

2016

## **Salt Lake City Corporation Plaintiff/Appellee v. Mark C. Haik Defendant/Appellant**

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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SALT LAKE CITY CORPORATION,

Plaintiff/ Appellee,

v.

MARK C. HAIK,

Defendant/ Appellant.

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Case No. 201600019-SC

District Court Case No. 140900915

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BRIEF OF APPELLEE

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Appeal from the Third Judicial District Court, Salt Lake County, Utah  
Honorable Andrew Stone, Presiding

---

Paul R. Haik  
KRESBACH AND HAIK, LTD.  
100 South Fifth Street  
Suite 1900  
Minneapolis, MN 55402  
Telephone: (612) 333-7400

*Attorneys for Appellant*

Shawn E. Draney  
Scott H. Martin  
Dani N. Cepernich  
SNOW, CHRISTENSEN & MARTINEAU  
10 Exchange Place, Eleventh Floor  
P.O. Box 45000  
Salt Lake City, UT 84145-500  
Telephone: (801) 521-9000

*Attorneys for Appellee*

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### COMPLETE LIST OF PARTIES

Since Defendant-Appellant Mark Haik filed his Brief, the following parties, who are not parties to this appeal, have been dismissed from the remaining proceedings in the district court:

Friends of Alta

Judith Maack

Kevin Tolton

Sandy City

Kent Jones, Utah State Engineer

The only remaining parties are:

Salt Lake City Corporation

Metropolitan Water District of Salt Lake & Sandy

Mark Haik

The Pearl Raty Trust, Pearl B. Raty as Trustee (successor in interest to former-Defendant Butler Management Group)

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## JURISDICTION

This appeal is from the district court's September 30, 2015, Order dismissing Defendant-Appellant Mark Haik's counterclaims, which the district court certified as final under Utah R. Civ. P. 54(b) on January 7, 2016. This Court has jurisdiction pursuant to Utah Code § 78A-3-102(j).<sup>1</sup>

## ISSUES PRESENTED FOR REVIEW

1. Did the district court correctly hold that Mr. Haik was barred by res judicata from relitigating the counterclaims? Whether a claim is barred by res judicata is a question of law the Court reviews for correctness. *Gillmor v. Family Link, LLC*, 2012 UT 38, ¶ 9, 284 P.3d 622. Federal common law applies "when deciding if a federal court's decision has preclusive effect on a subsequent state court proceeding." *Oman v. Davis Sch. Dist.* 2008 UT 70, ¶ 28, n.5, 194 P.3d 956. This issue was preserved in Salt Lake City Corporation's motion to dismiss the counterclaims. (R. 3008-43).

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<sup>1</sup> Mr. Haik cites Utah Code § 78A-3-102(3)(e)(v), which confers jurisdiction in this Court over "final orders and decrees in formal adjudicative proceedings originating with . . . the state engineer." That section is inapplicable. The order dismissing the counterclaims is not a "final order and decree in formal adjudicative proceedings." Even if the order had been on the First Cause of Action—the only judicial review in this case—the correct section would be 102(3)(f), as the state engineer proceedings were informal, not formal.

2. Does this Court lack jurisdiction to consider Mr. Haik's arguments regarding the district court's non-final denial of his motion to dismiss the Amended Petition for Judicial Review and Complaint? "This court is the exclusive judge of its own jurisdiction." *Powell v. Cannon*, 2008 UT 19, ¶ 9, 179 P.3d 799 (internal quotation marks omitted). "The question of whether an order is final and appealable is a question of law." *Id.*

#### STATEMENT OF THE CASE

This is an appeal from the district court's dismissal of Mr. Haik's counterclaims, which seek to force Salt Lake City to provide water for development of Mr. Haik's dry lots in Albion Basin. The district court dismissed the claims on the basis that they were or could have been litigated in two previous cases,<sup>2</sup> and therefore were barred by res judicata.

SLC filed this case against Mr. Haik and others seeking judicial review of the State Engineer's approval of two water right change applications. The Second Cause of Action sought adjudication of the validity, nature, and priority of Mr. Haik's (and others') claimed water rights.<sup>3</sup> The district court's

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<sup>2</sup> Copies of the U.S. District Court and Tenth Circuit decisions in these two cases are included in the Addendum.

<sup>3</sup> Those water rights derive from mother right 57-7800. In *Haik v. Sandy City*, 2011 UT 26, 254 P.3d 171, this Court upheld a district court's decision holding Mr.

proceedings on the Second Cause of Action are ongoing and no appealable final order has been entered on the claim.

Mr. Haik asserted five counterclaims. Mr. Haik's counterclaims request the following:

1. A declaration under Article XI, § 6 of the Utah Constitution that he is entitled "to water supply as authorized by Water Rights 57-10013 (a16844) or 57-10015 (a16846) to serve homes in Albion Basin Subdivision." (R. 2779, ¶ 122.)
2. A declaration that SLC's refusal to provide water to his lots treats him differently from other nearby landowners and therefore violates equal protection under Article I, § 24 of the Utah Constitution. (R. 2779-80, ¶¶ 124-25.)
3. A declaration that SLC's refusal to supply water to his lots violates his due process rights under Article I, § 7 of the Utah Constitution. (R. 2780, ¶¶ 127.)
4. A declaration "determining the validity of appropriation by the City as expressed in Water Right 57-10015 (a16846) or Water Right 57-

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Haik and others have a superior claim to title to their respective portions of water right 57-7800 as against Sandy City.



10013 (a16844) due to an expressed intent not (1) to apply the appropriated water to the stated beneficial use; and (2) refusal and failure to supply appropriated water within a reasonable time to the stated beneficial use.” (R. at 2781, ¶ 129.)

5. A declaration that SLC’s service of water outside of its municipal boundaries is subject to public regulation, presumably by the Public Service Commission. (R. 2781, ¶ 132.)

The counterclaims represent the latest chapter in what has been described by the Tenth Circuit as “an ongoing saga” between Mr. Haik, his father, and their predecessor in interest, Marvin Melville, and SLC. *Haik v. Salt Lake City Corp.*, 567 F. App’x 621, 623 (10th Cir. 2014) (*Haik II*). Forty years ago, Mr. Melville sued Salt Lake County challenging his inability to obtain a building permit for his property in the Albion Basin, located within the present day boundaries of the Town of Alta in Little Cottonwood Canyon, based on the Salt Lake County Board of Health’s requirement of 400 gallons of water per day, per domestic unit. *Melville v. Salt Lake County*, 570 P. 2d 687 (Utah 1977). Mr. Melville lost when this Court held that he had “at most” a contract right to 50 gallons per day (gpd), far less than the required 400 gpd. *Id.* at 689.

In 1994, Mr. Haik and his father purchased four undeveloped lots from Mr. Melville. *Haik v. Town of Alta*, No. 97-4202, 1999 WL 190717, at \*1 (10th Cir. Apr. 5, 1999) (*Haik I*). Since that time, the Haiks have attempted to develop their lots, but have been unable to do so in part because of the inadequate water supply. As a result of this inability, the Haiks sued the Town of Alta and SLC in 1996, seeking, among other things, an order requiring SLC to provide water to their lots. *Haik I*, 1999 WL 190717. Their efforts failed. *Id.* The U.S. District Court for the District of Utah (Judge Jenkins) and the Tenth Circuit both recognized that SLC has no obligation to serve water (or to allow service of water) to the Haiks' lots, and that its refusal to do so is a rational decision guided by ordinance and protection of critical watershed. *Haik v. Town of Alta*, No. 2:96-cv-723J, Memorandum Opinion & Order at 20-21 (D. Utah Oct. 31, 1997), *aff'd*, *Haik I*, 1999 WL 190717, at \*3-5. That case and the resulting decisions will be referred to throughout as *Haik I*.

Undeterred, the Haiks again sued the Town of Alta and Salt Lake City in 2012 seeking, among other things, the same relief—a mandate that SLC supply water to their Albion Basin lots. *Haik II*, 567 F. App'x 621. The U.S. District Court (Judge Stewart) and the Tenth Circuit again refused to grant the Haiks' requested relief, holding that neither the provisions of the Utah or United States

Constitutions, relevant statutes and case law, nor approved change applications on SLC water rights obligate SLC to supply water to the Haiks' lots. *Haik II*, No. 2:12-CV-997 TS, 2013 WL 968141, at \*9 (D. Utah Mar. 12, 2013), *aff'd*, 567 F. App'x 621 (10th Cir. 2014). That case and the resulting decisions will be referred to throughout as *Haik II*.

In the interim years, the Haiks continued to challenge SLC's refusal to supply water to their lots through repeated interactions with SLC, Salt Lake County, Town of Alta, and Salt Lake County Board of Health, among others. Those challenges include a 2013 suit Mr. Haik brought against the Salt Lake County Board of Health alleging that it violated his state and federal due process rights in denying his renewed applications for the necessary septic permits. *Haik v. Salt Lake County Bd. of Health*, 604 F. App'x 659 (10th Cir. 2015). The Salt Lake County Board of Health removed the case to federal court, and the U.S. District Court (Judge Stewart) summarily dismissed Mr. Haik's claims. *Id.* at 662. On appeal, Mr. Haik argued that the district court lacked jurisdiction because the removal was improper given that his complaint raised issues primarily of state law. *Id.* The Tenth Circuit disagreed, noting that "his complaint plainly seeks to raise issues of federal law." *Id.* It held that removal was nevertheless improper "because none of his claims present a *substantial* question of federal law" given



that the Tenth Circuit had “twice already affirmed district court rulings that Mr. Haik does not have a protected property interest in those permits so as to support his due process claims.” *Id.* (emphasis in original). The Tenth Circuit thus remanded with instructions to the district court to remand to the state court for lack of subject matter jurisdiction.<sup>4</sup> *Id.* at 663.

As with *Haik I* and *Haik II*, the counterclaims in this case center on Mr. Haik’s contention that SLC has an obligation to provide him water for his Albion Basin lots. (R. 2756-83.) During the hearing on SLC’s motion to dismiss, counsel for Mr. Haik conceded that the First through Third Counterclaims were raised in either or both *Haik I* and *Haik II*. (R. 6204-05.) Specifically, with respect to the First Counterclaim, he stated, “in the first Stewart decision [*Haik II*], yes, the judge ruled against us on our interpretation of Article XI, Section 6.” (R. 6186.) When questioned as to whether the equal protection claim “under the state constitution [was] raised in [*Haik I*],” counsel for Mr. Haik responded, “yes, there were equal protection, disparate treatment. And these were the same facts that

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<sup>4</sup> Mr. Haik implies that that the Tenth Circuit reversed a determination that his claims were barred by res judicata. (Appellant’s Br. at 39.) Mr. Haik made this argument to the district court. (R. 3474.) As discussed above, the Tenth Circuit reversed and remanded precisely *because* Mr. Haik’s federal claims were barred by res judicata, thereby leaving no substantial issue of federal law that would support removal—it did not, as Mr. Haik implies, hold that his claims were *not* barred by res judicata.

were at issue.” (R. 6192.) Counsel for Mr. Haik then described what Mr. Haik is seeking on “the first three counts”: “we’re seeking simply declaration of how do our rights and circumstances exist in this circumstance, was the Tenth Circuit right, was the Tenth Circuit wrong in what’s its interpretations of these state constitutional interests were as they apply to the facts.” (R. 6194-95.)

Following this exchange, the Court granted SLC’s motion to dismiss Mr. Haik’s counterclaims. It explained:

While I appreciate the clarification and, frankly, Mr. Haik, the candor of what we’re really looking at, at least as to counts 1 through 3, is did the Tenth Circuit get it right. I appreciate that the Utah Supreme Court has reserved the right to make its interpretations of state constructional law. It’s certainly not bound by that. But as to parties, parties are bound by the resolutions they bring to finality, whether they take the federal track or the state track.

So it may well be that your proposition as a legal proposition is that the Tenth Circuit got it wrong. That may well be true, but that’s really something that res judicata assumes is that we’re not going to get into that analysis because it’s been litigated fully.

So with respect to counts 1, 2, 3, there’s a concession here that those specific issues were raised in the earlier federal action—in the Stewart action, that is the first Stewart action—and on that basis, I’m going to grant the motion as to those claims. (R. 6204-05.)

The district court further granted the motion as to the Fourth and Fifth Counterclaims, explaining that, while they “may well not have been raised specifically, . . . they could have been raised. They come out of the same factual

circumstances. And this is a case not just for issue preclusion, but claim preclusion.” (R. 6205.) As the district court put it, “There has to be an end.” (R. 6205.)

## SUMMARY OF ARGUMENT

### I.

The district court properly held that Mr. Haik is barred by res judicata from relitigating his counterclaims.

Issue preclusion prevents Mr. Haik from relitigating his First through Fourth Counterclaims. The issues central to each of those respective counterclaims were decided in either *Haik I* or *Haik II* or both. In addition, the issue of whether two approved SLC change applications impose an obligation upon SLC under Article XI, § 6 to serve water to Mr. Haik’s Albion Basin lots—an issue that, by Mr. Haik’s own description, underlies the First through Fourth Counterclaims—was explicitly decided in SLC’s favor in *Haik II*.

Claim preclusion further applies to bar the relitigation of the counterclaims because the First, Second, and Third Counterclaims were admittedly asserted in either or both *Haik I* and *Haik II*, which involved the same parties and resulted in final judgments on the merits. While the Fourth and Fifth Counterclaims were not previously raised as such, they arise out of the same transactions that gave



rise to the two prior federal cases. Nothing has changed since 2012 that would bring the counterclaims outside the realm of claim preclusion. SLC's assertion of the Second Cause of Action in this case, based on an injury to its long-held water rights in Little Cottonwood Creek, does not constitute a "new fact," nor are the counterclaims "new and independent claims" based on this "new fact."

Mr. Haik's contention that the final federal court decisions in *Haik I* and *Haik II* can never have claim preclusive effect because they involve state law or state constitutional claims, is frivolous. State law claims that either were or could have been raised in a prior federal case cannot be litigated in a subsequent state court case because of claim preclusion. Issues that were previously decided by a federal court applying state law standards likewise cannot be litigated in a subsequent state court case because of issue preclusion.

## II.

To the extent Mr. Haik seeks review of the district court's denial of his motion to dismiss the Amended Petition for Judicial Review and Complaint, the Court lacks jurisdiction. The district court has allowed SLC and the District to continue to prosecute their Second Cause of Action. The interlocutory order denying the motion to dismiss is not a final appealable order because it did not

resolve all claims against all parties, and does not fall within any of the exceptions to the final judgment rule.

## ARGUMENT

### I. THE DISTRICT COURT PROPERLY HELD THAT MR. HAIK IS BARRED BY RES JUDICATA FROM RELITIGATING HIS COUNTERCLAIMS.

In the words of the Tenth Circuit, Mr. Haik's assertion of the counterclaims in this case is the latest in the "ongoing saga" between him, his father, and their predecessor in interest and SLC. Mr. Haik has used this case, which involves the question of the validity, nature, and priority of his claimed Little Cottonwood Creek water right, as his next forum to advance the same arguments he has been advancing for decades: that SLC has an obligation to serve water to his undeveloped lots in the Albion Basin, and its refusal to do so violates Mr. Haik's rights. This is an issue wholly separate from the question of what, if anything, Mr. Haik acquired through the purported conveyance of 1/6 of mother water right 57-7800—the issue raised by SLC in the Second Cause of Action. It is further an issue that has been repeatedly decided against Mr. Haik. In light of this fact, the district court was correct in dismissing Mr. Haik's counterclaims as barred by res judicata.

The doctrine of res judicata “encompasses two distinct barriers to repeat litigation: claim preclusion and issue preclusion.” *Park Lake Res. Ltd. Liab. v. U.S. Dep’t of Agr.*, 378 F.3d 1132, 1135 (10th Cir. 2004).<sup>5</sup> “[I]ssue preclusion bars a party from relitigating an issue once it has suffered an adverse determination on the issue, even if the issue arises when the party is pursuing or defending against a different claim.” *Id.* at 1136 (internal quotation marks omitted). “Under [claim preclusion], a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.” *Id.* Both apply here to bar Mr. Haik from relitigating his counterclaims.

A. *The counterclaims raise the same issues that were decided against Mr. Haik in the prior federal cases.*

“[I]ssue preclusion bars a party from relitigating an issue once it has suffered an adverse determination on the issue, even if the issue arises when the party is pursuing or defending against a different claim.” *Park Lake*, 378 F.3d at 1136. Issue preclusion applies when four requirements are satisfied:

(1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior

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<sup>5</sup> Federal common law applies “when deciding if a federal court’s decision has preclusive effect on a subsequent state court proceeding.” *Oman v. Davis Sch. Dist.* 2008 UT 70, ¶ 28, n.5, 194 P.3d 956.

adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

*Id.* (internal quotation marks omitted).

Mr. Haik does not dispute that he was a party to both *Haik I* and *Haik II*. Nor does he dispute that those cases resulted in judgments on the merits or that he had a full and fair opportunity to litigate the issues raised in those cases. Rather, Mr. Haik argues that the issues raised in the counterclaims are different than those raised in *Haik I* and *Haik II* (Appellant's Br. at 48-49). This is inaccurate.

The five issues raised in the counterclaims that were identical to those raised in either or both *Haik I* and *Haik II* are: (a) whether Utah Const. Article XI, § 6 obligates SLC to supply water outside of its municipal boundary, but within its service area; (b) whether SLC's refusal to supply water to Mr. Haik's Albion Basin lots violates his right to equal protection; (c) whether Mr. Haik has a protectable property interest in receiving water from SLC; (d) whether SLC's approved change applications obligate it to put the water to beneficial use in the manner identified in the change applications; and (e) whether SLC's change applications impose a constitutional obligation on SLC to supply water to Mr. Haik's Albion Basin lots. Each of these issues was decided in *Haik I* or *Haik II* or

both. Issues (a) through (d) are necessary to Mr. Haik's First through Fourth Counterclaims, respectively.<sup>6</sup> Issue (e) is the overarching issue Mr. Haik seeks to litigate through his counterclaims.

1. Issues (a) through (d), which are necessary to Mr. Haik's First through Fourth Counterclaims, were previously decided against Mr. Haik.

In his First Counterclaim, Mr. Haik requests a declaration under Article XI, § 6 as to his "entitlement to water supply as authorized by Water Rights 57-10013 (a16844) or 57-10015 (a16846) to serve homes in Albion Basin Subdivision." (R. 2777, ¶ 122.) This issue was decided in *Haik II*. The district court rejected the Haiks' argument that Article XI, § 6, *County Water System, Inc. v. Salt Lake City*, and *Platt v. Town of Torrey*, when read together, "require[e] the city to provide water to them, especially in light of the change applications which, if perfected, would allow the city to do so." *Haik v. Salt Lake City Corp.*, No. 2:12-CV-997 TS,

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<sup>6</sup> Mr. Haik argues that the issue raised in the Fifth Counterclaim (declaratory relief that SLC is subject to public regulation) is not identical to any previously-litigated issue. (Appellant's Br. at 48-49.) SLC has never claimed that it is. Rather, the Fifth Counterclaim is barred by claim preclusion. Further, if Mr. Haik is barred by issue preclusion from relitigating the issue of whether he is entitled to receive water from SLC, he likely lacks standing to assert his Fifth Counterclaim. Any alleged injury to him caused by the non-regulation of SLC's service of water outside of its municipal boundaries necessarily requires that Mr. Haik have some right to receive water from SLC. Without that right, Mr. Haik has no personal stake in the issue.



2013 WL 968141, at \*9 (D. Utah Mar. 12, 2013) (unpublished), *aff'd*, 567 F. App'x 621 (10th Cir. 2014). It explained, "When read together, these statements do not require the city to provide water to Plaintiffs, they merely permit the city to do so and, if the city so chooses, a reasonableness requirement is imposed. Nor do these provisions stand for the proposition that the city cannot have legitimate reasons (such as the protection of the watershed) to decline to supply water to nonresidents." *Id.*

On appeal, the Tenth Circuit affirmed, holding,

Even assuming the lots are now within the city's service area, this fact doesn't entitle the Haiks to more water. To be sure, Article XI, Section 6 of the Utah Constitution mandates that a municipality supply water owned by it to its *inhabitants* at reasonable charges. But Article XI, Section 6 says nothing of "others beyond the limits of the city," and just because the Haiks' lots now fall within Salt Lake City's service area, it does not follow that the Haiks are now Salt Lake City inhabitants as well.

Consistent with the Utah Constitution, Utah courts do not impose a duty on municipalities like Salt Lake City to supply water to nonresidents like the Haiks.

*Haik II*, 567 F. App'x at 629-30 (internal citations omitted). The Tenth Circuit further stated that it was "not persuaded that even th[e] reasonableness] requirement [the plaintiffs advocated] applies." *Id.* at 630. There was no authority "require[ing] a municipality to have a reasonable basis for refusing to supply water to nonresidents in the first place." *Id.*

Mr. Haik's Second Counterclaim raises the issue of whether SLC's refusal to supply water to his Albion Basin lots violates his right to equal protection. This issue was decided in *Haik I*, and in *Haik II* in the specific context of the post-*Haik I* facts Mr. Haik again relies on.

In *Haik I*, the Haiks argued that "Salt Lake City's refusal to consent to water service violates the Haik's right to equal protection under the law because it irrationally treats them differently from other similarly situated property owners." *Haik II*, Memorandum Opinion & Order at 20-21. The district court rejected this argument, explaining:

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

*Id.* at 21-22. The Tenth Circuit affirmed under both the United States and Utah Constitution equal protection provisions, holding "Salt Lake City's actions were reasonable." *Haik I*, 1999 WL 190717 at \*3-5. It explained, "Line-drawing inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the lines. That the line might

have been drawn differently at some points is not a matter for judicial consideration.” *Id.* at \*5 (internal quotation marks omitted).

The Haiks again raised an equal protection argument in *Haik II*. However, because they alleged “new facts” in support of this claim, the Tenth Circuit held that it was not barred by *res judicata*. *Haik* 2012, 567 F. App’x at 632 (“Hypothetically at least, the Haiks’ new allegations could make out an equal-protection violation where none had occurred before.”). Nevertheless, it rejected the claim on its merits:

[T]he Haiks have not alleged differential treatment that states a class-of-one equal-protection claim. We have little forgiveness for this since we expressly considered several things unique about the Haiks’ situation in *Haik I*—including the location of their property, their desired use, and their limited contractual rights. The current complaint does not even attempt to allege facts that might lead us to believe that the new water recipients are similar to them in any of these respects.

*Id.* at 632-33.

Mr. Haik’s Third Counterclaim, seeking a declaration of his due process rights, turns on the existence of a protectable property interest. Whether Mr. Haik has such a property interest was decided in *Haik I* and again in *Haik II*. Indeed, in *Haik II*, the Tenth Circuit held Mr. Haik’s due process claims were barred by issue preclusion because the protectable property interest issue had been decided in the previous case. *Haik II*, 567 F. App’x at 628-31.

In *Haik I*, the Tenth Circuit held that the Haiks' taking claim, asserted under both the Utah Constitution and the United States Constitution, failed because "they did not have a protectable interest in property that was taken or damaged by Alta's denial of a building permit." 1999 WL 190717 at \*7. Specifically, the Tenth Circuit held that "mere expectation of municipal water service in the future is not a legal right that constitutes property subject to taking." *Id.*

In *Haik II*, the Tenth Circuit held that its prior holding on the taking claim was sufficient to bar the Haiks' due process claims under the doctrine of issue preclusion. 567 F. App'x at 628-31. It nevertheless went on to consider whether the approval of SLC's change applications conferred upon the Haiks a protectable property interest not yet in existence at the time of the first decision. *Id.* at 629-31. The Tenth Circuit held that it did not: "The change applications did not alter anyone's obligations and they certainly did not give the Haiks a protected property interest or 'legitimate claim of entitlement' to more water." *Id.* at 630. Mr. Haik's citation to Utah's Municipal Land Use, Development, and Management Act (R. 2780, ¶ 127), has no effect on this determination, as it does not even purport to create protectable property interests.

In his Fourth Counterclaim, Mr. Haik seeks a declaration that SLC's water rights a16846 (57-10015) and a16844 (57-10013) are invalid in light of SLC's failure to put the water to the full beneficial use identified in the change applications—namely, its failure to provide water to the Albion Basin. Although the precise authority for such a claim is unclear,<sup>7</sup> the issue raised in the Fourth Counterclaim was decided in Haik II. There, the Tenth Circuit held that “[n]othing about [the change application] process requires the successful applicant to perfect or to use the water in the manner approved.” 567 F. App'x at 629.

