

1992

Hi-Country Estates Homeowners Association v. Bagley & Company, Gerald H. Bagley and Foothills Water Company : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

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

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

Recommended Citation

Brief of Appellee, *Hi-Country Estates Homeowners Association v. Bagley & Company*, No. 920450 (Utah Court of Appeals, 1992).
https://digitalcommons.law.byu.edu/byu_ca1/3408

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
KFU
50

.A10

DOCKET NO. 920450-CA

IN THE UTAH COURT OF APPEALS

HI-COUNTRY ESTATES HOMEOWNERS
ASSOCIATION, a Utah corporation,

Plaintiff/Appellant and Cross-
Appellee,

vs.

BAGLEY & COMPANY, a Utah corporation,
et al.,

Defendants/Appellees and Cross-
Appellants,

FOOTHILLS WATER COMPANY, a Utah
corporation,

Defendant/Appellee and
Cross-Appellant

vs.

HI-COUNTRY ESTATES HOMEOWNERS
ASSOCIATION, a Utah corporation, et
al.,

Plaintiff/Appellant and
Cross-Appellee.

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

Priority No. **15**

APPELLEE FOOTHILLS WATER COMPANY'S BRIEF

On Remand From The Utah Supreme Court.

LARRY R. KELLER (1785)
KELLER & LUNDGREN, L.C.
Attorney for Appellant
257 Towers, Suite 340
257 East 200 South - 10
Salt Lake City, Utah 84111
Telephone: (801) 532-7282

VAL R. ANTCZAK (0120)
of and for
PARSONS BEHLE & LATIMER
Attorneys for Appellee
Foothills Water Co.
201 So. Main St., Suite 1800
P.O. Box 45898
Salt Lake City, UT 84145-0898
Telephone: (801) 532-1234

1996

LIST OF PARTIES

Hi-Country Estates Homeowners Association, a Utah corporation	Plaintiff- Appellant and Cross-Appellee
Bagley & Company	Defendant, Cross-Appellant
Dr. Gerald Bagley	Defendant, Cross-Appellant
Hi-Country Estates, Inc., a dissolved Utah corporation	Defendant
HI-Country Estates Second, a dissolved Utah Partnership	Defendant
Keith Spencer	Defendant, Counterclaim Defendant and Cross-Appellee
Charles Lewton	Defendant, Counterclaim Defendant and Cross-Appellee
Foothills Water Company, a Utah corporation	Defendant, Counterclaimant, Appellee and Cross-Appellant
J. Rodney Dansie	Defendant
W. Norman Sims	Counterclaim Defendant and Cross-Appellee
William P. Turner	Counterclaim Defendant and Cross-Appellee

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF JURISDICTION	1
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENTS	3
ARGUMENT	4
I. THE UTAH SUPREME COURT'S OPINION COMPELS AFFIRMANCE OF THE DISTRICT COURT'S RULINGS	4
II. HOMEOWNER'S HAS NOT SHOWN THAT THE DISTRICT COURT'S DETERMINATION REGARDING THE FAIR MARKET VALUE OF THE WATER RIGHT, SYSTEM AND LOTS IS CLEARLY ERRONEOUS	7
III. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S DETERMINATION THAT THE WELL LEASE AGREEMENT IS A VALID AND BINDING ENCUMBRANCE ON THE WATER SYSTEM.	11
CONCLUSION	16

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Hi-Country Estates Homeowner's Association v. Bagley & Co.</u> , 901 P.2d 1017 (Utah 1995)	5,6,7,13
<u>Hi-Country Estates Homeowners Association v. Bagley & Co.</u> , 863 P.2d 1 (Utah Ct. App. 1993)	5,7
<u>Reed v. Reed</u> , 806 P.2d 1182 (Utah 1991)	8
<u>Reid v. Mutual of Omaha Insurance Co.</u> , 776 P.2d 896 (Utah 1989)	1
<u>Reliance Insurance Co. v. Utah Department of Transp.</u> , 858 P.2d 1363 (Utah 1993)	1
<u>Sackler v. Savin</u> , 897 P.2d 1217 (Utah 1995)	1
Utah Code Ann. § 78-2a-3(2)(k)	1

STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2a-3(2)(k).

STATEMENT OF 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. This issue is being initially considered in this court.

2. Whether the district court's finding, under the theory of "unjust enrichment" that the fair market value of the water right, system and lots is \$98,500, is clearly erroneous. As stated, the standard of review is whether the district court's finding was clearly erroneous in light of the evidence of record. Reliance Ins. Co. v. Utah Dep't of Transp., 858 P.2d 1363, 1366 (Utah 1993); Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896, 899 (Utah 1989).

3. Whether the Well Lease Agreement is a valid and binding encumbrance on the system, even if the Well Lease Agreement has lapsed. The standard of review is no deference to the lower court's holding, with review for correctness. Sackler v. Savin, 897 P.2d 1217, 1220 (Utah 1995); Reliance Ins., 858 P.2d at 1366.

STATEMENT OF THE CASE

Foothills Water Company ("Foothills") will not burden the court with a separate recitation of the case or of the facts, save to correct several misstatements in the Statement of the Case and Statement of the Facts in the brief filed by Hi-Country Estates Homeowner's Association ("Homeowners"). First, in its Statement of the Case, Homeowners asserted that this court "issued an Order requiring full briefing of the issues involved in Homeowners' Motion." The Order on Briefing entered by this court requested briefing on only three issues, and restricted the substantive arguments to those arguments raised in the original briefs filed in this court.

In its Statement of Facts, Homeowners makes the legal assertion that "the only parties against whom title was not quieted in this case were Foothills and Gerald H. Bagley and Bagley & Company." (Brief at 3.) Any order quieting title in this action which purports to extinguish interests under the well lease agreement cannot bind individual members of the Dansie family who were persons with a known interest in the well lease agreement, but were not named or served in this action.

Homeowners also asserts in its Statement of Facts that "[t]he decision of the Utah Court of Appeals issued September 22, 1993, is final as to all parties except Homeowners and Foothills." (Brief at 6.) Those portions of the decision of this court issued

September 22, 1993 which were affected by the Utah Supreme Court opinion dated July 20, 1995, are not final or binding on any parties to this action, whether or not they petitioned the Utah Supreme Court for certiorari.

SUMMARY OF ARGUMENTS

Homeowners' attempts in its brief to recharacterize its former arguments are a veiled attempt to convince this court to overrule the decision of the Utah Supreme Court in this case. That decision compels affirmance of the district court's rulings. Homeowners based its original argument for reversal of the district court's determination of value and the effect of the well lease agreement on findings and an order entered by the Public Service Commission (the "PSC"). This court reversed the district court's findings on that basis. The Utah Supreme Court's opinion, holding that the PSC has no jurisdiction to value the water system for purposes of determining the appropriate compensation to avoid unjust enrichment, or to invalidate the well lease agreement, eliminates Homeowners' argument for reversal, and thus compels affirmance.

Homeowners has failed to demonstrate that the district court's valuation of the water right, system and lots for purposes of determining appropriate compensation is clearly erroneous. The district court reviewed the evidence regarding valuation, including expert testimony presented on both sides, during a three day trial.

Homeowners' extensive efforts to gain control of the water system belie Homeowners' assertion that the system is worth no more than \$27,650. A detailed review of the evidence would demonstrate that, if the district committed error in connection with its valuation, the district court set an unjustifiably low figure.

The district court correctly found that the well lease agreement is a valid and binding encumbrance on the water system. In partial consideration for the lease of the Dansie well, Gerald H. Bagley ("Bagley"), former owner of the water system, agreed that Jesse H. Dansie ("Dansie") would have the right, along with his immediate family, to receive up to 12 million gallons of water per year, and that Dansie would have the right to use any excess water from the system and only be required to pay incremental costs. The well lease agreement, which was a recorded document, expressly provided that these rights would continue after expiration or termination of the agreement for so long as the water system continued to operate. The stipulated facts and the clear language of the well lease agreement compel the decision reached by the district court.

ARGUMENT

I. THE UTAH SUPREME COURT'S OPINION COMPELS AFFIRMANCE OF THE DISTRICT COURT'S RULINGS.

Foothills argued in its memorandum in response to Homeowners' motion to decide issues on other grounds that

rebriefing was unnecessary. The Utah Supreme Court rejected the arguments advanced by Homeowners for reversal of the issues remaining in this case and remanded the case to this court to complete the appeals process. The Utah Supreme Court's opinion, Hi-Country Estates Homeowner's Ass'n. v. Bagley & Co., 901 P.2d 1017 (Utah 1995), compels affirmance of the district court's rulings that the fair market value of the water right, system and lots is \$98,500 to avoid unjust enrichment and that the 1977 Well Lease and Water Line Extension Agreement (the "Well Lease") is a valid and binding encumbrance on the water system.

