EXHIBIT "A"
Rodney Dansie Testimony

WELL LEASE AND WATER LINE EXTENSION AGREEMENT

THIS AGREEMENT made and entered into this 7th day of April, 1977, by and between JESSE H. DANSIE, hereinafter referred to as "Dansie", and GERALD H. BAGLEY, hereinafter referred to as "Bagley",

W I T N E S S E T H :

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

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

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

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

A. WELL LEASE

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

EXHIBIT A

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

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

4. Bagley shall have the right to renew this Well Lease on terms to be agreed to by Bagley and Dansie at the termination of this Lease on April 10, 1987.

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

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

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

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

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

9. Dansie does not warrant that the water from Dansie Well No. 1 does now or at any time during the term of this Agreement, and any extension thereof, will meet any standards for culinary water as required by the Utah State Division of Health. However, a letter of approval of the water by the Utah State Board of Health is attached (Exhibit #2) and the requirements are set forth in said letter.

B. EXTENSION NO. 1

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

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

00055

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

C. EXTENSION NO. 2

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

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

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

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

D. EXTENSION NO. 3

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

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

E. OTHER WELLS AND HOOK-UPS

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

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

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

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

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

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

F. MISCELLANEOUS

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

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

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

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

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

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

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

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

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

DATED this 7th day of April, 1977.

JESSIE H. DANSIE

GERALD H. BAGLEY

EXHIBIT "B"
Rodney Dansie Testimony

AMENDMENT TO WELL LEASE AND WATER LINE EXTENSION AGREEMENT

This Amendment made and entered into this 2nd day of July, 1985, by and between Jesse H. Dansie, hereinafter referred to as "Dansie," and Gerald H. Bagley, hereinafter referred to as "Bagley."

W I T N E S S E T H

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JESSIE H. DANSIE

GERALD H. BAGLEY

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EXHIBIT "C"
Rodney Dansie Testimony

Declaration of Trust

DT-3J

This is a Revocable Living Trust

We are transferring the ownership of our property real and personal from ourselves to ourselves as trustees. As trustees we reserve the rights the same as if we owned the property, to buy, sell, trade, use it all up, change the trust in whole or in part, to name new beneficiaries, change their amounts, borrow money using the trust assets as collateral, loan money, do business, or anything an individual can do.

When one of us is deceased, the remaining one is sole trustee, with the same powers as the two of us.

When we are both deceased, the ones we have appointed as successive trustees are to handle things as to the trust instructions.

The trust hereby created then becomes irrevocable. It can not be changed only as to the options explained in the trust.

Under this trust instrument we are declaring...

Two trusts - No. One knows as HOME TRUST 87-610190

Federal SS4 No. _____

No. Two known as RANCH TRUST 87-6190191

Other trust may be added as needed

WHEREAS, WE, JESSE H. DANSIE and RUTH B. DANSIE, of the City/Town of Herriman, County of Salt Lake, State of Utah which property is described more fully in the Deed conveying it from Alma H. and Agnes K. Dansie to Jesse H. and Ruth B. Dansie, as "that certain piece or parcel of land with buildings thereon standing, located in said Salt Lake County, including all fixtures and furnishings included.

1. That Part of Lot 1, Block 20, Herriman, Lying East of the Center Line of Section 35, Township 3 South, Range 2 West, Salt Lake Meridian Together with 3 hours of Herriman City Irrigation Water and 2 hours of Rose Creek Irrigation Water.

2. Commencing 116.72 rods North and 11.93 rods East of the Southwest corner of Section 35, Township 3 South, Range 2 West, Salt Lake Base and Meridian, and running thence South 14 rods; thence East 23.87 rods; thence North 14 rods; thence West 23.87 rods, to the place of BEGINNING. 2.38 Ac.

3. Commencing 116.72 rods north and 448.88 feet east from the Southwest corner of Section 35, Township 3 South, Range 2 west, Salt Lake Meridian; thence east 5 rods 12 feet; thence north 14.5 rods, more or less, to street; thence south 84 degrees west 6.04 rods, more or less, to a point due north of point of beginning; thence south to point of BEGINNING.

4. Commencing at a Point 116.72 rods North and 27.205 rods East from the Southwest corner of Section 35, Township 3. South, Range 2 West, Salt Lake Meridian and running thence North 13.5 rods; thence South 84 degrees West 8.64 rods; thence South 12.7 rods; thence East 8.615 rods to the place of BEGINNING, less rights of way for public roads.

5. The Northeast quarter of the Southeast quarter of Section 33, Township 3 South Range 2 West, Salt Lake Base and Meridian.

6. The Northeast Quarter of the Southwest Quarter of Section 33, Township 3 South, Range 2 West, Salt Lake Base and Meridian, and the Northwest Quarter of the Southeast Quarter of Section 33, Township 3 South, Range 2 West, Salt Lake Base and Meridian. Together with four shares of water stock in the Herriman Irrigation Company. (Cont. below signatures on signature page)

 Jesse H. Dansie Ruth B. Dansie

The following is a list of our valuable personal property, all automobiles, trucks, campers, trailers, boats, motor homes, tools and equipment, other farm equipment

Also, all collections: guns, stamps, coins, furs, jewelry, others

Insurances

Bank accounts FIRST INTERSTATE BANK 23-10140-5-1086; FIRST SECURITY BANK OF UTAH 10275-18-0217; DRAPER BANK AND TRUST 31488-2-0807

Saving accounts (including money market certificates)

See Exhibit "B" attached hereto

Credit unions Utah Prison Employee's Credit Union: #70 in name of Ruth B. Dansie; #1028 in name of Jesse H. Dansie, including matching funds in insurance and death benefits.

Stocks Prudential Federal Savings, 100 shares #686-000456335; 10 shares in the name of Jesse H. Dansie and Jesse R. Dansie

Herriman Pipeline and Development Co., 14 shares of water stock No. 446 (4 shares); No. (10 shares)

Other: see Quick Claim Deed for property easements, waterlines, distribution facilities and system and rights to use of water system and use of water under a lease agreement with Dr. Gerold H. Bagley, said agreement dated April 7, 1977.

A more complete list of our personal property and the bequeaths, and their distributions, will be found in the family registry on page 71 and 72.

Article 1

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that we do hereby acknowledge and declare that we hold and will hold said real property and all right, title and interest in and to said property and all furniture, fixtures and personal property situated therein IN TRUST

1. For the use and benefit of the following five persons, in equal shares, per stirpes: JHD RBD

Jesse Rodney Dansie, Richard P. Dansie, Boyd W. Dansie, Joyce M. Taylor, Bonnie R. Parkin.

Upon the death of the survivor of us, unless all the beneficiaries shall predecease us or unless we shall die as a result of a common accident or disaster, our Successor Trustee is hereby directed forthwith to transfer said property and all rights, title, and interest in and to said property unto the beneficiaries absolutely and thereby terminate this trust; provided, however, that if any beneficiary hereunder shall then be a minor, the Successor Trustee shall hold the trust assets in continuing trust until such beneficiary attains the age of twenty-one years. During such period of continuing trust the Successor Trustee, in his absolute discretion, may retain the specific trust property herein described if he believes it in the best interest of the beneficiary so to do, or he may sell or otherwise dispose of such specific trust property, investing and reinvesting the proceeds as he may deem appropriate. If the specific trust property shall be productive of income or if it be sold or otherwise disposed of, the Successor Trustee may apply or expend any or all of the income or principal directly for the maintenance, education and support of the minor beneficiary without the intervention of any guardian and without application to any court. Such payments of income or principal may be made to the beneficiaries without the intervention of any guardian and without application to any court. Such payments of income or principal may be made to the parents of such minor or to the person whom the minor is living without any liability upon the Successor Trustee to see to the application thereof. If any such minor survives us but dies before the age of twenty-one years, at his or her death the Successor Trustee shall deliver, pay over, transfer and distribute the trust property being helf for such minor to said minor's personal representatives, absolutely.

Jesse H. Dansie Ruth B. Dansie

2. We reserve unto ourselves the power and right (a) to place a mortgage or other lien upon the property, and (b) to collect any rental or other income which may accrue from the trust property and, in our sole discretion as Trustees, either to accumulate such income as an addition to the trust assets being held hereunder or pay such income to ourselves as individuals.

3. We reserve unto ourselves the power and right during our lifetime to amend or revoke in whole or in part the trust hereby created without the necessity of obtaining the consent of any beneficiary, and without giving notice to any beneficiary, but no such amendment or revocation shall be effective unless and until it is filed in the land records. The sale or other disposition by us of the whole or any part of the property shall constitute as to such whole or part a revocation of this trust.

4. The death during our lifetime, or in a common accident or disaster with us, of all of the beneficiaries. Should we for any reason fail to designate such new beneficiaries, this trust shall terminate upon the death of the survivor of us and the trust property shall revert to the estate of such survivor.

5. Upon the death or legal incapacity of one of us, the survivor shall continue as sole Trustee. Upon the death of the survivor of us, or if we both shall die in a common accident, we hereby nominate and appoint as Successor Trustee here under the beneficiary first above named, unless such beneficiary be a minor or legally incompetent, in which event we hereby nominate and appoint as Successor Trustee hereunder the beneficiary whose name appears second above. If such beneficiary named second above shall be a minor or legally incompetent, then we nominate and appoint as Successor Trustee hereunder:

(Name) as refered to in Article 1 of Declaration of Trust Jesse Rodney Dansie, Richard P. Dansie, Boyd W. Dansie, Joyce M. Taylor, Bonnie R. Parkin.

(Address) _____
Number Street City State

6. This Declaration of Trust shall extend to and be binding upon the heirs, executors, administrators and assigns of the undersigned and upon the Successors to the Trustee.

7. We as Trustees and our Successor Trustee shall serve without bond.

8. This Declaration of Trust shall be construed and enforced in accordance with the laws of the State of Utah

Article II

Upon the death of the Trustor; if the Trustor's spouse survives the Trustor, the spouse shall divide the remaining trust property and any property added thereto under the Trustor's will into two trusts to be know thereafter respectively as the HOME TRUST "Marital Trust".

