Public Service Commission - Fw: Answer

From: "J. Rodney Dansie" [redacted]
To: "Public Service Commission" <psc@utah.gov>
Date: 8/27/2012 11:04 AM
Subject: Fw: Answer
Attachments: MeminOpptoMotforEnt.082012.pdf Docket No. 11-2195-01

From: Tom Bowen
Sent: Monday, August 20, 2012 8:24 AM
To: 'J. Rodney Dansie'
Subject: Answer

Rod:

Attached is the answer to your request that the court enter an order. Call me when you get a chance so that we can discuss a response. We have to file it by Thursday.

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IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, WEST JORDAN DEPARTMENT, STATE OF UTAH

HI-COUNTRY ESTATES HOMEOWNERS ASSOCIATION, a Utah Corporation Plaintiff, vs. BAGLEY & COMPANY, et al., Defendants	**MEMORANDUM IN OPPOSITION TO MOTION FOR ENTRY OF AN ORDER IMPLEMENTING COURT OF APPEALS' DECISION** Case No. 0201007452 Previous Case No. 850901464 Judge Andrew Stone
FOOTHILLS WATER COMPANY, a Utah Corporation, J. RODNEY DANSIE, THE DANSIE FAMILY TRUST, RICHARD P. DANSIE, BOYD W. DANSIE, JOYCE M. TAYLOR and BONNIE R. PARKIN, Counterclaimants, vs. HI-COUNTRY ESTATES HOMEOWNERS ASSOCIATION, a Utah Corporation, et al., Counterclaim Defendants.	

Plaintiff and Counterclaim Defendant Hi-Country Estates Homeowners Association ("**Hi-Country**"), through counsel, submits the following Memorandum in Opposition to the Dansies' Motion for Entry of an Order Implementing Court of Appeals' Decision filed by Foothills Water Company, J. Rodney Dansie, Dansie Family Trust, Richard P. Dansie, Boyd W. Dansie, Joyce M. Taylor, and Bonnie R. Parkin (collectively, the "**Dansies**").

INTRODUCTION

Despite repeated statements from the Court of Appeals that neither its 2008 Opinion nor its 2011 Opinion "adjudicate[d] the rights of the parties or the enforceability of the Well Lease going forward," the Dansies now seek, based exclusively on those same opinions, an "order for this Court to enforce" the Well Lease going forward. Issuing such an order would run directly contrary to the decision of the Court of Appeals and would improperly extend this case that has already lasted decades. Furthermore, the portion of the 2011 Opinion that the Dansies seek to transform into prospective relief is expressly conditioned on the Utah Public Service Commission ("**PSC**") not asserting jurisdiction over Hi-Country. But the Dansies fail to disclose to the Court that the PSC has already asserted such jurisdiction. Thus, the Dansies request for an order is not only contrary to the express language of the 2011 Opinion, but is also moot. The Dansies motion should therefore be denied and Hi-Country should be awarded reasonable attorneys' fees incurred in responding to this motion.

FACTUAL BACKGROUND & PROCEDURAL HISTORY

This case has been before this Court since 1985, and a central item of dispute during that time has been the effect of the 1977 Well Lease Agreement (the "**Well Lease**"), which provided

Dansie Well No. 1 as the primary source of water to Association members during the term of the lease. On March 17, 1986, after five days of hearings, the Utah Public Service Commission ("**PSC**") entered an order concluding that the Well Lease was "grossly unreasonable, requiring not only substantial monthly payments, but also showering virtually limitless benefits on [the Dansies]." The PSC then "prohibit[ed] the [Well Lease] from affecting the rates paid by [the Association members]," *Hi-Country Estates Homeowners Ass'n v. Bagley & Co.*, 901 P.2d 1017, 1023 (Utah 1995), and indicated that that Dansies could continue to "obtain their water from [Dansie] Well No. 1" as long as they paid "the actual cost of any water provided to [them]." In 1994, because the Dansies refused to pay the actual costs of receiving water as required by the PSC Order, Hi-Country disconnected its water system from Dansie Well #1 and the remainder of the Dansies' water system.