On appeal of the district court's judgment to this court, Homeowners based its original argument on appeal for reversal of these rulings on the binding effect of the findings and order of the PSC dated March 17, 1986. Based on the PSC order, this court reversed the district court's denial of Homeowners' motion for summary judgment on the issue of the amount of reimbursement owed to Foothills. Hi-Country Estates Homeowners Ass'n v. Bagley & Co., 863 P.2d 1, 10 (Utah Ct. App. 1993). This court concluded that the PSC's determination of the value of the improvements to the water system that could be included in the rate base bound the district court to limit its reimbursement award to \$16,334.99. Id.

This court also reversed the district court's holding that the Well Lease is a valid and binding encumbrance on the water system, also based on the PSC order. Id. at 11-12. The PSC had

stated in passing that it would be unreasonable to expect the rate-payers to support the entire burden of the Well Lease. Consequently, this court concluded that the PSC order invalidated the Well Lease, id., although the PSC never intended to invalidate the Well Lease.

The Utah Supreme Court concluded that the PSC does not have authority to value the water system in this case for purposes of determining the amount of unjust enrichment, and that the PSC determined the value of the water system only for purposes of rate-making in its 1986 order. Hi-Country Estates Homeowners Ass'n., 901 P.2d at 1021-22. Accordingly, the Utah Supreme Court reversed this court's decision regarding the issue of the amount of reimbursement owed to Foothills. Id. at 1022.

The Utah Supreme Court further held that the PSC did not have jurisdiction to invalidate the Well Lease so long as that agreement did not impact the rates paid by the homeowners, and that the PSC's 1986 order did not purport or intend to invalidate the Well Lease. Id. at 1023. Accordingly, the Utah Supreme Court reversed this court's determination that the PSC's order invalidated the Well Lease. Id. at 1024. In its analysis of the Well Lease, the Utah Supreme Court pointed out that the district court ruled that the Well Lease was a valid and binding encumbrance on the water system notwithstanding the PSC's order. Id. at 1022. While the Utah Supreme Court did not expressly mandate affirmance

of the district court's rulings, its decision invalidates Homeowners' argument for reversal and compels affirmance.

In any event, Homeowners has not demonstrated that the district court's finding regarding fair market value is clearly erroneous, and the district court's ruling regarding the binding effect of the Well Lease is correct. Insofar as this court reviews the rulings of the district court, the decision of the Utah Supreme Court makes clear that any review may not be based directly or indirectly on the PSC's 1986 findings and order.

II. HOMEOWNER'S HAS NOT SHOWN THAT THE DISTRICT COURT'S DETERMINATION REGARDING THE FAIR MARKET VALUE OF THE WATER RIGHT, SYSTEM AND LOTS IS CLEARLY ERRONEOUS.

Homeowners has failed to demonstrate that the \$98,500 fair market valuation of the water right, system and lots for purposes of determining the appropriate compensation to Foothills is clearly erroneous.¹ The trial of this issue continued over a

¹ Further, an issue that must be addressed by the district court is the appropriate compensation to be paid to Foothills by Homeowners to compensate Foothills for Homeowners' use of water lines belonging to Foothills to transport water outside of the Hi-Country Estates subdivision to customers formerly served by Foothills. The district court originally issued an interlocutory order permitting Foothills to transport water through the disputed water system to Foothills' customers within its service area but outside the subdivision. See Hi-Country Estates Homeowner's Ass'n. v. Bagley & Co., 863 P.2d 1, 12 (Utah Ct. App. 1993). This court reversed that order. Id. The Utah Supreme Court concluded that the rights of Foothills to transport water to its customers outside the subdivision are now moot given that Foothills has been decertified as a public utility by the PSC. Hi-Country Estates Homeowner's Ass'n v. Bagley & Co., 901 P.2d 1017, 1020 n.3 (Utah 1995).

period of three days. Valuation experts were called on both sides. It was the district court's province to assess the credibility of the expert witnesses. Reed v. Reed, 806 P.2d 1182, 1184 (Utah 1991). Homeowners has failed to demonstrate that the factual finding of the district court that the water right, system and lots has a fair market value of \$98,500 is clearly erroneous.

As argued in the Consolidated Initial Brief of Foothills at page 38, "if this Court wished to examine [the] evidence, it would likely conclude that the district court's determination, if taken as based primarily on the value of the disputed property, set an unjustifiably low figure" Stanley S. Postma, an expert retained by Foothills, utilized three approaches to estimate the value of the water system. (See Addendum 2 at 203; R. at 2155.) Mr. Postma arrived at a replacement cost for the water system at \$670,161. (See Addendum 2 at 204; R. at 2156.) Mr. Postma concluded that the depreciated residual value of the water system was \$559,400. (See Addendum 2 at 212; R. at 2164.) Finally,

Although Foothills may not transport water to its former customers, Homeowners should not be able to transport water to these customers without compensating Foothills for the use of Foothill's lines. In the Findings of Fact entered by the PSC in connection with the decertification of Foothills, the Administrative Law Judge recited that the laterals to serve two contiguous areas, namely Beagley Acres and South Oquirrh, are not owned by Homeowners, and that Homeowners would either replace those laterals or reach accommodation with Foothills. (See Appendix 1 at 2.) The district court's unjust enrichment valuation did not include lines to Foothills' former customers outside the subdivision.

utilizing a net present value approach, Mr. Postma valued the system at between \$169,907.87 and \$319,800. (See Addendum 2 at 213; R. at 2165.) By weighting these three valuation approaches, Mr. Postma arrived at a value of the system between \$250,000 and \$300,000. (See id.) Further, Mr. Postma testified that the water right was worth between \$149,000 and \$182,000 for a total value of between \$409,000 and \$482,000. (See Addendum 2 at 219, 221; R. at 2171, 2173.)

Seth Schick, another expert hired by Foothills, testified that he would add \$115,000 to the valuation of the water system by Mr. Postma for the value of the set-up of the system, and would add \$60,000 depending on the ownership of easements. (See Addendum 2 at 320-21; R. at 2272-73.) Mr. Seth testified that the water right was worth \$359,000 based on a discounted present value. (See Addendum 2 at 322-23; R. at 2274-75.)

Homeowners argues that the water system has little value to anyone but Homeowners, but in any rate is worth no more than \$27,650. Nonetheless, as argued in the Consolidated Initial Brief of Foothills at page 38, "[t]he extent of [Homeowners'] efforts to obtain control over the water system is itself evidence that [Homeowners] places a value on the property far in excess of the absurdly low figure of \$27,650 at which [Homeowners] claims to value the system."

One evaluation expert called by Homeowners testified that the water system had no value. Mr John Probasco testified that the value of the system based on a net book value basis would be over \$93,000, but that additional expenditures would be needed. (See Addendum 3 at 99-101; R. at 2051-53.) Mr. Probasco acknowledged that another valuation method would be to determine the cost to each homeowner to drill a well to replace reliance on the system, and that cost would equal approximately \$15,000 for each homeowner served. (See Addendum 3 at 105-06; R. at 2057-58.) Mr. Probasco further testified that his testimony was the first time he had prepared testimony to arrive at a fair market valuation as if a water system were going to be sold. (See Addendum 3 at 107; R. at 2059.)

Finally, Mr. Richard Ellis testified that he had valued the system at \$27,650 for purchase by the Salt Lake County Water Conservancy District. (See Addendum 3 at 126-29; R. at 2078-81.) Mr. Ellis' estimate was based on a net present value calculation based on projected net revenues. (See Addendum 3 at 125-26; R. at 2077-78.) Mr. Ellis acknowledged that his revenue projection was based on the Water Conservancy District rate for water at \$.79 per thousand gallons, rather than the rate authorized to be charged by Foothills at \$2.40 per thousand gallons. (See Addendum 3 at 129-30; R. at 2081-82.) The resulting valuations of Homeowners'

experts were much less than the system is worth as evidenced by Homeowners' dogged attempts to gain control.

The district court also considered the evidence regarding the alleged payment by Homeowners for the water right, system and lots. As argued in the Consolidated Initial Brief of Foothills at page 39, "[n]one of the evidence cited by [Homeowners] compels (or indeed even supports) a conclusion that the developers ever intended or agreed that [Homeowners] would ever be given title or control, at no cost, of valuable assets in which [the developers] had invested considerable sums of money."