SS-4 Identification Number 87-6190190 and the RANCH TRUST Non-Marital Trust".

SS-4 Identification Number 87-6190191

A. *Marital Trust Property.* The Marital Trust shall consist of:

1. *Designated Property.* Property received by the spouse from any source and specifically designated as property of the Marital Trust including property added to such trust under the Trustor's Will.

2. *Fractional Share.* A fractional share of the trust property determined as follows:

(a) The numerator of the fraction shall be an amount equal to the maximum marital deduction allowable for federal estate tax purposes in the Trustor's estate, less the value of all other property which passes or has passed to or in trust for the benefit of the Trustor's spouse other than under this provision of this agreement, which is included in the gross estate of the Trustor, and which qualifies in determining the marital deduction for federal estate tax purposes.

(b) The denominator shall be the total of the property in this trust which is included for federal estate tax purposes in the Trustor's gross estate and which qualifies for such marital deduction.

(c) Such fraction shall be applied to the total property in this trust included for federal estate tax purposes in the Trustor's gross estate and which qualifies for such marital deduction.

3. Insofar as possible, the nature, character and extent of property, its qualification for the marital deduction, the value of assets included in the Trustor's gross estate and any other fact required by the terms hereof to be determined shall be the same as finally determined for federal estate tax purposes in the Trustor's taxable estate. The Trustee may conclusively rely upon a written statement from the personal representative or legal counsel for such representative that the estate tax has been finally determined and as to all facts determined therein. (*Optional:* In dividing the trust property the Trustee [shall/shall not] take into account any deemed "increase" in the Trustor's gross estate resulting from the application of Section 2602 (c) (5) (A) of the Internal Revenue Code.)

B. Non Marital Trust. The Non Marital Trust shall consist of all other property held under this instrument. If the Trustor's spouse does not survive the Trustor, the Non Marital Trust shall consist of all property held under this instrument.

 Jesse R. Dansie Ruth B. Dansie

IN WITNESS WHEREOF we have hereunto set our hands and seals this 20th day of March 19 82.

(First co-owner sign here) Jesse H Dansie L.S.

(Second co-owner sign here) Ruth B. Dansie L.S.

Witness: (1) Lyle Eastman

Witness: (2) Donna Eastman ; (3) Elroy H Dansie

State of UTAH ss: Herriman, Utah

County Salt Lake of

On the 20th day of March, nineteen hundred and 82, before me came Jesse H. Dansie and Ruth B. Dansie known to me to be the individual described in, and who executed the foregoing instrument, and they acknowledged that they executed the same, and in due form of law acknowledged the foregoing instrument to be their free act and deed and desired the same migh be recorded as such.

(Notary Seal)

Notary Public

Aaron Jones
1789 Severn Drive, Salt Lake City, Utah

My commission expires June 6, 1984

EXHIBIT "A"
LEGAL DESCRIPTION
U-1-13700

PARCEL 2:

The North half of the Northwest Quarter of Section 3, Township 4 South, Range 2 West, Salt Lake Base and Meridian.

PARCEL 3:

COMMENCING at the Southwest corner of Section 34, Township 3 South, Range 2 West, and running thence East 160 rods; thence North 80 rods; thence East 70 rods; thence North 16 rods; thence East 10 rods; thence North 144 rods; thence West 160 rods; thence South 80 rods; thence West 80 rods; thence South 160 rods to COMMENCEMENT.

excepting the following 7 parcels:

A. Parcel deeded to Doran Hunt by Warranty Deed recorded in Book 2861 at page 90, records of Salt Lake County, Utah.

B. Parcel deed to Herriman Irrigation Company by Warranty Deed recorded in Book 2777 at page 341, records of Salt Lake County, Utah.

C. Parcel deeded to Don Davis by Warranty Deed recorded in Book 3197 at page 33, records of Salt Lake County, Utah.

~~D. Parcel deeded to Albert Yazzie by Quit Claim Deed recorded in Book 3183 at page 413, records of Salt Lake County, Utah.~~ R.H.D. R.B.D.

E. Commencing on the centerline of County Road No. U-111 at a point which is North 665.93 feet and East 578.11 feet from the Southwest corner of Section 34, Township 3 South, Range 2 West, Salt Lake Base and Meridian, and running thence along the centerline of an irrigation ditch, two courses, as follows: North 42°51' West 163.06 feet; thence North 33°11' West 311.35 feet; thence North 0°14'55" West 131.10 feet; thence North 85° 32'20" East 546.60 feet; thence South 81°06'30" East 187.50 feet; thence South 0°14'55" East 407.94 feet to the centerline of said County Road; thence along said centerline South 75°27' West 465.00 feet to the point of Commencement.

F. Commencing on the South line of Section 34, Township 3 South, Range 2 West, Salt Lake Base and Meridian, at a point which is South 89°51'11" East 745.75 feet from the Southwest corner of said Section 34 and running thence North 0°14'55" West 710.56 feet, more or less, to the centerline of County Road No. U-111; thence North 75°27' East, along said centerline412.78 feet; thence South 0°14'55" East 815.28 feet, more or less, to the above mentioned Section line; thence along said Section line, North 89°51'11" West 400.00 feet to the point of Beginning.

G. Commencing at the centerline of a County Road and the West line of Section 34, Township 3 South, Range 2 West, Salt Lake Base and Meridian, at a point which is North 0°14'55" West 520.31 feet from the Southwest corner of said Section 34 and running thence North 0°14'55" West 676.85 feet; thence South 86°12'15" East 302.10 feet; thence South 0°14'55" East 131.10 feet; thence South 33°11' East 311.35 feet; thence South 42°51' East 163.06 feet; more or less, to the center-

EXHIBIT "A"
LEGAL DESCRIPTION
U-1-13700
Page 2

line of the abovementioned County Road; thence along said centerline, South 75°27' West 360.00 feet; thence South 76°37' West 238.39 feet to the point of beginning.

H. Commencing on the South line of Section 34, Township 3 South, Range 2 West, Salt Lake Base and Meridian, at a point which is South 89°51'11" East 1145.75 feet from the Southwest corner of said Section 34 and running thence South 89°51'11" East 300.00 feet; thence North 0°14'55" West 893.83 feet, more or less, to the centerline of a County Road; thence South 75°27' West along said centerline 309.59 feet; thence South 0°14'55" East 815.29 feet, more or less, to the point of beginning.

12. Beginning at the Northeast corner of the Southwest Quarter of the Southeast Quarter of Section 33, Township 3 South, Range 2 West, Salt Lake Base and Meridian, and running thence South 398.0 feet to the center of Butterfield Canyon Road; thence following up the road North 60 degrees 01' West to a point due South of another point which is 25 feet West of the point of beginning; thence East 25 feet to the point of BEGINNING.

13. Lot purchased September 26, 1984 described as

An undivided ¼ interest in Lot 51, Hi-Country Estates, according to the plat thereof, as recorded in the office of the County Recorder of said Countym together with a right of way over and across the private roads located within said subdivision. Together with a Water Right Application No. 40075 (59-3626).

STATE OF UTAH
COUNTY OF Salt Lake } ss. Herriman, Utah

Personally appeared before me this 20th day of March 19 82, Jesse H. Dansie and Ruth B. Dansie, known to me to be the signers and seniers of the foregoing instrument, and acknowledged the same to be their free act and deed.

(Notary Seal)

Notary Public

Aaron Jones
1789 Severn Drive, Salt Lake City, Utah

EXHIBIT "B"

INSURANCES (including matching funds and death benefits)

Jesse H. Dansie

Operating Engineers Local #3 Union
Death benefit only
Beneficiary: Ruth B. Dansie

Group Life Insurance, Utah State Retirement Board
GL-200
Beneficiary: Ruth B. Dansie

New York Life Insurance Co.
09-442-717
Beneficiary: Ruth B. Dansie

Utah State Retirement Office
Death benefit only
Beneficiary: Ruth B. Dansie

Surety Life Insurance Company

Beneficiary: Ruth B. Dansie

Ruth B. Dansie

Utah State Retirement Office
Death benefit only
Beneficiary: Jesse H. Dansie

Metropolitan Life Insurance Co.
540-486-589M; and 520-284-673M
Beneficiary: Jesse H. Dansie

Metropolitan Life Insurance Company

Beneficiary: Jesse H. Dansie

SAVINGS ACCOUNTS (Including money market certificates and Savings Cert.)

1. Prudential Federal Savings
   Account No.

2. First Security Bank
   Account No.

(Continued)

QUIT-CLAIM DEED

(JOINT)

To all People to whom these Presents shall come, Greetings:
KNOW YE, THAT WE,

(Name) Jesse H. Dansie and (Name) Ruth B. Dansie
in conformity with the terms of a certain Declaration of Trust executed by us under date of March 20th, 1982, do by these presents release and forever Quit-Claim to ourselves as Trustees under the terms of such Declaration of Trust, and to our successors as Trustee under the terms of such Declaration of Trust, all right, title, interest, claim and demand whatsoever which we as Releasors have or ought to have in or to the property located at: Lot 51, Hi-Country Estates

An undivided ¼ interest in.....
Lot 51, Hi-Country Estates, according to the plat thereof, as recorded in the office of the County Recorder of said County, together with a right of way over and across the private roads located within said subdivision. Together with a Water Right Application No. 90175(59-3626). Subject to easements, rights, rights-of-way, assessments, reservations, conditions, restrictions and covenants of record or enforceable in law or equity.

To Have and to Hold the premises, with all the appurtenances, as such Trustees forever; and we declare and agree that neither we as individuals nor our heirs or assigns shall have or make any claim or demand upon such property.

In Witness Whereof, we have hereunto set our hands and seals this 29th day of November, 1985.