Each of Mr. Haik's First through Fourth Counterclaims turns on issues that have previously been litigated and decided against him, in some instances twice. They are therefore barred by issue preclusion. (The Fifth Counterclaim, as will be discussed below, is barred by claim preclusion.)

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<sup>7</sup> The Fourth Counterclaim appears to be a collateral attack on the State Engineer's approval of the change applications. The only avenue to raise such a challenge to the approval of SLC's change applications is a judicial review action pursuant to Utah Code Section 73-3-14 and Utah's Administrative Procedures Act.



2. Issue (e), the overarching issue Mr. Haik seeks to litigate through the counterclaims, was decided against Mr. Haik in *Haik II*.

In addition to the above-identified issues, which are specific to the First through Fourth individual counterclaims, there is a common issue underlying Mr. Haik's counterclaims: "whether Utah Constitution XI, §6 [sic], is properly interpreted to give property owners a constitutionally protected right to water when a change application is approved designating their subdivision as a permissible place of use of water." (R. 2757-58, ¶ 9.) The change applications to which Mr. Haik refers are SLC's change applications a16844 and a16846. This issue is the overarching issue that Mr. Haik seeks to relitigate in this case. While not tied to a specific counterclaim, Mr. Haik is barred from doing so because it is the precise issue that was decided against him in *Haik II*.

In that case, the Haiks "argue[d] that the change applications," a16844 and a16846, "show that water is available and should be provided to them." *Haik II*, 2013 WL 968141 at \*6. They further argued "that, by failing to disclose or intentionally withholding information about the change applications, Defendants engaged in all sorts of malfeasance." *Id.* The district court explained, "in order for any of Plaintiffs' claims to succeed, Plaintiffs must show that they are entitled to water and that Defendants have refused to provide water to which they are

entitled.” *Id.* In other words, the Haiks had to show that SLC had “an obligation” “to supply water” to their Albion Basin lots—the same thing they argue in the present case. (*See* R. 2758, ¶ 14.)

In its Memorandum Order and Decision on the defendants’ motion to dismiss in *Haik II*, the District of Utah explained,

Unfortunately for Plaintiffs, they cannot make [the required] showing [that they are entitled to water]. . . . The city . . . declined to provide water based on the 1963 Agreement and to further its interest in the protection of the watershed.

Plaintiffs point to the change applications to rebut the reasons put forth by . . . Salt Lake City, but Plaintiffs have failed to provide any allegations that the change applications entitle them to water. *While the change applications may show some future ability for Salt Lake City to provide water to the Albion Basin Subdivision, there is no obligation to do so. . . .*

Based on this simple fact, all of Plaintiffs’ claims fail . . . .

*Haik II*, 2013 WL 968141 at \*6 (emphasis added).

On appeal, the Tenth Circuit affirmed. In doing so, it held that “the change applications did not require Salt Lake City to supply water to the Haiks.” *Haik II*, 567 F. App’x at 636. “[A]t most, the approved change applications empowered Salt Lake City to supply water to the Haiks’ lots.” *Id.* at 629 (internal quotation marks omitted, emphasis added). “The city’s ability to supply water” does not “amount[] to an obligation to do so.” *Id.*

Because Mr. Haik has previously litigated the issue of whether SLC's change applications, which would allow SLC to serve water to his lots, impose a constitutional obligation on it to do so, he is barred from relitigating that issue—which is the overarching issue in this case—here.

B. *Claim preclusion bars the relitigation of Mr. Haik's counterclaims because each of those claims was raised or could have been raised in the two prior federal cases.*

Claim preclusion applies when three requirements are satisfied: “(1) a judgment on the merits in the earlier action; (2) identity of the parties or their privies in both suits; and (3) identity of the cause of action in both suits.” *Yapp v. Excel Corp.*, 186 F.3d 1222, 1226 (10th Cir. 1999). Mr. Haik does not dispute the first two elements—that the two prior cases resulted in judgments on the merits and that both he and SLC were parties to both prior cases. Rather, he argues that SLC's filing of the present suit constitutes a change in circumstance that prevents application of claim preclusion (Appellant's Br. at 40-43). This argument is without merit.

The Tenth Circuit “has adopted the transactional approach of the Restatement (Second) of Judgments in determining what constitutes identity of the causes of action.” *Yapp*, 186 F.3d at 1227. Under this approach, “a claim arising out of the same transaction, or series of connected transactions as a

previous suit, which concluded in a valid and final judgment, will be precluded.” *Id.* (internal quotation marks omitted). “What constitutes the same transaction or series of transactions is to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties’ expectations or business understanding or usage.” *Id.* (internal quotation marks omitted).

In the district court, Mr. Haik conceded that his First, Second, and Third Counterclaims had been raised in one or more of the two prior federal cases. (R. 6186-95, 6204-05.) His Fourth and Fifth Counterclaims, seeking declarations that water rights a168558 (57-10015) and a16844 (57-10013) are invalid because SLC has not put the water to the beneficial use identified in the change applications and that SLC is subject to some public regulation, while not asserted as separate claims in the prior cases,<sup>8</sup> arose out of the same transaction or set of facts. This is illustrated by the Tenth Circuit’s decision in *Haik II*.

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<sup>8</sup> While the Fourth Counterclaim was not previously asserted as a claim for declaratory relief, the argument underlying it—that SLC’s water rights are invalid because SLC has not put the water to the full beneficial use identified in its change applications—was previously litigated in *Haik II*, as discussed below.

The Tenth Circuit began its decision by noting, "This appeal marks just one chapter in an ongoing saga over the municipal supply of water to property owned by Mark and Raymond Haik in Alta, Utah." *Haik II*, 567 F. App'x at 623. It then briefly explained the facts giving rise to *Haik I*: the Haiks had "purchased four undeveloped lots in the Albion Basin Subdivision, located at the top of the Little Cottonwood Canyon" and "wanted to develop their lots but were unable to do so because of inadequate water supply." *Id.* When the Haiks "contacted Alta to arrange for water service, [they] learned that Alta has no independent rights to the water at issue." *Id.* at 624. Because the "Albion Basin Subdivision falls outside the 1976 [Town of Alta] limits, . . . Salt Lake City's pre-approval for water service" is required. *Id.* "Yet when the Haiks inquired, Salt Lake City declined to consent to the extension of water service to their lots." *Id.* This led the Haiks to sue the Town of Alta and SLC, "asserting equal-protection claims against both municipalities" and challenging "Salt Lake City's refusal to consent" to the Town of Alta serving the Albion Basin lots. *Id.* "The district court rejected the Haiks' claims on summary judgment," and the Tenth Circuit affirmed. *Id.* at 624-25.

The Tenth Circuit then addressed the "new" facts giving rise to *Haik II*: First, the Haiks based their claims on SLC change applications, which they



alleged “resulted in two things: (1) Salt Lake City could provide more than 400 gallons of water per day to each of the Haiks’ lots; and (2) the Albion Basin became part of Salt Lake City’s water ‘service area.’” *Id.* at 625. Second, the Haiks relied on a second round of permit denials that occurred after the change applications were approved and, specifically, a letter from “Jeffry Niermeyer, the Director of Salt Lake City’s Department of Public Utilities, [which] told permitting authorities that the Haiks were entitled to only 50 gallons of water per day under the Little Cottonwood contract.” *Id.* Third, the Haiks relied on their alleged post-*Haik I* discovery “that Salt Lake City has been billing a number of homes in the Albion Basin Subdivision for water in unmetered amounts,” which “shows that Salt Lake City is treating them differently from others within the Albion Basin Subdivision without reason.” *Id.* Finally, the Haiks relied on their allegation “that Salt Lake City has repeatedly consented to supply water to similarly situated people in the surrounding watershed canyons,” some of which predated *Haik 1996* and some that did not. *Id.*

The same operative facts from *Haik I* and *Haik II* form the basis of Mr. Haik’s counterclaims. There is nothing new. The counterclaims stem from Mr. Haik’s decades-long inability to receive water for his Albion Basin lots. (R. 2760, ¶ 21; 2766, ¶¶ 64-65.) Mr. Haik argues that SLC’s refusal to supply water to his

Albion Basin lots is wrongful, just as he did in *Haik I*. And, as in *Haik II*, he relies on (1) SLC's change applications a16844 and a16846 (R. 2756, ¶¶ 10-12; 2799, ¶ 122; 2781, ¶¶ 129, 130); (2) the 50 gpd letter from Mr. Niermeyer (R. 2765, ¶¶ 55-57); (3) unmetered water sales to other lots in the Albion Basin Subdivision (R. 2764, ¶ 49; 2766, ¶ 63); and (4) SLC's alleged new water supply agreements with others outside the municipal boundaries (R. 2767-68, ¶¶ 67, 69-72). A review of Mr. Haik's 132 factual allegations pled in support of his counterclaims reveals only a retread of prior facts and claims and, importantly, no facts that post-date the Haiks' 2012 Complaint or the Tenth Circuit's 2014 decision in *Haik II*. Nothing has changed that would enable Mr. Haik to assert new claims based on the same operative facts he has now been litigating for twenty years.

Mr. Haik nevertheless argues that there has been a change in circumstances that would justify allowing him to relitigate his First, Second, and Third Counterclaims and to assert his Fourth and Fifth Counterclaims. In doing so, he relies on SLC's assertion of the Second Cause of Action in this case, claiming that SLC's allegation "of injury to [its] water rights" is a "new event" "that takes the counterclaims out of any preclusion." (Appellant's Br. at 41.) SLC's assertion of the Second Cause of Action in this case is not a "new fact" that would enable Mr. Haik to litigate the counterclaims.

Under federal res judicata law, “a new action will be permitted only where it raises *new and independent* claims, not part of the previous transaction, based on . . . new facts.” *Hatch v. Boulder Town Council*, 471 F.3d 1142, 1150 (10th Cir. 2006) (emphasis in original). Here, there are no “new facts.” SLC’s assertion of a claim for the adjudication of the nature, validity, and priority of Mr. Haik’s claimed water right is not a “new fact.” Nor does SLC’s assertion of that claim turn on any new facts. SLC’s identified injury—interference with its various Little Cottonwood Creek water rights—is based on facts that existed at the time of *Haik I* and *Haik II*, namely, SLC’s long-held water rights. Indeed, two of those water rights, a16844 (57-10013) and a16846 (57-10015), were the explicit basis of Mr. Haik’s assertion of claims in *Haik II*. *Haik II*, 567 F. App’x at 625-26. SLC’s assertion of the Second Cause of Action in this case merely provided Mr. Haik with a new forum to assert his counterclaims—it does not give rise to a new transaction or “new and independent claims” that previously did not exist.

Even if SLC’s assertion of the Second Cause of Action could be considered a “new fact,” the counterclaims are nevertheless barred by claim preclusion because they fall within “one of several exceptions to the rule that only claims related to the existing transaction are precluded.” *Hatch*, 471 F.3d at 1150. Applicable here is the exception of “where . . . the object of the first proceeding

was to establish the legality of the continuing conduct into the future.” *Id.* at 1151 (internal quotation marks omitted). Through both *Haik I* and *Haik II*, Mr. Haik sought a declaration that SLC has an obligation to serve water to his Albion Basin lots and that its refusal to do so violates various of his constitutional rights. He unquestionably sought to establish the legality, or illegality, of SLC’s “continuing conduct into the future.” As this exception recognizes, allowing Mr. Haik to assert claims designed to obtain this same prospective relief every time SLC claims impairment of its long-held Little Cottonwood Creek water rights is antithetical to the principles of finality underlying the doctrine of res judicata.

Because Mr. Haik’s counterclaims either admittedly were raised in one or both of the two prior cases or arise out of the same transaction and thus could have been raised, each of the elements of claim preclusion is satisfied.

C. *Mr. Haik’s argument that decisions of the federal courts can never have preclusive effect if the issue decided turns on state law is without merit.*

Mr. Haik additionally argues that neither issue preclusion nor claim preclusion can bar the relitigation of his counterclaims because res judicata does not apply to cases involving state law and state constitutional claims where the prior decision was a federal decision. (Appellant’s Br. at 43-47, 47-48, 49-50.) He frames the question as whether “Federal courts [can] foreclose Utah State Court

review of Federal interpretations of . . . the Utah Constitution.” (Appellant’s Br. at 43.) He also attempts to frame the same argument as a “lack of finality.” (Appellant’s Br. at 49.)

In support of this argument, Mr. Haik relies upon the principle that “[t]his court, not the United States Supreme Court, has the authority and obligation to interpret Utah’s constitutional guarantees, including the scope of due process, and we owe federal law no more deference in that regard than we do sister state interpretation of identical state language.” *State v. Tiedemann*, 2007 UT 49, ¶ 33, 162 P.3d 1106.

While a federal court’s interpretation of a provision of the United States Constitution does not bind this Court in interpreting an identical provision of the Utah Constitution, that is not what is at issue here. Rather, the question here is whether a final judgment in a federal court bars the *parties to that case* from relitigating claims or issues that were or could have been raised and decided in that case, whether they be Utah constitutional claims or otherwise. The answer to that question is yes.

Utah courts have repeatedly held that claim preclusion bars the relitigation of state law claims that have been previously litigated in federal court. *See, e.g., McCarthy v. State*, 1 Utah 2d 205, 265 P.2d 387, 389 (1953) (“The [state law] issue



having been squarely presented and determined [in the federal court proceeding], it is res judicata as between these parties.”); *Pride Stables v. Homestead Golf Club*, 2003 UT App 411, ¶ 18, 82 P.3d 198 (holding claim preclusion applied where “the parties fully litigated in the bankruptcy proceeding the issue of whether an express contract existed,” a matter of Utah law).

Mr. Haik offers no authority to support his position that a different rule applies to claims under the Utah Constitution. This Court has, on at least two occasions, considered whether a federal court decision on claims under the Utah Constitution has claim preclusive effect. *Nu-Med USA, Inc. v. 4Life Research, L.C.*, 2008 UT 50, ¶ 8, 190 P.3d 1264; *Snyder v. Murray City Corp.*, 2003 UT 13, ¶ 36, 73 P.3d 325. Although in both cases there was no preclusive effect, this was because neither federal court decision was a final decision on the merits—not because, as Mr. Haik contends, there is a categorical exclusion of such cases from the doctrine of claim preclusion. *Nu-Med*, 2008 UT 50, ¶ 8 (holding claim preclusion did not apply because “the federal district court’s voluntary dismissal was without prejudice”); *Snyder*, 2003 UT 13, ¶¶ 36-37 (holding claim preclusion did not apply because the federal court declined to exercise supplemental

jurisdiction over the state constitutional claims and dismissed them without prejudice).

This Court has further held that where “plaintiffs failed to assert their state claim [in a prior federal proceeding] when the federal court had the power to adjudicate it with their federal claim, they are barred under the doctrine of res judicata from litigating the issues in the instant action.” *Belliston v. Texaco, Inc.*, 521 P.2d 397, 382 (Utah 1974). Applying this principle, the Utah Court of Appeals has routinely affirmed the dismissal of state claims where those claims could and should have been litigated in a prior federal proceeding.<sup>9</sup> Thus, even though Mr. Haik did not previously assert his Fourth or Fifth Counterclaim, he is barred by claim preclusion from doing so here.

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<sup>9</sup> See, e.g., *Bishop v. Inwest Title Servs., Inc.*, 2014 UT App 189, ¶ 13, 336 P.3d 578 (“Bishop could and should have asserted his claimed superior right under the Warranty Deed—and his claims for damages flowing from that superior right—in conjunction with his quiet title claim against BANA and Boyce in the federal action. Because he failed to do so, his present claims against BANA and Boyce are barred by the doctrine of claim preclusion.”); *Hansen v. Bank of N.Y. Mellon*, 2013 UT App 132, ¶ 15, 303 P.3d 1025 (“Because we conclude that . . . Hansen’s [state law] claims in this case could have been brought in the federal action, we hold that the district court correctly dismissed Hansen’s claims as being barred by res judicata.”); *Massey v. Bd. of Trustees of Ogden Area Community Action Comm., Inc.*, 2004 UT App 27, ¶ 12, 86 P.3d 120 (“Because Massey’s wrongful termination claim under state law stems from the same claim as the section 1983 claim, Massey could and should have brought his state claims in the prior [federal] suit.” (internal quotation marks and brackets omitted)).

Mr. Haik also relies on *Jensen v. Cunningham*, 2011 UT 17, 250 P.3d 465. But *Jensen* does not extend as far as Mr. Haik would have it reach—to hold that a federal court’s decision on a state law issue can *never* give rise to issue preclusion.

In *Jensen*, this Court held that the U.S. District Court’s grant of summary judgment to the defendants on federal constitutional claims under 42 U.S.C. § 1983 did not collaterally estop the plaintiffs from asserting state constitutional claims based on the same facts in a state court proceeding. 2011 UT 17, ¶ 49. There, the U.S. District Court had expressly declined to exercise supplemental jurisdiction over the plaintiffs’ state constitutional claims and dismissed them without making any findings with regard to those claims.<sup>10</sup> *Id.* ¶ 39. The grant of summary judgment was thus limited to analysis of the plaintiffs’ federal constitutional claims, applying the federal framework for qualified immunity. This Court held that type of “federal court determination that the material undisputed facts do not give rise to a federal constitutional violation does not preclude a state court from deciding whether those same facts will give rise to a state constitutional violation.” *Id.* ¶ 49. That holding does not somehow establish that a federal court’s decision on a *state* constitutional claim (or state

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<sup>10</sup> This is presumably the reason that claim preclusion was not raised in *Jensen*.

common law claim) is deprived of issue preclusive effect. Indeed, in *Jensen*, this Court acknowledged that where “an issue had been decided by the federal court using the same standard that would be applied in state court, the plaintiff [i]s precluded from relitigating that issue in state court.” *Id.* ¶ 42.

Thus, while it is clear that Utah courts need not defer to a federal court’s interpretation of the Utah Constitution or Utah law, there is no authority to support Mr. Haik’s position that a federal court’s ruling against a particular party on a state law issue has no preclusive effect *as to that party*. To the contrary, this Court has held that a federal court’s decision on an issue of state law, applying state law, does, in fact, have issue preclusive effect. *Jensen v. Redevelopment Agency of Sandy City*, 951 P.2d 735, 737 (Utah 1997) (“The Tenth Circuit held that under Utah law plaintiffs did not have a property interest in the information it supplied to the City. . . . The Tenth Circuit’s ruling that plaintiffs did not have any property interest in the information it disclosed to the City and RDA is res judicata of that issue in this action.”). *Haik I* and *Haik II* involve precisely such decisions.

Mr. Haik’s argument that the federal court decisions in *Haik I* and *Haik II* cannot give rise to res judicata is frivolous. To the extent it can be read as a request that this Court adopt a new rule exempting from the doctrine of res

judicata federal court decisions in cases involving state law claims and issues, the Court should refuse to do so. Such a rule would erode the very purposes of the doctrine of res judicata—"to protect litigants from the burden of relitigating an identical issue with the same party or his [or her] privy and to promote judicial economy by preventing needless litigation," *State ex rel. S.D.C.*, 2001 UT App 353, ¶ 12, 36 P.3d 540.

## **II. THE COURT LACKS JURISDICTION OVER ANY APPEAL OF THE DISTRICT COURT'S DENIAL OF MR. HAIK'S MOTION TO DISMISS.**

Although not included in his Statement of Issues, Mr. Haik has argued that the district court "clearly erred in failing to dismiss the suit" in response to Mr. Haik's motion to dismiss. (Appellant's Br. at 51.) He has further included in his Statement of Facts a discussion of SLC's and the District's asserted injury in support of the Second Cause of Action, concluding that the "Amended Petition 'does not expressly allege a reasonable probability of future injury.'" (*Id.* at 15-19.) While less than clear, it appears that through this appeal, Mr. Haik seeks review of the district court's denial of his motion to dismiss. To the extent he does, the Court lacks jurisdiction to consider that decision.

This Court "does not have jurisdiction over an appeal unless it is taken from a final judgment, Utah R. App. P. 3(a), or qualifies for an exception to the

final judgment rule.” *Loffredo v. Holt*, 2001 UT 97, ¶ 10, 37 P.3d 1070. The district court’s denial of Mr. Haik’s motion to dismiss is not a final judgment—it did not “end the controversy between the litigants,” *id.* ¶ 12, but rather allowed SLC and the District to continue to pursue their Second Cause of Action.

The district court’s denial of Mr. Haik’s motion to dismiss further does not satisfy any of the exceptions to the final judgment rule. “[O]rders and judgments that are not final can be appealed if such appeals are statutorily permissible, if the appellate court grants permission under rule 5 of the Utah Rules of Appellate Procedure, or if the trial court expressly certifies them as final for purposes of appeal under rule 54(b) of the Utah Rules of Civil Procedure.” *Bradbury v. Valencia*, 2000 UT 50, ¶ 12, 5 P.3d 649. None of those circumstances applies here.

To the extent Mr. Haik has sought review of the district court’s denial of his motion to dismiss, the Court lacks jurisdiction. The Court must dismiss any such portion of Mr. Haik’s appeal and refuse to consider his arguments on SLC’s and the District’s standing to assert the Second Cause of Action and the merits of the claims asserted therein.

#### CONCLUSION

For the foregoing reasons, SLC requests that this Court affirm the district court’s dismissal of Mr. Haik’s counterclaims.



DATED this 7<sup>th</sup> day of October, 2016.

SNOW, CHRISTENSEN & MARTINEAU

By 

Shawn E. Draney

*Attorneys for Appellee*

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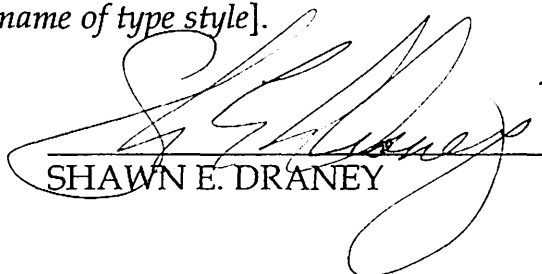
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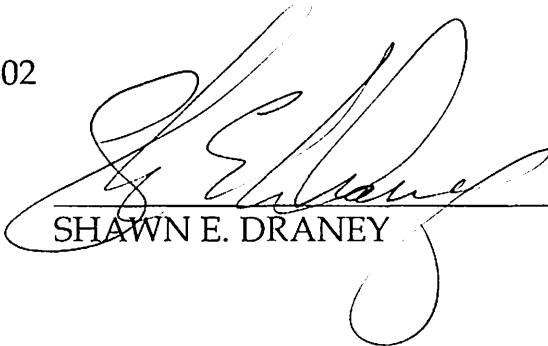
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SHAWN E. DRANEY

### CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing **BRIEF OF APPELLEE** were served by U.S. mail, postage prepaid, on October 7, 2016 as follows:

Paul R. Haik  
KRESBACH AND HAIK, LTD.  
100 South Fifth Street  
Suite 1900  
Minneapolis, MN 55402



SHAWN E. DRANEY

#### ADDENDUM

- A. *Haik v. Town of Alta*, No. 2:96-cv-723J, Memorandum Opinion & Order at 20-21 (D. Utah Oct. 31, 1997)
- B. *Haik v. Town of Alta*, No. 97-4202, 1999 WL 190717 (10th Cir. April 5, 1999)
- C. *Haik v. Salt Lake City Corp.*, No. 2:12-CV-997 TS, 2013 WL 968141 (D. Utah Mar. 12, 2013)
- D. *Haik v. Salt Lake City Corp.*, 567 F. App'x 621 (10th Cir. 2014)

4814-4426-7066, v. 1

# Addendum A

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

\*\*\*\*\*

RAYMOND A. HAIK and  
MARK C. HAIK,

Plaintiffs,

vs.

THE TOWN OF ALTA, a political subdivision  
of the State of Utah, and SALT LAKE CITY  
CORPORATION, a political subdivision of the  
State of Utah,

Defendants.

Civil No. 2:96-cv-732J

MEMORANDUM OPINION  
AND ORDER

\*\*\*\*\*

Plaintiffs Raymond A. Haik and Mark C. Haik ("Haiks") commenced this action to redress an alleged denial of equal protection of the law by the Town of Alta ("Alta"). The Haiks own unimproved parcels of land located within the Albion Basin and within Alta's municipal limits. They contend that Alta owes a legal duty to extend municipal water service to their lots, notwithstanding the terms of the Water Supply Agreement between Alta and co-defendant Salt Lake City requiring Alta to obtain Salt Lake City's approval prior to extending additional water service to private landowners. Without municipal water service, the Haiks further assert, they are unable to obtain the building permits required to construct dwellings on their lots. If Alta's refusal to extend water service is somehow sustained, the Haiks contend that they are then entitled to just compensation for a "taking" of their property.