Further, this argument goes beyond the scope of the Order on Briefing. The issue requested to be addressed was "[w]hether 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." (Order on Briefing at 3.) This argument does not address the fair market value of the water right, system and lots, but argues that compensation under a theory of "unjust enrichment" is inappropriate. Insofar as this argument is beyond the scope of the Order on Briefing, it should be stricken from the brief.

After a three day trial, the district court found that the fair market value of the water right, system and lots is \$98,500 for purposes of determining the appropriate compensation to be paid to Foothills. Homeowners has failed to demonstrate that

this finding of the district court is clearly erroneous such that a lower value is appropriate.

III. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S DETERMINATION THAT THE WELL LEASE AGREEMENT IS A VALID AND BINDING ENCUMBRANCE ON THE WATER SYSTEM.

The district court appropriately found that the Well Lease is a valid encumbrance on the water system. Pursuant to the terms of the Well Lease, Jesse H. Dansie ("Dansie") granted a leasehold interest in the Dansie well to Bagley, and agreed to construct certain line extensions. In consideration, Bagley agreed to pay an up front fee, plus monthly payments, plus a percentage of fees received from residences outside of the Hi-Country Estates property. As further consideration, Bagley agreed that Dansie and members of his immediate family would have the right to receive up to 12 million gallons of water at no cost, and to use any excess water from the system not required by customers of the water company, provided that Dansie would pay the incremental pumping costs. (See Addendum 6 to Homeowners' Brief.) On October 19, 1984, Dansie filed a Notice of Interest in Real Property with the County Recorder giving notice of his interest in the water system arising from the Well Lease. (See R. at 575, 1844; Addendum 4 hereto.)

The right to receive water was to continue beyond the expiration or termination of the Well Lease so long as the water system is in existence. (See Addendum 6 to Homeowners' Brief at 7-

8.) The Well Lease gave Dansie the continuing right to use the excess capacity of the water system, which excess capacity was created in part at the time of the Well Lease by the connection of the water system to the Dansie well, provided that Dansie would pay any incremental costs. The district court recognized the validity of the Well Lease, and concluded that Dansie's continuing right to use the excess capacity of the water system remained a valid and binding encumbrance on the water system.

As a review of Addendum 7 to Homeowners' Brief will reveal, Homeowners based its argument that the Well Lease is not a valid encumbrance on the water system on the findings of the PSC. In rearguing several of the points in its April 8, 1996 Brief, Homeowners directly and indirectly encourages this court to rely on findings of the PSC in reviewing the district court's finding that the Well Lease is a valid encumbrance on the water system.

For example, Homeowners argues that it would be unfair and unjust to impose the "grossly unreasonable" terms of the Well Lease upon them because they were not parties to the agreement, and because they are the persons the Well Lease was supposed to have benefitted in the first place. This argument in Homeowners' original brief is based upon the PSC's determination in the 1986 findings and order that the Well Lease was unreasonable insofar as it affected the rates to be paid by the homeowners. Nowhere in Homeowners' Brief nor in Homeowners' initial Appellant's Brief does

Homeowners explain or argue how or why the Well Lease is unreasonable save by referring to the findings and order of the PSC. (See Addendum 7 to Homeowners' Brief.)

As the Utah Supreme Court found, the PSC's 1986 order does not purport to invalidate the Well Lease, nor would the PSC have had that authority. Hi-Country Estates Homeowners Ass'n, 901 P.2d at 1023. The district court did not find the Well Lease to be unreasonable for purposes of determining its binding effect, but found it to be a valid and binding encumbrance on the water system.

Any suggestion by Homeowners' that the Well Lease Agreement should not be enforced because it is grossly unreasonable is a transparent attempt by Homeowners' to have this court overrule the Utah Supreme Court's determination that the PSC has no jurisdiction to construe the Well Lease except insofar as the agreement affects rates paid by Homeowners. Any direct or indirect reference to findings of the PSC in support of Homeowners' assertion that this court should reverse the district court's ruling that the Well Lease is a valid encumbrance on the water system should be stricken from Homeowners' Brief.

Likewise, Homeowners argues, purportedly in support of its assertion that the Well Lease is not a valid and binding encumbrance on the water system, that Bagley will be personally responsible for the lease terms and conditions if Homeowners as assignee fails to meet the terms and conditions of the lease. This

argument is based upon the PSC ruling that "it is reasonable to expect [Dansie] to look to Foothills for the \$600 monthly lease payment and to Bagley personally for any remaining obligations under the Well Lease Agreement." (Addendum 7 of Homeowners' Brief at 45.)

But for the ruling of the PSC, this argument of Homeowners' is irrelevant. The fact that Bagley is secondarily liable under the Well Lease in the case of assignment does not alter the fact that the Well Lease is a binding encumbrance on the water system. Secondary liability does not alter the primary obligations. Insofar as this argument is based upon the PSC finding, it should be stricken from Homeowners' Brief.

Homeowners' argument that the Well Lease cannot be a valid basis for an encumbrance because it terminated by its own terms on April 10, 1987, ignores an express term of the Well Lease.² As pointed out in the Reply Brief of Foothills Water Company filed herein at 24, the parties stipulated to the fact that the Well Lease was a recorded document.

Paragraph F.7. of the Well Lease provides:

Bagley, and his assigns or successors,
agree to supply water to the Dansie property

² The Well Lease provides that the parties to the agreement could renew the Well Lease on terms to be agreed to by the parties. In April of 1987, Foothills and Dansie agreed to continue the Well Lease on a month-to-month basis, and continued that arrangement until March of 1993.

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.

(Addendum 6 to Homeowner's Brief at 7-8 (emphasis added).)

As argued in the Reply Brief of Foothill's Water Company filed herein at 24: "The Judge below recognized that although the obligation of Mr. Jessie Dansie to deliver water to Foothill's predecessor ended at some point, the owner of the system had agreed that [certain of] Mr. Dansie's right[s] . . . continued beyond that expiration term so long as the system existed." Those rights included the right of Dansie and his immediate family to receive up to 12,000,000 gallons of water per year at no charge, and to use the excess capacity of the system by paying the incremental cost. The stipulated facts and the clear language of the Well Lease Agreement compel the decision reached by the court below.

The district court properly found that the Well Lease is a valid and binding encumbrance on the water system. This court should affirm the district court's ruling.

CONCLUSION

This court should affirm the district court's ruling that the fair market value of the water right, system and lots for purposes of determining the appropriate compensation to be paid to Foothills is \$98,500 or greater based on the testimony received. Homeowners has not demonstrated that the district court's finding is clearly erroneous justifying a lower value. This court should also affirm the district court's ruling that the Well Lease is a valid and binding encumbrance on the water system. The clear language of the Well Lease and the stipulated facts compel the decision reached by the district court.

DATED this 7th day of June, 1996.

/s/
VAL R. ANTCHAK
of and for
Parsons Behle & Latimer
Attorneys for Appellee
Foothills Water Co.

There are no determinative constitutional provisions, statutes, ordinances, or rules applicable to this brief.

/s/

CERTIFICATE OF SERVICE

I certify that on the 7th day of June, 1996 I caused a true and correct copy of the foregoing **APPELLEE FOOTHILLS WATER COMPANY'S BRIEF** to be mailed via first class mail, postage prepaid, to the following:

Larry R. Keller
KELLER & LUNDGREN, L.C.
257 Towers, Suite 340
257 East 200 South, - 10
Salt Lake City, Utah 84111



Tab 1

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Application)
for a Certificate of Convenience)
and Necessity of HI-COUNTRY ES-)
TATES HOMEOWNERS ASSOCIATION and)
Concomitant Decertification of)
FOOTHILLS WATER COMPANY)
Applicant)

DOCKET NO. 94-2195-01

REPORT AND ORDER

Certificate No. 2737

ISSUED: March 23, 1994

SYNOPSIS

Applicant possessing adequate assets to serve the area heretofore served by Foothills Water Company, and Foothills Water Company no longer possessing adequate plant to serve said area, and the fitness of Foothills Water Company being otherwise questionable, we grant the application.