As a result of the disconnection from the Dansies' water system, Hi-Country provided water to only its members and a limited number of others at rates equivalent to member rates. Consequently, on February 5, 1996, the PSC granted Hi-Country an exemption from rate regulation. On August 8, 1997, the Dansies filed their Amended Counterclaims, which sought damages for breach of the Well Lease and sought specific performance of the Well Lease going forward. In February 2005, the parties stipulated to, and the trial court certified for trial, all remaining issues in this longstanding dispute over the Well Lease. Following a trial, the trial court entered its Final Judgment on January 5, 2006 (a copy of the Final Judgment is attached to this memorandum as Exhibit A). In the Final Judgment, the trial court held that "[t]he Dansies are entitled to receive water from Dansie well No. 1 through the Associations' Water System in accordance with the Well Lease only upon payment of the pro rata costs of transporting water

through the Association's Water System." Additionally, the trial court held that the Dansies had "the right to receive 55 additional water connections from the Association, but only if the Dansies pay the Association for those connections at the Association's usual charge for each such connection."

Both parties appealed the Final Judgment, and on March 27, 2008, the Court of Appeals issued its opinion. *Hi-Country VI*, 2008 UT App 105, 182 P.3d 417. *Hi-Country VI* purported to "affirm the trial court on all issues," *id.* ¶ 24, but contained language in a footnote that arguably suggested that the requirements under the Final Judgment that the Dansies pay for water received was no longer in effect. After remittitur, the Dansies filed a Motion to Modify Final Judgment with this Court. The Dansies argued that, based upon footnote 2 of *Hi-Country VI*, the trial court should significantly modify the findings and conclusions of the Final Judgment to remove any requirement that the Dansies pay their share of the costs of water delivery.

This Court denied the Dansies' motion to modify the Final Judgment, holding that that there was "no ambiguity whatsoever" that *Hi-Country VI* had affirmed the Final Judgment on all issues and that the Dansies' request "would result in a very different trial court order than the one the Court of Appeals affirmed." This Court concluded that it did not have the authority "to interpret the opinion so broadly in the face of the unequivocal affirmance."

On appeal from the refusal to modify the Final Judgment, the Utah Court of Appeals issued *Hi-Country IX*. 2011 UT App 252, 262 P.3d 1188.[1] *Hi-Country IX* affirmed this Court's decision refusing to modify the Final Judgment, indicated that the Court was correct in viewing

[1] *Hi-Country IX* followed two successive Petitions for Rehearing based on earlier versions of the opinions. Thus, *Hi-Country VII*, 2010 UT App 86U, and *Hi-Country VIII*, 2011 UT App 24, were superseded by *Hi-Country IX*.

Hi-Country VI as a "complete affirmance," and included no instructions to this Court on remand. *Hi-Country IX* provided, however, that the Dansies' were entitled to their plain language rights under the Well Lease unless the PSC intervened. After *Hi-Country IX* issued and certiorari review was denied, Hi-Country sent a letter to the PSC requesting an assessment on whether Hi-Country was within PSC jurisdiction. Following an investigation by the Department of Public Utilities and a proceeding before an administrative law judge, a proceeding in which Rod Dansie and Hi-Country both participated, the PSC issued a ruling revoking Hi-Country's exemption and again asserting jurisdiction. A copy of the Report and Order is attached as Exhibit B to this Memorandum.

ANALYSIS

The order proposed by the Dansies is both unnecessary and improper because it contradicts the express intent of *Hi-Country IX* and fails to recognize the current status of the Well Lease given PSC intervention. The Dansies' expressed purposes for seeking this order are (1) so that the "file in this matter . . . clearly reflect[s] the present status of the dispute between the parties," and (2) to provide them with an "order for this Court to enforce if the Association refuses their demand that free water be provided." (Dansies Memo. 4.) Neither of these purposes are valid reasons for entering the order: a cursory review of the docket in this matter shows that the *Hi-Country IX* decision is already part of the file in this matter, and the second purpose actually directly conflicts with the *Hi-Country IX* decision. Ultimately, as further discussed below, the Court should refuse to enter the requested order for two primary reasons: first, the Court of Appeals expressly disavowed any possibility that its opinion was to be

prospectively applied; and second, the acknowledged exception to the Dansies' rights under the Well Lease agreement, namely the jurisdiction of the PSC, has already occurred.