J. Rodney Dansie
Witness

Ruth B. Dansie L.S.
Releasor (First co-owner)

Witness

Jesse H. Dansie L.S.
Releasor (Second-co-owner)

STATE OF Utah }
COUNTY OF Salt } ss.

Personally appeared before me this 29th day of November 19 85, Jesse H. Dansie and Ruth B. Dansie, known to me to be the signers and sealers of the foregoing instrument, and acknowledged the same to be their free act and deed.

(Notary Seal) Nov. 1989 expiration

Notary Public

Received for record _____ at _____ Attest: _____
Date Time Clerk

and recorded in Vol. _____

on Page _____ of the Land Records by

The consideration for this transfer is less than One Dollar.

EXHIBIT "A"
LEGAL DESCRIPTION
U-1-13700
Page 2

line of the abovementioned County Road; thence along said centerline, South 75°27' West 360.00 feet; thence South 76°37' West 238.39 feet to the point of beginning.

H. Commencing on the South line of Section 34, Township 3 South, Range 2 West, Salt Lake Base and Meridian, at a point which is South 89°51'11" East 1145.75 feet from the Southwest corner of said Section 34 and running thence South 89°51'11" East 300.00 feet; thence North 0°14'55" West 893.83 feet, more or less, to the centerline of a County Road; thence South 75°27' West along said centerline 309.59 feet; thence South 0°14'55" East 815.29 feet, more or less, to the point of beginning.

EXHIBIT "A"
LEGAL DESCRIPTION
U-1-13700

PARCEL 2:

The North half of the Northwest Quarter of Section 3, Township 4 South, Range 2 West, Salt Lake Base and Meridian.

PARCEL 3:

COMMENCING at the Southwest corner of Section 34, Township 3 South, Range 2 West, and running thence East 160 rods; thence North 80 rods; thence East 70 rods; thence North 16 rods; thence East 10 rods; thence North 144 rods; thence West 160 rods; thence South 80 rods; thence West 80 rods; thence South 160 rods to COMMENCEMENT.

SHD R.B.D.

excepting the following 7 parcels:

A. Parcel deeded to Doran Hunt by Warranty Deed recorded in Book 2861 at page 90, records of Salt Lake County, Utah.

B. Parcel deed to Herriman Irrigation Company by Warranty Deed recorded in Book 2777 at page 341, records of Salt Lake County, Utah.

C. Parcel deeded to Don Davis by Warranty Deed recorded in Book 3197 at page 33, records of Salt Lake County, Utah.

~~D. Parcel deeded to Albert Tazzie by Quit-Claim Deed recorded in Book 3183 at page 413, records of Salt Lake County, Utah.~~ SHD R.B.D.

E. Commencing on the centerline of County Road No. U-111 at a point which is North 665.93 feet and East 578.11 feet from the Southwest corner of Section 34, Township 3 South, Range 2 West, Salt Lake Base and Meridian, and running thence along the centerline of an irrigation ditch, two courses, as follows: North 42°51' West 163.06 feet; thence North 33°11' West 311.35 feet; thence North 0°14'55" West 131.10 feet; thence North 85° 32'20" East 546.60 feet; thence South 81°06'30" East 187.50 feet; thence South 0°14'55" East 407.94 feet to the centerline of said County Road; thence along said centerline South 75°27' West 465.00 feet to the point of Commencement.

F. Commencing on the South line of Section 34, Township 3 South, Range 2 West, Salt Lake Base and Meridian, at a point which is South 89°51'11" East 745.75 feet from the Southwest corner of said Section 34 and running thence North 0°14'55" West 710.56 feet, more or less, to the centerline of County Road No. U-111; thence North 75°27' East, along said centerline412.78 feet; thence South 0°14'55" East 815.28 feet, more or less, to the above mentioned Section line; thence along said Section line, North 89°51'11" West 400.00 feet to the point of Beginning.

G. Commencing at the centerline of a County Road and the West line of Section 34, Township 3 South, Range 2 West, Salt Lake Base and Meridian, at a point which is North 0°14'55" West 520.31 feet from the Southwest corner of said Section 34 and running thence North 0°14'55" West 676.85 feet; thence South 86°12'15" East 302.10 feet; thence South 0°14'55" East 131.10 feet; thence South 33°11' East 311.35 feet; thence South 42°51' East 163.06 feet; more or less, to the center-

EXHIBIT "D"
Rodney Dansie Testimony

STATE OF UTAH
DEPARTMENT OF HEALTH

4076054

CERTIFICATE OF DEATH
STATE OF UTAH - DEPARTMENT OF HEALTH

LOCAL FILE NUMBER 18-869 — STATE FILE NUMBER

1. NAME OF DECEDENT — First / Middle / Last	JESSE / HOMER / DANSIE
2. SEX	Male
3. RACE (White, Black, Am. Indian, etc.) (Specify)	White
4. DATE OF DEATH (Month, Day, Year)	March 8, 1987
5. WAS DECEDENT OF SPANISH ORIGIN? YES ☐ NO ☒ If yes, indicate type: Mexican ☐ Puerto Rican ☐ Cuban ☐ Other ☐ (If other, specify)	
6. DATE OF BIRTH (Month, Day, Year)	April 29, 1910
7. AGE (Last Birthday)	76 Yrs.
IF UNDER 1 year — Months / Days	
IF UNDER 24 HOURS — Hours / Minutes	
8. BIRTHPLACE (State or foreign country)	Utah
9. CITIZEN OF WHAT COUNTRY	USA
10. MARITAL STATUS — Never Married ☐ / Married ☒ / Widowed ☐ / Divorced ☐	
11. EDUCATION — (Specify only highest grade completed) Elementary or Secondary (0-12) College (13-16 or 17+)	14
12. SOCIAL SECURITY NUMBER	528-05-9496
13a. USUAL OCCUPATION (Give kind of work done during most of working life, even if retired.)	Farmer
13b. KIND OF BUSINESS OR INDUSTRY	Farming
14. NAME OF SURVIVING SPOUSE (If wife, enter maiden name.)	Ruth Martha Butikofer
15. NAME OF FATHER	Alma H. Dansie
16. MAIDEN NAME OF MOTHER	Agnes Ruth Kunz
17. Was decedent ever in U.S. Armed Forces? YES ☐ NO ☒	
18a. USUAL RESIDENCE — (Street address or location)	7005 West 13090 South
18b. INSIDE CITY LIMITS? YES ☒ NO ☐	
18c. CITY OR TOWN	Herriman
18d. COUNTY	Salt Lake
18e. STATE AND ZIP CODE	Utah 84065
19. NAME, RELATIONSHIP AND MAILING ADDRESS OF INFORMANT	Ruth B. Dansie (wife) 7005 West 13090 South Herriman, Utah 84065
20a. NAME of hospital, nursing home or other institution where death occurred. If outside an institution, give street address or location.)	7005 West 13090 South
Inpatient / E.D. patient / DOA	
20b. CITY OR TOWN	Herriman
20c. COUNTY	Salt Lake
21a. MEDICAL EXAMINER: I hereby certify that to the best of my knowledge the death occurred at the hour, date and place stated above from the causes stated below based on examination of the body and/or investigation of the circumstances.	
21b. PHYSICIAN AND MEDICAL EXAMINER SIGNATURE	John H. Holbrook MD
21c. TIME of death (24 hr. clock)	0530
21d. Decedent was pronounced dead at: HOUR: DATE:	
22. PHYSICIAN: I hereby certify that to the best of my knowledge the death occurred at the hour, date and place stated above from the causes stated below, that I attended the decedent, and I last saw the decedent alive on: month / day / year	2 / 14 / 87
If not certified by medical examiner, was death reported to MAE? YES ☐ NO ☐ If yes, enter the date and hour reported. M.E. Case No.	
22. HOUR / MO / DAY / YEAR	
23a. CERTIFIER'S Name and title (Type or print)	John Holbrook, M. D.
23b. DATE SIGNED (Month, Day, Year)	3/9/87
23c. CERTIFIER'S Address and zip code	50 U Medical Drive, S.L.C. Utah 84132
23d. UTAH PHYSICIAN LICENSE NUMBER	3961
24a. Burial ☐ Cremation ☐ Other ☐	
24b. DATE	Mar. 12, 1987
24c. SIGNATURE OF FUNERAL DIRECTOR	W. Callard
24d. FUNERAL HOME — Name, address and license number	Goff Mortuary #41 Midvale, Utah 84047
25. NAME AND LOCATION OF CEMETERY OR CREMATORY	Herriman Cemetery Herriman, Utah
26. LOCAL REGISTRAR — Signature	[illegible]
27. Date accepted for registration by local registrar	March 10, 1987
28. PART I. DEATH WAS CAUSED BY: (Enter only one cause per line for A, B and C.) IMMEDIATE CAUSE (A)	Metastatic Colon Carcinoma
CONDITIONS IF ANY WHICH GAVE RISE TO THE IMMEDIATE CAUSE (A), STATING THE UNDERLYING CAUSE LAST. DUE TO, OR AS A CONSEQUENCE OF (B)	
DUE TO, OR AS A CONSEQUENCE OF (C)	
Interval between onset and death	
29. PART II. OTHER SIGNIFICANT CONDITIONS — CONTRIBUTING TO DEATH, BUT NOT RELATED TO THE IMMEDIATE CAUSE GIVEN IN PART I.	Severe Congestive heart failure
30. AUTOPSY YES ☐ NO ☒	
31a. IF YES, were findings considered in determining cause of death? YES ☐ NO ☐	
32. Accident ☐ Suicide ☐ Homicide ☐ Pending investigation ☐ Undetermined if injured Accidentally or Purposely ☐	
32a. DATE of Injury (Month, Day, Year)	
32b. TIME OF INJURY (24 Hour Clock)	
33. INJURY AT WORK? YES ☐ NO ☐	
34. PLACE OF INJURY (Specify home, farm, factory, freeway, street, office buildings, etc.)	
35. LOCATION OF INJURY — STREET AND NUMBER OR LOCATION AND CITY OR TOWN.	
36a. Distance from place of injury to usual residence (Item 18)	Miles
36b. Were laboratory tests done for drugs or toxic substances? YES ☐ NO ☐	
37. Were laboratory tests done for alcohol? YES ☐ NO ☐	
38. DESCRIBE HOW INJURY occurred (enter sequence of events which resulted in injury). NATURE OF INJURY SHOULD BE ENTERED IN ITEM 39.	
If motor vehicle accident, specify if decedent was driver, passenger or pedestrian.	