Appearances:

Larry W. Keller

For Applicant

Laurie Noda, Assistant As-
sistant Attorney General

Division of Public Util-
ities, Utah Department of
Commerce

J. Rodney Dansie

Foothills Water Company

By the Commission:

PROCEDURAL HISTORY

This matter came on regularly for hearing the tenth day of March, 1994, before A. Robert Thurman, Administrative Law Judge, at the Commission Offices, 160 East 300 South, Salt Lake City, Utah. Owing to irregularities in notice, further proceedings were conducted March 17, 1994. Evidence was offered and received, and the Administrative Law Judge, having been fully advised in the premises, now enters the following Report, containing proposed Findings of Fact, Conclusions of Law, and the Order based thereon.

FINDINGS OF FACT

1. Hi-Country Estates Homeowners Association (hereafter "Applicant") is a nonprofit corporation organized under the laws of Utah and in good standing therewith.
2. Foothills Water Company (hereafter "Foothills") is a water corporation certificated by this Commission.
3. Owing to the present status of certain litigation, Applicant holds title to most of the plant (water rights, storage and distribution lines) formerly owned by Foothills. The only parts of the system not now owned by Applicant are a storage tank (hereafter "the upper tank") and laterals to serve two small contiguous areas, namely Beagley Acres and South Oquirrh.
4. It is feasible to serve the area without the upper tank and the laterals. Applicant stands ready, willing and able to replace those assets if no accommodation can be reached with the owners thereof.
5. Applicant stands ready to serve water users outside the service area at its tariffed rates if such users wish to join the association.
6. Without the plant formerly owned by Foothills, it is not feasible for Foothills to continue to serve the area. Foothills does not have the financial resources to replace its former assets.
7. There are appeals pending from the quiet title order in favor of Applicant; however, any reversal is entirely speculative, and since no stay has been entered, there is

no legal impediment to the application.

CONCLUSIONS OF LAW

We take administrative notice of the long history of Foothill's violations of our Orders and conflicts with many of its customers, as well as the intractable and ongoing conflict of interest of its ownership. Given this long history, and Foothill's present inability to muster the resources to serve, it is clearly in the public interest to decertify Foothills and transfer the responsibility for service to Applicant.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that:

- >> Certificate of Convenience No. 2151 issued to Foothills Water Company, be, and it is, canceled and annulled, effective the date of this Order; said Company may bill for service rendered during March, 1994, to the effective date of this Order.
- >> Foothills Water Company's manager, J. Rodney Dansie immediately cease and desist from acting in any manner to operate the system or to interfere with the operation of the system by the certificate holder named hereafter.
- >> Certificate of Convenience and Necessity No. 2737 be, and it is, issued to Hi-Country Estates Homeowners Association as follows:

To operate as water corporation serving the following described service area: Beginning at the Northeast corner of the Southwest quarter of the Southwest quarter of Section 33, Township 3 South, Range 2 West, Salt Lake Base and Meridian (SLBM), and running thence West to the Northwest corner of the Southwest quarter of the Southwest.

quarter of said Section 33; thence South to the Northeast corner of Section 5, Township 4 South, Range 2 West, SLBM; thence West to the Northwest corner of the Northeast quarter of the Northeast quarter of said Section 5; thence South to the Southwest corner of the Northeast quarter of the Northeast quarter of said Section 5; thence West to the Northwest corner of the Southwest quarter of the Northwest quarter of said Section 5; thence South to the Southwest corner of said Section 5; thence East to the Southeast corner of the Southwest quarter of the Southwest quarter of said Section 5; thence North to the Northeast corner of the Northwest quarter of the Southwest quarter of said Section 5; thence East to the center of Section 5; thence South to the Southwest corner of the Northwest quarter of the Southeast quarter of said Section 5; thence East to the Southeast corner of the Northeast quarter of the Southeast quarter of said Section 5; thence South to the Southwest corner of Lot 103, Hi-Country Estates Subdivision; thence Southeasterly to the Southeast corner of said Lot 103; thence Northeasterly along the East property Lines of Lots 103 and 102, Hi-Country Estates Subdivision to the West line of the Southeast quarter of the Southwest quarter of Section 4, Township 4 South, Range 2 West, SLBM; thence South to the Southwest corner of the Southeast quarter of the Southwest quarter of said Section 4; thence East to the Southeast corner of the Southwest quarter of the Southeast quarter of said Section 4; thence North to the Northeast corner of the Southwest quarter of the Southeast quarter of said Section 4; thence West to the Northwest corner of the Southwest quarter of the Southeast quarter of said Section 4; thence North to the North quarter corner of said Section 4; thence East to the Southeast corner of Lot 1A, Hi-Country Estates Subdivision; thence North to the South boundary of Hi-Country Road; thence Easterly along the South boundary of Hi-Country Road to the South boundary of

Utah State Highway U-111; thence Northwesterly along the South boundary of said highway to the North line of the Southeast quarter of the Southwest quarter of Section 33, Township 3 South, Range 2 West, SLBM; thence West to the point of beginning.

- >> The decertification and certification ordered above are subject to further order of the Commission and reversal in the event that title to the assets necessary to operate the system is affected by subsequent action in the courts.
- >> To obviate questions relating to fire protection, Hi-Country Estates Homeowners Association will file with the Commission, commencing May 1, 1994, monthly reports of the progress of efforts to bring the system into compliance with requirements of the Salt Lake Fire Marshall.
- >> Rates are provisionally set to equal those allowed Foothills Water Company in the Commission's last rate Order; the Division of Public Utilities shall undertake an immediate review of said rates to determine if they are just and reasonable for Hi-Country Estates Homeowners Association, and report to the Commission no later than June 1, 1994.
- >> Any person aggrieved by this Order may petition the Commission for review within 20 days of the date of this Order. Failure so to do will forfeit the right to appeal to the Utah Supreme Court.

DATED at Salt Lake City, Utah, this 23rd day of March,

1994.

/s/ A. Robert Thurman
Administrative Law Judge

Approved and confirmed this 23rd day of March, 1994, as the
Report and Order of the Public Service Commission of Utah.

/s/ Stephen F. Mecham, Chairman

(SEAL)

/s/ James M. Byrne, Commissioner

/s/ Stephen C. Hewlett, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary

Tab 2

1 brief synopsis, first would be the replacement cost of the
2 system.

3 A. I looked at three different approaches, because I
4 feel that one approach probably doesn't give you an accurate
5 valuation of the system. Therefore, several approaches ought
6 to be examined. The first one was the replacement method,
7 wherein I took the original maps prepared for the installation
8 of the system, which were provided to me by Mr. Dansie, and
9 calculated the quantities of materials, pipe, et cetera, and
10 then placed a cost to those, using current market costs, or
11 current construction costs for that type of construction. I
12 called that the replacement approach. That would be if you
13 replaced the system as is, with similar material, but in a new
14 condition.

15 Q. What was the conclusion from that approach?

16 A. The value that I came to was \$761,920.

17 Q. Just so that we deal with your supplemental report
18 to some extent, to the extent that it may affect that
19 valuation, there is some question with respect to whether
20 certain of those replacement costs relate to parts of the
21 system which are outside of what the homeowners claim. Is
22 that your understanding?

23 A. That's correct.

24 Q. In your supplemental report, you attempted to
25 quantify those items which may not be claimed by the

1 homeowners; is that correct?

2 A. Yes, it did.

3 Q. Going to your Exhibit F, is that one of the items
4 you dealt with in your Exhibit F?

5 A. Yes, it is.

6 Q. What was your conclusion with respect to the
7 replacement costs for items located outside of the subdivision
8 limits?

9 A. Replacement cost for those portions of the system
10 located outside of the subdivision was \$123,885. The
11 replacement costs for those portions remaining in the system
12 was \$670,161.

13 Q. Understanding this from an operational standpoint,
14 do you have an opinion, Mr. Postma, with respect to whether
15 Foothills Water Company could provide service to customers
16 located outside of the boundaries of the homeowners
17 association, if the water system is taken from Foothills Water
18 Company?

19 A. Yes, I do have an opinion.

20 Q. Specifically, with respect to, for instance, the
21 customers located within what is called the Beagley Acres and
22 South Oquirrh, could Foothills serve those customers?

23 A. They could, but they would have to install a number
24 of facilities in order to do that.

25 Q. So for Foothills to continue to serve those

1 THE COURT: That's a very astute observation. The
2 testimony would have been in 15 minutes ago, but for the
3 argument. And the Court takes no exception to counsel, both
4 counsel, aggressively asserting their position. But you do
5 not have a jury in this case. The Court can sift out what is
6 relevant and what is irrelevant. The Court is certainly not
7 suggesting that you abandon any protection of the record
8 that's being made in this case. The Court understands what
9 the underlying issues are. If there is a peripheral issue
10 regarding the well, let's take care of everything globally in
11 the hearing today, so it doesn't come back before the Court at
12 this level, to the expense of all the litigants. Deal
13 succinctly with the issue of valuation, and if there is some
14 testimony that has a spill-over effect, regarding the issue of
15 the wells, quickly deal with that, so the Court is properly
16 informed when the decision is to be made. The objection is
17 overruled.