On November 27, 1996, plaintiffs filed a Motion for Partial Summary Judgment (dkt. no. 17). On January 22, 1997, defendants Alta and Salt Lake City filed their memoranda in

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opposition to plaintiffs' motion (dkt. nos. 19, 22), as well as their own cross motions for summary judgment (dkt. nos. 18, 21), accompanied by supporting affidavits (dkt. nos. 20, 23, 24). Alta also filed a motion to strike certain exhibits annexed to plaintiffs' motion papers as unauthenticated documents (dkt. no. 25). The Haiks filed their response/reply memoranda on March 19, 1997 (dkt. nos. 31, 32, 33), and on April 9, 1997, Alta and Salt Lake City filed their reply memoranda (dkt. nos. 34, 36), together with a supplemental affidavit (dkt. no. 35).

On April 25, 1997, these motions were heard by the court. At that time, the court requested the submission of additional data concerning water availability and took all motions under advisement. In the weeks thereafter, the parties filed a series of papers—submission and objections, reply and "sur-reply" (dkt. nos. 41, 42, 43, 44, 46, 50, 52).

Having reviewed the motions, memoranda, affidavits, submissions, objections, replies and sur-replies, and having considered the arguments of counsel, the court now rules as follows:

**Factual Background<sup>1</sup>**

Albion Basin is located above the Alta and Snowbird ski resorts at the top of Little Cottonwood Canyon, east of Salt Lake City, and comprises part of the watershed relied upon by Salt Lake City and other Salt Lake Valley communities for their culinary water supply.

In 1963, Canyonlands, Inc., an apparent predecessor in interest to plaintiffs, entered into a contract with the Little Cottonwood Water Company which promised the availability of not more than 50 gallons per day to users in each of not more than 35 cabins to be constructed in the Albion Basin Subdivision #1.

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<sup>1</sup> The parties' respective statements of facts recount this history in detail, supported by affidavits and buttressed by hundreds of pages of exhibits. The following offers only a brief summary of the stated facts.

Prior to 1971, land ownership in the Albion Basin was relatively free of county zoning regulations. In 1966, Salt Lake County had adopted a uniform zoning ordinance governing unincorporated areas of the county, and in November 1971, the county for the first time sought to limit building in the Albion Basin through an amendment to the 1966 ordinance. The amendment provided that no dwelling could be erected on less than fifty acres of land. This amendment followed on the heels of applications for building permits that had been filed by Albion Basin Subdivision landowners who wished to construct four-plex housing units on their lots.

Marvin and Renee Melville, together with other Albion Basin Subdivision landowners, challenged the amendment in district court as being arbitrary, capricious, and unlawfully enacted. The first time around, the Melvilles prevailed; in 1975, the Utah Supreme Court struck down the 1971 amendment, holding that "when a zoning regulation is to be applied to unzoned land, it must be done after notice has been given four times by publication and not under the guise of an amendment." *Melville v. Salt Lake County*, 536 P.2d 133 (Utah 1975).

On August 4, 1975, Salt Lake County enacted another zoning ordinance, this one restricting construction in the Albion Basin to one single family cabin per subdivision lot. In May of 1976, a second trial was conducted in the *Melville* litigation on the plaintiffs' fourth cause of action seeking writs of mandamus compelling the issuance of building permits for the plaintiffs' proposed four-plex units. Plaintiffs did not prevail in the district court because they failed to show that any company or person, including Marvin Melville, had the right to use sufficient water in Little Cottonwood Canyon to supply the 400 gallons per day per unit that was required by the Salt Lake County Board of Health before a building permit could issue. On appeal, the Utah Supreme Court affirmed, concluding that "[a]t most plaintiffs have proved that they *may* have a

right to 50 gallons of water per unit constructed, which does not meet the County Board of Health's requirement of 400 gallons per unit per day." *Melville v. Salt Lake County*, 570 P.2d 687, 689 (Utah 1977) (emphasis in original).<sup>2</sup>

Meanwhile, on August 12, 1976, Salt Lake City entered into the INTERGOVERNMENTAL AGREEMENT—WATER SUPPLY AGREEMENT SALT LAKE CITY TO ALTA CITY ("Water Supply Agreement"). Reciting that Salt Lake City "owns and/or controls the major portion of the primary waters of Little Cottonwood Canyon for the use and benefit of Salt Lake City residents, some of which, at this time, can be made available to Alta," the Water Supply Agreement provides that Salt Lake City "agrees to make available to Alta for its use, as hereinafter described, the normal flow of raw, untreated water, not to exceed 265,000 gallons per day." *Id.* at ¶1. Alta's "use, as hereinafter described," includes the following express limitation:

8. It is expressly understood and agreed that said pipelines shall not be extended to or supply water to any properties or facilities not within the present city limits of Alta without the prior written consent of [Salt Lake] City.

*Id.* at ¶ 8. It is uncontroverted that in 1976, Albion Basin Subdivision # 1 lay beyond the city limits of Alta. Moreover, the Water Supply Agreement recited that "Alta recognizes [Salt Lake] City's need to protect its watershed and specifically agrees to be bound by and comply with all City water ordinances, applicable County ordinances, Salt Lake City-County Board of Health regulations and applicable state law." *Id.* at ¶ 12. It also appears uncontroverted that in 1976, "applicable County ordinances" limited construction in the Albion Basin Subdivision #1 to one

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<sup>2</sup> The court also concluded that plaintiffs failed to show that they had lawfully appropriated the water flowing from a spring flowing from the portal of the old Alta-Helena Mine, located on Marvin Melville's Albion Basin property, and likewise failed to establish that they owned the spring waters as "percolating water" arising on the Melville property under *Riordan v. Westwood*, 115 Utah 215, 203 P.2d 922, 929, 930 (1949). The spring produced water at a rate of 20 gallons per minute, which a health department official testified was adequate to supply the proposed four-plexes with the required 400 gallons of water per unit per day. 570 P.2d at 688-89.

single family cabin per subdivision lot, which the Board of Health required to be supplied with 400 gallons of water per day as a precondition to issuing a building permit.

Following the Utah Supreme Court's denial of the mandamus remedy in 1977, Marvin Melville made repeated requests to Salt Lake City for water to supply his Albion Basin property. Those requests were consistently refused, and it appears that Melville never succeeded in obtaining a building permit for his Albion Basin property or commencing construction of the proposed dwellings.

In 1981, Alta undertook to annex the Albion Basin Subdivision, which was accomplished by an August 20, 1981 resolution following a July 16, 1981 public hearing.<sup>3</sup> Thereafter, Alta conditioned issuance of building permits in the Albion Basin upon "approval of all uses, regardless of the size or number of units" given "in writing by the Salt Lake City-County Health Department, who shall certify as to the adequacy of the culinary water system and the sewage system." The approval of culinary water and sewer systems "shall be in accordance with the regulations of the Salt Lake City-County Health Department and the Utah State Division of Health." Town of Alta Uniform Zoning Ordinance, § 22-7-8(2) (1989).<sup>4</sup> The regulations referred to by the Alta ordinance continue to require the availability of 400 gallons of water per day per housing unit to be constructed. *See* Utah Admin. Code § R309-105-1 (1.2.6) (1997).

In 1983, Alta requested an amendment to the Water Supply Agreement, authorizing an extension of water service to the newly annexed Albion Basin properties. Salt Lake City,

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<sup>3</sup> Annexation was supported by, among others, Marvin Melville. *See* Affidavit of Mayor William H. Levitt, dated January 21, 1997 (dkt. no. 23), at ¶ 22. Melville now avers that he "agreed to the annexation on the belief that Alta would provide all city services to my property." Affidavit of Marvin Melville, dated March 5, 1997, at ¶ 5.

<sup>4</sup> *Id.* at ¶ 26.

however, declined to consent to the proposed amendment. In 1988, however, Salt Lake City adopted a Watershed Management Plan and consented to Alta's use of water for snowmaking within Alta's city limits, which by 1988 included land within the Albion Basin area.

In 1988, Alta, Salt Lake City, and other government entities commenced discussion of acquiring private lands in the Albion Basin area for public use, and began developing acquisition strategies toward that end. Salt Lake City also entered into discussions with the Little Cottonwood Water Company in 1988 that culminated in Salt Lake City succeeding to the company's obligations under various water supply contracts, including the 1963 agreement affecting Albion Basin Subdivision #1, following the dissolution of the company in 1994.

In April 1991, the Salt Lake City Council adopted a Watershed Ordinance, § 17.04.020.A, B(1) of the Salt Lake city Ordinances, which, *inter alia*, prohibits the city from entering into any new water sales agreements or expanding any existing agreements, with three exceptions:

- (a) water sales for residential use to property owners with a spring on the property;
- (b) water sales to governmental entities for use on land they own or lease; or
- (c) water sales for snowmaking and fire protection in certain cases.

In 1992, pursuant to the 1991 ordinance, Salt Lake City agreed to supply water to the U.S. Forest Service for recreational purposes at several locations, including the Albion Basin campground. In 1993, Salt Lake City gave consent to use of additional water for snowmaking by the Alta Ski Lifts Company. In 1995, Salt Lake City also consented to the extension of Alta's municipal water lines to an expanded Alpenglowlodge facility, which purportedly falls within the 1976 city limits of Alta and therefore within the terms of the 1976 Water Supply Agreement.

In November, 1992, Alta prepared a General Plan for the Town of Alta. The General Plan

identifies Albion Basin as a "high priority" area for the acquisition by Alta of privately-owned lands and recommends that "no future development be allowed in areas not served by a public sewer system," presumably including Albion Basin Subdivision #1. In September, 1994, Alta executed a Memorandum of Understanding with the U.S. Forest Service acknowledging that "a majority of the private land which exists in Albion Basin is presently undeveloped," that "development rights are affected by current laws and ordinances," and that "some properties lack water rights necessary for development," and endorsing "the public acquisition of land in the Albion Basin."

A month later, in October 1994, the Haiks stepped into this milieu by purchasing Lots 25, 26, 29 and 30 of Albion Basin Subdivision #1 from Marvin Melville.

In a November 29, 1994 response to Raymond Haik's written inquiry concerning water and sewer services, Alta informed Haik that Alta does not provide water and sewer services to the Albion Basin Subdivision and referred him to the Salt Lake City Department of Public Utilities, Water Division. Upon inquiry by the Haiks, Salt Lake City in 1996 declined to consent to the extension of Alta water pipes and water supply to the Haiks' lots, relying on Paragraph 8 of the 1976 Water Supply Agreement and the 1991 Watershed Ordinance, § 17.04.020 of the Salt Lake City Ordinances.

In October, 1997, three years after their purchase, the Haiks continue to own Lots 25, 26, 29 and 30 of Albion Basin Subdivision #1, and continue to be unable to build on those lots because of the lack of culinary water supply that remains a legal prerequisite to the construction of dwellings on the property.



## I. The Haiks' Equal Protection Claims Against Alta

As the Ninth Circuit pointed out in *Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir. 1990),

The interest in water for real estate development is not a fundamental right. *Bank of America Nat'l Trust and Savings Ass'n v. Summerland County Water Dist.*, 767 F.2d 544, 548 (9th Cir. 1985). Unless a classification trammels fundamental personal rights or implicates a suspect classification, to meet constitutional challenge the law in question needs only some rational relation to a legitimate state interest. *City of New Orleans v. Dukes*, 427 U.S. 297, 303-04, 96 S.Ct. 2513, 2516-17, 49 L.Ed.2d 511 (1976). . . .

However, the rational relation test will not sustain conduct by state officials that is malicious, irrational or plainly arbitrary. . . .

917 F.2d at 1155 (citation omitted). In this case, the Haiks contend that Alta, by refusing their requests to extend water service to the Haiks' Albion Basin properties, has acted in arbitrary and irrational fashion and has thereby denied the Haiks equal protection of the laws. The Haiks' contention presupposes the existence of a legal duty on the part of Alta to supply water to property owners such as the Haiks, as well as the legal and physical capacity to do so.

### A. The Municipal Duty to Supply Water

In *Rose v. Plymouth Town*, 110 Utah 358, 173 P.2d 285 (1946), the Utah Supreme Court held that mandamus did not lie to compel town authorities to extend their municipal water system to plaintiff's residence located within the town's geographical limits where such extension could be accomplished only at considerable expense. "Unless the town authorities are shown to have failed to exercise judgment or discretion such that a refusal to extend the water system would be unreasonable their decision is final." 173 P.2d at 287. In dictum, Chief Justice Larson observed,

If this were a case where the town authorities had refused to connect the plaintiff's residence to a main already laid or if the plaintiff had financed the cost of the extension and agreed to accept water at the prescribed rates in payment therefor, the remedy might lie, because the writ would then be for the purpose of compelling the town to perform a duty, a ministerial act about which it would have no

*discretion.* But such is not this suit. The effort here is to compel the extension of the water system a considerable distance under circumstances which call for reason and judgment and the exercise of discretion and are not ministerial.

*Id.* (emphasis added).

*Child v. City of Spanish Fork*, 538 P.2d 184 (Utah 1975), rejected a claim that a municipality's requirement that landowners in a newly annexed area convey shares of water in exchange for annexation was arbitrary, unreasonable, and a denial of equal protection. Agreeing with the district court that the requirement "represented prudence in planning for the City's needs," the Utah Supreme Court upheld the requirement as being wholly within the city's powers and not "in any degree unreasonable or arbitrary," and rejected plaintiffs' assertion that the city should fund the acquisition of additional water through a bond issue. 538 P.2d at 186-87. Rejecting the new annexe'es' claim of unequal treatment as compared to existing residents who made no conveyance of water rights, the court observed that "different treatment of individuals does not necessarily violate the equal protection of the laws assurances." Persons may be treated differently by the law "if the classifications have a reasonable relationship to a proper and lawful purpose, and if all persons within the same class are treated equally." *Id.* at 187. The *Child* court concluded that "the treatment of all of the plaintiffs as a class seeking annexation is for a proper and lawful purpose; and . . . all of the persons in that class are treated equally." *Id.*

Similarly, *Thompson v. Salt Lake City*, 724 P.2d 958 (Utah 1986), involved another effort to compel a municipality to provide water service. By ordinance, Salt Lake City conditioned water service upon agreement by the landowner to be responsible for payment for all water provided to his property. Lessees sued to obtain water service where their lessor refused to sign such an agreement, asserting that the city had a duty to provide water service and that the

condition requiring landowner agreement was "arbitrary, unreasonable, and discriminatory," and denied equal protection of the laws. Once again the Utah Supreme Court denied relief, holding that although they are authorized to provide water service, municipalities are not public utilities and do not "have a legal duty to provide water service to all members of the public . . . ." The court upheld the ordinance on the grounds that (1) the ordinance tracked a state statute authorizing municipalities to require property owners to be responsible for payment for water service (*see* Utah Code Ann. § 10-7-10 (1973)); (2) the ordinance placed "all property owners in the same class and treat[ed] them equally"; (3) the ordinance imposed the payment obligation on "the most logical and reasonable persons to bear that responsibility" and thus represented "the most effective means of insuring payment for water service"; and (4) the ordinance did not discriminate against tenants. "The ordinance therefore encompasses a legitimate purpose and objective and does not create an unconstitutional classification to achieve that objective." 724 P.2d at 959, 960.

At the outset, the Haiks acknowledge that, consistent with *Thompson*, Alta was not and is not designated as a public utility,<sup>5</sup> and "[h]ence, it does not have a legal duty to provide water service to all members of the public." *Thompson*, 724 P.2d at 959. Yet "[e]ven a municipality," the Haiks submit, "cannot arbitrarily choose to supply water to certain residents while denying it to others."<sup>6</sup>

*Rose, Thompson, and Child*, the Haiks assert, "make clear that a municipality may refuse

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<sup>5</sup> Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment, filed November 26, 1996 (dkt. no. 15) ("Pltfs' Mem."), at 6.

<sup>6</sup> Reply Memorandum in Support of Plaintiffs' Motion for Summary Judgment, and Memorandum in Opposition to Defendants' Cross-Motions for Summary Judgment and Defendant Town of Alta's Motion to Strike, filed March 19, 1997 (dkt. no. 32) ("Pltfs' Reply/Opp. Mem. (Alta)"), at 9.

water service to residents for economic reasons. No such economic justification for refusing water service to the Haiks exists here, however." Pltfs' Reply/Opp. Mem. (Alta) at 10. The Haiks urge that they remain entirely willing and able to fund the extension of water lines to their property, thus eliminating the kind of economic impediment that justified municipal inaction in *Rose, Thompson, and Child*. "[W]here the Haiks have offered to pay the costs of the extension, and Alta has available sufficient water," the Haiks conclude, "Alta's obligation to provide water to the Haiks' lots is 'a ministerial act about which it [has] no discretion.'" Pltfs' Reply/Opp. Mem. (Alta) at 10-11 (quoting *Rose*, 173 P.2d at 287).

Yet it does not follow from *Rose, Thompson, or Child* that economic considerations are the *only* valid reasons that may justify declining to extend municipal water service to particular property. The Haiks' argument presupposes that "Alta has available sufficient water," which in this case turns on considerations of legal right and the exercise of lawful power.

While Utah law empowers municipalities to "construct, maintain and operate waterworks" by statute, *see* Utah Code Ann. § 10-8-14 (1996), a town does not gain any entitlement to ownership or use of any water simply by virtue of the town's existence. Counties, cities and towns have no "reserved right" to enough water to supply the needs of their constituents. Water to be supplied through a municipal water system must be acquired through lawful means as outlined in the statute. *See* Utah Code Ann. § 10-7-4 (1996); *Child*, 538 P.2d at 186 (consistent with the statute, a city may acquire water resources by purchase, lease, condemnation, gift, assignment, "or even by prescriptive use or easement").

Ownership of land, without more, likewise does not entitle a private landowner to use water that flows across, under or nearby that land. Instead, the Legislature decreed long ago that

"[a]ll waters in this state, whether above or under the ground are hereby declared to be the property of the public . . . ." Utah Code Ann. § 73-1-1 (1989). As the Utah Supreme Court explained in the second *Melville* opinion, "No one owns or can own water in this state . . . . One can only acquire the right to use the water. One's right to use the water is measured by the amount he puts to beneficial use without interfering with another person's prior right to the use of the water." 570 P.2d at 688. In Utah, rights in land and rights to water arise separately and are legally distinct from each other. Ownership of one does not necessarily confer a right to the other. A municipality, like a private landowner, must acquire its water in the manner prescribed by law. See *Mt. Olivet Cem. Ass'n v. Salt Lake City*, 65 Utah 193, 235 P. 876, 879 (1925) (neither the city's ownership of land in Emigration Canyon nor its exercise of regulatory police power established proprietary right to use water).

#### B. Alta's "Capacity" to Supply Water

The waters of Little Cottonwood Canyon have been subject to extensive prior appropriation for years, indeed, for many years before the events concerning the Albion Basin transpired as recounted above. See generally *Little Cottonwood Water Co. v. Sandy City*, 123 Utah 242, 258 P.2d 440 (1953) (surface waters of Little Cottonwood Canyon fully appropriated; groundwater appropriation disputed as impairing surface water flow). Nothing in the Haiks' pleadings suggests that any unappropriated water remains available near Alta that Alta may now put to beneficial use by extending its water system to the Haiks' Albion Basin lots.<sup>7</sup>

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<sup>7</sup> Nor do the Haiks suggest the availability of any water that may be acquired by Alta through condemnation. It appears that Salt Lake City has acquired the water rights belonging to the former Little Cottonwood Water Co., which otherwise might have been acquired by Alta through eminent domain proceedings. Cf. *North Salt Lake v. St. Joseph Water & Irr. Co.*, 118 Utah 600, 223 P.2d 577 (1950) (municipality may acquire water rights by eminent domain from entity that provides public water service).

At this point, Salt Lake City—not Alta—appears to hold all the cards where water in Little Cottonwood Canyon is concerned. Indeed, as successor to the Little Cottonwood Water Company, Salt Lake City even has control of the water (50 gallons per day) to be supplied to dwellings in the Albion Basin Subdivision #1 under the company's 1963 agreement.<sup>8</sup>

Besides purchasing the Albion Basin lots from Marvin Melville, the Haiks stepped into Melville's shoes in another respect: notwithstanding the physical "availability" of sufficient water to support the construction of dwellings on their lots, they can establish no right under Utah's prior appropriation system of water rights that entitles either themselves or the Town of Alta to use that water for that purpose. Alta's "right" to use 265,000 gallons of water per day flows from its contractual agreement with that premier prior appropriator, Salt Lake City, who expressly conditioned Alta's right upon Salt Lake City's retained power to consent—or refuse to consent—to extensions of Alta's municipal water system beyond Alta's 1976 geographical limits.

It may be true that Alta has told others that it has "the *capacity* to supply water for 34 residential connections in addition to the approximately 190 connections it currently services," (Pltfs' Mem. at xii ¶ 45 (emphasis added)), but this physical capacity does not translate into the *legal* capacity—the right or power—to authorize or support such use, at least outside of Alta's 1976 geographical limits, because Alta's legal capacity to supply water remains circumscribed at its source, the 1976 Water Supply Agreement.

In the first instance, then, Alta cannot supply water to the Haiks beyond that which is "available" under its 1976 Water Supply Agreement with Salt Lake City. Water is not available to

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<sup>8</sup> Nothing in the present record suggests that Salt Lake City has forfeited any of its rights to water in Little Cottonwood Canyon for nonuse. See *Nephi City v. Hansen*, 779 P.2d at 673, 674-76 (Utah 1989) (city's nonconsumptive water rights forfeited where rights were "unused for about thirty years").



the Haiks under the Water Supply Agreement absent Salt Lake City's consent to an extension of service beyond Alta's 1976 limits. Where Salt Lake City withholds its consent, Alta has no legal right to extend water service to the Haiks.

## II. Alta's 1981 Annexation of Albion Basin

The Haiks cite to Utah Code Ann. § 10-2-401(4), which states that as a matter of legislative policy, "areas annexed to municipalities in accordance with appropriate standards should receive the services provided by the annexing municipality . . . as soon as possible following the annexation," and to § 10-2-417(3), which provides that municipalities "shall not annex territory . . . without the ability and without the intent to benefit the annexed area by rendering municipal services in the annexed area."

Paragraphs 5 and 6 of Alta's July 16, 1981 Policy Declaration referred to the intended availability of police and fire protection, avalanche warning, sewer dump station and planning and zoning services. Yet the Policy Declaration makes no express commitment to extend Alta's water system to the Haiks' property or to supply water notwithstanding the terms of the Water Supply Agreement. Paragraph 7 of the Policy Declaration simply specifies that "[a]ny sewer and water improvements required by future development, according to the established policy of the Town," will be paid for by the owner or developer affected, taking into account the *possibility* of future water availability. Affidavit of Mayor William H. Levitt, dated January 21, 1997 (dkt. no. 23), at ¶ 20.

As far as § 10-2-417(3) is concerned, this plainly was not a case of annexation solely to generate revenue. Anticipated revenue was minimal. The services referred to in the Policy

Declaration were provided.<sup>9</sup> Compare *Chevron U.S.A., Inc. v. City of North Salt Lake*, 711 P.2d 228 (Utah 1985) (where it is uncontroverted that city annexed property solely to gain revenue with "no ability to render services that would benefit" the annexed property, annexation properly held unlawful under § 10-2-417(3)). Sections 10-2-401(4) and 10-2-417(3) do not specify which municipal services the annexing authority must have the ability and intent to provide for a lawful annexation to occur; nor does the balance of the Local Boundary Commissions Act, §§ 10-2-401 *et seq.*, expressly require that water or sewer services be furnished to all annexed property, or that municipalities act immediately to further the development of annexed areas.<sup>10</sup>

Apart from case and statutory authority, the Haiks point to no express contractual agreement with Alta, made either in the context of annexation or otherwise, entitling the Haiks to municipal water service. Instead, the Haiks assert that Alta "became obligated to provide water in the Albion Basin by its own statements at the time of annexation." Pltfs' Reply/Opp. Mem. (Alta) at 11. According to the Haiks, the Mayor of Alta spoke of doing "everything possible to regularize the water supply in the basin," and that Alta would "try to work something out with the Water Department, as they actually have full control over the water in the canyon." *Id.* (quoting Pltfs' Exh. 11, at 2-3). "By such statements," the Haiks argue, "Alta convinced the property owners in the Albion Basin to favor annexation." *Id.* at 12.<sup>11</sup>

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<sup>9</sup> In fact, Paragraph 6 of the Policy Declaration recited that "[t]he subject area has been serviced by the Town of Alta for several years by fire and police protection, avalanche warning, 911 emergency communications, library, and sewage disposal through the Town dump station."