SDH-BHS 95 (4-85)

This is to certify that this is a true copy of the certificate on file in this office. This certified copy is issued under authority of section 26-2-26 of the Utah Code Annotated, 1953 As Amended.

Date Issued: MAR 1 0 1987

County SALT LAKE

Registrar [illegible]

John E Brockert
John E. Brockert
DIRECTOR OF VITAL STATISTICS
By Mary Lou J. Markley Em

L094440

WARNING: IT IS ILLEGAL TO DUPLICATE THIS COPY FOR OFFICIAL PURPOSES.

STATE OF UTAH — DEPARTMENT OF HEALTH

40760543

LOCAL FILE NUMBER 78-547

CERTIFICATE OF DEATH
STATE OF UTAH - DEPARTMENT OF HEALTH

STATE FILE NUMBER 143 88 001166

Field	Entry
1. Name of decedent (First, Middle, Last)	RUTH MARTHA DANSIE
2. Sex	Female
3. Race	White
4. Date of death	February 9, 1988
6. Date of birth	May 1, 1911
7. Age (last birthday)	76 Yrs.
8. Birthplace	Idaho
9. Citizen of what country	U.S.A.
10. Marital status	Widowed
11. Education	10
12. Social security number	529 62 4791
13a. Usual occupation	Homemaker
13b. Kind of business or industry	Own Home
15. Name of father	Rudolf Butikofer
16. Maiden name of mother	Maria Metzener
17. Was decedent ever in U.S. Armed Forces?	No
18a. Usual residence	7005 West 13090 South
18b. Inside city limits	Yes
18c. City or town	Herriman
18d. County	Salt Lake
18e. State and zip code	Utah 84065
19. Name, relationship and mailing address of informant	J. Rodney Dansie (Son), 7198 West 13090 South, Herriman, Utah 84065
20a. Name of hospital	University Hospital
20b.	Inpatient
20c. City or town	Salt Lake City
20d. County	Salt Lake
21b. Signature	[signature]
22a. Physician: last saw decedent alive on	2 (month) 9 (day) 88 (year)
Reported to Medical Examiner	No
23a. Certifier	Ed Nelson, M. D.
23b. Time of death	0730
23c. Date signed	2/9/88
23d. Certifier address	50 N Medical Drive, S.L.C.Utah,84132
23e. Utah physician license number	5159
24a. Disposition	Burial
24b. Date	Feb 13, 1988
24c. Signature	[signature]
24d. Funeral home	Goff Mortuary, Inc. #41, Midvale, Utah 84047
25. Name and location of cemetery or crematory	Herriman Cemetery, Herriman, Utah
26a. Local registrar signature	[signature]
26b. Date accepted for registration by local registrar	Feb. 10, 1988
27. Part I. (a) Immediate cause	Cardiopulmonary Arrest
(b) Due to, or as a consequence of	Assumed Intra-Abd Sepsis
Part II. Other significant conditions	Cerebrovascular Disease/Cardiovascular Disease
Autopsy	No

This is to certify that this is a true copy of the certificate on file in this office. This certified copy is issued under authority of section 26-2-22 of the Utah Code Annotated, 1953 As Amended.

Date Issued: JUN 19 2003

Barry E. Nangle
Barry E. Nangle
DIRECTOR OF VITAL RECORDS

SDH-BVR 94 (8/96)

SL 230716

00230716

THE GREAT SEAL OF THE STATE OF UTAH 1896

EXHIBIT "E"
Rodney Dansie Testimony

THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY
WEST JORDAN DEPARTMENT, STATE OF UTAH

Hi-Country Estates Homeowners Association:	
Plaintiff	MEMORANDUM DECISION AND ORDER
v	
Bagley & Co., et. al.,	
Defendant	Case: 020107452 Judge Barry Lawrence

Procedural Background:

In this matter, Judge Brian entered a Final Judgment on January 5, 2006. As indicated by the title of that document, that Judgment resolved all claims in the case. Paragraph 3 of that Judgment contained the following language:

> Under the Well Lease, the Dansies are entitled to receive 12 million gallons of water per year, or such larger amount as the excess capacity of the Association's Water System will permit, only upon payment of their pro rata share of the Association's cost for power, chlorination and water testing. Furthermore, all water transported outside of Hi-Country Estates is subject to a "fair use" transportation fee. Further, under the Well Lease, the Dansies are provided a right of first refusal to purchase the Association's Water System and 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.

The matter was appealed to the Utah Court of Appeals, which "affirm[ed] the trial court on all issues." *Hi-Country Estates Homeowners Association v. Bagley & Co.*, 2008 UT App 105, ¶ 24, 182 P.3d 417 (the "2008 Opinion"). Defendants' counsel acknowledged that paragraph 3 of the 2006 Final Judgment was or could have been addressed in that appeal. The Court of Appeals did not remand the case back to this Court and the Utah Supreme Court denied certiorari. 199 P.3d 970.

Defendants' Pending Motion

Defendants have now filed a Motion for Entry of an Order Implementing Court of Appeals' Decision. In that motion, defendants ask this Court to do the very same thing they previously asked this Court to do in 2009 - enter an Order modifying the 2006 Final Judgment to conform to a recent Court of Appeals decision, except this request seeks conformance with the 2011 Opinion instead of the 2008 Opinion. Defendants specifically ask the Court to issue the following Order:

> Based upon the 2008 and 2011 opinions of the Utah Court of Appeals, in this matter, IT IS ORDERED that the Dansies are, going forward, entitled to their contractual rights under the Well Lease Agreement to free water and free hookups unless the PSC intervenes and determines otherwise.

(Proposed Order dated August 27, 2012.)

Ruling

In 2008, this Court ruled that it lacked authority to modify the judgment to confirm with an appellate decision, and that there was no procedural mechanism allowing for defendants' request. That ruling was affirmed by the Court of Appeals. Defendants have failed to explain why the result should be any different this time. Accordingly, this Court again rules that it does not have the power to modify the 2006 Judgment, and that there is no rule of procedure allowing for defendants' request.

Along the same lines, this Court is concerned that defendants' motion calls for a purely advisory ruling. All claims in this matter have been fully and finally adjudicated, and no case or controversy currently exists before the Court. For that reason too, this Court declines to grant defendants' request. ***Baird v. State,*** 574 P.2d 713, 715 (Utah 1978) ("The courts are not a forum for hearing academic contentions or rendering advisory opinions.").

Plaintiff's Request For Attorneys Fees.

Plaintiffs request an award of reasonable attorneys fees incurred in defending against this motion. The Court denies plaintiffs' request. But in doing so, the Court notes that any future filings by the parties that raise issues that have already been resolved or are not expressly permitted by the Utah Rules of Civil Procedure may warrant an award of attorneys fees against the filing party.

Nonetheless, defendants filed a Motion to Modify Judgment before this Court, claiming that footnote 2 of the 2008 Opinion, which quoted from the Well Lease (regarding the fact that the plaintiffs were entitled to water at no cost) was inconsistent with Paragraph 3 of the 2006 Final Judgment. This Court denied defendants' request, concluding that "in the face of the unequivocal affirmance by the Court of Appeals, this court lacks authority to modify the judgment." (Order dated April 21, 2009, at ¶ 8.) The Court stated that if there is an inconsistency between the trial court ruling and an appellate court opinion, "the appellate court's directive governs." (*Id.* at ¶ 9.) The Court also stated that there was no permissible procedural mechanism for defendants' request. (*Id.* at¶ 10.)

Defendants then appealed this Court's 2009 Order to the Court of Appeals. The Court of Appeals affirmed. *Hi-Country Estates Homeowners Association v. Bagley & Co.*, 2011 UT App 252, 262 P.3d 1188 (the "2011 Opinion"). The Court stated:

> We therefore agree with the trial court that, "in the face of the unequivocal affirmance by the Court of Appeals, [the trial court] lacks authority to modify the final judgment." The trial court thus properly refused to interpret an opinion that states, "We therefore affirm the trial court on all issues" as having actually affirmed on some issues and reversed on others. A contrary approach would risk eroding the clarity of the mandate rule and the authority of the appellate courts of this state.

Id. at ¶ 6.

Defendants then petitioned for rehearing, arguing that the decision was confusing because it "does not provide guidance concerning the viability of ¶ 3 of the Final Judgment which requires the Dansies to pay the pro rata costs for the delivery of the water." *Id.* at ¶ 12. The Court of Appeals, on rehearing, rejected this argument, reasoning that:

> our affirmance of paragraph 3 of the Final Judgment must be understood as being limited to its historical context and not as "adjudicat [ing] the rights of the parties or the enforceability of the Well Lease going forward." To be clear, the effect of the Final Judgment, as affirmed and explained in our 2008 opinion and in the above Amended Memorandum Decision, is 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.

Id. at ¶ 14.

Order

Based on the foregoing, the Court hereby DENIES defendants' Motion for Entry of an Order Implementing Court of Appeals' Decision. The Court also DENIES plaintiffs' request for attorneys fees. The Court further notes that there are no pending claims in this case, and the matter has been fully adjudicated. A final judgment has been entered and the case is now closed.

No further Order is necessary in this matter.