18 Q. Would you state the cost of Foothills adding any
19 pipes and equipment necessary to serve those two areas, the
20 Beagley Acres and South Oquirrh?

21 A. Estimated a cost of \$209,940 to extend lines and
22 also to construct a water tank to serve those properties.

23 Q. Going back to Exhibit E, Mr. Postma, you have
24 indicated what your first approach, that is the replacement
25 cost approach, was. What was the other -- what were the other

1 approaches you used in coming up with a value?

2 A. The second approach was to use that replacement
3 cost, and then discount it based upon depreciated values,
4 assuming a life of different components of that system, and
5 considering the year that they were installed, their current
6 age, coming up with what I felt a depreciated residual value
7 was, and I came up with a value of \$559,400.

8 Q. Is that a value supported by your -- one of your
9 tables?

10 A. Yes. It is shown in table 2.

11 Q. That's table 2 from Exhibit E?

12 A. Yes.

13 Q. What was the final approach you used in coming up
14 with the value for this system?

15 A. The net present value approach, assuming -- I did it
16 under two scenarios. One, under the present number of
17 customers. At that time it was 52 customers. And then
18 assuming, using the existing tariff that was approved by the
19 Public Service Commission, and then developing a pro forma
20 statement for a 20-year operation of the system, using the
21 9-percent rate of return, I valued it at \$169,907.87. That is
22 shown in table 3.

23 Then in table 4 I used the assumption that the
24 system had 130 customers, which are the number of lots in the
25 subdivision, and looked at it from that basis, using the

00101

1 20-year horizon, the current tariff rates, came up with a net
2 present value of \$319,800, approximately.

3 Q. Did you use the three approaches that you just
4 described to come up with a value for this water system?

5 A. Yes.

6 Q. What was your final conclusion with respect to
7 value?

8 A. My conclusion with respect to value on the physical
9 components of the system was that it would be between a range
10 of \$250,000 and \$300,000. I used that range because of the
11 three different approaches, and my valuation of the weights of
12 each of those approaches.

13 Q. Would that be your testimony with respect to the
14 value of the physical components of this system today?

15 A. Yes, it is.

16 Q. Would the fact that portion of the system outside of
17 the subdivision affect -- or may not be included in that
18 affect your decision with respect to valuation?

19 A. Restate that.

20 Q. If Beagley Acres and South Oquirrh are not part of
21 the system for which Foothills is entitled to compensation,
22 would that affect the \$250,000, \$300,000 figure you came up
23 with?

24 A. Not substantially. There would be a small impact,
25 because of the loss of some customers, and the nonuse of some

1 A. Yes, I consulted with him, to get his opinion.

2 Q. In valuing water systems in the past, have you, as
3 an expert witness, used various persons to give you values
4 with respect to particular items?

5 A. Yes.

6 Q. Is that the reason you called Mr. Barnett with
7 respect to water rights?

8 A. Yes. He is considered an authority in that field.

9 Q. You have relied on that statement by Mr. Barnett
10 with respect to that value?

11 A. I gave consideration to it in connection with my own
12 opinion, yes.

13 MR. KELLER: I am not certain how the Court ruled
14 with regard to my objection on the basis of it is hearsay.
15 This gentleman is basing his opinion on the hearsay opinion of
16 someone else, and relating that other person's opinion, who is
17 here to testify, anyway. I am simply arguing there is an
18 improper foundation, it is hearsay.

19 THE COURT: Overruled.

20 Q. Go ahead. Could you state your opinion with respect
21 to value.

22 A. The opinion that I rendered was that the value of
23 that right would be between \$800 and \$1,000 per acre foot,
24 yielding a total value of between \$149,000 and \$182,000.

25 Q. In evaluating this water system, are you aware

1 whether it is approved by the health department?

2 A. Yes. I checked with the health department and
3 determined they had given an approved status to it.

4 Q. Is that important in evaluating a system such as
5 this?

6 A. Certainly.

7 Q. You have taken that into account?

8 A. Absolutely.

9 Q. Are there fire protection requirements for a system
10 such as this?

11 A. One of the purposes of the system in a subdivision
12 is to provide fire protection to the residents of that system.

13 Q. Are you aware --

14 A. It is a very important purpose.

15 Q. Is there an entity or department that approves it
16 for purposes of whether it provides fire protection?

17 A. County fire department would approve it in this
18 case. I think they have jurisdiction of this area.

19 Q. Are you aware of whether this system is approved?

20 A. I did not check with them, but I am under the
21 impression it is approved.

22 MR. KELLER: Objection to his impression.

23 THE COURT: Sustained.

24 MR. ANTCZAK: I will withdraw that question.

25 Q. You earlier testified that the value with respect to

02172

1 the physical assets for this system that you would place is
2 between \$250,000 and \$300,000; is that correct?

3 A. Yes.

4 Q. To try to value the system with the water right
5 would simply be an addition of the water right value to that
6 amount; is that correct?

7 A. Yes. That was presented that way in my report.

8 Q. What is that, your ultimate conclusion with respect
9 to that package, the water system and the water right in
10 question?

11 A. The total valuation of the system is between
12 \$409,000 and \$482,000.

13 Q. Mr. Postma, you are aware that there is a well lease
14 between the Dansie family trust or Jesse Dansie and Foothills
15 Water Company?

16 A. Yes.

17 Q. In your supplemental report, Exhibit F, did you
18 attempt to evaluate whether the exercise of the rights
19 pursuant to that well lease on the system would have any
20 effect on the ability to operate the system?

21 A. I looked at the impacts of transporting water
22 through the system on the system's capacity, to determine what
23 portion of the capacity of that system would be utilized to
24 transport that water.

25 MR. ANTCZAK: At this time, for purposes of clarity,

02173

1 A. As I reviewed the documents, including the income
2 approach, I found that to be the most acceptable, the
3 replacement less depreciation approach.

4 Q. Have you done your own valuation of the system in
5 question?

6 A. Yes, I have, to some extent.

7 Q. Could you indicate to the Court what your expert
8 opinion is with respect to what the value of this system is,
9 or should be.

10 A. Working with these systems, we very soon recognize
11 there is costs other than just replacement. This organization
12 is going, it is up and going, serving water to customers.
13 Somebody created that, whoever it was, and whoever owned it at
14 the time. They invested money and time and effort in doing
15 that. Our present-day experience in this matter would put
16 those costs well over \$100,000 to bring this system into
17 being.

18 Now, Mr. Postma did not reflect any of that in his
19 evaluation. What he reflected was the absolute physical costs
20 of construction and materials. But for this size of a
21 project, if you were to begin it 19 years ago and bring those
22 costs to today, you would find that you would have expended
23 funds for attorneys, bonding, for engineering, administrative
24 services, et cetera, that would exceed \$100,000.

25 Q. So would you add \$100,000 to Mr. Postma's

02072

1 depreciated replacement cost approach?

2 A. Yes, or more.

3 Q. Do you have a number in mind with respect to how
4 much you would add?

5 A. My calculations are \$115,000.

6 Q. Are there any other amounts you would add to that
7 \$451,000 number?

8 A. There is another value that I would like to add to
9 Mr. Postma's value, and that would include a value for the
10 right-of-way where the pipelines presently lie. To obtain
11 those right-of-ways to date would cost in the neighborhood of
12 something exceeding two dollars a linear foot. There are some
13 right close to 30,000 linear feet, according to Mr. Postma's
14 report. So that adds another \$60,000 worth of worth to this
15 system. I don't see in the documents who owns those
16 easements. Somebody owns those easements, and that worth is
17 there.

18 Q. You are looking at it from the perspective what this
19 value would be to a third-party buying the system?

20 A. That's correct.

21 Q. The last component which you may have evaluated, I
22 suppose, is the water right itself; is that correct?

23 A. That's correct.

24 Q. You are familiar with the 186.56 water right that
25 has been discussed here and has been discussed by Mr. Barnett?