<sup>10</sup> If anything, the Act appears to *restrict* development in newly annexed areas. See Utah Code Ann. § 10-2-418 (1996); *Sweetwater Properties v. Town of Alta*, 622 P.2d 1178, 1181-82 (Utah 1981). However, the parties to this proceeding have not briefed or argued the question whether § 10-2-418 affected the Haik property in any way.

<sup>11</sup> The Haiks also point to statements made when Mayor Levitt met privately with Albion Basin property  
(continued...)

The Haiks would now enforce these statements against Alta, apparently as a matter of promissory estoppel.<sup>12</sup> However,

Utah recognizes the general rule precluding a party from asserting estoppel against the government. *Utah State University v. Sutro & Co.*, 646 P.2d 715, 718 (Utah 1982). This rule safeguards the interests of the public which may be jeopardized by the "vagaries of political tides, frequent changes of public officials, the possibility of collusion, or of circumventing procedures set up by law, then suing for the value of goods furnished or services rendered." *Id.* Nonetheless, we recognize an exception to this general rule in unusual circumstances "when it is plainly apparent that its application would result in injustice, and there would be no substantial adverse effect on public policy...." *Id.* The critical inquiry is "whether it appears that the facts may be found with such certainty, and the injustice to be suffered is of sufficient gravity, to invoke the exception." *Id.* at 720.

*Prows v. State of Utah*, 822 P.2d 764, 769 (Utah 1991).

Alta's 1981 Policy Declaration may itself have some binding force, but informal statements by the Mayor in the context of the annexation discussions do not operate as an amendment to that

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<sup>11</sup>(...continued)

owners, promising to "do everything possible" to allow them to build. *Id.*

<sup>12</sup> Though the Haiks' do not invoke promissory estoppel by name, the arguments presented in their memoranda appear to track its essential elements. As *Andreason v. Aetna Casualty & Surety Co.*, 848 P.2d 171 (Utah Ct. App. 1993), explains:

Promissory estoppel may be invoked in circumstances where "equity recognizes the unfairness of permitting withdrawal of the promise and will enforce it." *Tolboe*, 682 P.2d at 846 (quoting *Union Tank Car Co. v. Wheat Bros.*, 15 Utah 2d 101, 387 P.2d 1000, 1003 (1964)). The necessary elements of promissory estoppel include: "(1) a promise reasonably expected to induce reliance; (2) reasonable reliance inducing action or forbearance on the part of the promisee or a third person; and (3) detriment to the promisee or third person." *Weese v. Davis County Comm'n*, 834 P.2d 1, 4 n. 17 (Utah 1992) (emphasis added). Utah has also adopted the Restatement (Second) of Contracts section 90 describing promissory estoppel as follows: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires." *Tolboe*, 682 P.2d at 845 (quoting Restatement (Second) Contracts § 90(1) (1981)).

*Id.* at 174-75 (quoting *Tolboe Constr. Co. v. Staker Paving & Constr. Co.*, 682 P.2d 843 (Utah 1984)). "Promissory estoppel is historically rooted as a substitute for consideration, *Allegheny College v. National Chautauqua County Bank*, 246 N.Y. 369, 159 N.E. 173, 57 A.L.R. 980, per Cardozo, C. J., citing 1 Williston on Contracts, Secs. 116, 139 . . . ." *Ravarino v. Price*, 123 Utah 559, 568, 260 P.2d 570, 575 (1953).

document adding water service to the services listed in Paragraph 5. "The policy declaration, including maps, may be amended from time to time *by the governing body after at least 20 days' notice and public hearing.*" Utah Code Ann. § 10-2-414 (1996) (emphasis added). Nothing in the statute confers upon the Mayor the power to amend. Nor may the Mayor's "promise" be read into the Annexation Ordinance as a matter of "statutory construction." Pltfs' Reply/Opp. Mem. (Alta) at 13-14.

The Haiks have established no express legislative or contractual duty on the part of Alta to supply water to Albion Basin Subdivision #1. Alta cannot fairly be burdened with an implied legal duty to supply water that Alta has no legal right to use. Nor can it fairly be said that Alta has denied to any person the equal protection of its laws simply because it has failed to supply what it does not have the legal right to supply.<sup>13</sup>

It is Salt Lake City, not Alta, that holds the right and exercises the power.

If a duty to supply water exists, that duty must devolve upon the entity with legal right to, and lawful control of the water that may be physically available to the Haiks' property--Salt Lake City.

### III. Salt Lake City and "Prior Written Consent" to the Extension of Water Service

The Haiks assert no duty on the part of Salt Lake City to supply water to the Albion Basin property; Albion Basin lies beyond the Salt Lake City limits. While the statute provides that a city operating a waterworks "may sell and deliver the surplus product or service capacity of any such

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<sup>13</sup> The general duty imposed upon municipalities by Article XI, § 6 of the Utah Constitution, viz., that "all such waterworks, water rights, and sources of water supply now owned or hereafter to be acquired by any municipal corporation, shall be preserved, maintained and operated by it for supplying its inhabitants with water at reasonable charges," presupposes that the water to be supplied to inhabitants has already been lawfully acquired by the municipality.

works, not required by the city or its inhabitants, to others beyond the limits of the city," Utah Code Ann. § 10-8-14(1), a city plainly is not required to do so.<sup>14</sup> In fact, the Haiks concede that as a matter of contract, Salt Lake City may refuse consent to an extension of water service by Alta pursuant to the Water Supply Agreement, at least so long as such refusal is "reasonable" and not "arbitrary" or "capricious."

The Haiks contend that they are entitled to test the reasonableness of Salt Lake City's refusal to consent as "taxpaying property owners of Alta," but should also be treated as "intended third-party beneficiaries of the Water Supply Agreement." Reply Memorandum in Support of Plaintiffs' Motion for Summary Judgment, and Response in Opposition to Salt Lake City's Cross-Motion for Summary Judgment, filed March 19, 1997 (dkt. no. 31) ("Pltfs' Reply Mem. (SLC)"), at 11. They acknowledge "the right of Salt Lake City to exert some control over uses in the watershed," but deny its right to disallow "any new residential water use, no matter how environmentally sound" outside of Alta's 1976 limits. *Id.* at 19.

#### A. Implied Covenant of Good Faith and Fair Dealing

The Haiks assert that Salt Lake City's duty reasonably to give or refuse consent flows from the implied covenant of good faith and fair dealing, citing *Olympus Hills Shopping Ctr. Ltd. v. Smith's Food and Drug Centers, Inc.*, 889 P.2d 445, 451 (Utah Ct. App. 1994), *cert. denied*, 899 P.2d 1231 (Utah 1995). *Olympus Hills* recognizes that "parties who retain express power or

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<sup>14</sup> Indeed, this provision may test the limits of Article XI, Section 6 of the Utah Constitution, which forbids a municipal corporation to "directly or indirectly, lease, sell, or alien or dispose of any waterworks, water rights, or sources of water supply now, or hereafter to be owned by it . . ." See generally *Hyde Park Town v. Chambers*, 99 Utah 118, 104 P.2d 220 (1939) (agreement granting tap rights in consideration for right-of-way held void under Utah Const., art. XI, § 6; dictum that "[i]f they have surplus water they may sell it within legal bounds," citing statute).

discretion under contract can exercise that power or discretion in such a way as to breach the covenant of good faith and fair dealing," as where a party "uses its discretion for a reason outside of the contemplated range—a reason beyond the risks assumed by the party claiming a breach," or for a reason inconsistent with "the justified expectations of the other party." *Id.* at 450, 451 (quoting Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv.L.Rev. 369, 385-86 (1980), and Restatement (Second) of Contracts § 205 cmt. a (1981)). However, the Haiks do not delineate how Salt Lake City has wrongfully exercised power or discretion under the Water Supply Agreement, either for a reason beyond the risks that Alta assumed in that agreement or for a reason inconsistent with Alta's "justified expectations." *See id.* at 451.

Instead, the Haiks assert that Salt Lake City's distinction between allowing water use within Alta's city limits under the Water Supply Agreement and refusing consent to its use outside of Alta's 1976 city limits is simply irrational. While Salt Lake City may rationally limit development in order to maintain and improve water quality, the Haiks concede, extending water and sewer service to their property would not defeat this policy, but rather would further Salt Lake City's watershed protection goals.

That the Haiks' preferred outcome may be reasonable or rational does not of necessity render the contrary outcome unreasonable or irrational. Circumstances often admit more than one rational or reasonable result.

That Salt Lake City would refuse consent to extensions in order to limit developmental "sprawl" in the Albion Basin, as Salt Lake City avers it has done, does not indicate that it has

wrongfully exercised power or discretion under the Water Supply Agreement, either for a reason beyond the risks that Alta assumed in that agreement or for a reason inconsistent with Alta's "justified expectations." Restriction of Alta's expansion of water service seems to be the clear import of Paragraph 8.

Paragraph 8 is phrased not in the affirmative language of grant ("Alta may extend its pipelines . . . as approved by Salt Lake City"), but in the negative language of limitation: "pipelines shall not be extended to or supply water to any properties or facilities not within the present city limits of Alta without the prior written consent of [Salt Lake] City." In essence, Paragraph 8 takes the extension of Alta's water pipelines beyond its 1976 limits out of the subject matter of the Water Supply Agreement and makes such extensions the subject of a future, separate agreement requiring Salt Lake City's prior assent in writing.

The Haiks' counsel have diligently sifted the contract law books in search of a rule that would compel Salt Lake City to give consent under Paragraph 8 of the Water Supply Agreement, but they have done so to no avail. The court concludes that the Haiks have failed to establish that Salt Lake City has breached any duty reasonably to give or refuse consent, whether under the implied covenant of good faith and fair dealing, or otherwise.

#### **B. Equal Protection Claims Against Salt Lake City**

The Haiks do not challenge the validity of Salt Lake City's 1988 Water Management Plan, its 1991 Watershed Ordinance, or even the 1976 Water Supply Agreement. Instead they assail "the irrational distinction Salt Lake City has drawn between uses inside Alta's 1976 Town limits . . . and uses outside" in refusing to consent to extension of water service under Paragraph 8 the Water Supply Agreement. Pltfs' Reply/Opp. Mem. (SLC) at 19. The Haiks contend that Salt



Lake City's refusal to consent to water service violates the Haiks' right to equal protection under the law because it irrationally treats them differently from other similarly situated property owners. Allowing increased water use within the 1976 limits, the Haiks submit, threatens watershed degradation no less than increased water use outside those limits; where Salt Lake City allows one, in fairness it should allow the other, particularly where the amount of water already allocated for use by Alta under the 1976 Agreement would allow for such an extension.

The Haiks have recast their contractual "reasonableness" theory in constitutional terms. Their argument would also appear to recast Salt Lake City in the role of a local government furnishing water service to "similarly situated property owners," and whose conduct is to be scrutinized using the rational basis standard. See *Thompson v. Salt Lake City*, 724 P.2d at 959-60; *Bank of America Nat'l Trust v. Summerland County*, 767 F.2d 544, 548 (9th Cir. 1985).

Determining whether legislation survives rational-basis scrutiny is a two-step process. The first step is to identify a legitimate government purpose the enacting governmental body could have been pursuing. The actual motivations of the legislators are unimportant, and the decision makers are not required to articulate a reason for their acts. The second step of the rational-basis inquiry is to determine whether a rational basis exists to believe that the legislation would further the hypothesized purpose. Here the inquiry is whether a conceivably rational basis exists, not whether that basis was actually considered by the legislative body.

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

consent pursuant to Paragraph 8 of the Water Supply Agreement.<sup>15</sup>

#### IV. "Taking" of the Haiks' Albion Basin Property

Alta also moved for summary judgment on the Haiks' claim that their Albion Basin property has been the subject of a "taking" without payment of just compensation.<sup>16</sup> The Haiks assert that development of their Albion Basin "was not foreclosed to the Haiks until after they had purchased the land in 1994," when Alta "refused to extend water or sewer to their lots in spite of the Haiks' willingness to pay for that extension," and consequently denied them a building permit. Pltfs' Reply/Opp. Mem. (Alta) at 24. "These actions," the Haiks argue, "constitute a taking." *Id.*

Governmental land use regulation may, under extreme circumstances, amount to a "taking" of the affected private property which entitles the property owner to just compensation under the United States and Utah Constitutions. *See, e.g., United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985). To prevail on their taking claim, the Haiks must show that Alta's actions (1) did not substantially advance a legitimate public purpose; or (2) denied it economically viable use of its property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987). The fact that a regulation deprives the property owner of *the most profitable use* of his property does not necessarily accomplish a taking or establish the owner's right to just compensation. *See Andrus v.*

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<sup>15</sup> Moreover, even if subject to rational basis scrutiny, Salt Lake City responds that limiting development outside Alta's 1976 limits was accomplished "for the very purpose of preventing development over a dispersed area, since dispersed development has a greater detrimental impact on water quality," thus furnishing a rational basis for the distinction challenged by the Haiks. Reply Memorandum in Support of Defendant Salt Lake City's Cross Motion for Summary Judgment, filed April 9, 1997, at 19. While the Haiks dispute this rationale, they have not shown it to be arbitrary or capricious, or for that matter, unreasonable.

<sup>16</sup> The Haiks appear to make a Rule 56 cross motion on this claim for the first time in their reply memorandum. *See* Pltfs' Reply/Opp. Mem. (Alta) at 23 n.13.

*Allard*, 444 U.S. 51, 66 (1979).

In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), cited by the Haiks, the county adopted an ordinance expressly forbidding construction or reconstruction of buildings on canyon property that had been ravaged first by fire, then by flood, and then designated as an "interim flood protection area." *Id.* at 307. The Court held that "where the government's activities have already worked a taking of *all use of property*, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* at 321 (emphasis added). Here, Alta has adopted no express prohibition against building in the Albion Basin. Nor do the Haiks suggest that Alta's conditioning of issuance of building permits upon the availability of 400 gallons of water per day per unit amounts to a "taking" of all use of their property because it does not advance a legitimate public policy or unfairly forestalls any reasonable development. Compare *Del Monte Dunes at Monterey v. City of Monterey*, 95 F.3d 1422, 1434 (9th Cir. 1996).

In *Nollan v. California Coastal Commission*, the governmental entity conditioned the issuance of a building permit upon the landowners' surrender of an easement to the public across their beachfront property. The Court concluded in *Nollan* that if the governmental entity "wants an easement across the Nollans' property, it must pay for it." 483 U.S. at 842. Here, Alta has asked to Haiks to transfer, convey, or surrender nothing.

The Haiks still have in October of 1997 what they purchased from Marvin Melville in October of 1994: lots in Albion Basin Subdivision #1 with appurtenant water rights limited to 50 gallons per day per unit under the 1963 agreement. They retain the "full 'bundle' of property rights" they purchased. *Andrus*, 444 U.S. at 66. And notwithstanding the Haiks' assertion that at

the time of annexation, "Albion Basin property owners had a right to expect that they would be able to build homes on their land," Pltfs' Reply/Opp. Mem. (Alta) at 24,<sup>17</sup> they still lack the "one 'strand' of the bundle" that their predecessor in interest also did not have: a legal right to use water in an amount sufficient to satisfy the health department requirement of 400 gallons per day per unit. The Haiks cannot build on their property, not because Alta or Salt Lake City have changed the rules, but rather because the rules remain the same.

The right to *use* real property, as part of the constitutional right to "property" protected by the Fifth and Fourteenth Amendments, does not carry with it a corollary right to use water already put to other beneficial use by a prior appropriator. Nor does such a right obtain upon annexation in the form of an entitlement to "municipal services." Otherwise, state and local governments in the arid West could conceivably be held to have "taken" all lands for which no unappropriated water exists to be supplied through state, county or city systems.

In *Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir. 1990), owners of undeveloped land who had been refused water hookups by a local public utility district sought compensation for the taking of their property because the lack of water hookups made them ineligible for county building permits and denied them all economically viable use of their land. Reversing summary judgment in favor of the utility district, the Ninth Circuit observed:

Withholding *available* water from land zoned exclusively for residential use might interfere with the landowners' reasonable investment-backed expectations by preventing all practical use of that land. . . . That the [plaintiffs] can still walk on, or ride a bike on, or look at their land does not, at this preliminary stage of the case, reassure us to the contrary. In this context, *assuming that the [plaintiffs]*

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<sup>17</sup> The Supreme Court has suggested that where an owner is denied only some economically viable uses, a taking still may have occurred where government action has a sufficient economic impact and interferes with distinct investment-backed expectations. See *Lucas*, 505 U.S. at 1019-20 n.8.

can show that sufficient water was available, then BCPUD's water moratorium may indeed constitute more than a mere reduction in property value. *Cf. Trustees for Alaska v. E.P.A.*, 749 F.2d 549, 560 (9th Cir. 1984) (mere reduction in property value does not establish a denial of all economically viable use of property).

917 F.2d at 1155 (emphasis added & citation omitted). To establish a taking of their property, the landowners in *Lockary* were thus required to establish first that sufficient water was *available* to be furnished through the utility district hookups they requested.

Here, it appears from the record that neither the Haiks nor the Town of Alta have available the water necessary to make an "economically viable use" of the Albion Basin property through construction of residential dwellings. While Alta has rights under the Water Supply Agreement to more water than it currently uses, that water is not legally "available" outside Alta's 1976 limits without the consent of the proprietor, Salt Lake City. As the Ninth Circuit acknowledged in *Lockary*, if the loss of economic viability of property "is caused by something other than the government regulation, it does not constitute a taking." 917 F.2d at 1155 (citing *Bedford v. United States*, 192 U.S. 217, 225 (1904)).

On the present record, it appears that the Haiks' taking claim also fails as a matter of law.

#### V. Defendants' Motion to Strike Certain Exhibits

Alta also filed a motion to strike certain of the Haiks' exhibits<sup>18</sup> as, *inter alia*, not properly authenticated for purposes of Rule 56. Salt Lake City joined Alta's motion by footnote. See Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendant Salt Lake City's Cross-Motion for Summary Judgment, filed January 22, 1997 (dkt. no.

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<sup>18</sup> Specifically, Alta objects to Exhibits 6, 16, 17, 24, 26, 27, 31, 40 and 42 to the Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment.

19), at 7 n.2.<sup>19</sup> The Haiks respond that the challenged documents were obtained pursuant to Utah Code Ann. § 63-2-102 from the defendants' own files and that there exist sufficient indicia of authenticity to render the exhibits admissible even at trial. Pltfs' Reply/Opp. Mem. (Alta) at 1-8.

Generally, under Rule 56 the moving party must adduce admissible evidence to demonstrate that there are no genuine issues of material fact which preclude entry of summary judgment, for it is clear that "only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment." *Beyene v. Coleman Security Systems Services, Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988). *Accord, Hall v. Bellmon*, 935 F.2d 1106 (10th Cir. 1991); *Jones v. Wilkinson*, 800 F.2d 989, 1002 (10th Cir. 1986) ("Fed.R.Civ.P. 56 . . . requires that material supporting a motion for summary judgment be admissible evidence"); *World of Sleep, Inc. v. Lay-Z-Boy Chair Co.*, 756 F.2d 1467, 1474 (10th Cir. 1985) ("Under Fed.R.Civ.P. 56(e), the court may consider only admissible evidence in ruling on a motion for summary judgment."); *H.B. Zachry Co. v. O'Brien*, 378 F.2d 423, 425 (10th Cir. 1967).

A moving party may . . . supplement the motion with affidavits, pleadings, deposition transcripts, interrogatory answers, admissions, stipulations, transcripts from another proceeding, oral testimony, *authenticated exhibits*, and anything of which the court may properly take judicial notice. To be considered, the facts contained in these materials must be admissible or usable at trial, although for purposes of summary judgment, the facts need not be presented to the court in a form admissible at trial.

Steven Baicker-McKee, et al., *Federal Civil Rules Handbook* 600 (1997 ed.) (emphasis added & footnote omitted).

Rule 56(e) expressly requires that summary judgment affidavits "set forth such facts as

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<sup>19</sup> While Salt Lake City points to plaintiffs' Exhibits 14, 17, 23, 27, and 40 as having disputed authenticity, Alta's motion to strike did not address Exhibits 14 and 23 and are not encompassed within Salt Lake City's joinder in that motion.

would be admissible in evidence . . . ." The same principles apply to deposition testimony and other forms of evidence approved for use on summary judgment by Rule 56(c). *See Garside v. Osco Drug, Inc.*, 895 F.2d 46, 49 (1st Cir. 1990); *Klein v. Trustees of Indiana University*, 766 F.2d 275, 283 (7th Cir. 1985) ("the party opposing the summary judgment motion must present affidavits, depositions, answers to interrogatories, or admissions which set forth disputed facts in a form admissible in evidence.") 762 F.2d 952); *Clay v. Equifax, Inc.*, 762 F.2d 952, 956 (11th Cir. 1985). As the court observed in *Martz v. Union Labor Life Ins. Co.*, 757 F.2d 135, 138 (7th Cir. 1985): "The facts must be established through one of the vehicles designed to ensure reliability and veracity—depositions, answers to interrogatories, admissions and affidavits. When a party seeks to offer evidence through other exhibits, they must be identified by affidavit or otherwise made admissible in evidence. 6 Moore's Federal Practice P 56.11[1.-8] (2d ed. 1983)." *See also Singer v. Wadman*, 595 F. Supp. 188, 269 (D. Utah) (Winder, J.). Only deposition testimony that in substance would be admissible in evidence at trial may be introduced on a summary judgment motion. *Skillsky v. Lucky Stores, Inc.*, 893 F.2d 1088, 1091 (9th Cir. 1990) (deposition testimony that is not based on personal knowledge and is hearsay is inadmissible and cannot raise a genuine issue of material fact sufficient to withstand summary judgment); *Jacobsen v. Filler*, 790 F.2d 1362, 1367 (9th Cir. 1986).

The Haiks may be correct that when examined, each of the challenged exhibits would prove to be authentic.<sup>20</sup> Nevertheless, as moving parties under Rule 56, the Haiks are bound to

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<sup>20</sup> However, as a general rule, newspaper articles (e.g., Exhibit 40) are not admissible for purposes of summary judgment. *See, e.g., Horta v. Sullivan*, 4 F.3d 2, 8 (1st Cir. 1993) (court refused to consider hearsay newspaper account in exhibit form and asserted that "inadmissible evidence may not be considered"); *Dowdell v. Chapman*, 930 F.Supp. 533, 541 (M.D. Ala. 1996) *Tilton v. Capital Cities/ABC, Inc.*, 905 F.Supp. 1514, 1544 (N.D. Okla. 1995) (a "newspaper article is not proper evidence for submission on summary judgment as it is inadmissible hearsay").

(continued...)



abide by the rule's requirements concerning the admissibility of Rule 56(c) materials. For that reason, the defendants' motion to strike plaintiffs' Exhibits 6, 16, 17, 24, 26, 27, 31, 40 and 42 should be granted.<sup>21</sup>

### Conclusion

The Haiks have failed to show that they are entitled to judgment as a matter of law that the Town of Alta, by declining to extend its water service to the Haiks' Albion Basin property, has denied them equal protection of the laws, or breached any other asserted statutory or contractual duty to furnish culinary water. The Haiks likewise have failed to establish a breach of any contractual or other legal duty on the part of Salt Lake City to approve the extension of Alta's water lines to serve the Haiks' property. The parties having established the absence of any genuine issue of material fact, it now appears that the Town of Alta and Salt Lake City are each entitled to judgment as a matter of law on the Haiks' pleaded claims. Therefore,

IT IS ORDERED that plaintiffs' motion for partial summary judgment is DENIED; that defendant Town of alta's motion for summary judgment is GRANTED; that the Town of Alta's motion to strike is GRANTED; and that Salt Lake City's motion for summary judgment is

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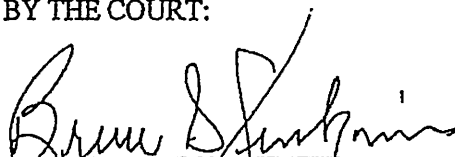
<sup>20</sup>(...continued)

<sup>21</sup> The Haiks requested a continuance should "the Court determine[] that the challenged exhibits must be struck, and that without them it must deny the plaintiffs' Motion for Summary Judgment." Pltfs' Reply/Opp. Mem. (Alta) at 8. It appears, however, that the exhibits in question are not material to the issues that the Court has determined to be dispositive, and a continuance to permit authentication of the exhibits appears unnecessary.