Dated this 11th of December, 2012

Judge Barry Lawrence

IN THE UTAH COURT OF APPEALS

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Hi-Country Estates Homeowners Association, a Utah corporation, Plaintiff, v. Bagley & Company, et al., Defendants.	AMENDED MEMORANDUM DECISION[1] Case No. 20090433-CA FILED (July 29, 2011) 2011 UT App 252
Foothills Water Company, a Utah corporation; J. Rodney Dansie; Dansie Family Trust; Richard P. Dansie; Joyce M. Taylor; and Bonnie R. Parkin, Counterclaimants and Appellants, v. Hi-Country Estates Homeowners Association, a Utah corporation, Counterclaim Defendant and Appellee.	

Third District, West Jordan Department, 020107452
The Honorable Stephen L. Roth

1. This Amended Memorandum Decision supersedes the Amended Memorandum Decision in Case No. 20090433-CA issued on January 27, 2011.

Attorneys: J. Thomas Bowen, Midvale, for Appellants
J. Craig Smith, Matthew E. Jensen, and Jeffry R. Gittins, Salt Lake City, for Appellee

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Before Judges Davis, Orme, and Voros.

VOROS, Judge:

¶1 This appeal represents the latest episode in a course of litigation spanning a quarter of a century. We last ruled in this case in *Hi-Country Estates Homeowners Ass'n v. Bagley & Co.*, 2008 UT App 105, 182 P.3d 417, *cert. denied*, 199 P.3d 970 (2008). That appeal arose from a counterclaim filed by Foothills Water Company, J. Rodney Dansie, the Dansie Family Trust, Richard P. Dansie, Boyd W. Dansie, Joyce M. Taylor, and Bonnie R. Parkin (collectively, the Dansies) against the Hi-Country Estates Homeowners Association (the Association). *See id.* ¶ 1. The Dansies sought damages for breach of a 1977 well lease agreement (the Well Lease). *See id.* ¶ 2.

¶2 The trial court entered an omnibus order somewhat optimistically titled Final Judgment. *See id.* ¶ 6. First, the court ruled that the Well Lease was an enforceable contract, neither void as against public policy nor unconscionable. *See id.* Second, the trial court denied the Dansies' breach of contract claims. *See id.* In the context of these claims, the trial court ruled that, pursuant to a 1986 order of the Public Service Commission (PSC), the Dansies were entitled to receive water under the Well Lease only upon payment of their pro rata share of fees and costs and not, as stated in the Well Lease itself, "at no cost." *See id.* Because the Dansies had refused to pay these fees, the trial court ruled that the Association had not breached its obligation under the Well Lease. *See id.* In addition, the trial court found no evidentiary basis for the Dansies' claim of damages in the form of an orchard withering, loss of landscaping, and loss of property value. *See id.* ¶ 17. Third, the trial court awarded the Dansies judgment in the sum of $16,334.99 as reimbursement for improvements to the water system. *See id.* ¶ 6. Finally, the trial court denied the Dansies' claim for attorney fees. *See id.*

¶3 The Dansies appealed. We affirmed the trial court's order that the Well Lease was not void as against public policy. *See id.* ¶ 13. In doing so, we stated in a footnote that, because the PSC no longer exercised jurisdiction over the Association, "we now

interpret the Dansies' rights and obligations under the Well Lease according to its plain language." *Id.* ¶ 12 n.2. We also affirmed the trial court's order that the Well Lease was not unconscionable. *See id.* ¶ 15. And we affirmed the trial court's denial of the Dansies' breach of contract claims relating to the severing of the water systems. *See id.* ¶ 16. We did so under the rules of appellate procedure, holding that in challenging on appeal the trial court's factual findings on damages, the Dansies had failed to marshal the evidence as required by rule 24(a)(9) of the Utah Rules of Appellate Procedure. *See id.* ¶ 20; *see also* Utah R. App. P. 24(a)(9). We also affirmed the trial court's judgment in favor of the Dansies in the sum of $16,334.99. *See Hi-Country Estates*, 2008 UT App 105, ¶ 21. Finally, we affirmed the trial court's denial of attorney fees. *See id.* ¶ 22. Our opinion concluded, "We therefore affirm the trial court on all issues." *Id.* ¶ 24. The Utah Supreme Court denied cross-petitions for certiorari.

¶4 After remittitur, the Dansies filed a motion with the trial court to modify the Final Judgment to conform to footnote 2 of our opinion as they understood it. The Association resisted the motion, and the trial court denied it. The Dansies appeal. We conclude that our 2008 opinion appropriately resolved the issues before us under relevant principles of appellate review. Furthermore, the trial court properly read our opinion as a complete affirmance.

¶5 "The mandate rule dictates that pronouncements of an appellate court on legal issues in a case become the law of the case and must be followed in subsequent proceedings of that case: The mandate rule . . . binds both the district court and the parties to honor the mandate of the appellate court." *Utah Dep't of Transp. v. Ivers*, 2009 UT 56, ¶ 12, 218 P.3d 583 (omission in original) (citation and internal quotation marks omitted). "The lower court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces." *Id.* (internal quotation marks omitted).

¶6 For reasons we explain below, we do not believe the language in footnote two of our opinion conflicts with our ultimate order. Nevertheless, to the extent a real or apparent conflict exists in a judicial opinion, the opinion's "directions" control. *See Amax Magnesium Corp. v. Utah State Tax Comm'n*, 848 P.2d 715, 718 (Utah Ct. App. 1993) ("Where the language used in the body of an appellate opinion conflicts with directions on remand, the latter controls."), *rev'd on other grounds*, 874 P.2d 840 (Utah 1994). And the only directions in our 2008 opinion indicate that we are affirming the trial court on all issues. The opening paragraph of that opinion states, "Counterclaim Plaintiffs . . .

appeal several of the trial court's determinations. Counterclaim Defendant . . . filed a cross-appeal challenging other determinations. We affirm." *Hi-Country Estates Homeowners Ass'n v. Bagley & Co.*, 2008 UT App 105, ¶ 1, 182 P.3d 417. The final sentence of the opinion states, "We therefore affirm the trial court on all issues." *Id.* ¶ 24. Nowhere in the opinion do we use the words "reverse," "vacate," "modify," or (except in reciting the history of the litigation) "remand." We therefore agree with the trial court that, "in the face of the unequivocal affirmance by the Court of Appeals, [the trial court] lacks authority to modify the final judgment." The trial court thus properly refused to interpret an opinion that states, "We therefore affirm the trial court on all issues" as having actually affirmed on some issues and reversed on others. A contrary approach would risk eroding the clarity of the mandate rule and the authority of the appellate courts of this state.

¶7 Mandate rule aside, we do not read our 2008 opinion as a partial reversal. Footnote two appears in section I of the opinion. We there rejected the Association's claim that the Well Lease's "provisions for free water and water connections" are void as against public policy. We explained in footnote two that, because the 1986 order of the PSC was no longer in effect, we would interpret the Well Lease "according to its plain language." *Id.* ¶ 12 n.2. We thus clarified that the precise question we were treating was whether the Well Lease *as written*--not as superseded by PSC directives--was contrary to public policy. We concluded that it was not. *See id.* ¶¶ 12-13. A contrary ruling--that the Well Lease as written was unenforceable because it was unconscionable or against public policy--would have barred all the Dansies' past and future breach of contract claims. Our determination that the Well Lease did not offend public policy left unresolved the question of breach of contract.

¶8 We resolved the breach of contract claim in section III. *See id.* ¶ 16. We noted there that the trial court had addressed both breach and damages.[2] We first summarized the trial court's ruling with respect to breach; in so doing, we noted that "[i]n dismissing the claims, the trial court relied on the 1986 PSC order." *Id.* We then summarized the trial court's ruling with respect to damages, noting that the trial court

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2. Proof of damages is an element of a claim for breach of contract. *See Bair v. Axiom Design*, 2001 UT 20, ¶ 14, 20 P.3d 388 ("The elements of a prima facie case for breach of contract are (1) a contract, (2) performance by the party seeking recovery, (3) breach of the contract by the other party, and (4) damages.").

had "determined that the Dansies had failed to prove damages proximately caused by the alleged breach." *Id.* We resolved this issue on the element of damages, "affirm[ing] the dismissal of the breach of contract claims based on this failure to prove damages." *Id.* We properly did so on the ground that the Dansies had not "adequately marshal[ed] the evidence." *Id.* ¶ 20. Resolving the claim on the element of damages made it unnecessary for us to address whether a breach of the contract had been otherwise established. *See id.* ¶ 20.

¶9 Our 2008 opinion thus resolved all outstanding issues in favor of the trial court's order. It explicitly resolved all issues enumerated in the concluding paragraph. *See id.* ¶ 24. Any remaining challenges to the trial court's order, whether or not we addressed them on the merits, were also necessarily resolved in favor of the trial court's order. *See Piacitelli v. Southern Utah State Coll.*, 636 P.2d 1063, 1065 (Utah 1981) (noting that a final order, "unless reversed on appeal, is res judicata and binding upon [the] parties"). Finally, any challenges to prior trial court rulings that the parties might have appealed, but did not, were at that point waived. *See DeBry v. Cascade Enters.*, 935 P.2d 499, 502 (Utah 1997) (failing to raise issues ripe for appeal results in waiver of the right to raise them at a later time).[3]

¶10 The opinion made no attempt to resolve future issues that might arise between the parties, including future claims of damages against the Association for future breaches of the Well Lease. The opinion did establish 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. The Association contends that this can never happen, because as soon as it delivers a drop of water to the Dansies at no cost as required by the Well Lease, the PSC will exercise jurisdiction and require payment.

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3. Notwithstanding our 2008 opinion stating that we affirmed the trial court "on all issues," the Dansies did not file a petition for rehearing. The Association filed a petition for rehearing on a question unrelated to the instant appeal. *See* Utah R. App. P. 35(a) (permitting the filing of a petition for rehearing within fourteen days after the entry of an appellate decision drawing the court's attention to "points of law or fact which the petitioner claims the court has overlooked or misapprehended"). We denied that petition.