1 A. Yes.

2 Q. Do you have an opinion with respect to the value of
3 that water right?

4 A. Yes, I do.

5 Q. What is that opinion, please?

6 MR. KELLER: I object, your Honor. May the record
7 reflect my objection. First of all, relevancy. Secondly, I
8 don't think this gentleman is a proper expert to testify as to
9 the value of a water right. The last gentleman did that for a
10 living. This gentleman hasn't testified as to that.

11 MR. ANTCZAK: I think he did. I can lay additional
12 foundation.

13 THE COURT: Overruled.

14 Q. Go ahead.

15 A. To come to a value of the water rights -- again, I
16 am not testifying as to who owns the water rights. I am
17 telling you only how I feel that the value should be. The 186
18 acre feet I see as being worth at least equivalent to the
19 market price established by Weber Basin today's rate. They
20 are presently getting ready to set their new rates for the
21 year. It would be approximately \$140 a year per acre foot.
22 That is undeveloped water. You get the right to develop the
23 water, at whatever point you decide your point of diversion is
24 going to be, if it is approved by the State of Utah. So that
25 is not water delivered to your house. That is water

1 somewhere, someplace, that you are going to develop on your
2 own. If you do a present worth on that, a 30-year income
3 stream, using a six-percent discount factor, that water is
4 worth \$359,000 today.

5 Q. Would that be your opinion with respect to value of
6 that water right?

7 A. My opinion is that this price is set by Weber Basin.
8 This is what they feel that water is worth. We have Central
9 Utah Project bringing water into the valley, and it is going
10 to be very costly when it arrives. The price given earlier by
11 the previous witness is based principally on what you may be
12 able to find some farm water and buy water rights, at today's
13 price. I don't see any of my clients wanting to sell water at
14 that price. And we have some of them here in the valley that
15 we are recommending to hold their water, and to never consider
16 a price such as the previous witness suggested.

17 Q. Mr. Schick, are you -- have you been involved with
18 respect to any small water companies, such as the water
19 company that Foothills Water Company is, that is one that has
20 50 to 100 customers?

21 A. Yes.

22 Q. Have you been involved --

23 A. We represent Plymouth town, has some 300 families.
24 We take care of all of their town needs, including their water
25 system. Last year we put in approximately \$600,000 worth of

1 development for them. We represent Coal Canyon water company
2 in Ogden valley, a small company with some -- the maximum
3 total capacity is 45 connections. We also represent Peterson
4 Pipeline in Morgan County. We do all of their planning, and
5 have done since 1975, planning and their engineering. They
6 have at the present time 94 connections. We represent Daggett
7 County water and sewer district in the south -- the northeast
8 corner of the State of Utah, near the town of Manila. They
9 have 147 connections. They purchased their system from a
10 private owner in 1985 at a price of \$595,000, including the
11 water rights, and system.

12 MR. ANTCZAK: I have no further questions.

13 THE COURT: Cross-examination?

14 CROSS-EXAMINATION

15 BY MR. KELLER:

16 Q. Mr. Schick, it is your opinion that the -- this
17 water right is worth \$140 per acre foot; is that correct?

18 A. That is the price being charged by Weber Basin.

19 Q. You are aware that there is 182.56 --

20 A. 186.56.

21 Q. -- acre feet per year with regard to this water
22 right?

23 A. Yes.

24 Q. Your multiplication of 186.56 times 140 comes out to
25 \$350,000?

02376

Tab 3

1 Q. On this system --

2 A. On this system, I wouldn't apply it.

3 Q. Is that because what the homeowners are getting here
4 is not a brand-new system?

5 A. That is true.

6 Q. And the replacement value of the system doesn't
7 assist the Court in determining how much to award in this
8 case, because that's the price of a brand-new system,
9 brand-new components; is that correct?

10 A. That's true.

11 Q. In coming to the conclusions that you came to,
12 Mr. Probasco, did you add in the costs of all of the
13 components that you are aware of in the system?

14 A. Yes.

15 Q. And did you go out to the system in 1988 and review
16 it?

17 A. Yes.

18 Q. Did you look inside the pump houses and examine all
19 of the equipment that was there?

20 A. Yes.

21 Q. In 1990, just recently, you said you went out there
22 again and reviewed the system; is that correct?

23 A. That is true.

24 Q. Did you have occasion then -- do you have occasion
25 to tell us whether or not the schedules attached to your

1 report, Exhibit 8, represent your present opinion as to the
2 value of the system, that book value as of August 1990?

3 A. Yes.

4 Q. What is the total, in table 1, of your net book
5 value for the system in August 1990?

6 A. \$80,526.

7 Q. In table 2, there are some other figures. What
8 needs to be added to the net book value?

9 A. The table 2 has got two numbers on there. One is
10 the addition that was put in for \$10,940, plus improvements
11 that have been made to the system, through 1986, reflecting a
12 total of \$13,377.

13 Q. Where did you get the information regarding
14 improvements on the system?

15 A. Most of them were reviewed with Mr. Dansie.

16 Q. So these are Mr. -- this is Mr. Dansie's information
17 you have put on paper?

18 A. Yes.

19 Q. If I understand you correctly -- please correct me
20 if I am wrong -- table 1 represents the cost of the original
21 system, Phase I, that you installed; is that correct?

22 A. That is correct.

23 Q. Table 2 is the improvements since approximately
24 1971, when the Phase I was completed; is that correct?

25 A. That is true.

1 Q. And the sum total of the value of the improvements
2 between 1974 and the present is a total of \$13,376.69; is that
3 correct?

4 A. That is true.

5 Q. So your opinion becomes 93,000 plus when you add the
6 cost of the original system; is that right?

7 A. That's true.

8 Q. In looking at your evaluation, you had to make
9 further determinations with regard to what it was going to
10 take to get the system working once the homeowners take
11 possession of it; is that correct?

12 A. That is correct.

13 Q. On the last page of your report, you have seven
14 items listed. I wonder if you would take a moment and go
15 through those seven items, and tell us why you put that item
16 on, and how you arrived at the figure.

17 A. The first item is painting of the inside and outside
18 of the tank. The paint system put on there originally was a
19 15-year paint system. It is far beyond that. It is showing
20 that it needs to be repainted at this time.

21 The telemetering cable originally installed from the
22 booster station up to the upper tank essentially does not
23 exist. The cable, part of it is laying on the ground, it is
24 broken along the way. Some type of telemetering system would
25 need to be put in to make it properly operate.

02052

1 The original design called for two 20-horsepower
2 booster pumps to be installed in the booster pump station.
3 There is one in there, and then a small pump at the present
4 time. The reason for the two was to provide adequate --
5 some -- up to 500 gallons a minute fire protection in case the
6 line was broken at the upper tank, and it wasn't able to
7 provide some fire protection to the homes above the lower
8 reservoir.

9 The fourth item, the pressure reducing valve, or
10 pressure sustaining valve, to maintain pressure to certain
11 lots in the lower subdivision, and that -- the valve has been
12 removed. It really ought to be put back in with the control
13 valves.

14 The next item, item 5, is the estimated cost to
15 drill and equip a well that would be sufficient to supply
16 water to the subdivision. Since the tank is a 40,000 one,
17 where it should be -- they should have at least 100,000, it
18 should be within the subdivision or service area, or some lot
19 that belongs to them. I estimate the cost of that to be about
20 \$100,000, together with the lines and valving that is
21 necessary to serve that reservoir, arriving at a total cost of
22 repairs and improvements of \$160,300.

23 Q. The tank that you are talking about, you are aware
24 of the fact, are you not, that off of the subdivision property
25 is a 40,000-gallon tank located above the subdivision?

02053

1 A. Yes.

2 Q. Used to serve some of the customers in the top; is
3 that correct?

4 A. That is true.

5 Q. You are aware of the fact that the homeowners are
6 not claiming anything that's outside the boundaries of the
7 subdivision?

8 A. That's correct.

9 Q. In your expert opinion, is a 40,000-gallon tank
10 sufficient to provide fire and safety protection necessary for
11 the subdivision?

12 A. No. The tank ought to be large enough to serve --
13 provide a fire flow of 750 gallons a minute for a four-hour
14 fire, or in that neighborhood, to give adequate protection, to
15 protect a home.

16 Q. So, in your opinion, what is the minimum size of the
17 tank that the homeowners would have to put in, within the
18 boundaries of the subdivision, to take the place of this
19 40,000-gallon tank?

20 A. 100,000 gallons.

21 Q. That would meet fire codes?

22 A. Along with the pump station, that would meet fire
23 requirements.

24 Q. So your total estimated repair and improvement
25 costs, once the homeowners take over this water system, take

02054

1 possession of it, they are going to have to put \$160,300 into
2 the system to get it operating normally and meeting code and
3 standards?

