

The Dansies respond to the Memorandum in Opposition of Hi-Country Estates Homeowners Association (Hi-Country) as follows hereinafter:

I. PSC Jurisdiction

After functioning outside of the PSC jurisdiction for over sixteen years and upon learning of the Court of Appeals' latest pronouncement in this matter,¹ Hi-Country sent a letter to the PSC requesting an "assessment" of whether it was within the PSC's jurisdiction.² In truth, Hi-Country's action was an attempt to avoid the effect of the Court's ruling that "the Dansies are, *going forward*, entitled to their contractual rights to free water and free hook-ups unless the PSC *intervenes and determines otherwise*." (*Hi-Country IX*, ¶ 14, emphasis added) Indeed, Exhibit B of Hi-Country's errata sheet states in the PSC's Conclusions of Law that Hi-Country presented evidence that it was "serving non-members," and that it agreed to PSC jurisdiction.³ Hi-Country has also freely admitted that it requested PSC regulation.⁴ The only plausible explanation for Hi-Country's zeal to return to PSC jurisdiction is that it is seeking to avoid the plain language of a 40 year old agreement that has been upheld by the trial court, the Court of Appeals, and the Utah Supreme Court granting

¹*Hi-Country Estates Homeowners Ass'n v. Bagley & Co.*, 2011 UT App. 252 ¶ 14 (hereinafter "Hi-Country IX").

²*Hi-Country Memorandum in Opposition*, p.5; hereafter, "Hi-Country Brief."

³*PCS Hearing and Order*, p. 7.

⁴*Notice of Meeting and Special Assessment of Hi-Country Estates Homeowners Association*, August 16, 2012, refers to the proceedings before the PSC as "our application to be regulated by the Public Service Commission."

the Dansies free water and hook-ups. To say that it was merely "requesting an assessment" is disingenuous.

II. The issue is not moot.

Hi-Country mischaracterizes the appellate court's opinion. Its claim that "the Court of Appeals expressly disavowed the possibility that its opinion was to be prospectively applied"⁵ ignores the clear language of the opinion. The Court stated that the Dansies *going forward* were entitled to their contractual rights to free water and free hook-ups. The term "going forward" clearly contemplates that the Court's opinion will be prospectively applied and that the Dansies are entitled to free water and hook-ups under the agreement, but that it was not rendering an opinion regarding any future claims for breaches of the Well Lease.

Hi-Country also misinterprets the Court's opinion relating to PSC intervention. The Court held that the Dansies were entitled to their contractual rights "unless the PSC *intervenes and determines otherwise.*" Hi-Country argues that the term "intervene" is synonymous with asserting jurisdiction over Hi-Country.⁶ Such an interpretation is incorrect. The term "intervene"⁷ means that the PSC must take action to stop or modify the Well Lease or appear in the dispute between Hi-Country and the Dansies. Further, the opinion requires the PSC to "determine otherwise" that the

⁵*Hi-Country Brief* at 5-6.

⁶*Hi-Country Brief* at 7-8.

⁷Merriam-Webster Dictionary: *intervene*: to come in or between by way of hindrance or modification; to become a third party to a legal proceeding begun by others for the protection of an alleged interest.

Dansies are not entitled to their contractual rights to free water and free hook-ups under the contract. The PSC has merely decided that Hi-Country, not the Dansies, is now subject to PSC jurisdiction.⁸ In any event, neither of the conditions cited by the Court of Appeals has been met. The PSC has not intervened in this matter and has not determined that the Well Lease is other than as written. If that time ever comes, then at that point the actions of the PSC may have a bearing on this case. At the present time, they do not. Hi-Country's assertion that the matter is moot simply because it has voluntarily submitted itself to the jurisdiction of the PSC is erroneous. As such, all of the cases cited by Hi-Country are inapposite under the facts of this case.

III. Judge Bryan's Final Judgment must be read in light of the Court of Appeals' decision.

Hi-Country relies upon Judge Bryan's "final judgment" in this case. That order has been subjected to much scrutiny by counsel and by the courts. The Dansies concede that the Court of Appeals affirmed Judge Bryan "in all respects," but that affirmance was explained by the Court in ¶14 of the Hi-Country IX opinion. The Court there expressly stated that its affirmance of the final judgment was limited to its historical context, and that it was not an adjudication of the rights of the parties or the enforceability of the Well Lease going forward. The Court reiterated that in spite of its affirmation of the final judgment, the effect of its ruling was that the Dansies were entitled to their contractual rights to free water and free hook-ups.

In order to avoid, in the future, the very dispute that is ensuing now, the Dansies requested that the Court simply enter an order clarifying Judge Roth's previous order. Although Judge Roth

⁸The Dansies submit that they are not subject to PSC jurisdiction under any circumstances.

felt compelled to uphold the final judgment based upon the Court's 2008 opinion, he found the language to be very confusing and recognized that there was a conflict between the Court of Appeals' upholding Judge Bryan, in all respects, and the language in the body of its opinion stating that the Dansies were entitled to the free water and free hook-ups.⁹ The Court of Appeals has now clarified the intent of its 2008 opinion and particularly §3 of Judge Bryan's final judgment. Thus, the order sought by the Dansies from this Court is proper at this juncture.

IV. Attorney Fees

Hi-Country's request for attorney fees should be denied. Hi-Country asserts that the Dansies should pay attorney fees because they failed to disclose to the Court that the PSC had already asserted jurisdiction over Hi-Country. Obviously, the PSC has not asserted jurisdiction in this case. It has decided, at the request of Hi-Country, that Hi-Country is subject to its jurisdiction, but it certainly has not made any determination that it has jurisdiction in this matter. When, and if, that happens, it will certainly be disclosed to the Court; but the present action of the PSC has no bearing on the issues presently before the Court.

CONCLUSION

The order presented to the Court quotes verbatim from the 2011 opinion of the Utah Court

⁹Judge Roth did not have the benefit of the clarification from the Court of Appeals when he signed his order. But he took the extraordinary steps of writing much of the order by hand and expressing his concern from the bench about the ambiguity of the 2008 opinion. Hi-Country IX has now addressed Judge Roth's concerns and explained that the 2008 opinion was not intended to impact the clear language of the Well Lease or affect the rights of the Dansies to receive free water and hook-ups.

of Appeals. The proposed order accurately reflects the possibility that sometime in the future the PSC may intervene in the contract dispute which has been the subject of years of litigation. Thus far the PSC has not intervened, and whether it will in the future is speculation. The opinion of the Court of Appeals clearly states that it is perspective in nature and that going forward from the entry of the opinion, the Dansies are entitled to free water and free hook-ups. Hi-Country is attempting to use PSC jurisdiction as a shield to relieve it from the obligations of a contract which it assumed many years ago. Hi-Country was more than happy to avoid PSC jurisdiction until the Court of Appeals ruled as it did, and Hi-Country saw a way to escape from its contractual duties. The request for attorney fees meets none of the standards that have been articulated by the appellate courts for an award.¹⁰ The request for fees should be denied, and the request for the entry of an order implementing the precise language of the Court of Appeals should be granted.

DATED this ____ day of August, 2012.

J. Thomas Bowen, Attorney for

¹⁰See *Gallegos v. Lloyd*, 2008 UT App. 40 ¶8, 178 P.3rd 922.