Perhaps the Association is correct.[4] But none of us can foretell the future--statutes can be amended; regulations can be repealed; administrative policies and attitudes can change. Thus, our opinion wisely hazarded no guess as to whether the PSC could or would exert jurisdiction in the future, and thus made no effort to adjudicate the rights of the parties or the enforceability of the Well Lease going forward.

¶11 In sum, our 2008 opinion properly and consistently resolved all issues before us on appeal. Moreover, we see no error in the trial court's refusal to modify the Final Judgment after remittitur and therefore affirm its disposition.

ON PETITION FOR REHEARING

¶12 The Dansies have petitioned for rehearing, claiming that our decision is confusing because it "does not provide guidance concerning the viability of ¶ 3 of the Final Judgment which requires the Dansies to pay the pro rata costs for the delivery of the water." We take this opportunity to resolve any such confusion.

¶13 In our 2008 opinion, we took pains in footnote 2 to explain that this payment obligation was a result of PSC regulation and that, with the termination of PSC jurisdiction over the water system, the Dansies' "rights and obligations under the Well Lease" would be determined "according to its plain language." *Hi-Country Estates Homeowners Ass'n v. Bagley & Co.*, 2008 UT App 105, ¶ 12 n.2, 182 P.3d 417, *cert. denied*, 199 P.3d 970 (2008). We then quoted the provision of the Well Lease providing the Dansies with a certain number of free hook-ups and a certain amount of free water. And in the foregoing Amended Memorandum Decision we reiterated 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." *See supra* ¶ 10. We expressed no opinion on the Association's contention that, in the future, the Dansies could never

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4. The trial court seems to have accepted this argument. In its Memorandum Decision and Order dated November 5, 2001, the trial court ruled that, "because there was no way for The Association to provide water service to the Dansies without violating the 1986 PSC order, the damages that arose after February 5, 1996 are also not attributable to The Association." We did not, and did not need to, grapple with the vagaries of this argument on appeal. We resolved all issues on other grounds.

enjoy free hook-ups and free water under the Well Lease because the PSC would necessarily re-exert jurisdiction and prevent it. Rather, we noted that "statutes can be amended; regulations can be repealed; administrative policies and attitudes can change." *Id.*

¶14 Thus, our affirmance of paragraph 3 of the Final Judgment must be understood as being limited to its historical context and not as "adjudicat[ing] the rights of the parties or the enforceability of the Well Lease going forward." To be clear, the effect of the Final Judgment, as affirmed and explained in our 2008 opinion and in the above Amended Memorandum Decision, is 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. Given these observations, the petition for rehearing is denied.

J. Frederic Voros Jr., Judge

¶15 I CONCUR:

Gregory K. Orme, Judge

DAVIS, Presiding Judge (dissenting):

¶16 The lead opinion recognizes the rule that a trial court is constrained to implement the spirit, and not only the letter, of our prior mandate. *See supra* ¶ 5 (citing *Utah Dep't of Transp. v. Ivers*, 2009 UT 56, ¶ 12, 218 P.3d 583). However, in assessing whether the trial court correctly implemented our prior mandate, the lead opinion does exactly the opposite, essentially focusing only on form and not on substance. This elevation of form over substance results in an outcome contrary to that intended in our prior

opinion and is manifestly unjust. I therefore do not join the lead opinion and must dissent.

¶17 First, the lead opinion takes the "affirm on all issues" language out of context in order to support its argument that we were affirming on all issues that were pending before the trial court. Although the concluding sentence of our prior opinion read, "We therefore affirm the trial court on all issues," *Hi-Country Estates Homeowners Ass'n v. Bagley & Co.*, 2008 UT App 105, ¶ 24, 182 P.3d 417, the lead opinion fails to consider the phrase in context to determine what the "therefore" referenced. *See supra* ¶¶ 3, 6. When considering our prior opinion as a whole, it is clear that the "affirm on all issues" phrase was more limited than the lead opinion suggests. The paragraph in which the language occurs set forth *four* issues on which we affirmed the trial court. Then we summed up, quite unnecessarily, "We *therefore* affirm the trial court on all issues." *Hi-Country Estates*, 2008 UT App 105, ¶ 24 (emphasis added). Thus, the "affirm on all issues" language refers only to our affirmance on each of the four issues that we had set forth in the previous sentences.[1]

¶18 Second, there seems to be some confusion regarding the breach of contract claims that were the subject of the prior appeal. The breach of contract claims included a cause of action based on the alleged breach caused by the Association separating the water systems, which requested relief in the form of damages, and a cause of action based on the Association's alleged breach resulting from its continuing refusal to provide free water and hook-ups, which requested relief in the form of specific performance. The section of our prior opinion entitled "Breach of the Well Lease" and the corresponding affirmance in our concluding paragraph addressed only the former--the claims for

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1. The Association essentially argues that looking beyond the conclusion of an appellate opinion would create confusion and would allow a litigant to wait until an appeal was remitted to the trial court and then "scour the appellate decision for any scrap of language that may arguably indicate that the appellate court could not possibly have meant what it said." But ironically, the Association and the lead opinion do precisely this, focusing on only one phrase of the opinion to support their positions. Other than our "affirm on all issues" language taken out of context, there is absolutely nothing in our prior opinion that would support the Association's argument that we intended the PSC order to govern the parties after February 5, 1996, and to leave intact the determination to that effect found in the trial court's Final Judgment.

damages resulting from the 1994 separation of the water systems. *See id.* ¶ 16 (stating that the Dansies' breach of contract claims "were based on the Association severing the two water systems"); *id.* ¶ 17 (noting that the trial court had dismissed the contract claims because the Dansies "failed to prove any damages proximately caused by the separation of the two water systems"); *id.* ¶ 20 (affirming dismissal of breach of contract claims based on "failure to prove damages proximately caused by the alleged breach"); *id.* ¶ 24 (concluding that we affirmed the breach of contract claims because "the Dansies did not prove damages proximately caused by the separation of the water systems"). And we emphasized that when addressing such breach of contract claims, reliance on the 1986 PSC Order was appropriate because "the PSC did have jurisdiction over the Association at the time the alleged breach occurred," that is, the 1994 severance of the water systems. *Id.* ¶ 16. However, neither this section of our opinion nor the restated affirmance on this issue in our concluding paragraph addressed the alleged breach of contract due to the Association's continuing refusal to provide the benefits as set forth in the Well Lease even after PSC jurisdiction had ended. And our affirmance on the breach of contract claims due to separation of the water systems simply cannot be used to infer our affirmance of breach of contract claims that addressed the current obligations of the parties.[2] *Cf. Messick v. PHD Trucking Serv., Inc.*, 678 P.2d 791, 795 (Utah 1984) ("[P]laintiff's reliance upon this Court's former mandate . . . is entirely out of context here. A close examination of our former opinion, and specifically the subject mandate, reveals that the mandate was directed toward the question of what *method* (pay schedule) rather than *rate* of compensation was to be used with regard to plaintiff's driving.").

¶19 Instead, the only portion of our prior opinion that addressed the breach of contract claims requesting specific performance was footnote 2, which stated as follows:

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2. Of course, the breach of contract claims requesting specific performance could not have been disposed of based upon our affirmance of the trial court's determination that the Dansies had failed to adequately prove damages. *See generally South Shores Concession, Inc. v. State*, 600 P.2d 550, 552 (Utah 1979) ("'The right to specific performance is essentially an exceptional one, and a decree for such relief is given *instead of damages* only when by this means a court can do more perfect and complete justice.'" (emphasis added)).

> In addressing the breach of contract claims, the trial court determined that the Association was required to provide the water "only upon payment of [the Dansies'] pro rata share of the Association's cost for power, chlorination, and water testing," and that the Association was required to provide the water connections "only if [the Dansies] pa[id] the Association for those connections at the Association's usual charge for such connection." The court reasoned that such payment by the Dansies was required because "[t]he 1986 PSC Order prohibits the Well Lease from affecting the rates paid by . . . the association members."
>
> On February 5, 1996, the PSC revoked the status of the water system as a public utility. Therefore, from that point forward, the PSC did not have jurisdiction over the water system and the 1986 PSC order was no longer binding. Thus, we now interpret the Dansies' rights and obligations under the Well Lease according to its plain language, which, as amended, states: "Dansie shall have the right to receive up to five (5) residential hook-ups on to the water system on the Dansie property for members of his immediate family without any payment of hook-up fees and shall further have the right to receive up to 12 million (12,000,000) gallons of water per year from the combined water system at no cost for culinary and yard irrigation use . . . ." The Well Lease also provides: "Dansie shall further have the right to receive up to fifty (50) residential hook-ups onto the water system on the Dansie property for which no hook-up fees will be charged."

Hi-Country Estates, 2008 UT App 105, ¶ 12 n.2 (alterations and omissions in original) (citation omitted). Thus, we explained in footnote 2 that the trial court had made an unqualified determination that the Dansies were not entitled to free water and we concluded that such a determination was incorrect as far as it concerned alleged breaches occurring after February 5, 1996. The lead opinion is indeed correct that we never used any word such as "modify" or "vacate" that taken alone would indicate a reversal on this issue. However, I see no authority indicating that any particular words must be employed in order to disagree with and reverse a trial court on an issue.

Again, the case law is clear that context is important and that we may not simply rely on individual words when interpreting an appellate mandate. *See, e.g., Coombs v. Salt Lake & Fort Douglas Ry. Co.*, 11 Utah 137, 39 P. 503, 506 (1895) ("'The mandate and opinion, taken together, although they use the word, "reversed," amount to a reversal only in respect to the accounting, and to a modification of the decree in respect to the accounting, and to an affirmance of it in all other respects.'" (quoting *Gaines v. Rugg*, 148 U.S. 228, 238 (1893))).

