well lease agreement has lapsed.

Appellant filed a Motion to Decide Certain Appeal Issues on Other Grounds, appellee filed a response, and appellant filed a reply to appellee's response. Both parties concede that no new substantive arguments can be raised that were not included in the original briefs filed in this court. The discussion of facts shall be similarly limited to those facts stated in the two reported opinions; provided that, facts necessary to an understanding of the issues to be briefed may be included to the extent they are not inconsistent with the facts in the reported opinions. Briefs that do not comply with this order are subject to being stricken on motion or sua sponte by the court pursuant to Rule 24(j) of the Utah Rules of Appellate Procedure.

IT IS HEREBY ORDERED that appellant shall file its brief / within thirty days of the date hereof, appellee shall thereafter have thirty days to file a responsive brief, and appellant's reply brief, if any, shall be filed within thirty days of the

filing date of appellee's brief. All briefs shall be limited to the issues outlined and described herein.

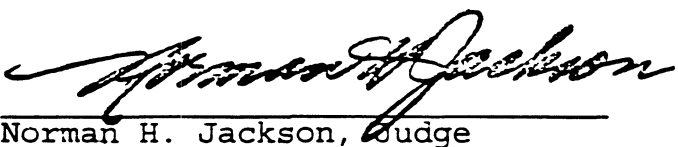
Dated this 8th day of February, 1996.



James L. Davis,
Associate Presiding Judge



Judith M. Billings, Judge



Norman H. Jackson, Judge

CERTIFICATE OF MAILING

I hereby certify that on February 8, 1996, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below.

\ Larry R. Keller (Argued)
Larry R. Keller & Associates
Attorney at Law for Appellant High County,
257 Towers, Suite 340
257 East 200 South - 10
Salt Lake City, UT 84111

Ralph J. Marsh (Argued)
Backman, Clark & Marsh
Attorneys at Law for Cross-Appellant Bagley & Co.
800 McIntyre Building
68 South Main
Salt Lake City, UT 84101

Val R. Antczak (Argued)
T.-Patrick Casey
Parsons, Behle & Latimer
Attorneys at Law for Cross-Appellant Football Water
201 South Main St., Suite 1800
P. O. Box 11898
Salt Lake City, UT 84147-8098

The Honorable Pat B. Brian
District Court Judge
240 East 400 South
Salt Lake City, UT 84111

Third District, Salt Lake County #C85-1464

Dated this 8th day of February, 1996.

By



Deputy Clerk