I. The Dansies Are Seeking a Prospective Order, but the Court of Appeals Expressly Rejected that Its Opinion Grants Prospective Relief.

The Dansies' memorandum seeks an order to enforce against Hi-Country. In other words, they want an order of specific performance on the Well Lease Agreement. But such a ruling runs contrary to *Hi-Country IX* because that opinion specifically disavows any intent to provide prospective relief to the parties, and such an order would be an improper reversal of the Final Judgment's dismissal of Dansies' claim for specific performance.

On at least three occasions, *Hi-Country IX* states that neither it nor *Hi-Country VI* attempts to provide future relief to the parties. Specifically, in paragraph 10, the opinion states that it "made no attempt to resolve future issues that might arise between the parties, including future claims of damages against [Hi-Country] for future breaches of the Well Lease." *Hi-Country IX*, 2011 UT App 252, ¶ 10. The Court of Appeals further stated that its opinions "made no effort to adjudicate the rights of the parties or the enforceability of the Well Lease going forward." *Id.* Finally, in considering the Petition for Rehearing, the Court of Appeals again reaffirmed that its decision was "limited to its historical context and not as 'adjudicat[ing] the rights of the parties or the enforceability of the Well Lease going forward.'" *Id.* ¶ 14. Thus, Dansies' attempt by this motion to obtain a prospective order is in direct contradiction with the thrice-expressed intent of the Court of Appeals.

The Court of Appeals' refusal to grant prospective relief is consistent with the Final Judgment and the earlier complete affirmance of that judgment. Indeed, the substance and goal of the present motion, although bearing a different name, is no different that the Dansies' Motion

to Modify Final Judgment that was filed almost four years and multiple appellate decisions ago. The Dansies sought an order of specific performance as part of their amended counterclaim, but the Final Judgment dismissed the relevant causes of action after trial. (Final Judgment at 6 (dismissing the first and third causes of action of the Dansies' counterclaim for specific performance as "no cause of action").) *Hi-Country VI* affirmed that dismissal. *Hi-Country VI*, 2008 UT App 105, ¶¶ 1, 24; *Hi-Country IX*, 2011 UT App 252, ¶¶ 4, 9. Nothing in *Hi-Country IX* can be read to disturb that dismissal. Thus, just as this Court correctly ruled that it had no authority to grant the Motion to Modify Final Judgment, it likewise lacks authority to grant the present motion. Specifically, the law of the case doctrine prevents this Court from disturbing the Final Judgment's affirmed dismissal of the Dansies' claims for specific performance. *See Hi-Country XI*, 2011 UT App 252 ¶¶ 5–6 (concluding that under the mandate rule, the trial court "lacks authority to modify the final judgment" that was affirmed on appeal). The Court should therefore decline to enter the Dansies' proposed order as improper under the mandate rule.

II. The Issue of What Rights the Dansies Have under the Well Lease Is Moot Because the PSC Has Already Asserted Jurisdiction over Hi-Country

Even if *Hi-Country IX* could be read as allowing some sort of prospective order in the Dansies' favor, any such relief would be contingent on the PSC not asserting jurisdiction over Hi-Country. Because the PSC has already asserted jurisdiction over Hi-Country, issuing the order proposed by the Dansies would have no effect and is therefore a moot issue. *Hi-Country IX* was careful to acknowledge the role of the PSC in this case. Specifically, in paragraph 10, the opinion states that "so long as the PSC does not exercise jurisdiction over the water system, the rights of the parties are as set forth by the plain language of the Well Lease," and in paragraph 14, the opinion acknowledges the Dansies rights "unless the PSC intervenes and determines

otherwise." Thus, there is no question that Dansies' rights under the Well Lease give way to the PSC if it asserts jurisdiction.