¶20 The lead opinion states that our language in footnote 2 was not a partial reversal but was simply an explanation that we were not considering PSC directives when assessing the contract for enforceability. *See supra* ¶ 7. But the footnote language does not simply state that we are not considering the PSC directives, but that we are not considering those directives *because* the PSC Order is no longer binding and the parties are now to be governed by the unmodified language of the Well Lease. The language employed in footnote 2 gives no hint of being limited to our consideration of the Well Lease's validity but, rather, quite definitively states that "the 1986 PSC order was no longer binding [after February 5, 1996,]" and that "we now interpret the Dansies' rights and obligations under the Well Lease according to its plain language." *Hi-Country Estates*, 2008 UT App 105, ¶ 12 n.2. The footnote also states, "[T]he Association is no longer a public utility, and thus, neither [statutes regulating public utilities] nor the PSC order is currently applicable to the Association." *Id.* ¶ 12. Thus, the footnote language establishes the current inapplicability of the PSC Order and the resulting current obligations of the parties, and is not merely setting up some hypothetical situation under which we would evaluate the validity of the Well Lease.[3]

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3. The Dansies are caught, the Association insists, in a Catch-22 that renders the promise of free water a perpetual mirage: because the Dansies are not members of the Association, as soon as the Association delivers a drop of water to them at no cost, it falls under the jurisdiction of the PSC. Once under PSC jurisdiction, the Association can no longer deliver water to them at no cost. In support of their argument, the Association points to language from a trial court memorandum decision issued prior to the Final Judgment. However, this memorandum decision was not brought to our attention by either party during the prior appeal. Furthermore, I am not convinced that the language from the memorandum decision is as unequivocal as the Association believes. The memorandum decision addressed the Association's Motion for Partial

(continued...)

¶21 Admittedly, we failed to include in the prior opinion's concluding paragraph our determination from footnote 2 regarding the current obligations of the parties under the Well Lease, which resulted in some understandable confusion. This omission may have been either a mere oversight or an erroneous understanding that the issue was not yet squarely before us and that we needed only give guidance to govern issues that were very likely to arise in future proceedings. Nonetheless, I think it sufficient that both parties argue, and I would agree, that the issue was appropriately before us in the prior appeal and, as discussed above, we analyzed the issue and ruled thereon. The incomplete nature of our conclusion should not relieve the parties from being bound by our express decision on a matter appropriately before us.

¶22 Although the lead opinion recognizes that the spirit, and not only the letter, of our prior mandate must be implemented, I disagree that the opinion follows such a directive. Instead of considering the substance of our prior language, the lead opinion focuses entirely on form. The lead opinion reasons that the Dansies do not receive the benefits we referenced in footnote 2 only because (1) our prior concluding paragraph used the "affirm on all issues" language in its conclusion; (2) we did not use any words that by themselves indicate a reversal, such as "reverse" or "vacate"; and (3) the determination we made in footnote 2 was not reiterated in the concluding paragraph. *See supra* ¶¶ 6, 9. Indeed, the lead opinion concedes that our prior opinion "did establish 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."[4] *Supra*

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3. (...continued)
Summary Judgment With Regard to Damages Resulting from the Separation of the Two Water Systems, not any claim seeking specific performance of the Well Lease. And the trial court stated, immediately after reiterating the Association's Catch-22 argument, "[B]ecause there was no way for The Association to provide water service to the Dansies without violating the 1986 PSC order, *the damages* that arose after February 5, 1996 are also not attributable to The Association." (Emphasis added.) Thus, the trial court's memorandum decision addresses damages arising after, not obligations due after, February 5, 1996.

4. The trial court, too, recognized that we addressed the issue of the current obligations of the parties under the Well Lease, the trial court referring to our footnote 2 language as our "conclusion" on the issue. In the face of the understanding of both the trial court
(continued...)

¶ 10. However, the lead opinion refuses to give such determination any effect because it was not reiterated in the opinion's concluding paragraph. *See supra* ¶ 9 ("[Our prior opinion] explicitly resolved all issues enumerated in the concluding paragraph. Any remaining challenges to the trial court's order, whether or not we addressed them on the merits, were also necessarily resolved in favor of the trial court's order." (citation omitted)). I think such an approach is in direct violation of the requirement that we consider our whole opinion when assessing whether the trial court implemented our prior mandate, *see Frost v. Liberty Mut. Ins. Co.*, 813 S.W.2d 302, 304-05 (Mo. 1991) ("On remand, proceedings in the trial court should be in accordance with both the mandate and the result contemplated in the opinion. It is well settled that the mandate is not to be read and applied in a vacuum. The opinion is part of the mandate and must be used to interpret the mandate . . . ." (omission in original) (citations and internal quotation marks omitted)); *Warren v. Robison*, 21 Utah 429, 61 P. 28, 30 (1900) ("[W]here an appeal is taken from a judgment of an inferior court entered under a mandate of the appellate court, the latter tribunal will construe its own mandate *in connection with its opinion*, to determine whether the inferior court proceeded in accordance therewith." (emphasis added)). The mandate rule applies to "pronouncements of an appellate court on legal issues in a case," *Utah Dep't of Transp. v. Ivers*, 2009 UT 56, ¶ 12, 218 P.3d 583 (internal quotation marks omitted), and is not limited to only those pronouncements found within the concluding paragraph of an appellate opinion.[5]

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4. (...continued)
and my colleagues that we definitively addressed the issue, I cannot fault the Dansies for failing to file a petition for rehearing to alert us to the fact that such pronouncement was not included in our concluding paragraph. Indeed, it is quite possible that our oversight was not apparent to the Dansies before the time had passed for filing a petition for rehearing. Furthermore, it is entirely appropriate to challenge a trial court's implementation of an appellate court mandate though a new appeal.

5. Of course, to the extent that there is an inconsistency between statements made in the appellate court's opinion and its ultimate mandate, the mandate controls. *See Amax Magnesium Corp. v. Utah State Tax Comm'n*, 848 P.2d 715, 718 (Utah Ct. App. 1993) ("Where the language used in the body of an appellate opinion conflicts with directions on remand, the latter controls."), *rev'd on other grounds*, 874 P.2d 840 (Utah 1994). However, as the Association points out, "[a] court should be hesitant to conclude that there is an inconsistency and should make every effort to reconcile the body of the

(continued...)

¶23 I would reverse the trial court's denial of the Dansies' motion to modify and remand to the trial court for further proceedings.[6]

James Z. Davis,
Presiding Judge

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5. (...continued)
opinion to the directive." *See generally Culbertson v. Board of Cnty. Comm'rs*, 2001 UT 108, ¶ 15, 44 P.3d 642 ("We construe an ambiguous order under the rules that apply to other legal documents."); *Utah Valley Bank v. Tanner*, 636 P.2d 1060, 1061-62 (Utah 1981) ("Each contract provision is to be considered in relation to all of the others, with a view toward giving effect to all and ignoring none."). Here there is no inconsistency between footnote 2 and our concluding paragraph because, as explained above, footnote 2 addressed the claims requesting specific performance and the concluding paragraph addressed the claims requesting damages. Footnote 2 contains two full paragraphs of analysis explicitly setting forth our conclusion that the PSC Order was not applicable after February 5, 1996, in evaluating the rights and obligations of the parties under the Well Lease. And there is no other statement within our decision that would indicate that we took any position to the contrary, that is, that the order was still at all applicable after February 5, 1996.

6. An appellate court has the authority to reopen issues previously decided "when the court is convinced that its prior decision was clearly erroneous and would work a manifest injustice." *Thurston v. Box Elder Cnty.*, 892 P.2d 1034, 1039 (Utah 1995). Although I do not agree with the lead opinion in its interpretation of our prior mandate, I think that under such an interpretation our prior opinion is clearly erroneous and works a manifest injustice. I would therefore exercise our authority to reopen the issue in order to avoid the unjust result of unintentionally relieving the Association from its obligations under the Well Lease via what was essentially a clerical error of failing to reiterate a determination in our concluding paragraph.

IN THE UTAH COURT OF APPEALS

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Hi-Country Estates Homeowners Association, a Utah corporation,

Plaintiff,

v.

Bagley & Company, a Utah corporation; J. Rodney Dansie; and Gerald Bagley,

Defendants.

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, Appellants, and Cross-appellees,

v.

Hi-Country Estates Homeowners Association, a Utah corporation,

Counterclaim Defendants, Appellees, and Cross-appellants.

OPINION
(For Official Publication)

Case No. 20060139-CA

F I L E D
(March 27, 2008)

2008 UT App 105

Third District, West Jordan Department, 020107452
The Honorable Pat B. Brian

Attorneys: Raymond J. Etcheverry and Angie Nelson, Salt Lake City, for Appellants and Cross-appellees
Dale F. Gardiner, Salt Lake City, for Appellees and Cross-appellants

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Before Judges Thorne, Davis, and Orme.

DAVIS, Judge:

¶1 Counterclaim Plaintiffs Foothills Water Company, J. Rodney Dansie, the Dansie Family Trust, Richard P. Dansie, Boyd W. Dansie, Joyce M. Taylor, and Bonnie R. Parkin (the Dansies) appeal several of the trial court's determinations. Counterclaim Defendant Hi-Country Estates Homeowners Association (the Association) filed a cross-appeal challenging other determinations. We affirm.

BACKGROUND[1]

¶2 This case revolves around a water system that supplies water to the Hi-Country Estates Subdivision. From 1973 to 1985, Gerald Bagley operated and made improvements to the water system, first in his capacity as an individual, then as a partner of Bagley and Company, and finally as a principal of Foothills Water Company (Foothills). In 1977, Bagley, apparently in his individual capacity, and Jesse Dansie entered into a well lease agreement (the Well Lease), which allowed Bagley to connect the water system to Dansie's well and draw water from Dansie's well for a ten-year period. Water lines were installed to transfer the water from the well to the water system, as well as to transport water to property owned by Dansie. As part of the Well Lease, Dansie had the right to receive water from the water system at no cost through five residential hook-ups, and the right to receive up to fifty additional hook-ups at no cost. The Well Lease was amended in July 1985, giving Dansie the right to receive up to twelve million gallons of water per year from the water system at no cost for as long as the system was operable.