4 A. Yes.

5 Q. You have told us that the value of the entire
6 system, including the initial, prior to 1974, would be
7 \$93,000, but it is going to cost them \$160,000 to get the
8 system working, correct?

9 A. That's true.

10 Q. Mr. Probasco, if you were representing a client who
11 was interested in purchasing this water system on the open
12 market, with regard to the nature and the age of the system,
13 would this system have any value to a purchaser on the open
14 market, in your opinion?

15 A. Very little, if any.

16 Q. Is that because the purchaser would have to
17 understand it is going to cost him \$160,000 to bring it up to
18 standards and get it operating properly?

19 A. That's correct.

20 Q. Does it also take into account the fact that the
21 component parts of this system are in many cases 19 years old?

22 A. Yes.

23 Q. What has been your experience with regard to
24 replacement of water pipes and other component parts of a
25 water system? How often do they normally have to be replaced,

1 in general? Do you have an opinion about that?

2 A. It depends a lot on the operation, how well it is
3 operated, how well it is maintained. If it was duct-lined
4 pipe, much longer than this, the high velocities that can be
5 created in this particular subdivision, it is hard to tell how
6 long the pipe may really be available. Normally, you would
7 repair sections as they need to be repaired.

8 Q. When would you expect, in a system this old, that
9 you would begin to need -- you would begin to replace portions
10 of the pipe?

11 A. I think you would be close to it now. There might
12 be sections that you need to look at closely.

13 MR. KELLER: May I have just a moment, your Honor?

14 THE COURT: You may.

15 (A brief pause in the proceedings.)

16 MR. KELLER: I have no further questions at this
17 time, your Honor.

18 THE COURT: Before cross-examination, the Court has
19 a short matter to put on the record. We will take care of
20 that, and you may proceed with cross-examination.

21 (Court was in recess.)

22 MR. KELLER: With the Court's permission, I have a
23 couple of questions to finish.

24 THE COURT: You may proceed.

25 Q. (By Mr. Keller) Mr. Probasco, in your report, you

1 expressed an opinion with regard to the value to this water
2 system as it relates to others besides the homeowners. Will
3 you tell us what that opinion is.

4 A. My opinion was that the system was of little or no
5 value to anybody but the homeowners that lived there. That
6 opinion is based mainly on what limited reports I have seen on
7 the return of the system, cash flow, et cetera, like that.

8 Q. What would happen, in your opinion, with regard to
9 the value of the system, if the homes were suddenly abandoned?

10 A. The system would be abandoned.

11 MR. KELLER: No further questions.

12 THE COURT: You may proceed.

13 CROSS EXAMINATION

14 BY MR. ANTCZAK:

15 Q. Have you heard anything to make you think that the
16 Hi-Country Estates is in imminent danger of being abandoned?

17 A. The only indication I have is that individuals are
18 drilling individual wells, rather than using the system, and
19 the number that have dropped off the system from that.

20 Q. There is no indication at all, all of the current
21 customers are going to abandon the system?

22 A. No.

23 Q. When you say the system may only have value to those
24 homeowners, when you look at it from the standpoint of those
25 homeowners, that system is fairly valuable in the sense that

1 the alternative to a system is drilling your own well, isn't
2 it?

3 A. That's true.

4 Q. That could cost as much as, what, Mr. Probasco, per
5 home?

6 A. Oh, probably in the neighborhood of \$15,000. They
7 wouldn't need as big a well as what the homeowners association
8 was trying to drill.

9 Q. Perhaps a better way or a different way of valuing
10 this, from the perspective of those individuals, is to take
11 the number of individuals who need service, and times that by
12 the cost it would take to drill their own well? That would be
13 a different way to value it, wouldn't it?

14 A. That could be used.

15 Q. Have you had any experience in appraising a system
16 such as this, for purposes of determining fair market value?
17 I am distinguishing that from what I think you did for Park
18 City, for instance, where you were trying to determine an
19 appropriate rate to be charged to customers within that
20 service territory. Can you tell me if you have done fair
21 market value appraisals before?

22 A. Only for towns and cities. Not for resale.

23 Q. Towns and cities, as you say, you don't appraise
24 them for purposes of resale? You appraise them for purposes
25 of what to charge their citizens?

02058

1 A. Yes.

2 Q. Would it be fair to say this is the first time you
3 have attempted to prepare testimony and submit reports with
4 respect to fair market valuation or valuation of a system as
5 if it were going to be sold?

6 A. There is very few that are sold. That's true.

7 Q. If I understand your testimony, it is to take a cost
8 approach less depreciation, in order to come up with a value.
9 Is that a good, general and fair synopsis of what your
10 testimony is?

11 A. That's true.

12 Q. You have begun by indicating that you have taken the
13 cost, first, for Phase I of the system; is that correct?

14 A. That is true.

15 Q. If I may approach the map. If I understood your
16 testimony, Phase I relates to the system within the
17 subdivision boundaries, and to the east of this point; is that
18 correct?

19 A. That is true.

20 Q. You have not attempted to place a value or determine
21 the cost of certain portions of the Foothills water system
22 outside of the subdivision limits; is that correct?

23 A. That is true.

24 Q. For instance, those lines that serve the South
25 Oquirrh and Beagley Acres system, or subdivisions, has not

1 A. My involvement has been mostly doing background work
2 for the -- at that time David Ovard, assistant to the general
3 manager, in helping him perform calculations while
4 negotiations were on-going with the homeowners and with
5 Mr. Dansie at that time.

6 Q. Were you familiar with who Mr. Dansie represented in
7 those negotiations?

8 A. Yes, I was.

9 Q. Who was that?

10 A. He was representing himself, as -- I don't know
11 owner -- but in a capacity with Foothills Water Company.

12 Q. Did you have occasion to draw the assignment of -
13 attempting to value the water system for purposes of its
14 purchase by the water conservancy district?

15 A. Yes, I did.

16 Q. With regard to that assignment, what steps and
17 action did you take?

18 A. To value it at that time, we used a net capital -- a
19 capitalized net revenue approach, meaning that the value that
20 the system had to us were the annual cash flow that would come
21 to the district, looking at the net revenue to the district,
22 above operating and maintenance expenses. So we took that
23 number. We calculated an annual delivery amount. At that
24 time we assumed approximately 14 million gallons a year. And
25 we divided that revenue. We assumed 20 percent of our current

1 retail rate, 79 cents per 1,000 gallons, we assumed 20 percent
2 was net profit to the district. We figured what our annual
3 revenues would be from that number, and divided it by an
4 interest rate, or our cost of capital, which at that time we
5 were estimating to be 8 percent. We took the annual cash
6 stream to the district and divided it by the 8 percent to
7 develop a capitalized revenue.

8 Q. Is that a method of evaluation commonly used by
9 persons in your profession?

10 A. Yes, it is one method that is used.

11 Q. Is it a method of valuation approved by the board of
12 directors of the district?

13 A. Yes, it is. I hesitate in that the approved policy
14 by the board was for the sale of assets. We felt using this
15 method was consistent, if we were to purchase an asset, also,
16 that had a revenue stream associated with it.

17 Q. You attempted to determine how much the conservancy
18 district could purchase this system for and run it at a
19 profit, so as to make it appropriate for the conservancy
20 district to purchase the system; is that correct?

21 A. That's correct.

22 Q. Did you come to a bottom line conclusion as to the
23 value of the system?

24 A. Yes, I did.

25 Q. What was that conclusion?

02078

1 A. At that time it was worth \$27,650.

2 Q. Were you familiar with the assets of the system at
3 that time?

4 A. I had previously, about a year and a half prior to
5 that, had seen a list of assets, accounting records of
6 Mr. Dansie, that he had provided to the Public Service
7 Commission.

8 Q. That was your opinion in October of 1988. What is
9 your opinion now, July 30 of 1990?

10 A. To my knowledge, I would still value the system
11 approximately that same value.

12 Q. That's \$27,650; is that correct?

13 A. That's correct.

14 MR. KELLER: Your Honor, at this time I wish to
15 present to the Court two documents from this public agency,
16 which have been certified as true and accurate by the
17 secretary of the board, Mr. David G. Ovard. I have provided
18 copies to counsel. I wish to move to introduce Plaintiff's
19 Exhibits 9 and 10 at this time.