The Dansies claim that Hi-Country has ignored their requests for water, but a parallel proceeding before the PSC illustrates that Hi-Country has taken seriously its legal obligations.[2] Shortly after the Supreme Court declined certiorari review of *Hi-Country IX*, Hi-Country contacted the PSC to assess whether Hi-Country still qualified for an exemption from regulation. PSC Report and Order at 3. After discovery, the Division of Public Utilities recommended that the exemption be canceled and Hi-Country again be subject to the jurisdiction of the PSC. *Id.* The PSC, after a hearing in which Rod Dansie participated, issued its Report and Order on July 12, 2012. The Report and Order cancelled Hi-Country's letter of exemption and reinstated its certificate of convenience and necessity. Thus, Hi-Country has been adjudicated a public utility subject to the jurisdiction of the PSC.[3]

Because the PSC has already intervened and asserted jurisdiction over Hi-Country, the issue presented in this motion is moot. An issue is moot "if during the pendency of the [action] circumstances change so that the controversy is eliminated, thereby rendering the relief requested impossible or of no legal effect." *Angilau v. Winder*, 2011 UT 13, ¶ 15, 248 P.3d 975 (internal

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[2] Hi-Country's obligation under the Well Lease is only one aspect of the complicated legal framework governing Hi-Country's water system. As Hi-Country has communicated to the Dansies on a number of occasions, Hi-Country must comply with Division of Drinking Water regulations and the Public Utility Code. Hi-Country has requested information from the Dansies about their water system to allow for compliance with Drinking Water regulations, but no such information has ever been provided. Furthermore, the Dansies demands often do not conform to the plain meaning of the Well Lease. For example, the Dansies have repeatedly demanded free water delivery to lot 43, but the Well Lease, by its plain language, does not benefit that lot.

[3] As a public utility, Hi-Country is subject to the obligations and prohibitions outlined in the Public Utility Code, including the obligation to obtain approval of the PSC of its schedule of rates (i.e., tariff), Utah Code Ann. § 54-3-2, the obligation to deliver water only in accordance with their approved tariff, *id.* § 54-3-7, and the prohibition against granting any person a preferential rate, *id.* § 54-3-8. Because of the inherent conflict between these provisions and the Dansies' desired water deliveries, the Court of Appeals was careful to recognize that Hi-Country's obligations under the Well Lease would change if the PSC asserted jurisdiction.

quotation marks omitted). Indeed, on its face, the Dansies' requested relief would be of "no legal effect" because the expressed condition for superseding the proposed order—"unless the PSC intervenes"—has already been satisfied. Stated another way, the law does not require a vain act, and entering the Dansies' proposed order would be such an act. Accordingly, even if the Court had authority to enter a prospective order inconsistent with its affirmed Final Judgment, doing so would be futile where the PSC has already asserted jurisdiction.

CONCLUSION

This Court should deny the Dansies' Motion for Entry of an Order Implementing Court of Appeals' Decision because such an order is contrary to *Hi-Country IX* and is improper given the already-established jurisdiction of the PSC over the Hi-Country water system. Furthermore, because the request runs directly contrary to *Hi-Country IX* and because the Dansies failed to disclose to the Court that the PSC has already asserted jurisdiction in this matter, Hi-Country requests an award of reasonable attorney fees in responding to this motion.

DATED this 16th day of August, 2012.

J. Craig Smith
Matthew E. Jensen
Attorneys for Hi-Country Estates HOA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of August, 2012, I served a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO MOTION FOR ENTRY OF AN ORDER IMPLEMENTING COURT OF APPEALS' DECISION** by causing the same to be mailed, via United States first class mail, postage pre-paid, to the following:

J. Thomas Bowen, Esq.
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Murray, Utah 84117-3545

DiAnn Calacino