GRANTED, and plaintiffs' complaint shall be and hereby is DISMISSED.

DATED this 31 day of October, 1997.

BY THE COURT:

  
\_\_\_\_\_  
Bruce S. Jenkins  
United States Senior District Judge

klh

United States District Court  
for the  
District of Utah  
November 4, 1997

\* \* MAILING CERTIFICATE OF CLERK \* \*

Re: 2:96-cv-00732

True and correct copies of the attached were mailed by the clerk to the following:

Mr. Stephen G. Crockett, Esq.  
GIAUQUE CROCKETT BENDINGER & PETERSON  
170 S MAIN STE 400  
SALT LAKE CITY, UT 84101-1664  
FAX 9,5311486

Mr. Craig V Wentz, Esq.  
CHRISTENSEN & JENSEN  
175 S WEST TEMPLE STE 510  
SALT LAKE CITY, UT 84101

Mr. Paul D Veasy, Esq.  
PARSONS BEHLE & LATIMER  
201 S MAIN ST STE 1800  
PO BOX 45898  
SALT LAKE CITY, UT 84111-0898  
FAX 9,5366111

Mr. Steven W. Allred, Esq.  
SALT LAKE CITY ATTORNEYS OFFICE  
451 S STATE ST STE 505  
SALT LAKE CITY, UT 84111  
FAX 9,5357640

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03236

# Addendum B

176 F.3d 488

Unpublished Disposition

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a  
"Table of Decisions Without Reported  
Opinions" appearing in the Federal Reporter.  
See CTA 10 Rule 32.1 before citing.)  
United States Court of Appeals, Tenth Circuit.

Raymond A. HAIK; Mark C.  
Haik, Plaintiffs-Appellants,

v.

TOWN of Alta, a political subdivision  
of the State of Utah; Salt Lake City  
Corporation, a political subdivision of  
the State of Utah, Defendants-Appellees.

No. 97-4202.

|  
April 5, 1999.

(D.C. No. 96-CV-732-J)(Dist. of Utah)

Before BRISCOE, BARRETT, and MURPHY Circuit  
Judges.

### ORDER AND JUDGMENT\*

\*1 Raymond A. Haik and Mark C. Haik (the Haiks)  
appeal the district court's grant of summary judgment in  
favor of defendants, the Town of Alta (Alta) and Salt  
Lake City Corporation (Salt Lake City) on their equal  
protection and taking claims.

#### *Background*

In October, 1994, the Haiks purchased lots 25, 26, 29,  
and 30, of the Albion Basin Subdivision # 1 (Albion  
Basin) located above the Alta and Snowbird ski resorts  
at the top of Little Cottonwood Canyon, east of Salt  
Lake City, Utah. The Haiks then contacted Alta regarding  
water and sewer services for their lots. Alta responded  
in November, 1994, that it does not provide water and  
sewer services to Albion Basin and referred the Haiks to  
Salt Lake City's Department of Public Utilities, Water  
Division. In April, 1995, the Haiks requested applications

for building permits and sewer and water services from  
Alta. Alta responded that it would be premature to begin  
the building permit process until the Haiks had procured  
adequate water and approval for a full containment  
sewage holding tank. The Haiks then sought information  
from Salt Lake City regarding water service to Albion  
Basin. In 1996, Salt Lake City notified the Haiks that it  
declined to consent to the extension of Alta water pipes  
and water supply to Albion Basin, relying on paragraph  
8 of the 1976 Water Supply Agreement and the 1991  
Watershed Ordinance, § 17.04.020 of Salt Lake City's  
Ordinances.

Alta receives its water supply from Salt Lake City by virtue  
of the August 12, 1976, INTERGOVERNMENTAL  
AGREEMENT-WATER SUPPLY AGREEMENT  
SALT LAKE CITY TO ALTA CITY (the 1976 Water  
Supply Agreement). (Appellants' App. Vol. I, Tab 9.) The  
1976 Water Supply Agreement "make[s] available to Alta  
for its use, ..., the normal flow of raw, untreated water,  
not to exceed 265,000 gallons per day,...." *Id.* at 97 ¶ 1.  
Paragraph 8, relied on by Salt Lake City, contains the  
following restriction:

8. It is expressly understood and  
agreed that said pipelines shall not  
be extended to or supply water  
to any properties or facilities not  
within the present city limits of Alta  
without the prior written consent of  
[Salt Lake] City.

*Id.* at 99 ¶ 8. It is undisputed that Albion Basin lays beyond  
the 1976 Alta city limits. It is also undisputed that the  
Board of Health required lots to be supplied with 400  
gallons of water per day as a precondition for issuance of  
a building permit and that the lots were each entitled to  
only 50 gallons of water per day from a water agreement  
with Little Cottonwood Water Company.

In October, 1997, the Haiks initiated this action, claiming  
that because Alta has surplus water and the lots are  
located within the current town limits, Alta had a legal  
duty to supply water to their lots based on Alta's historical  
conduct and applicable state and federal laws.<sup>1</sup> *Id.* Vol.  
I at 6 ¶ 20. The Haiks contended that: (1) Alta had taken  
and damaged their property for public use by refusing  
to extend its municipal services to Albion Basin and by  
its refusal to grant them a building permit, in violation  
of Article I, Section 22 of the Utah Constitution, *id.* at

11 ¶ 39; (2) Alta's actions in furtherance of its policy of non-development have been arbitrary and capricious, depriving them of their right to substantive due process and equal protection of the law under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983, *id.* at 13 ¶ 47; (3) Alta's actions deprived them of their rights to substantive due process and equal protection of the law under Article I, Sections 7 and 24 of the Utah Constitution and violated the Annexation Ordinance and Utah Code section 10-2-401(4), which required Alta to make the same level of municipal services available to their property as it does to others, *id.* at 14 ¶ 50; (4) they were entitled to a declaration that the 1976 Water Supply Agreement does not preclude the extension of Alta's water lines to their lots; *id.* at 15 ¶ 54; and (5) they were entitled to an injunction preventing Salt Lake City from raising the 1976 Water Supply Agreement as a defense to the extension of Alta's water lines and requiring Alta to make municipal services available to their lots in order to receive a building permit, *id.* at 16 ¶ 59.

\*2 On October 31, 1997, the district court granted summary judgment in favor of Alta and Salt Lake City. *Id.* Vol. III at 853-81. On the Haiks' equal protection claim against Alta, the district court concluded that the claim "presupposed the existence of a legal duty on the part of Alta to supply water to property owners such as the Haiks, as well as the legal and physical capacity to do so." *Id.* at 860. The court then noted that while Alta may have the physical capacity to supply water to the Haiks' lots, Alta does not have the legal capacity to do so under the terms of the 1976 Water Supply Agreement, without Salt Lake City's consent. *Id.* at 865-66. On the Haiks' equal protection claim against Salt Lake City, the court found that: (a) the Haiks "failed to establish that Salt Lake City had breached any duty [to] reasonably ... give or refuse consent, whether under the implied covenant of good faith dealing, or otherwise," *id.* at 872, and (b) equal protection is not available to challenge Salt Lake City's exercise of its contractual power to consent pursuant to paragraph 8 of the 1976 Water Supply Agreement because it had no legal duty to furnish water to users outside its own city limits, be they "similarly situated" or not, *id.* at 873-74. On the Haiks' annexation claim, the district court concluded that they failed to establish an express legislative or contractual duty on the part of Alta to supply water to their property and Alta cannot be fairly burdened with an implied legal duty to supply water that Alta has no legal right to use. *Id.* at 869. The court then rejected the Haiks' taking claim

against Alta on the ground that "neither the Haiks nor the Town of Alta ha[d] available the water necessary to make an 'economically viable use' of the Albion Basin property through construction of residential dwelling," *id.* at 877, and the Haiks retain the "full 'bundle' of property rights' they purchased," *id.* at 875. The court reasoned that if the loss of economic viability is caused by something other than the government regulation, it does not constitute a taking. *Id.* at 877.

On appeal, the Haiks contend that the district court erred: (1) in concluding that they could not bring an equal protection claim against Salt Lake City because it was acting in a proprietary capacity in supplying water outside its corporate limits; (2) in concluding that Alta did not violate their right to equal protection by refusing to extend its water lines to their lots, in view of the district court's finding that Alta was physically able to supply water and they were willing and able to pay the costs of connection; (3) in failing to recognize that Salt Lake City's refusal to consent to Alta's extension of water to their lots could not be reasonable where it was not based on any finding that their proposed use would be detrimental to the watershed, but on a collusive desire to prevent any development in the upper Albion Basin; and (4) in determining no taking occurred even though they are completely unable to build on their lots.

\*3 We review the district court's order granting summary judgment *de novo*, applying the same standard as the district court. *Thomas v. International Bus. Machs.*, 48 F.3d 478, 484 (10th Cir.1995). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "We examine the factual record and reasonable inferences therefrom in the light most favorable to [the non-movants], who opposed summary judgment." *Thomas*, 48 F.3d at 484.

## Discussion

### I. Equal Protection

The Haiks argue that they have asserted a viable equal protection claim against Salt Lake City. The Haiks

maintain that: (1) Salt Lake City's refusal to consent to the extension of Alta's water lines to their property is a governmental act subject to equal protection challenges, and (2) even if Salt Lake City acted in a proprietary rather than a governmental capacity, equal protection challenges may be raised against governmental entities acting in their propriety capacities. The Haiks declare that Salt Lake City's refusal to consent to Alta's extension of its water lines to their lots could not be reasonable in that it was not based on any finding that their proposed use would be detrimental to the watershed, but on a collusive desire to prevent any development in the upper Albion Basin.<sup>2</sup> In addition, the Haiks reason that the district court erred in concluding that Alta did not violate their right to equal protection by refusing to extend its water lines to their lots, in view of the district court's finding that Alta was physically able to supply water and they were willing and able to pay the costs of connection.<sup>3</sup>

#### A. Federal Equal Protection

According to the Equal Protection Clause of the Fourteenth Amendment, "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This Clause "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly." *Vacco v. Quill*, 521 U.S. 793, ---, 117 S.Ct. 2293, 2297, 138 L.Ed.2d 834 (1997). Unless a legislative classification or distinction burdens a fundamental right or targets a suspect class, courts will uphold it if it is rationally related to a legitimate end. *Id.*

*Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 532 (10th Cir.1998).

"The interest in water for real estate development is not a fundamental right." *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir.1990). See also *O'Neal v. City of Seattle*, 66 F.3d 1064, 1067 (9th Cir.1995) (equal protection claim based on denial of water service reviewed under rational basis standard because it affects only economic interests, not fundamental rights); *Magnuson v. City of Hickory Hills*, 933 F.2d 562, 567 (7th Cir.1991) ("We do not consider the right to continued municipal water service such a fundamental right;..."); *Ransom v. Marrazzo*, 848 F.2d 398, 413 (3d Cir.1988) (strict scrutiny not required because water service is not a fundamental right); *Chatham v. Jackson*, 613 F.2d 73, 80 (5th Cir.1980) (water service not a fundamental right). Thus, to meet a

constitutional challenge the state action in question needs only some rational relation to a legitimate state interest. *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976); *Tonkovich*, 159 F.3d at 532. Moreover, because state action subject to rational basis review is presumptively constitutional, the burden is on the plaintiffs to establish that the state action is irrational or arbitrary and that it cannot conceivably further a legitimate governmental interest. *Riddle v. Mondragon*, 83 F.3d 1197, 1207 (10th Cir.1996). "Under the rational basis test, if there is a 'plausible reason[ ] for [the state] action, our inquiry is at an end.'" *United States v. Castillo*, 140 F.3d 874, 883 (10th Cir.1998) (quoting *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980)). "We need not find that the legislature ever articulated this reason, nor that it actually underlay the legislative decision, nor even that it was wise." *Id.* (citations omitted).

\*4 There are plausible reasons for Alta's refusal to extend its water lines to the Haiks' property. Alta has a legitimate state interest in not breaching its 1976 Water Supply Agreement. Alta does not have an independent right to water; it merely purchases water from Salt Lake City. Thus, while Alta may have the physical capacity to supply water to the Haiks' lots, it does not have the legal right to do so, and to compel Alta to breach its contract would be unreasonable. Nor, we add, does Alta have a legal obligation under Utah law to provide the Haiks with water. A series of Utah Supreme Court cases have specifically expressed that "a municipal corporation ... does not have a legal duty to provide water service to all members of the public...." *Thompson v. Salt Lake City Corp.*, 724 P.2d 958, 959 (Utah 1986). See *Rose v. Plymouth*, 110 Utah 358, 173 P.2d 285, 286 (Utah 1946). The Utah Supreme Court recently reinforced that a municipality need only act "reasonably" with respect to the provision of municipal services to its residents. See *Platt v. Town of Torrey*, 949 P.2d 325, 329 (1997). We find Alta treated the Haiks reasonably here.

Furthermore, Salt Lake City has a legitimate interest in preserving its watershed. The Haiks failed to establish that Salt Lake City's refusal to consent to the extension of Alta's water lines to their property was irrational or arbitrary or that it could not conceivably further a legitimate governmental interest in view of the extensive evidence presented by Salt Lake City regarding preservation of its watershed, Little Cottonwood Canyon.



The Haiks challenge Salt Lake City's stated interest in protecting the watershed by noting Salt Lake City has consented to other extensions and uses not contemplated by the 1976 Water Supply Agreement. The additional uses referred to are Alta's 1995 extension, without Salt Lake City's consent, of its lines to the Alpenglowlodge, Salt Lake City's consent in 1988 and again in 1993 to allow Alta Ski Lifts Company to use additional water for snowmaking, and Salt Lake City's consent in 1992 to provide water to the U.S. Forest Service for recreational purposes at the Albion Basin campground. Because Alpenglowlodge sits within Alta's 1976 boundaries, extension of the lines without Salt Lake City's consent was appropriate and is irrelevant to plaintiffs' claim of unequal and irrational treatment. This same explanation applies to Salt Lake City's 1988 consent for snowmaking purposes, which was similarly limited. Finally, the City's 1992 consent to allow the Forest Service to use water for recreational purposes and 1993 consent to allow additional snowmaking were authorized by 1991 Salt Lake City ordinance § 17.04.020.B, which authorized the City to consent only to use for snowmaking or fire protection, use by certain governmental entities on land owned or leased by those entities, and use by residential property owners with a spring on their property. See Appellant's App. at 327-28. Significantly, § 17.04 prohibits the City from consenting to any use-including extension of Alta's water lines to the Haiks' property-other than these three articulated uses, or amending any current permit to enlarge the service boundary or increase the water supply. See *id.* at 327. The Salt Lake City Council has made a rational legislative determination that the particular uses above, even if outside existing service areas, will not result in significant harm to the watershed, whereas increased residential and commercial use outside existing service areas (in this case Alta's 1976 town boundaries) will result in such damage. This classification is rational and is related to the City's stated objective of protecting the watershed.

\*5 In short, Alta and Salt Lake City proffer they had to draw the line somewhere, and chose to do so in the 1976 Agreement at Alta's 1976 town boundaries. They do not claim to be seeking to stop all development in the canyon, or even all development in Alta for that matter. Rather, their purported objective is to curtail further environmentally harmful development outside Alta's 1976 town boundaries. Line-drawing "inevitably requires that some persons who have an almost equally strong claim to

favorable treatment be placed on different sides of the lines. [That] the line might have been drawn differently at some points is" not a matter for judicial consideration. *Federal Communications Comm'n v. Beach Communications, Inc.*, 508 U.S. 307, 315-16, 113 S.Ct. 2096, 124 L.Ed.2d 211 (quoting *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980)).

## B. Utah Equal Protection

Article I, § 24 of the Utah Constitution states: "All laws of a general nature shall have uniform operation." Utah Const. Art. I, § 24. Although this language is dissimilar to its federal counterpart, "these provisions embody the same general principle: persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same." *Malan v. Lewis*, 693 P.2d 661, 669 (Utah 1984). "First, a law must apply equally to all persons within a class." *Id.* at 670. "Second, the statutory classifications and the different treatment given the classes must be based on differences that have a reasonable tendency to further the objectives of the statute." *Id.* If the relationship of the classification to the objectives is unreasonable or fanciful, the disparate treatment is unreasonable. *Id.* We presume that the state acted on a reasonable basis. *Id.* at 671 n. 14. However, that presumption does not require us to accept any conceivable reason for the state action. *Id.* "Rather, we judge such enactments on the basis of reasonable or actual ... purpose." *Id.* Additionally, a municipal corporation "does not have a legal duty to provide water service to all members of the public,...." *Thompson v. Salt Lake City Corp.*, 724 P.2d 958, 959 (Utah 1986).

Alta consistently refused to extend its water lines outside its 1976 city limits without Salt Lake City's permission. Thus, Alta treats all persons in the class of property owners outside its 1976 city limits, including the Haiks, the same. Furthermore, Alta's and Salt Lake City's actions were reasonable.

Therefore, we hold that Alta and Salt Lake City did not violate the Haiks' equal protection rights under either federal or state law.

## II. Taking

\*6 The Haiks contend that the district court erred in determining no taking occurred even though they are completely unable to build on their lots. The Haiks assert that it is immaterial that Alta has not expressly prohibited building in the Albion Basin because by denying them a building permit for their lots without culinary water, Alta has deprived them of all viable economic use of their property. Additionally, the Haiks point out that a regulatory taking can exist even when no exaction has been demanded by the state and that it is immaterial that the applicable regulations and ordinances predated their ownership as a property owner can “come” to a taking.<sup>4</sup>

The Haiks brought their taking claim exclusively under Article I, § 22 of the Utah Constitution, which provides, “Private property shall not be taken or damaged for public use without just compensation.”<sup>5</sup> Utah Const. Art. I, § 22. “This provision is broader in its language than the similar provision in the Fifth Amendment of the United States Constitution.” *Bagford v. Ephraim City*, 904 P.2d 1095, 1097 (Utah 1995). To recover, “a claimant must possess a protectable interest in property that is taken or damaged for a public use.” *Id.* See *Farmers New World Life Ins. Co. v. Bountiful City*, 803 P.2d 1241, 1243-44 (Utah 1990); *Colman v. Utah State Land Bd.*, 795 P.2d 622, 625 (Utah 1990). In *Colman*, the Utah Supreme Court observed:

Many statutes and ordinances regulate what a property owner can do with and on the owner's property. Those regulations may have a significant impact on the utility or value of property, yet they generally do not require compensation under article I, section 22. Only when governmental action rises to the level of a taking or damage under article I, section 22 is the State required to pay compensation.

*Coleman*, 795 P.2d at 627. “[A] ‘taking’ is ‘any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed.’” *Id.* at 626 (quoting *State ex rel., State Road Comm'n v. District Court, Fourth Judicial Dist. in and for Utah County*, 94 Utah 384, 78 P.2d 502, 506 (Utah 1937)).

The district court found that “[t]he Haiks still have in October 1997 what they purchased from Marvin Melville in October of 1994: lots in Albion Basin Subdivision # 1 with appurtenant water rights limited to 50 gallons per day per unit under the 1963 agreement. They retain the “full ‘bundle’ of property rights” they purchased.” (Appellants' App. Vol. III at 875.) “[T]hey still lack the “one ‘strand’ of the bundle” that their predecessor in interest also did not have: a legal right to use water in an amount sufficient to satisfy the health department requirement of 400 gallons per day per unit.” *Id.* at 876. The district court determined that “[t]he Haiks cannot build on their property, not because Alta or Salt Lake City have changed the rules, but rather because the rules remain the same.” *Id.*

\*7 The Haiks cannot maintain a taking claim because they did not have a protectable interest in property that was taken or damaged by Alta's denial of a building permit. Alta's denial of a building permit was based on the health department requirement of 400 gallons of water per day per unit, which the Haiks did not meet. As the Court in *Coleman* pointed out, “[m]any statutes and ordinances regulate what a property owner can do with and on the owner's property ... yet they generally do not require compensation....” *Coleman*, 795 P.2d at 627. This is but one of many such regulations. See *Smith Inv. Co. v. Sandy City*, 958 P.2d 245, 253 (Utah Ct.App.1998) (“If the ordinance and the state policies and reasons underlying it do, within reason, debatably promote the legitimate goals of increased public health, safety, or general welfare, we must allow ... legislative judgment to control.”). Furthermore, mere expectation of municipal water service in the future is not a legal right that constitutes property subject to taking. See *Bagford*, 904 P.2d at 1099 (expectation of renewal of lease not property subject to taking). Therefore, we hold that no taking occurred under the Utah Constitution Article I, § 22.

AFFIRMED.

## All Citations

176 F.3d 488 (Table), 1999 WL 190717, 1999 CJ C.A.R. 1903

## Footnotes

- \* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.
- 1 The Haiks initiated this action in the Third Judicial District Court in and for Salt Lake County, State of Utah. (Appellants' App. Vol. I at 1.) Salt Lake City removed the action to federal district court. *Id.* at 34.
- 2 We assume for the purposes of this discussion only that the Haiks may maintain an equal protection claim against Salt Lake City.
- 3 The Haiks initially brought their equal protection claim under both the United States Constitution and the Utah Constitution. It is unclear whether the district court considered their equal protection claim under both state and federal law or solely under state law. It is also unclear under which their appeal lies. However, in the interests of finality, we will consider their claim under both federal and state law.
- 4 The Haiks brought this claim solely against Alta. Therefore, we will not consider the Haiks' statements on appeal that, "No taking of the full economic use of the Haiks' property occurred until Salt Lake City denied its consent to extend water to them in 1996. In refusing to consent, Salt Lake City went beyond what the relevant background principles would dictate and hence worked a taking." (Brief for Appellants at 37) (internal quotation and citations omitted).
- 5 Therefore, we will not consider the Haiks' appellate arguments that Alta's actions constitute a taking under the Fifth and Fourteenth Amendments to the United States Constitution. See Brief for Appellants at 32 ("The denial of a building permit to the Haiks constitutes a taking for which the Fifth and Fourteenth Amendments require just compensation, ...."); *id.* at 37.

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# Addendum C

2013 WL 968141

Only the Westlaw citation is currently available.

United States District Court,

D. Utah,

Central Division.

Mark Charles HAIK, an Individual; and  
Raymond A. Haik, an Individual, Plaintiffs,

v.

SALT LAKE CITY CORPORATION; a municipal  
corporation; Jeffery Thomas Niermeyer, an  
Individual; Town of Alta; a municipal corporation;  
and John Guldner an Individual, Defendants.

No. 2:12-CV-997 TS.

March 12, 2013.

MEMORANDUM DECISION  
AND ORDER GRANTING  
DEFENDANTS' MOTIONS TO DISMISS

TED STEWART, District Judge.

\*1 This matter is before the Court on three motions to dismiss: (1) Defendants Salt Lake City and Town of Alta's Joint Rule 12(b)(6) Motion to Dismiss; (2) Defendant Jeffery T. Niermeyer's Rule 12(b)(6) Motion to Dismiss; and (3) Defendant John Guldner's F.R.C.P. 12(b)(6) Motion to Dismiss for Failure to State a Claim. For the reasons discussed below, the Court will grant Defendants' Motions and dismiss Plaintiffs' Complaint.

I. MOTION TO DISMISS STANDARD

In considering a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6), all well-pleaded factual allegations, as distinguished from conclusory allegations, are accepted as true and viewed in the light most favorable to Plaintiffs as the nonmoving party.<sup>1</sup> Plaintiffs must provide "enough facts to state a claim to relief that is plausible on its face"<sup>2</sup> which requires "more than an unadorned, the-defendant-unlawfully harmed-me accusation."<sup>3</sup> "A pleading that offers 'labels and conclusions' or 'a formulaic recitation

of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'"<sup>4</sup> "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted."<sup>5</sup> As the Court in *Iqbal* stated,

only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not show[n]—that the pleader is entitled to relief.<sup>6</sup>

When considering the adequacy of a plaintiff's allegations in a complaint subject to a motion to dismiss, a district court not only considers the complaint, but also "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice."<sup>7</sup> Thus, "notwithstanding the usual rule that a court should consider no evidence beyond the pleadings on a Rule 12(b)(6) motion to dismiss, '[a] district court may consider documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity.'"<sup>8</sup>

II. BACKGROUND

The following facts are taken from Plaintiffs' Complaint, the materials attached thereto, and other documents referenced by the parties. The facts are viewed in the light most favorable to Plaintiffs and are accepted as true for the purposes of Defendants' Motions.