20 THE COURT: Any objection?

21 MR. ANTCZAK: No, your Honor.

22 THE COURT: They are received.

23 Q. Mr. Ellis, do you have a copy of the letter of
24 October 4 of 1988 in your file?

25 A. Yes, I do.

02079

1 Q. Do you have that before you at the present time?

2 A. Yes.

3 Q. I will represent to you that's what has been

4 admitted as Exhibit 9. Did you take any part in preparing

5 this particular letter?

6 A. Not in preparing the letter, other than providing

7 some information found in it.

8 Q. Your opinion as to the value of this system at

9 \$27,650, is that contained in this letter to Mr. J. Rodney

10 Dansie?

11 A. Yes, it is.

12 Q. To your knowledge, was this letter of October 4,

13 1988 -- did that represent the bottom line offer of the

14 conservancy district to J. Rodney Dansie as to how much they

15 would purchase that water system for?

16 A. Yes, it does.

17 Q. Were the efforts of the Water Conservancy District

18 at that time undertaken as a result of the conflict that had

19 occurred between Mr. Dansie and the homeowners association?

20 A. Yes, it was, to my knowledge.

21 Q. Asking you to turn to the minutes, which I will

22 represent to you were admitted as Exhibit 10, those are board

23 minutes of September 19, 1988; is that correct?

24 A. That's correct.

25 Q. Do those minutes reflect that the board approved the

02630

1 offer, counter offer made to Mr. Dansie, based upon your
2 evaluation of the system?

3 A. Yes, they do.

4 Q. In your opinion, as one who holds an MBA and a BS in
5 business management, sir, if this water system were placed on
6 the open market and viewed from an investment standpoint,
7 would it have any greater or lesser value than the offer made
8 to Mr. Dansie by the Water Conservancy District in October of
9 1988?

10 A. In my opinion, I would not think it would have a
11 significant difference in value.

12 Q. So your opinion is, on the open market, this system
13 would be worth \$27,650?

14 A. That's correct.

15 MR. KELLER: No further questions.

16 CROSS-EXAMINATION

17 BY MR. ANTCHAK:

18 Q. Mr. Ellis, you made your calculations based on
19 certain revenue projections; is that correct?

20 A. That's correct.

21 Q. Those revenue projections were based upon the
22 Conservancy District rate for water service; is that correct?

23 A. That is correct.

24 Q. It is probably fair to say, I am sure, the
25 Conservancy District likes compliments, that is a fairly cost-

02081

1 effective alternative for water service relative to private
2 water systems? Your rates are much cheaper than most rates?

3 A. Our rates are average for the valley.

4 Q. But for small water systems, they have little or no
5 relationship, do they?

6 A. To my knowledge, they would have a relationship. I
7 have seen some small water systems with cheaper rates than we
8 have.

9 Q. You have seen some with a lot higher rates?

10 A. Yes.

11 Q. You understand that the Conservancy District rate is
12 .79 -- 79 cents per thousand gallons?

13 A. That's correct.

14 Q. And you know, don't you, that Foothills' authorized
15 rate is \$2.40 a thousand gallons; is that correct?

16 A. I do not know that.

17 Q. If you just used that number, instead of your
18 number, to calculate the rate, it would presumably increase
19 that net present value calculation by about three times,
20 wouldn't it, over three times? Simply a mathematical --

21 MR. KELLER: I object to this question on the
22 grounds it is asking him questions about the rates. All I
23 asked him about was the valuation of the system. I think it
24 is inappropriate, beyond the scope of direct examination,
25 irrelevant.

02082

1 THE COURT: Overruled.

2 A. I would presume that's so. However, we were dealing
3 with our water rates, in that's what we would be basing it on,
4 not Foothills' water rates.

5 Q. You indicate that the number in Exhibit 9, the
6 \$27,650 number, was the number you calculated.

7 A. Yes, it is.

8 Q. Do you know how much before the October 4, 1988
9 date, that letter, that you made that calculation?

10 A. I would assume it would be within probably two weeks
11 of that.

12 Q. The board minutes indicate that an offer of \$30,000
13 was approved. Does that mean you had already provided them
14 with your estimate at that time? Or do you know?

15 A. That is probably correct.

16 Q. Do you know?

17 A. That probably was. I do not know for sure.

18 MR. ANTCZAK: If I could make this in the form of a
19 statement, subject to Mr. Keller, in asking questions with
20 respect to Foothills' water rate, I think oversimplified it,
21 given he didn't know what that rate was, I am not going to
22 reask it. I want to tell Mr. Keller not to use the \$2.40
23 figure. It is actually \$37.50 for the first amount, and then
24 some additional incremental amount. I don't want to be
25 misstating that for the record.

1 Q. The second thing is, Mr. Ellis, on page 2 of
2 Exhibit 9, if you would turn to that, please.

3 A. Yes.

4 Q. The other thing that the water conservancy district
5 offered Foothills Water Company for the system is \$2,000 for
6 each new connection made to the system within the next ten
7 years, isn't it?

8 A. Yes, it is.

9 Q. You are aware that there are a number of additional
10 connections which could be made to that system?

11 A. That's correct.

12 Q. That offer also required active customers of
13 Foothills to pay Foothills' unpaid charges within a reasonable
14 period of time. I am referring to paragraph 4. Will you look
15 at that.

16 A. Uh-huh (affirmative).

17 Q. That would also have some value to Foothills,
18 wouldn't it, in terms of looking at it as an overall package?

19 A. Yes, it would.

20 Q. You don't know what that value would be?

21 A. I have no idea.

22 MR. ANTCZAK: I have no further questions.

23 THE COURT: Redirect?

24

25

02084

Tab 4

4002849

NOTICE OF INTEREST IN REAL PROPERTY

550

HARRIS HARRIS

HARRIS HARRIS

Oct 19 12 25 PM '84

Rodney Danie

Jesse H. Danie of Herriman, Utah claims an interest in the property as follows: Water lines, Water tank and Distribution lines and Property easements for water lines . Property Serial # 41 DO 113-001 & Ref# 01061200 a part of Lot 67 and also Property Serial # 32-05-151-006 Roads and Bridle paths and water lines and transmission lines and property easements for water lines in Hi-Country Estates Phase 1. 33 Acres .

based on a Well Lease and Real Estate Agreement Dated April 7, 1977

by and between Jesse H. Danie and Gerald H. Bagley and Hi-Country Estates Water Distribution System

Jesse H. Danie
Jesse H. Danie



STATE OF UTAH

County of Salt Lake

On the 8th day of October A. D. one thousand nine hundred and eighty Four Jesse H. Danie personally appeared before me Jesse H. Danie the signer of the foregoing instrument, Who duly acknowledge to me that he executed the same.

My Commission expires 3/26/86

Herriman, Utah

J. Rodney Danie
Notary Public

RC5597 MH1132

VTDI 32-05-151-006-0000	DIST 41D		TOTAL ACRES	33.71
HI-COUNTRY ESTATES	PRINT P	UPDATE	REAL ESTATE	120
HOMEOWNERS ASSOCIATION	EXEMPT	LEGAL	BUILDINGS	0
			MOTOR VEHIC	0
7570 W 13300 S	EDIT 1	BATCH NO 0	TOTAL VALUE	120
RIVERTON, UT	84065	BATCH SEQ 0		
LOC: 47 W MICH COUNTRY RD	EDIT 1	BOOK 4433	PAGE 0804	DATE 00/00/00
SUB: HI COUNTRY ESTATES			TYPE UNKN	PLAT
P R O P E R T Y D E S C R I P T I O N				
HI-COUNTRY ESTATES PRIVATE ROADS, BRIDLE PATHS 33.71 AC				
VTDI 32-05-151-001-0000	DIST 41D		TOTAL ACRES	0.75
HI-COUNTRY ESTATES	PRINT P	UPDATE	REAL ESTATE	730
HOMEOWNERS ASSOCIATION	EXEMPT	LEGAL	BUILDINGS	39,750
I BAGLEY & ENTERPRISES			MOTOR VEHIC	0
PO BOX 17230	EDIT 1	BATCH NO 0	TOTAL VALUE	40,480
SLC, UT	84117	BATCH SEQ 0		
LOC: 90 N CANYON RD	EDIT 0	BOOK 5573	PAGE 1997	DATE 07/26/84
SUB: HI-COUNTRY ESTATES			TYPE UNKN	PLAT
P R O P E R T Y D E S C R I P T I O N				
HI-COUNTRY ESTATES WATER TANK LOTS. 0.75 AC 4433-0804				