Plaintiffs Mark and Raymond Haik (the "Haiks") own certain parcels of land in the Albion Basin (hereinafter "Albion Basin Subdivision"). The Albion Basin is located above the Alta and Snowbird ski resorts at the top of Little Cottonwood Canyon in Salt Lake County, Utah. To properly understand the current dispute, it is necessary to understand the contractual, regulatory, and legal background concerning water in the Albion Basin.



\*2 In 1963, Canyonlands, Inc., an apparent predecessor in interest to Plaintiffs, entered into a contract with the Little Cottonwood Water Company, which promised the availability of not more than 50 gallons per day to users in each of not more than 35 cabins to be constructed in Albion Basin Subdivision # 1. Salt Lake City later succeeded to the Little Cottonwood Water Company's obligations under various water supply agreements, including the 1963 agreement.

In 1971, Marvin Melville, from whom Plaintiffs would later purchase their lots, applied for a permit "to construct a four-plex on lots in an approved subdivision known as Albion Basin Subdivision # 1."<sup>9</sup> Salt Lake County refused to grant the permits, maintaining that the plaintiffs "had not proved their rights to an adequate culinary water supply."<sup>10</sup> Mr. Melville sought mandamus relief from the Utah courts.

In order to obtain a building permit, the county required 400 gallons of water per day, per unit. Mr. Melville argued that he had sufficient water to meet these requirements, pointing to a spring and the agreement with the Little Cottonwood Water Company. The Utah Supreme Court found that Melville did not own the rights to the spring water. The court also found that the agreement with the Little Cottonwood Water Company did not provide sufficient water. As stated, that agreement only allowed for "a quantity of water not to exceed 50 gallons per day."<sup>11</sup> Based on this, the Utah Supreme Court found that "[a]t most plaintiffs have proved that they may have a right to 50 gallons of water per unit constructed, which does not meet the County Board of Health's requirement of 400 gallons per unit per day."<sup>12</sup> As a result, the Utah Supreme Court affirmed the trial court's dismissal of Mr. Melville's request for mandamus relief.

In 1976, Salt Lake City and the Town of Alta entered into the Water Supply Agreement. Under the Water Supply Agreement, Salt Lake City agreed "to make available to Alta for its use, as hereinafter described, the normal flow of raw, untreated water, not to exceed 265,000 gallons per day."<sup>13</sup> However, the Water Supply Agreement stated that Alta's water "pipelines shall not be extended to or supply water to any properties or facilities not within the present city limits of Alta without the prior written

consent of" Salt Lake City.<sup>14</sup> The Haiks' property lies outside the Alta city limits as they existed in 1976.

In 1991, Salt Lake City adopted its Watershed Ordinance. Among other things, the Watershed Ordinance prohibited Salt Lake City from entering into any new water sales agreements or expanding any existing agreements, with three exceptions: (1) water sales for residential use to property owners with a spring on the property; (2) water sales to governmental entities for use on land they own or lease; or (3) water sales for snowmaking and fire protection in certain cases.

Plaintiffs "stepped into this milieu" when they purchased their lots from Mr. Melville in 1994.<sup>15</sup> After purchasing the property, the Haiks sought water from Alta. Alta informed Plaintiffs that it did not provide water and sewer services to their property, and referred them to the Salt Lake City Department of Public Works. Salt Lake City, in turn, declined to consent to an extension of Alta water pipes and water supply to Plaintiffs' property, relying on the Water Supply Agreement and the Watershed Ordinance.

\*3 Plaintiffs brought suit against Alta and Salt Lake City, alleging that Alta had a legal duty to extend municipal water service to their lots and that, without such extension, they were entitled to just compensation for a taking of their property. Plaintiffs brought various claims, including claims that Alta and Salt Lake City violated the equal protection, due process, and takings clauses of the United States and Utah constitutions.

That matter was eventually removed to this Court and was heard by the Honorable Judge Bruce Jenkins. On October 31, 1997, Judge Jenkins granted summary judgment in favor of Alta and Salt Lake City. In a thorough decision, Judge Jenkins rejected all of Plaintiffs' claims.

Judge Jenkins first rejected Plaintiffs' equal protection claims against Alta. Plaintiff had argued "that Alta, by refusing their requests to extend water service to the Haiks' Albion Basin properties, has acted in arbitrary and irrational fashion and has thereby denied the Haiks equal protection of the law."<sup>16</sup> But this "contention presupposes the existence of a legal duty on the part of Alta to supply water to property owners such as the Haiks, as well as the legal and physical capacity to do

so.”<sup>17</sup> Judge Jenkins held that Alta had no duty to supply water and that their capacity to do so was constrained by the Water Supply Agreement. Thus, the Court held that “[w]ater is not available to the Haiks under the Water Supply Agreement absent Salt Lake City’s consent to an extension of service beyond Alta’s 1976 limits. Where Salt Lake City withholds consent, Alta has no legal right to extend water service to the Haiks.”<sup>18</sup>

Judge Jenkins found:

The Haiks have established no express legislative or contractual duty on the part of Alta to supply water to Albion Basin Subdivision # 1. Alta cannot fairly be burdened with an implied legal duty to supply water that Alta has no legal right to use. Nor can it fairly be said that Alta has denied to any person the equal protection of its laws simply because it has failed to supply what it does not have the legal right to supply.

It is Salt Lake City, not Alta, that holds the right and exercises the power.

If a duty to supply water exists, that duty must devolve upon the entity with legal right to, and lawful control of the water that may be physically available to the Haiks’ property—Salt Lake City.<sup>19</sup>

The Court then turned to the Haiks’ claims against Salt Lake City. The Haiks asserted “no duty on the part of Salt Lake City to supply water to the Albion Basin property” as their property was beyond the city limits.<sup>20</sup> However, the city could supply surplus water if it chose to do so, but the city was not required to do so.

The Haiks argued that the refusal by the city to provide water breached the covenant of good faith and fair dealing. Judge Jenkins rejected this claim, finding that “the Haiks have failed to establish that Salt Lake City has breached any duty reasonably to give or refuse consent, whether under the implied covenant of good faith and fair dealing, or otherwise.”<sup>21</sup> The Court also rejected the Haiks’ equal protection claim against the city, finding that “[t]he equal protection yardstick is simply not available to measure Salt Lake City’s exercise of its contractual power to consent pursuant to ... the Water Supply Agreement.”<sup>22</sup>

\*4 Judge Jenkins also rejected the Haiks’ takings claim, stating:

The Haiks still have in October of 1997 what they purchased from Marvin Melville in October of 1994: lots in Albion Basin Subdivision # 1 with appurtenant water rights limited to 50 gallons per day per unit under the 1963 agreement. They retain the full bundle of property rights they purchased. And notwithstanding the Haiks’ assertion that at the time of annexation, Albion Basin property owners had a right to expect that they would be able to build homes on their land, they still lack one strand of the bundle that their predecessor in interest also did not have: a legal right to use water in an amount sufficient to satisfy the health department requirement of 400 gallons per day per unit. The Haiks cannot build on their property, not because Alta or Salt Lake City have changed the rules, but rather because the rules remain the same.<sup>23</sup>

The Tenth Circuit Court of Appeals affirmed Judge Jenkins’ summary judgment ruling in all respects.<sup>24</sup> On Plaintiffs’ equal protection challenge, the Tenth Circuit held that “ ‘[t]he interest in water for real estate development is not a fundamental right.’ ”<sup>25</sup> Thus, to overcome Plaintiffs’ challenge, Alta and Salt Lake City needed only “some rational relation to a legitimate state interest.”<sup>26</sup> The Tenth Circuit found that Alta had a legitimate interest in refusing to extend its water lines to the Haiks’ property, namely not breaching the 1976 Water Supply Agreement. “Thus, while Alta may have the physical capacity to supply water to the Haiks’ lots, it does not have the legal right to do so, and to compel Alta to breach its contract would be unreasonable.”<sup>27</sup> The Tenth Circuit further found that “Salt Lake City has a legitimate interest in preserving its watershed” and that “[t]he Haiks failed to establish that Salt Lake City’s refusal to consent



to the extension of Alta's water lines to their property as irrational or arbitrary.”<sup>28</sup>

In short, Alta and Salt Lake City proffer they had to draw the line somewhere, and chose to do so in the 1976 Agreement at Alta's 1976 town boundaries. They do not claim to be seeking to stop all development in the canyon, or even all development in Alta for that matter. Rather, their purported objective is to curtail further environmentally harmful development outside Alta's 1976 town boundaries. Line-drawing inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the lines. [That] the line might have been drawn differently at some points is not a matter for judicial consideration.<sup>29</sup>

The Tenth Circuit also rejected Plaintiffs' takings claim.

The Haiks cannot maintain a taking claim because they did not have a protectable interest in property that was taken or damaged by Alta's denial of a building permit. Alta's denial of a building permit was based on the health department requirement of 400 gallons of water per day per unit, which the Haiks did not meet.<sup>30</sup>

\*5 Around the same time as this litigation was occurring in this Court, Salt Lake City filed certain change applications with the State Engineer that are at the center of Plaintiffs' Complaint here.

Under Utah law, a person entitled to use water may change a point of diversion, place of use, or purpose of water use by filing a change application with the State Engineer.<sup>31</sup> If certain requirements are met, the State Engineer may approve a change application.<sup>32</sup> However, the State Engineer has no authority to determine the rights of parties, and proceedings before the State Engineer do not constitute adjudications of water rights.<sup>33</sup>

If an application is granted, the person is authorized to proceed with the construction of necessary works, take any steps required to apply the water to the use named in the application, and perfect the proposed application.<sup>34</sup> Within the time set out by the State Engineer, the applicant must construct any necessary works, apply the water to beneficial use, and file proof with the State

Engineer.<sup>35</sup> The State Engineer may extend the time required to construct necessary works and put the water to beneficial use.<sup>36</sup> If the State Engineer is satisfied that the application has been perfected and the water has been put to beneficial use, the state engineer will issue a change certificate.<sup>37</sup> Applicants may withdraw their application or simply let it lapse.<sup>38</sup>

At issue here are certain change applications filed by Salt Lake City: applications a16846 and a16844. These applications were approved by the State Engineer and have been extended. However, there is nothing in the record to suggest that the applications have been perfected or that a certificate of change has been issued.

The change applications become important because Judge Jenkins, as part of the summary judgment process, “requested the submission of additional data concerning water availability.”<sup>39</sup> Defendants did not disclose the change applications in their response to Judge Jenkins. However, Salt Lake City did disclose the water quantities it had committed by contract to the Alta and Albion Basin areas. In its submission, Salt Lake City noted “that the decision to refuse to deliver water [to the Haiks] was not primarily based upon availability but rather upon the terms of the Water Sales Agreement and sound watershed management and water quality practices.”<sup>40</sup>

In September 2010, Plaintiff Mark Haik applied to the Salt Lake Valley Health Department for waste water system approval for single family residences in the Albion Basin Subdivision, and also filed an application with the Town of Alta for a building permit. In response, Defendant Niermeyer, the Director of Salt Lake City's Department of Public Utilities, sent a letter to the Salt Lake Valley Health Department and the Town Administrator of Alta, Defendant Guldner, in which he stated:

The Albion Basin Subdivision is currently allowed water use under a water Agreement dated May 22, 1963 between Canyonlands, Inc. and Salt Lake City as the successor in interest to the Little Cottonwood Water Company. The amount of water allowed under the contract cannot exceed 50 gallons per day per connection.

\*6 Mr. Haik has requested certification of water for the two above-noted properties.... Based on our

understanding of the State requirement of 400 gpd, and Fire Department requirement of 1750 gpm ... the contracted amount is insufficient to meet the current standards for water supply.<sup>41</sup>

On December 13, 2011, the Salt Lake Valley Health Department denied Plaintiffs' applications for waste water systems finding, in part, that Plaintiffs were unable to show a sufficient water supply. This decision was upheld by a hearing officer on October 24, 2012.<sup>42</sup>

The following day, Plaintiffs brought this action. Plaintiffs' Complaint contains the following claims: (1) an action to set aside judgment; (2) violation of equal protection; (3) violation of substantive due process; (4) violation of procedural due process; (5) misrepresentation; and (6) civil conspiracy.

### III. DISCUSSION

All of Plaintiffs' claims center around the change applications. Plaintiffs argue that the change applications show that water is available and should be provided to them. Plaintiffs argue that, by failing to disclose or intentionally withholding information about the change applications, Defendants engaged in all sorts of malfeasance. Thus, in order for any of Plaintiffs' claims to succeed, Plaintiffs must show that they are entitled to water and that Defendants have refused to provide water to which they are entitled.

Unfortunately for Plaintiffs, they cannot make this showing. Alta has refused to provide water because it cannot do so under its contract with Salt Lake City. The city, in turn, has declined to provide water based on the 1963 Agreement and to further its interest in the protection of the watershed.

Plaintiffs point to the change applications to rebut the reasons put forth by Alta and Salt Lake City, but Plaintiffs have failed to provide any allegations that the change applications entitle them to water. While the change applications may show some future ability for Salt Lake City to provide water to the Albion Basin Subdivision, there is no obligation to do so. The only water right that Plaintiffs have shown is set forth in the 1963 Agreement. As has been stated by the Salt Lake Valley Health Department, the Utah Supreme Court, the

District Court for the District of Utah, and the Tenth Circuit Court of Appeals, that amount is insufficient to allow for development.

Based on this simple fact, all of Plaintiffs' claims fail and Defendants' Motions to Dismiss must be granted. Though the Court could simply grant Defendants' Motion on this ground, the other arguments presented by Defendants provide additional grounds to warrant dismissal.

#### A. RES JUDICATA

Defendants argue that Plaintiffs' claims are largely barred by res judicata. "The doctrine of res judicata embraces two distinct branches: claim preclusion and issue preclusion."<sup>43</sup> "Claim preclusion involves the same parties or their privies and also the same cause of action, and this precludes the relitigation of all issues that could have been litigated as well as those that were, in fact, litigated in the prior action."<sup>44</sup> "Issue preclusion, on the other hand, arises from a different cause of action and prevents parties or their privies from relitigating facts and issues in the second suit that were fully litigated in the first suit."<sup>45</sup>

\*7 In order for claim preclusion to bar a subsequent cause of action, the following requirements must be met: (1) both cases must involve the same parties or their privies; (2) the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action; and (3) the first suit must have resulted in a final judgment on the merits.<sup>46</sup>

Issue preclusion applies when the following four elements are met: (1) the party against whom issue preclusion is asserted must have been a party to, or in privity with, a party to the prior adjudication; (2) the issue decided in the prior adjudication must be identical to the one presented in the instant action; (3) the issue in the first action must have been completely, fully, and fairly litigated; and (4) the first suit must have resulted in a final judgment on the merits.<sup>47</sup>

In this case, the amount of water to which Plaintiffs are entitled under the 1963 Agreement, as well as the majority of the constitutional claims, have been decided and are barred by res judicata. Therefore, they must be dismissed.

Plaintiffs argue that res judicata does not apply because of a change in circumstance. However, the only difference between this case and the prior cases involving Plaintiffs or their privies is the change applications. As discussed, the State Engineer has no authority to determine the rights of parties, and proceedings before the State Engineer do not constitute adjudications of water rights. Thus, there is nothing in the change applications that either entitles Plaintiffs to water or requires Defendants to provide that water. Plaintiffs' only claim to water is the same as it has always been. Therefore, Plaintiffs' claims are barred.

### B. ACTION TO SET ASIDE JUDGMENT

Plaintiffs bring an independent action to set aside judgment pursuant to Fed.R.Civ.P. 60(d)(1) and (3). Rule 60(d)(1) and (3) provide that the rule does not limit a court's power to entertain an independent action to relieve a party from a judgment, or set aside a judgment for fraud on the court.

#### 1. Rule 60(d)(1)

Plaintiffs bring an independent action under Rule 60(d). In *United States v. Beggerly*,<sup>48</sup> the United States Supreme Court held that "[i]ndependent actions must ... be reserved for those cases of 'injustices which, in certain circumstances, are deemed sufficiently gross to demand a departure' from rigid adherence to the doctrine of res judicata."<sup>49</sup> Thus, "an independent action should be available only to prevent a grave miscarriage of justice."<sup>50</sup> In *Beggerly*, the Court found that a party failing to make a full disclosure to the trial court did "not nearly approach this demanding standard."<sup>51</sup>

In this case, Plaintiffs' plausible allegations state that Defendants failed to provide allegedly relevant information to the Court, specifically the existence of the change applications. As stated, the change applications do not grant Plaintiffs any water rights and do not impose upon Defendants any duty to provide Plaintiffs water. Therefore, the relevance of such information to the earlier proceedings in this Court is minimal.

\*8 Even taking as true Plaintiffs' allegation that Defendants withheld this information, such an allegation does not meet the high burden necessary to bring an independent action. This case is similar to the facts of

*Beggerly*, where a party failed to make a full disclosure to the court. The Supreme Court found that such conduct did not meet the "demanding standard" required for an independent action to set aside judgment. The same can be said here. Therefore, Plaintiffs have failed to show that setting aside the judgment is necessary to prevent a grave miscarriage of justice.

#### 2. Rule 60(d)(3)

Plaintiffs further allege fraud on the court.

Fraud on the court ... is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury. It has been held that allegations of nondisclosure in pretrial discovery will not support an action for fraud on the court. It is thus fraud ... where the impartial functions of the court have been directly corrupted.<sup>52</sup>

The Tenth Circuit has stated:

Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated will constitute a fraud on the court. Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court.<sup>53</sup>

The court has further stated:

We think it clear that "fraud on the court," whatever else it embodies, requires a showing that one has acted with an intent to deceive or defraud the court. A proper balance between the interests underlying finality on the one hand and allowing relief due to

inequitable conduct on the other makes it essential that there be a showing of conscious wrongdoing—what can properly be characterized as a deliberate scheme to defraud—before relief from a final judgment is appropriate under the *Hazel-Atlas* standard. Thus, when there is no intent to deceive, the fact that misrepresentations were made to a court is not of itself a sufficient basis for setting aside a judgment under the guise of “fraud on the court.”<sup>54</sup>

Fraud upon the court must be proven by clear and convincing evidence.<sup>55</sup>

In this case, the Court is presented with, at most, nondisclosure of facts allegedly pertinent to the case before Judge Jenkins. The Tenth Circuit has made clear that such misconduct does not ordinarily rise to the level of fraud on the Court. Though Plaintiffs do their best to impute an evil intent to Defendants, their allegations falls short of what is required to substantiate a claim of fraud on the Court. Therefore, this claim must be dismissed.

### C. CONSTITUTIONAL CLAIMS

#### 1. Equal Protection

Plaintiffs appear to assert a class-of-one theory. To prevail under a class-of-one theory, “a plaintiff must first establish that others, ‘similarly situated in every material respect’ were treated differently.”<sup>56</sup> “A plaintiff must then show this difference in treatment was without rational basis, that is, the government action was irrational and abusive and wholly unrelated to any legitimate state activity.”<sup>57</sup> The Tenth Circuit has “recognized a substantial burden that plaintiffs demonstrate others similarly situated in all material respects were treated differently and that there is no objectively reasonable basis for the defendant’s action.”<sup>58</sup> The Tenth Circuit has also recently clarified that, under *Twombly* and *Iqbal*, a plaintiff must meet this “substantial burden” by offering “enough specific factual allegations to ‘nudge[ ] their claims across the line from conceivable to plausible.’”<sup>59</sup>

\*9 Plaintiffs’ Complaint fails to meet these pleading standards. Plaintiffs make the conclusory allegation that they are similarly situated to other landowners. However, there are not sufficient factual allegations to support these conclusory statements. Further, Plaintiffs’ equal protection claim fails because Plaintiffs cannot show that any differential treatment was without a rational basis. As has been held by this Court and the Tenth Circuit, there are legitimate reasons to deny Plaintiffs’ requests for water rights: compliance with contract provisions and protection of the watershed.

Plaintiffs point to a provision of the Utah constitution and two decisions from the Utah Supreme Court in support of their argument, but they are not helpful. Plaintiffs rely on Article XI, Section 6 of the Utah constitution. That provision states that municipalities are forbidden from leasing, selling, alienating, or disposing their waterworks, water rights, or sources of water supply, but that such may be used to supply its inhabitants with water at reasonable charges. Next, Plaintiffs cite to *County Water System, Inc. v. Salt Lake City*,<sup>60</sup> where the Utah Supreme court held that Salt Lake City may sell and distribute surplus water beyond its corporate limits.<sup>61</sup> Finally, Plaintiffs cite *Platt v. Town of Torrey*,<sup>62</sup> which stands for the proposition that municipalities must deal reasonably with nonresidents who purchase surplus water from the municipality.<sup>63</sup>

Plaintiffs read these together as requiring the city to provide water to them, especially in light of the change applications which, if perfected, would allow the city to do so. However, Plaintiffs read too much into this constitutional provision and these two cases. When read together, these statements do not require the city to provide water to Plaintiffs, they merely permit the city to do so and, if the city so chooses, a reasonableness requirement is imposed. Nor do these provisions stand for the proposition that the city cannot have legitimate reasons (such as the protection of the watershed) to decline to supply water to nonresidents. Therefore, these provisions are not helpful to Plaintiffs and do not save this claim from dismissal.

#### 2. Substantive Due Process

“Substantive due process bars ‘certain government actions regardless of the fairness of the procedures used to implement them.’”<sup>64</sup> “Executive action violates



substantive due process when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.' " 65

Plaintiffs' Complaint falls well short of this standard. All that Plaintiffs' allegations reveal is that Salt Lake City and Alta have consistently taken the same position toward Plaintiffs. That is, Alta has refused to extend its water lines to Plaintiffs' property, because it is barred from doing so by its agreement with Salt Lake City, and Salt Lake City has consistently refused Plaintiffs' requests for water. Plaintiffs have failed to provide anything showing that the city cannot so refuse. As Plaintiffs have failed to establish any right to water, and indeed several courts have detailed exactly why Plaintiffs do not have any such right, there is nothing about the Defendants' actions that shock the conscience.

### 3. Procedural Due Process

\*10 "To assess whether an individual was denied procedural due process, courts must engage in a two-step inquiry: (1) did the individual possess a protected interest such that the due process protections were applicable; and, if so, then (2) was the individual afforded an appropriate level of process." 66

As is detailed above, Plaintiffs and their predecessor in interest have been afforded an appropriate level of process. Plaintiffs have repeatedly requested and been denied water sufficient to allow for the development of their property. Their latest request was denied by the Salt Lake Valley Health Department. That denial was subsequently upheld by a hearing officer. In addition to being heard by state administrative bodies, Plaintiffs' disputes have wound their way through the state and federal court systems. At every step, Plaintiffs have been given the ability to fully litigate their claims. As a result, Plaintiffs' allegations that they have been denied procedural due process are not plausible.

As Plaintiffs have not shown a violation of their constitutional rights, let alone one that is clearly established, the individual Defendants are entitled to qualified immunity.

### D. CIVIL CONSPIRACY AND MISREPRESENTATION

Plaintiffs allege that Defendant Guldner, Alta's Town Administrator, made false statements to owners of land in the Albion Basin Subdivision in 1993 concerning the availability of water to service the Albion Basin. Similarly, Plaintiffs complain of statements made by city attorneys to this Court. Finally, Plaintiffs take issue with the statements made by Defendant Niermeyer in his May 23, 2011 letter. Plaintiffs allege that these various actions constitute civil conspiracy and misrepresentation. 67

"To prove a civil conspiracy, plaintiff must show the following elements: (1) a combination of two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful, overt acts, and (5) damages as a proximate result thereof." 68

To state a claim for fraudulent misrepresentation, Plaintiffs must allege:

- (1) that a representation was made
- (2) concerning a presently existing material fact
- (3) which was false
- and (4) which the representor either
  - (a) knew to be false or
  - (b) made recklessly, knowing that there was insufficient knowledge upon which to base such a representation,
- (5) for the purpose of inducing the other party to act upon it and
- (6) that the other party, acting reasonably and in ignorance of its falsity,
- (7) did in fact rely upon it
- (8) and was thereby induced to act
- (9) to that party's injury and damage . 69

For substantially the same reasons stated above with regard to Plaintiffs' other claims, these claims too must fail. Simply stated, Plaintiffs can point to no unlawful acts or misrepresentations by Defendants. Further, these claims would be barred for various reasons under the Utah Governmental Immunity Act. Therefore, these claims must be dismissed.

### E. ATTORNEY'S FEES

\*11 In addition to seeking dismissal, Defendants Salt Lake City and the Town of Alta seek attorney fees pursuant to 28 U.S.C. § 1927. However, Defendants do

not provide any discussion or analysis on this issue. While attorney fees may be warranted in this case, without further analysis on this point, Defendants' request must be denied at this time.

ORDERED that Defendants' Motions to Dismiss (Docket Nos. 26, 28, and 30) are GRANTED. Plaintiffs' Complaint is dismissed with prejudice.

#### All Citations

Not Reported in F.Supp.2d, 2013 WL 968141

#### IV. CONCLUSION

It is therefore

#### Footnotes

- 1 *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir.1997).
- 2 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007).
- 3 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
- 4 *Id.* (quoting *Twombly*, 550 U.S. at 557) (alteration in original).
- 5 *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir.1991).
- 6 *Iqbal*, 556 U.S. at 679 (alteration in original) (internal quotation marks and citations omitted).
- 7 *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (citing 5B WRIGHT & MILLER § 1357 (3d ed.2004 and Supp.2007)).
- 8 *Alvarado v. KOBTV, LLC*, 493 F.3d 1210, 1215 (10th Cir.2007) (quoting *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir.2002)).
- 9 *Melville v. Salt Lake Cnty.*, 570 P.2d 687, 687 (Utah 1977).
- 10 *Id.* at 688.
- 11 *Id.* at 689.
- 12 *Id.*
- 13 Docket No. 27, Ex. 4, at 1.
- 14 *Id.* at 3.
- 15 *Haik, et al. v. Township of Alta, et al.*, Case No. 2:96-CV-732 BSJ, Docket No. 53, at 7 (D.Utah Oct. 31, 1997) (hereinafter "Jenkins Decision").
- 16 *Id.* at 8.
- 17 *Id.*
- 18 *Id.* at 13-14.
- 19 *Id.* at 17.
- 20 *Id.*
- 21 *Id.* at 20.
- 22 *Id.* at 21-22.
- 23 *Id.* at 22-23 (quotation marks and citation omitted).
- 24 *Haik v. Town of Alta*, 176 F.3d 488 (10th Cir.1999) (unpublished decision).
- 25 *Id.* at \*3 (quoting *Lockary v. Kayfet*, 917 F.2d 1150, 1155 (9th Cir.1990)).
- 26 *Id.*
- 27 *Id.* at \*4.
- 28 *Id.*
- 29 *Id.* at \*5 (quotation marks and citation omitted).
- 30 *Id.* at \*7.
- 31 Utah Code Ann. § 73-3-3(3), (4).
- 32 *Id.* § 73-3-8.
- 33 *Jensen v. Jones*, 270 P.3d 425, 428 (Utah 2011).
- 34 Utah Code Ann. § 73-3-10.
- 35 *Id.* §§ 73-3-12(2)(a), -16.

36 *Id.* § 73–3–12(b).  
 37 *Id.* § 73–3–17.  
 38 *Id.* §§ 73–3–17(4), –18.  
 39 Jenkins Decision, at 2.  
 40 Docket No. 2, Ex. 8, at 3.  
 41 Docket No. 19, Ex. 18.  
 42 Docket No. 27, Ex. 9.  
 43 *Macris & Assoc., Inc. v. Newways, Inc.*, 16 P.3d 1214, 1219 (Utah 2000).  
 44 *Id.* (quotation marks and citation omitted).  
 45 *Id.* (quotation marks and citation omitted).  
 46 *Madsen v. Borthick*, 769 P.2d 245, 247 (Utah 1988).  
 47 *Oman v. Davis Sch. Dist.*, 194 P.3d 956, 965 (Utah 2008).  
 48 524 U.S. 38 (1998).  
 49 *Id.* at 46 (quoting *Hazel–Atlas Glass Co. v. Hartford–Empire Co.*, 322 U.S. 238, 244 (1944)).  
 50 *Id.* at 47.  
 51 *Id.*  
 52 *Bulloch v. United States*, 763 F.2d 1115, 1121 (10th Cir.1985) (citation omitted).  
 53 *Weese v. Schukman*, 98 F.3d 542, 552–53 (10th Cir.1996) (quoting *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir.1978)).  
 54 *Robinson v. Audi Aktiengesellschaft*, 56 F.3d 1259, 1267 (10th Cir.1995).  
 55 *Weese*, 98 F.3d at 552.  
 56 *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1216 (10th Cir.2011) (quoting *Jicarilla Apache Nation v. Rio Arriba Cnty.*, 440 F.3d 1202, 1210 (10th Cir.2006)).  
 57 *Id.* (quotation marks and citations omitted).  
 58 *Id.* at 1217 (quotation marks and citations omitted).  
 59 *Id.* at 1219 (quoting *Twombly*, 550 U.S. at 570).  
 60 278 P.2d 285 (Utah 1954).  
 61 *Id.* at 290.  
 62 949 P.2d 325 (Utah 1997).  
 63 *Id.* at 332.  
 64 *Brown v. Montoya*, 662 F.3d 1152, 1172 (10th Cir.2011) (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998)).  
 65 *Id.* (quoting *Cnty. of Sacramento*, 523 U.S. at 847).  
 66 *Guttman v. Khalsa*, 669 F.3d 1101, 1113–14 (10th Cir.2012) (quoting *Hatfield v. Bd. of Cnty. Comm’rs for Converse Cnty.*, 52 F.3d 858, 862 (10th Cir.1995)).  
 67 Plaintiffs also attempt to assert a § 1983 conspiracy claim. However, such a claim does not appear in their Complaint and cannot be raised for the first time in a reply brief.  
 68 *Israel Pagan Estate v. Cannon*, 746 P.2d 785, 790 (Utah Ct.App.1987).  
 69 *Armed Forces Ins. Exch. v. Harrison*, 70 P.3d 35, 40 (Utah 2003).

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# Addendum D

567 Fed.Appx. 621

This case was not selected for publication in the Federal Reporter. Not for Publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Tenth Circuit Rule 32.1. (Find CTA10 Rule 32.1) United States Court of Appeals, Tenth Circuit.

Mark C. HAIK and Raymond  
A. Haik, Plaintiffs–Appellants,

v.

SALT LAKE CITY CORPORATION, a municipal corporation; Town of Alta, a municipal corporation; Jeffery T. Niermeyer, an individual; and John Guldner, an individual, Defendants–Appellees.

No. 13–4050.

|  
June 5, 2014.

#### Synopsis

**Background:** Property owners brought action against city, alleging that city's continuing denial of water to property was unlawful based on several new or newly discovered facts. The United States District Court for the District of Utah, Ted Stewart, J., 2013 WL 968141, dismissed complaint. Property owners appealed.

**Holdings:** The Court of Appeals, Gregory A. Phillips, Circuit Judge, held that:

[1] owners' due process claims against city were precluded under doctrine of issue preclusion;

[2] allegations against city failed to state equal protection claim;

[3] owners' civil conspiracy claims against city and town were precluded under doctrine of claim preclusion; and

[4] owners' allegations against city and town failed to state claim for fraudulent misrepresentation.

Affirmed.

#### Attorneys and Law Firms

\*623 Paul R. Haik, Krebsbach and Haik, Minneapolis, MN, for Plaintiff–Appellant.

Shawn E. Draney, Scott H. Martin, Rodney R. Parker, R. Scott Young, Snow, Christensen & Martineau, David C. Richards, Sarah Elizabeth Spencer, Christensen & Jensen, P.C., Salt Lake City, UT, for Defendant–Appellee.

Before KELLY, HOLLOWAY\* and PHILLIPS, Circuit Judges.

#### ORDER AND JUDGMENT \*\*

GREGORY A. PHILLIPS, Circuit Judge.

This appeal marks just one chapter in an ongoing saga over the municipal supply of water to property owned by Mark and Raymond Haik in Alta, Utah. In 1996, the Haiks sued the Town of Alta and Salt Lake City in an attempt to force either or both municipalities to extend water service to their lots. *See Haik v. Town of Alta*, No. 97–4202, 1999 WL 190717, at \*1 (10th Cir. Apr. 5, 1999) [hereinafter *Haik I*]. The Haiks lost on summary judgment and we affirmed on appeal, concluding that the Haiks lacked an affirmative right to water and that Alta and Salt Lake City had acted reasonably in refusing to supply it. *See generally id.* Now the Haiks are before us again, appealing the district court's dismissal of their newest complaint, which alleges that Salt Lake City's continuing denial of water is unlawful based on several new or newly discovered facts. The issue is whether the Haiks' new allegations state plausible claims for relief in light of the preclusive effect of *Haik I*. They do not.

#### FACTS

##### 1. Events Leading to *Haik I*

In 1994, the Haiks purchased four undeveloped lots in the Albion Basin Subdivision, located at the top of the Little Cottonwood Canyon, east of Salt Lake City, Utah. The Haiks wanted to develop their lots but were unable to do so because of inadequate water supply. At the time, and apparently to this day, the Board of Health

requires landowners to show an entitlement to 400 gallons of water per day to receive a building permit. When the \*624 Haiks purchased their property, however, they succeeded to a right to just 50 gallons of water per day under a preexisting contract with the Little Cottonwood Water Company. No other water rights came with the property.<sup>1</sup>

The Haiks nonetheless believed they were entitled to more water because their lots fell within Alta's town limits. They contacted Alta to arrange for water service, but soon learned that Alta has no independent rights to the water at issue. Instead, Alta purchases Salt Lake City's surplus water according to an intergovernmental agreement from 1976 (Water Supply Agreement). The Water Supply Agreement grants Alta a good amount of water to do with as it pleases, but it restricts Alta's ability to extend water to properties outside *then-existing* town limits without first receiving the consent of Salt Lake City. The Albion Basin Subdivision falls outside the 1976 limits, thereby necessitating Salt Lake City's pre-approval for water service. Yet when the Haiks inquired, Salt Lake City declined to consent to the extension of water service to their lots. As a result, Alta denied the relevant building permits, leaving the Haiks high and dry.

## 2. Haik I

The Haiks sued Alta and Salt Lake City, asserting equal-protection claims against both municipalities. They further asserted an unconstitutional "taking" claim against Alta and alleged that Salt Lake City's refusal to consent under the Water Supply Agreement violated the implied covenant of good faith and fair dealing. They also alleged that Alta had a municipal duty to provide water to the Albion Basin because Alta annexed the subdivision in 1981.

The district court rejected the Haiks' claims on summary judgment. The court found that Alta had no obligation to supply water to the Haiks because, even though Alta may have had the physical ability to supply water to the Albion Basin Subdivision, it lacked the *legal* ability to do so (at least unilaterally) under the Water Supply Agreement. Put another way, the only water truly "available" to Alta was that granted by Salt Lake City.

Alta's annexation of the Albion Basin did not change this reality. Even though a municipality owes a general duty

to supply water under the Utah Constitution, the district court observed that this duty "presupposes that the water to be supplied to inhabitants has already been lawfully acquired by the municipality." App. at 310. In this instance, Alta had not acquired the right to supply water outside its 1976 limits absent Salt Lake City's consent. Further, the court said there was no unconstitutional taking of the Haiks' property because the Haiks still had in October of 1997 what they purchased in 1994: "lots in Albion Basin Subdivision # 1 with appurtenant water rights limited to 50 gallons per day per unit." App. at 316.

The court similarly concluded that Salt Lake City's actions were justified. Nothing compelled Salt Lake City to consent to the supply of water beyond Alta's 1976 limits, and Salt Lake City had no legal duty to supply water to people outside its own city limits. Notably, the district court did not believe that the Haiks could even \*625 maintain an equal protection claim against Salt Lake City, because the city's actions were proprietary rather than administrative.

The Haiks appealed the district court's dismissal of the equal-protection and taking claims. *Haik I*, 1999 WL 190717, at \*2.

On appeal, we assumed the Haiks could maintain equal-protection claims against both Alta and Salt Lake City but emphasized that the interest in water for real-estate development is not a fundamental right. *Id.* at \*3. As a result, Alta and Salt Lake City's actions were subject to rational-basis review, meaning they only needed to be "rationally related to a legitimate end." *Id.* In our view, the actions of both municipalities satisfied this standard. Alta, for one, had good reason to deny water to the Haiks since the town would have violated the Water Supply Agreement had it extended water without Salt Lake City's consent. *See id.* at \*4. Salt Lake City, in turn, could refuse consent under the Water Supply Agreement given its legitimate interest in watershed preservation. *See id.*

The Haiks challenged Salt Lake City's stated preservation interest, citing examples of other people in the area who were receiving water. *See id.* At the time, it was indeed true that Salt Lake City had consented to allow water to others outside Alta's 1976 limits. *See id.* In those cases, however, Salt Lake City had allowed water for snowmaking—one of the uses listed in a 1991 city ordinance governing new watershed permits, Ordinance 17.04.020. *See id.* We

believed it was rational for Salt Lake City to determine that uses listed in Ordinance 17.04.020 would not result in significant harm to the watershed, whereas other new uses outside the 1976 limits might. *Id.* As for the examples of water use *within* Alta's 1976 limits, those did not require Salt Lake City's consent and, to the extent the Haiks challenged this feature of the Water Supply Agreement itself, we saw nothing wrong with Salt Lake City's giving Alta *carte blanche* to supply water within the 1976 limits but refusing to do so beyond. *See id.* at \*5. The municipalities had to draw the line somewhere in light of their purported desire to curb harmful development. *Id.*

As for the Haiks' taking claim against Alta, it failed on appeal for the same reasons announced by the district court. *See id.* at \*6–7. We too believed the Haiks retained the “full ‘bundle’ of property rights” they had originally purchased. *See id.*

### 3. The Haiks' Current Complaint

In their current 115–page complaint, the Haiks allege several new or newly discovered facts:

*Approved Change Applications.* According to the current complaint, Salt Lake City filed over a dozen applications in the early 1990s to get approval from the State Engineer to make certain changes in water use. The Haiks base their new allegations on Change Application a16846 in particular, in which Salt Lake City sought to change the point of diversion and place of use for up to 15.75 acre-feet of water annually to serve the Albion Basin Subdivision. The Utah State Engineer approved the application in 1997 while Haik I was still pending. The Haiks allege this resulted in two things: (1) Salt Lake City could provide more than 400 gallons of water per day to each of the Haiks' lots; and (2) the Albion Basin Subdivision became a part of Salt Lake City's water “service area.” App. at 40, ¶ 164; App. at 42–43, ¶ 175. According to the complaint, however, neither Salt Lake City nor Alta mentioned these allegedly relevant facts during Haik I. Instead, the Haiks say that they learned about the approved change \*626 applications in 2007 after a neighbor came upon the records.

*Second Round of Permit Denials and Niermeyer Letter.* Upon learning of the State Engineer's approval of Change Application a16846, the Haiks sought the necessary development permits for a second time. Salt Lake City and Alta authorities, including Alta Town Administrator

John Guldner, denied them once again. For this, the Haiks partly blame Jeffry Niermeyer, the Director of Salt Lake City's Department of Public Utilities, who told permitting authorities that the Haiks were entitled to only 50 gallons of water per day under the Little Cottonwood contract. The Haiks claim this was a lie because, as Niermeyer knew, the Little Cottonwood contract had long been defunct. They allege that the real reason behind Niermeyer's letter was Salt Lake City's longstanding promise to Alta that city officials would use their “watershed management muscle” to help Alta stop development in the area. App. at 22, ¶ 74.

*Water Bills to the Albion Basin Subdivision.* The Haiks also allege that, since Haik I, they have discovered that Salt Lake City has been billing a number of homes in the Albion Basin Subdivision for water in unmetered amounts. The Haiks claim this shows that Salt Lake City is treating them differently from others within the Albion Basin Subdivision without reason.

*Salt Lake City's Approval of Water Supply to New Single-Family Residences.* The Haiks further allege that Salt Lake City has repeatedly consented to supply water to similarly situated people in the surrounding watershed canyons. Some of the Haiks' alleged examples of differential treatment predate Haik I, and some do not.

*Current Claims.* The Haiks seek to set aside the judgment in Haik I based on Salt Lake City and Alta's alleged concealment of the change applications. They also claim that Salt Lake City and Alta misrepresented to the district court in Haik I that no water was available to meet the domestic requirements of the Haiks' lots. Additionally, the Haiks raise the following substantive claims: (1) violation of equal protection under 42 U.S.C. § 1983 against Salt Lake City; (2) violation of equal protection under 42 U.S.C. § 1983 against Jeffry Niermeyer (in his personal capacity); (3) violation of substantive due process under 42 U.S.C. § 1983 against Salt Lake City; (4) violation of procedural due process under 42 U.S.C. § 1983 against Salt Lake City; (5) misrepresentation against Salt Lake City, Jeffry Niermeyer, Alta, and John Guldner; and (6) civil conspiracy against Salt Lake City and Alta.

### 4. The District Court's Dismissal

After considering the Haiks' new allegations, the district court granted the defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *See Haik v. Salt Lake City Corp.*, No. 2:12–CV–997 TS, 2013 WL

968141, at \*1 (D.Utah Mar. 12, 2013). The Haiks' attempt to set aside the judgment in *Haik I* failed because the district court found that the alleged misconduct fell short of the high standard for relief under Federal Rules of Civil Procedure 60(d)(1) and 60(d)(3). *See id.* at \*7–8. As for the Haiks' newly alleged claims, the district court believed that nothing of significance had changed since *Haik I* and that the majority of the Haiks' claims had already been decided. *See id.* at \*7. Alternatively, the court concluded that the Haiks' allegations were implausible. *See id.* at \*8–10.

## DISCUSSION

On appeal, the Haiks argue that their new and improved allegations state plausible \*627 claims for relief. We disagree. Nothing in the current complaint changes the legal landscape or position of the parties since *Haik I* or otherwise states a claim for relief. We discuss each of the Haiks' newly alleged claims in turn, leaving until last our discussion of their attempt to set aside the judgment in *Haik I*.

### 1. Standard of Review Under Rule 12(b)(6)

We review de novo the dismissal of a complaint under Rule 12(b)(6). *Diversey v. Schmidly*, 738 F.3d 1196, 1199 (10th Cir.2013). In doing so, we accept as true all well-pleaded factual allegations. *Schrock v. Wyeth, Inc.*, 727 F.3d 1273, 1280 (10th Cir.2013) (internal quotation marks omitted). We then ask whether the complaint contains “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

### 1. Preclusion

This case is unusual in that it follows a previous lawsuit involving several of the same parties, many similar allegations, and the same principal demand for relief. For this reason, we take a moment to discuss the twin doctrines of res judicata—claim preclusion and issue preclusion. “Under the doctrine of claim preclusion, a final judgment forecloses successive litigation of the very

same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.” *Taylor v. Sturgell*, 553 U.S. 880, 892, 128 S.Ct. 2161, 171 L.Ed.2d 155 (2008) (internal quotation marks omitted). “Issue preclusion, in contrast, bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim.” *Id.* (internal quotation marks omitted). The doctrines serve the defendant's interest in avoiding repeat lawsuits as well as the court's interest in avoiding a waste of judicial resources. *Arizona v. California*, 530 U.S. 392, 412, 120 S.Ct. 2304, 147 L.Ed.2d 374 (2000). The application of res judicata is a pure question of law reviewed de novo. *Pelt v. Utah*, 539 F.3d 1271, 1280 (10th Cir.2008).

Claim preclusion and issue preclusion are often difficult to apply in practice, and this case is no exception. The district court did not go too deep into the matter and simply concluded that the Haiks' rights and “the majority of the constitutional claims” had already been decided, without specifying which doctrine applied to what claims. App. at 280. On appeal, Appellees' arguments are similarly general. They argue that claim preclusion bars all of the current claims because the material facts have not changed since *Haik I*. From their perspective, the Haiks' claims either have been decided or should have been raised before.

[1] While we agree that the material facts from *Haik I* are unchanged, the preclusive effect of that judgment is more complicated. Even if the material facts are the same, the Haiks may still bring a lawsuit against Alta and Salt Lake City based on entirely new facts not part of the last cause of action. *See Hatch v. Boulder Town Council*, 471 F.3d 1142, 1150 (10th Cir.2006) (“[A] new action will be permitted only where it raises *new and independent claims*, not part of the previous transaction, based on the new facts.” (emphasis in original)). Though many of the Haiks' \*628 presently alleged facts are similar to those alleged before, we still believe at least some are new, and these new allegations are enough to make the Haiks' equal-protection and misrepresentation claims different for purposes of claim preclusion. The allegations still fail, but they fail under Rule 12(b)(6). The civil-conspiracy claim, however, is barred.

As for the Haiks' due-process claims, we think issue preclusion is the more applicable doctrine. While



Appellees do not argue that issue preclusion applies on appeal, we are on notice of the issues we decided in *Haik I* and believe this is an appropriate circumstance in which to raise the doctrine *sua sponte*. See *Arizona*, 530 U.S. at 412, 120 S.Ct. 2304 (“[I]f a court is on notice that it has previously decided the issue presented, the court may dismiss the action *sua sponte*, even though the defense has not been raised.”). The Haiks have briefed the applicability of *res judicata* generally and have argued that the issues decided in *Haik I* are not identical to the issues here.

### 3. The Due-Process Claims Against Salt Lake City Are Barred by *Haik I*

[2] Generally, to state either a procedural or substantive due-process claim, a plaintiff must first prove that the defendant's actions deprived the plaintiff of a *protected property interest*. *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 & n. 2 (10th Cir.2000). The Haiks did not raise due-process claims against Salt Lake City in *Haik I*, but they did raise a taking claim against the Town of Alta. See *Haik I*, 1999 WL 190717, at \*6. In concluding that the Haiks could not maintain this claim, we reasoned that Alta's denial of a building permit did not deprive the Haiks of anything they had before; they “retain[ed] the full bundle of property rights they purchased.” *Id.* (internal quotation marks omitted). Furthermore, we said the “mere expectation of municipal water service in the future” is not “property subject to taking.” *Id.* at \*7. In short, the Haiks' taking claim failed “because they did not have a protectable interest in property.” *Id.*

Issue preclusion “bars a party from relitigating an issue once it has suffered an adverse determination on the issue, even if the issue arises when the party is pursuing or defending against a different claim.”<sup>2</sup> *Moss v. Kopp*, 559 F.3d 1155, 1161 (10th Cir.2009). Here, the Haiks previously suffered an adverse determination on the very issue that is now critical to their due-process claims—that is, whether the denial of the development permits deprived them of a protected property interest. True, the Haiks previously argued that *Alta* deprived them of this interest by denying the permits, whereas now they allege that *Salt Lake City* deprived them of their interest by interfering with the permitting process (by way of the Niermeyer letter). But this is a difference without a distinction. The very same question remains: Do the Haiks have any protected interest in the building permits, or, to put a finer

point on it, in the water on which those permits depend? We said “no” before and are not inclined to \*629 give the Haiks a second opportunity to litigate this issue.

Nonetheless, the Haiks argue that our answer this time around should be “yes.” After *Haik I*, they believe they acquired a protected property interest when the State Engineer—unbeknownst to them—approved the change applications identified in the complaint. The Haiks characterize this discovery as a change in “material operative fact.” Appellants' Br. at 43. And they claim it is this new fact that gives rise to new issues not previously adjudicated. But because we disagree with the Haiks' premise, we must disagree with their conclusion as well. The change applications simply do not matter.

To begin with, we reject the notion that a protected property interest arose with the mere approval of Change Application a16846 or any other change application.<sup>3</sup> Under Utah law, a change application allows “a person entitled to the use of water” to seek permission to change “the point of diversion; place of use; or purpose of use for which the water was originally appropriated.” Utah Code Ann. § 73–3–3(2)(a). “If an application is approved, the applicant *may* ... perfect the proposed application,” *id.* § 73–3–10(3)(c) (emphasis added), at which time the State Engineer issues a certificate of appropriation. *Id.* § 73–3–17. Nothing about this process requires the successful applicant to perfect or to use the water in the manner approved. So at most, the approved change applications “empowered” Salt Lake City to supply water to the Haiks' lots. See *Searle v. Milburn Irrigation Co.*, 133 P.3d 382, 388 (Utah 2006). But Salt Lake City already had this power in *Haik I*. As was the case then, we fail to see how the city's ability to supply water amounts to an obligation to do so—let alone a protected property interest belonging to the Haiks.

Still, the Haiks allege that approved Change Application a16846 had the particular effect in this case of bringing the Albion Basin Subdivision into Salt Lake City's service area, thereby requiring the city to extend its municipal water service to their lots. They believe that this triggered rights or interests belonging to them under Article XI, Section 6 of the Utah Constitution as well as a duty on the part of Salt Lake City “to act reasonably in making water sales ... as a municipal function.” App. at 20, ¶ 62.

Even assuming the lots are now within the city's service area, this fact doesn't entitle the Haiks to more water. To be sure, Article XI, Section 6 of the Utah Constitution mandates that a municipality supply water owned by it to its *inhabitants* at reasonable charges. See Utah Const. art. XI, § 6 (“[A]ll such waterworks, water rights and sources of water supply now owned or hereafter to be acquired by any municipal corporation, shall be preserved, maintained and operated by it for supplying its inhabitants with water at reasonable charges.”); *Platt v. Town of Torrey*, 949 P.2d 325, 328 (Utah 1997). But Article XI, Section 6 says nothing of “others beyond the limits of the city,” see *Platt*, 949 P.2d at 330 (distinguishing municipal inhabitants from nonresidents), and just because the Haiks' lots now fall within Salt Lake City's service area, it does not follow that the Haiks are now Salt Lake City inhabitants as well. See *id.* at 328 (discussing a town's obligations to “nonresident users within its services area” (emphasis added)). Indeed, time and again, the Haiks describe themselves as nonresidents of Salt Lake City. See, e.g., App. at 99–100, ¶ 498; Appellants' Br. at 49.

Consistent with the Utah Constitution, Utah courts do not impose a duty on municipalities like Salt Lake City to supply water to nonresidents like the Haiks. The Haiks actually appear to recognize as much. Again, they only allege that the city failed to exercise its discretion according to the “reasonableness requirement” articulated by the Utah Supreme Court in *County Water System v. Salt Lake City*, 3 Utah 2d 46, 278 P.2d 285 (1954), and *Platt v. Town of Torrey*. App. at 54, ¶ 237. (Complaint at ¶ 320, 498.) But we are not persuaded that even this requirement applies. *County Water System* simply held that Salt Lake City's sale of surplus water outside city limits, like its sale of water within city limits, was not subject to regulation by the Public Service Commission. 278 P.2d at 290–91. There, the court recognized that the supplying of water to nonresidents was “as much a municipal function as the supplying of water within the city limits.” *Id.* at 290. *Platt*, in turn, said that *County Water System* supported the rule that “a reasonable basis must exist for the disparate treatment of residents and nonresidents,” specifically when it came to differing water rates. 949 P.2d at 328, 330. But both cases were concerned with the law only *after* a municipality elected to supply water to nonresidents. Neither case requires a municipality to have a reasonable basis for refusing to supply water to nonresidents in the first place.

In fact, *County Water System* and *Platt* are consistent with what the district court said in *Haik I*—that a municipality's decision about whether to supply water to nonresidents is entirely permissive. See *Cnty. Water Sys.*, 278 P.2d at 290; see also *Platt*, 949 P.2d at 331 (citing favorably *Schroeder v. City of Grayville*, 166 Ill.App.3d 814, 117 Ill.Dec. 681, 520 N.E.2d 1032, 1034 (1988) (“[A]lthough not obligated to serve non-residents in the absence of a contractual relationship, a municipality is prohibited from discriminating unreasonably in rates or manner of service when it elects to serve non-residents.”)); App. at 314 (“Salt Lake City has no legal duty to furnish water to users outside its own city limits, be they ‘similarly situated’ or not.”) Utah's statutory law reinforces this permissive approach; it “authorizes municipalities to construct and operate ‘waterworks’ ... and to ‘deliver the surplus product or service capacity of any such works, not required by the city or its inhabitants, to others beyond the limits of the city.’ ” *Platt*, 949 P.2d at 330 (emphases added) (quoting Utah Code Ann. § 10–8–14 (1996)). The purpose of allowing the municipal sale of excess water to people in adjacent areas is to avoid “shameful waste,” see *Cnty. Water Sys.*, 278 P.2d at 290, not to force municipalities to extend their water supply to every property owner living at the top of a far-flung canyon.

Granted, we can imagine why the Haiks got their hopes up when they learned that Salt Lake City had sought out and received approval to supply water to the Albion Basin Subdivision in amounts allowing for development. In our view, however, the Haiks' hope of more water is still just that—a “mere expectation” that someone somewhere might one day supply water to their lots. *Haik I*, 1999 WL 190717, at \*7. The change applications did not alter anyone's obligations and they certainly did not give the Haiks a protected property interest or “legitimate claim of entitlement” to more water. *Hyde Park Co.*, 226 F.3d at 1210.

\*631 In sum, we see no reason to revisit our determination that the Haiks lack a constitutionally protected property interest in receiving water for their lots.<sup>4</sup> While affirming on this ground does not spare Salt Lake City the burdens it has already suffered in responding to this lawsuit, it does honor the preclusive effect of *Haik I*.



#### 4. The Equal-Protection Allegations Against Salt Lake City Fail to State a Claim

In evaluating the sufficiency of their equal-protection allegations, the Haiks ask us to apply the two-step inquiry from *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000). In that case, the Supreme Court held that the Equal Protection Clause gives rise to a cause of action even if a plaintiff does not belong to a particular class or group. *See id.* To prevail, such a plaintiff must allege and prove (1) that she has been intentionally treated differently from others similarly situated and (2) that there is no rational basis for the difference in treatment. *Id.* Because the Haiks do not allege class membership, we will proceed under this general framework.<sup>5</sup> But we proceed with caution, recognizing that class-of-one claims pose a danger of “turning even quotidian exercises of government discretion into constitutional causes.” *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1216 (10th Cir.2011).

Of course, this is not the first time the Haiks have alleged equal-protection violations against Salt Lake City. In *Haik I*, they claimed that Salt Lake City had acted unreasonably by refusing to supply water to them while choosing to supply water to others. *See Haik I*, 1999 WL 190717, at \*3–4. The Haiks argue the same thing now, but this time they say Salt Lake City *really* has no good reason to continue to treat them differently. As before, the Haiks provide examples of other people who are receiving water while they go without.

Appellees generally argue that the Haiks' equal-protection claim is barred because it is the same claim rejected on the merits in *Haik I*. We disagree. True; claim preclusion forecloses successive litigation of the “same claim.” *Taylor*, 553 U.S. at 892, 128 S.Ct. 2161. But claims are only the “same” for purposes of claim preclusion if they arise out of the same transaction or series of connected transactions. *Yapp v. Excel Corp.*, 186 F.3d 1222, 1227 (10th Cir.1999). In general, a transaction “connotes a natural grouping or common nucleus of operative facts.” Restatement (Second) of Judgments § 24 cmt. b, at 199 (1982). Under the transactional test, therefore, a new claim can go forward so long as it is based on new and independent facts not part of the previous transaction. *Hatch*, 471 F.3d at 1150. Here, the Haiks allege that Salt Lake City is unfairly supplying water to

a number of new and different people in its watershed but that Salt Lake City (through Niermeyer) \*632 sent a letter to permitting authorities in May 2011 reflecting the city's refusal to supply water to them. The Haiks also allege some comparators that predate *Haik I*, and we agree with Salt Lake City that the Haiks should have raised those examples before. Still, we think the new facts (arising subsequent to the prior action) “are enough on their own” to constitute a new claim. *Id.* (quoting *Storey v. Cello Holdings, LLC*, 347 F.3d 370, 384 (2d Cir.2003)). Hypothetically at least, the Haiks' new allegations could make out an equal-protection violation where none had occurred before.

[3] But the allegations are insufficient. Again, the first thing a class-of-one plaintiff must establish is that others “similarly situated in every material respect were treated differently.” *Kan. Penn Gaming*, 656 F.3d at 1216 (emphasis added) (internal quotation marks omitted). Depending on the case and the nature of the differential treatment, the allegations necessary to establish this level of similarity will vary. *See Jennings v. City of Stillwater*, 383 F.3d 1199, 1214 (10th Cir.2004). The more variables involved in the government action at issue, the more specifics the plaintiff will need to allege to allow for meaningful comparison between the plaintiff's (negative) experience and the (positive) experiences of others. *See id.* at 1215. Here, the complaint fails to allege with any specificity that the new water recipients are similar to the Haiks.

The allegations of Salt Lake City's unmetered sale of water to “homes<sup>6</sup> in Albion Basin Subdivision” warrant separate discussion. App. at 19, ¶ 60. Certainly if the Haiks alleged that Salt Lake City was supplying water to their neighbors while denying water to them, they would be much closer to successfully alleging that Salt Lake City was treating them differently from others similarly situated. We're not sure if this is what the Haiks mean to allege since they also say that Salt Lake City treated them and several of their neighbors differently from others—*i.e.*, the city treated people in the Albion Basin Subdivision the same way. Regardless, the problem here is that the Haiks do not allege that Salt Lake City denied them the water it is evidently supplying (or at least billing) their neighbors. Instead, the allegations are that Salt Lake City (through Jeffry Niermeyer) told authorities that the Haiks were only entitled to 50 gallons of water per day under the Little Cottonwood Water contract, resulting in

the denial of the Haiks' building permits. In the absence of allegations that Salt Lake City took a different approach with regard to other requests for development permits in the neighborhood, we have no way of assessing differential treatment.

To some extent, this apples-to-oranges problem carries over to the other allegations of differential treatment as well. Have the Haiks even applied for the water permits/approvals Salt Lake City has allegedly issued to the "similarly situated" comparators in the complaint?

In sum, the Haiks have not alleged differential treatment that states a class-of-one equal-protection claim. We have little forgiveness for this since we expressly considered several things unique about the Haiks' situation in *Haik I*—including the location of their property, their desired use, and their limited contractual rights. The current complaint does not even attempt to allege facts that might lead us to \*633 believe that the new water recipients are similar to them in any of these respects.

#### 5. The Civil-Conspiracy Claim Against Salt Lake City and Alta Is Barred by *Haik I*

[4] Appellees argue that the Haiks' civil-conspiracy claim is barred by claim preclusion. We agree. The Haiks did not raise a state-law conspiracy claim in *Haik I*, but we believe that would have been the appropriate time to do so.<sup>7</sup> See *Strickland v. City of Albuquerque*, 130 F.3d 1408, 1413 (10th Cir.1997) ("[Claim preclusion] bars claims that were or could have been brought in the prior proceeding.").

The Haiks allege that Salt Lake City and Alta "combined to accomplish the objective of using denial of water as a means of controlling development within the Albion Basin Subdivision." App. at 120, ¶ 620. They describe this "policy" or "custom" of denying water service as longstanding. App. at 22–23, ¶¶ 74, 76. Indeed, the Haiks trace the denials back to the early 1990s, when Salt Lake City allegedly promised the former mayor of Alta that it would deny water service to stop development in the area. They also allege that Salt Lake City and Alta's concealment of the change applications is an overt act of the conspiracy.

We return to the transactional test. Again, it provides that "a claim arising out of the same transaction, or series of connected transactions as a previous suit,

which concluded in a valid and final judgment, will be precluded." *Yapp*, 186 F.3d at 1227 (internal quotation marks omitted). We normally look to the initial complaint in determining the scope of the previous litigation and the "transactional nexus into which facts and claims are fitted or excluded for purposes of claim preclusion." *Hatch*, 471 F.3d at 1150. Even though the complaint from *Haik I* is not a part of this record, we know a great deal about the first lawsuit from the decision of the district court and our own decision on appeal. Relevant here, we know the Haiks previously argued that Salt Lake City and Alta were joined in a "collusive desire to prevent any development in the upper Albion Basin." *Haik I*, 1999 WL 190717, at \*2. And they claimed that Salt Lake City and Alta were working together to deny water to them for no good reason.

It's clear that there is substantial overlap between these facts and the allegations supporting the Haiks' current civil-conspiracy claim. See Restatement (Second) of Judgments § 24 cmt. b, at 199 (1982) ("If there is a substantial overlap, the second action should ordinarily be held precluded.") As far as we can tell, the only new allegation (apart from ongoing conspiracy) is that Alta and Salt Lake City concealed the change applications. But this fact alone does not set forth a "new and independent" claim.<sup>8</sup> *Hatch*, 471 F.3d at 1150. Instead, we believe the Haiks' civil-conspiracy \*634 claim arises out of the same transaction or series of transactions as *Haik I* and could have been raised as part of the "trial unit" in that case. *Hatch*, 471 F.3d at 1146; see *Stone v. Dep't of Aviation*, 453 F.3d 1271, 1278 (10th Cir.2006) ("A plaintiff's obligation to bring all related claims together in the same action arises under the common law rule of claim preclusion prohibiting the splitting of actions."). The claim was properly dismissed for this reason.

Alternatively, we affirm the district court's dismissal under Rule 12(b)(6). In *Haik I*, we found nothing suspicious or unlawful about the Water Supply Agreement or Salt Lake City and Alta's "purported objective ... to curtail further environmentally harmful development outside Alta's 1976 town boundaries." *Haik I*, 1999 WL 190717, at \*5. The same is true now, the Haiks' new allegations notwithstanding.

#### 6. The Misrepresentation Allegations Against Salt Lake City, Alta, Niermeyer, and Guldner Fail to State a Claim

[5] Fraudulent—and negligent—misrepresentation claims both require reasonable reliance on a misrepresentation of material fact. *Olsen v. Univ. of Phx.*, 244 P.3d 388, 390 (Utah Ct.App.2010). The Haiks allege that all Appellees are liable for misrepresentation due to their alleged lies and ongoing deceit about Salt Lake City's water supply. More specifically, they allege that Appellees led them to believe that Salt Lake City had no water and that there were no plans to service the area, when in fact both of those things were false—as shown by the approved change applications. We think these allegations are enough to give rise to a new and different claim for purposes of claim preclusion given that the Haiks didn't know about the change applications before. Still, the Haiks do not plead factual content that allows us to draw the reasonable inference that anyone is liable for misrepresentation.<sup>9</sup>

For one, we fail to see how a representation that Salt Lake City did not have water available to service the Albion Basin is false. The only argument the Haiks have on this score is that the approved change applications somehow gave Salt Lake City all the water it needed to service their lots. As discussed above, however, the change applications only authorized Salt Lake City to change the point of diversion and place of use of water it already had a right to use. True, the applications paved the way for Salt Lake City to supply water to the Albion Basin Subdivision. But they did not suddenly increase the amount of water available in general, nor did they make Salt Lake City's determination that there was not enough surplus water to extend to the Haiks' lots a lie. After all, Salt Lake City could decide there was no water “available” to service the Albion Basin Subdivision for a number of reasons, notwithstanding the city's physical or legal ability to extend service.

We also find no reason to think it misleading for anyone to represent that Salt Lake City had no plans to service the \*635 Albion Basin. From the beginning of this dispute, Alta has maintained that Salt Lake City controls water service to the Albion Basin Subdivision and Salt Lake City has maintained that it will not supply water to the Haiks' lots.<sup>10</sup> Both of those statements are entirely true and continue to be true to this day. That Salt Lake City now has the State Engineer's approval to supply to the Albion Basin Subdivision does not mean the city has plans to do so. Indeed, had Salt Lake City told the Haiks the opposite—that it *did* have plans to service the area—it seems that

this would have been false. As this lawsuit proves, Salt Lake City has held firm to its longstanding representation that it will not extend water as the Haiks desire.

If the Haiks had actually relied on Salt Lake City and Alta's representations, they would not have filed suit to compel the supply of water to their lots. This is their prerogative, but they cannot claim that they filed their lawsuits in reliance on anything Salt Lake City, Alta, or any of its officials said. They filed because they believed they were entitled to more water and that Salt Lake City and Alta were wrongfully refusing it.

For these reasons, we believe the district court was correct in dismissing the Haiks' misrepresentation claims under Rule (12)(b)(6).

## 7. Relief from Judgment in *Haik I*

[6] The Haiks believe that their new allegations not only state claims for relief but that they are also enough to set aside the judgment in *Haik I*. They allege that Salt Lake City and Alta committed fraud on the court by concealing the change applications and by dishonestly answering the district court's questions about water availability and plans for the Albion Basin Subdivision.<sup>11</sup> These allegations do not come close to the level of intentional fraud or gross injustice required to set aside a previous judgment.

Federal Rule of Civil Procedure 60 governs relief from final judgments and “does not limit a court's power to entertain an independent action to relieve a party from a judgment” or to “set aside a judgment for fraud on the court.” Fed.R.Civ.P. 60(d). Parties seeking relief from a judgment through an independent action can do so only to “prevent a grave miscarriage of justice.” *United States v. Beggerly*, 524 U.S. 38, 47, 118 S.Ct. 1862, 141 L.Ed.2d 32 (1998). It is a “narrow avenue” for equitable relief, *United States v. Buck*, 281 F.3d 1336, 1341 (10th Cir.2002), and can only be based on recognized grounds, such as fraud. *Winfield Assocs., Inc. v. Stonecipher*, 429 F.2d 1087, 1090 (10th Cir.1970). Similarly, a judgment can be set aside for “fraud on the court” only in cases of “the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated.” *Buck*, 281 F.3d at 1342 (quoting \*636 *Weese v. Schukman*, 98 F.3d 542, 552–53 (10th Cir.1996)). We review the district court's denial of relief on

the ground of fraud upon the court for abuse of discretion. *Id.*

We have held that “nondisclosure to the court of facts allegedly pertinent to the matter before it[ ] will not ordinarily rise to the level of fraud on the court.” *Id.* The nondisclosure of the change applications is no exception. While the district court may have been curious about water availability and any plans for the area, the change applications were only marginally relevant to this inquiry at best. As we’ve stated, the change applications did not require Salt Lake City to supply water to the Haiks, nor did they necessarily reveal Salt Lake City’s plans for the area. So, even if Salt Lake City’s lawyer knew about the approved change applications, we hardly think he lied when he told the district court in *Haik I* that he thought it “would be very difficult for [the city] to ever consider” extending water service to the Albion Basin.<sup>12</sup> App. at 13, ¶ 28.

More importantly, the disclosure of the change applications would not have influenced the result in *Haik I*. Like the district court, we determined that Alta and Salt Lake City could reasonably refuse water to the Haiks and that, at most, the Haiks could only claim a right to 50 gallons of water per day. *Haik I*, 1999 WL 190717, at \*1, \*4. The parties agree that the approval of Change Application a16846 authorized Salt Lake City to use more water in the Albion Basin Subdivision. But we

never assumed that Salt Lake City lacked this authority before.<sup>13</sup> We just said that no one was required to extend water service to the Haiks’ lots. Despite the Haiks’ arguments to the contrary, this simple fact remains true today.

In sum, this case is a far cry from those involving the kind of gross injustice that “demand[s] a departure from rigid adherence to the doctrine of res judicata.” *Beggerly*, 524 U.S. at 46, 118 S.Ct. 1862 (internal quotation marks omitted). We find no abuse of discretion.

## CONCLUSION

After reviewing the Haiks’ complaint and the exhibits attached to it, we conclude that none of their claims survives dismissal. Three of the five claims are precluded by *Haik I*, and the allegations are otherwise insufficient to state a claim under *Twombly* and *Iqbal*. We also conclude that the district court did not abuse its discretion in denying the Haiks’ relief from our previous judgment. We therefore affirm.

The Haiks’ motion to certify is denied.

## All Citations

567 Fed.Appx. 621

## Footnotes

- \* The late Honorable William J. Holloway, United States Senior Circuit Judge, participated as a panel member when this case was heard, but passed away before final disposition. “The practice of this Court permits the remaining two panel judges, if in agreement, to act as a quorum in resolving the appeal.” *United States v. Wiles*, 106 F.3d 1516, 1516 n. \* (10th Cir.1997); see also 28 U.S.C. § 46(d) (noting circuit court may adopt procedures permitting disposition of an appeal where remaining quorum of panel agrees with the disposition). The remaining panel members have acted as a quorum with respect to this order and judgment.
- \*\* This order and judgment is not binding precedent except under the doctrines of law of the case, claim preclusion, and issue preclusion. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.
- 1 The Utah Supreme Court also reached this conclusion in a lawsuit brought by the previous owner of the Haiks’ lots seeking to compel the issuance of building permits. See *Melville v. Salt Lake Cnty.*, 570 P.2d 687, 689 (Utah 1977) (“At most plaintiffs have proved that they may have a right to 50 gallons of water per unit constructed, which does not meet the County Board of Health’s requirement of 400 gallons per unit per day.”). As far as we know, the preclusive effect of this judgment has never been argued.
- 2 We have recognized four requirements of issue preclusion:
  - (1) [T]he issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in



privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

*Park Lake Res. Ltd. Liab. Co. v. U.S. Dep't of Agric.*, 378 F.3d 1132, 1136 (10th Cir.2004). We discuss only the first requirement because the other three are obviously satisfied.

We're not sure what the Haiks argue on this score. On the one hand, they contend that the State Engineer's approval triggered Salt Lake City's "duty to supply" water to their lots. Appellants' Br. at 32. In their complaint, however, the Haiks repeatedly allege that the approved change applications merely "authorized" Salt Lake City to supply water to the Albion Basin Subdivision. See, e.g., App. at 33, ¶ 125; App. at 42–43, ¶ 175; App. at 55, ¶ 244.

Because the Haiks lack a protected property interest, we do not reach the separate question of whether they were afforded the appropriate level of process. See *Brown v. Montoya*, 662 F.3d 1152, 1167 (10th Cir.2011) ("[C]ourts must engage in a two-step inquiry: (1) did the individual possess a protected interest such that the due process protections were applicable; and, if so, then (2) was the individual afforded an appropriate level of process.") Accordingly, we need not evaluate the district court's conclusions on that score and we deny the Haiks' motion asking us to take judicial notice of proceedings before the Salt Lake Valley Board of Health.

As in *Haik I*, "we assume for the purposes of this discussion only that the Haiks may maintain an equal protection claim against Salt Lake City." *Haik I*, 1999 WL 190717, at n. 2.

We question the Haiks' use of the word "homes" because there is no indication that anyone in the Albion Basin Subdivision has received the necessary permits to develop their "lots"—terminology the Haiks switch to in their brief.

The complaint appears to allege a civil-conspiracy claim under Utah law, although the Haiks attempt to recast this claim under section 1983. Like the district court, we don't believe the complaint gives fair notice of a section 1983 conspiracy claim. Regardless, such a claim would also fail because the allegations do not set forth either a conspiracy or a constitutionally protected right. See *Dixon v. City of Lawton, Okl.*, 898 F.2d 1443, 1449 (10th Cir.1990) ("[T]o recover under a § 1983 conspiracy theory, a plaintiff must plead and prove not only a conspiracy, but also an actual deprivation of rights....").

"To prove a civil conspiracy, plaintiff must show the following elements: (1) a combination of two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts, and (5) damages as a proximate result thereof." *Israel Pagan Estate v. Cannon*, 746 P.2d 785, 790 (Utah Ct.App.1987).

"To state a claim for fraudulent misrepresentation, a plaintiff must allege (1) that a representation was made (2) concerning a presently existing material fact (3) which was false and (4) which the representor either (a) knew to be false or (b) made recklessly, knowing that there was insufficient knowledge upon which to base such a representation, (5) for the purpose of inducing the other party to act upon it and (6) that the other party, acting reasonably and in ignorance of its falsity, (7) did in fact rely upon it (8) and was thereby induced to act (9) to that party's injury and damage." *State v. Apotex Corp.*, 282 P.3d 66, 80 (Utah 2012).

Niermeyer's letter maintained this status quo. To the extent the Haiks allege that Niermeyer lied with he told permitting authorities that the Haiks had a right to 50 gallons per day under the allegedly defunct Little Cottonwood Contract, we fail to see how this suggested *overstatement* of the Haiks' rights might support their misrepresentation claim.

At one point in the complaint, the Haiks also allege that Salt Lake City failed to disclose its unmetered water sales to the Albion Basin Subdivision. To the extent this allegation is part of their claim for relief under Rule 60, we reject the significance of this alleged nondisclosure as well. As discussed, these water sales do not carry any weight in the equal-protection context, and they do not indicate that Salt Lake City had a duty to supply water to the Haiks in the amounts they desire.

We think it's entirely possible that the lawyer simply did not recall Change Application a16846. According to the complaint, it was filed about five years before the hearing at issue, along with a dozen other change applications.

The district court in *Haik I* did not assume this either, but the Haiks cite the following statement from the court's order in suggesting otherwise: "The general duty imposed upon municipalities by Article XI, § 6 of the Utah Constitution ... presupposes that the water to be supplied to inhabitants has already been lawfully acquired by the municipality." App. at 310 n. 13. The district court made this comment in discussing *Alta's* municipal obligations, not Salt Lake City's. Of course, the approved change applications do not require *Alta* to supply water to the Haiks either.