¶3 This protracted litigation began in March 1985, with the Association bringing an action to quiet title in the water system against Bagley, Bagley and Company, and Dansie. Bagley counterclaimed under an unjust enrichment theory for reimbursement of costs related to the operation and maintenance of the water system, should title to the water system be quieted

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1. The history of this case is extensive. We relate only those facts pertinent to the issues currently before us. For a more detailed recital see Hi-Country Estates Homeowners Association v. Bagley & Co., 928 P.2d 1047, 1048-50 (Utah Ct. App. 1996), and Hi-Country Estates Homeowners Association v. Bagley & Co., 863 P.2d 1, 2-7 (Utah Ct. App. 1993), rev'd, 901 P.2d 1017 (Utah 1995).

in the Association. Defendants also counterclaimed for enforcement of the Well Lease.

¶4 In June 1985, Bagley created Foothills and began to manage the water system through this entity. Toward the end of the year, Bagley transferred all interest and stock in Foothills to Dansie; and the following January, Bagley assigned to Foothills all of his rights related to the water system. Also in June 1985, Foothills applied to the Public Service Commission (the PSC) to operate the water system as a public utility; and the PSC granted a certificate of convenience and necessity. The following year, the PSC held rate-setting hearings and determined that, notwithstanding the terms of the Well Lease, in order for the Dansies to obtain their free water, they would need to pay the pro-rata costs for power, chlorination, and water testing.

¶5 Title in the water system was eventually quieted in the Association. In 1994, shortly after the Association assumed control of the water system, the Association disconnected the water lines to the Dansie property when the Dansies allegedly refused to pay the costs required by the 1986 PSC order. The Dansies thereafter built a temporary water system to service their property and claimed breach of contract based on the severance of the water systems. In 1996, the PSC revoked the water system's status as a public utility.

¶6 After nearly twenty years of district court determinations, appeals by the parties, and remands by appellate courts, trial on the remaining issues was held in early 2005. The trial court then issued a Final Judgment on those remaining issues on January 5, 2006, which (1) ruled that the Well Lease was an enforceable contract and was not, as the Association had argued, void because of public policy or unconscionability; (2) dismissed the Dansies' breach of contract claims because the Dansies refused to pay the costs set forth by the 1986 PSC order and because the Dansies had failed to prove damages that were proximately caused by the separation of the water systems or to mitigate their alleged damages; and (3) refused to award attorney fees the Dansies claimed under the terms of the Well Lease. A separate order was signed on the same day, fixing an award amount of $16,334.99 to Foothills for improvements made to the water system between the years 1981 and 1985, the court having previously determined in a separate memorandum decision that Foothills was entitled to such an award.

¶7 The Dansies appeal the dismissal of their breach of contract claims, arguing that they did offer to pay the necessary costs and that they did prove damages caused by the severing of the water systems. Further, the Dansies argue that the trial court should have granted them attorney fees under the terms of the

Well Lease. The Association cross-appeals, arguing that the Well Lease is not enforceable because of public policy concerns and the doctrine of unconscionability. The Association also appeals the amount awarded to the Dansies as reimbursement for improvements, arguing that the trial court incorrectly relied on a prior PSC finding in determining that amount.

ISSUES AND STANDARDS OF REVIEW

¶8 The Association argues that the Well Lease is void as against public policy and that it is also unconscionable. These are legal questions, which we review for correctness, giving no deference to the trial court's determination on the matters. See Sosa v. Paulos, 924 P.2d 357, 360 (Utah 1996) ("The determination of whether a contract is unconscionable is . . . a question of law for the court." (citing Resource Mgmt. Co. v. Weston Ranch & Livestock Co., 706 P.2d 1028, 1041 (Utah 1985)); Russ v. Woodside Homes, Inc., 905 P.2d 901, 904, 906-07 (Utah Ct. App. 1995) (reviewing for correctness the question of whether a contract provision was void because it violated public policy).

¶9 The Dansies contest the trial court's determinations that the Association did not breach the Well Lease and that, in any event, the Dansies did not prove any damages that were proximately caused by the alleged breach. Our analysis focuses on the damages determination, which is a question of fact reviewed under a clear error standard. See Judd ex rel. Montgomery v. Drezga, 2004 UT 91, ¶ 34, 103 P.3d 135 (recognizing that "damages are a question of fact"); State v. Pena, 869 P.2d 932, 935 (Utah 1994) ("Trial courts are given primary responsibility for making determinations of fact. Findings of fact are reviewed by an appellate court under the clearly erroneous standard.").

¶10 The Association also contests the amount awarded to the Dansies as reimbursement for improvements made to the water system, essentially arguing that a finding in the 1986 PSC order is insufficient evidence to support the amount of the trial court's award. "When an appellant is essentially challenging the legal sufficiency of the evidence, a clearly erroneous standard of appellate review applies. . . . We review the evidence in a light most favorable to the trial court's findings and affirm if there is a reasonable basis for doing so." Reinbold v. Utah Fun Shares, 850 P.2d 487, 489 (Utah Ct. App. 1993).

¶11 Finally, the Dansies contest the trial court's refusal to award attorney fees under the terms of the Well Lease. "Whether a party may recover attorney fees in an action is a question of law that we review for correctness." Ault v. Holden, 2002 UT 33,

¶ 46, 44 P.3d 781 (citing Warner v. DMG Color, Inc., 2000 UT 102, ¶ 21, 20 P.3d 868).

ANALYSIS

I. Public Policy

¶12 The Association argues that the Well Lease is void as a matter of public policy. Specifically, the Association argues that the provisions for free water and water connections violate "the public policy that a water company may not charge unreasonable, preferential, or discriminatory rates." As support for this argument, the Association points to sections of the Utah Code which provide that charges by a public utility be "just and reasonable," Utah Code Ann. § 54-3-1 (2000), and that a public utility may not be preferential in its treatment of persons and entities, see id. § 54-3-8(1) (Supp. 2007). The Association further relies on the 1986 PSC order, arguing that the order determined the Well Lease to be "'grossly unreasonable.'" But the Association is no longer a public utility, and thus, neither these statutes nor the PSC order is currently applicable to the Association.[2] And we do not see any indication that the public

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2. In addressing the breach of contract claim, the trial court determined that the Association was required to provide the water "only upon payment of [the Dansies'] pro rata share of the Association's cost for power, chlorination, and water testing," and that the Association was required to provide the water connections "only if [the Dansies] pa[id] the Association for those connections at the Association's usual charge for such connection." The court reasoned that such payment by the Dansies was required because "[t]he 1986 PSC Order prohibits the Well Lease from affecting the rates paid by . . . the association members."

On February 5, 1996, the PSC revoked the status of the water system as a public utility. Therefore, from that point forward, the PSC did not have jurisdiction over the water system, see Utah Code Ann. § 54-4-1 (2000), and the 1986 PSC order was no longer binding. Thus, we now interpret the Dansies' rights and obligations under the Well Lease according to its plain language, which, as amended, states:

> Dansie shall have the right to receive up to five (5) residential hook-ups on to the water system on the Dansie property for members of his immediate family without any payment of hook-up fees and shall further have the right to receive up to 12 million (12,000,000)

(continued...)

policy regarding the operation of public utilities should extend to agreements between private parties contracting for water service.

¶13 The Association also argues that the Well Lease violates "the public policy that the state's scarce water resources should be managed by public entities." In support, the Association points to the Utah Constitution, which gives municipalities the power to purchase or lease public utilities, see Utah Const. art. XI, § 5(b), as well as section 17A-2-1401(7)(d) of the Utah Code, which states the policies of water conservancy districts, see Utah Code Ann. § 17A-2-1401(7)(d) (2004) (repealed 2007). The Association argues that the Well Lease, specifically the Dansies' right of refusal, violates these policies because it prohibits the Association from turning its water system over to a governmental entity. Again, neither of these sources show a public policy to prevent the type of private contract entered into here. Instead, such contracts can harmoniously coexist with these constitutional and statutory provisions without frustrating public policy. Thus, considerations of public policy do not render the Well Lease void.

II. Unconscionability

¶14 The Association argues that the Well Lease is also void due to unconscionability. The basis for this argument is the Well Lease provisions for perpetual free water and water connections. But "[e]ven if a contract term is unreasonable or more advantageous to one party, the contract, without more, is not unconscionable--the terms must be 'so one-sided as to oppress . . . an innocent party.'" Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 402 (Utah 1998) (quoting Sosa v. Paulos, 924 P.2d 357, 361 (Utah 1996)).

¶15 Nearly all of the Association's arguments center on the alleged current values of the obligations and benefits under the Well Lease. However, while not suggesting that the current circumstances would support a different result, our focus is on the time at which the Well Lease was initially entered into. See Resource Mgmt. Co. v. Weston Ranch & Livestock Co., 706 P.2d

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2. (...continued)
gallons of water per year from the combined water system at no cost for culinary and yard irrigation use . . . .
The Well Lease also provides: "Dansie shall further have the right to receive up to fifty (50) residential hook-ups onto the water system on the Dansie property for which no hook-up fees will be charged."

1028, 1043 (Utah 1985) ("Ordinarily the fairness of a contract should be determined in light of the circumstances as they existed at the time of the making . . . . Unconscionability cannot be demonstrated by hindsight." (internal quotation marks omitted)); Bekins Bar V Ranch v. Huth, 664 P.2d 455, 461 (Utah 1983) ("The determination of whether a contract is unconscionable is usually made with respect to the conditions that existed at the time the contract was made, and without regard for the parties' subsequent conduct and dealings."). The Association's only argument concerning the circumstances in 1977 is that the Association did not need water from the Dansie well. But the Association concedes that at the time the Well Lease was entered into, Bagley and Dansie had plans for a future subdivision, which may have been the primary reason for the Well Lease. Thus, Bagley did receive a potentially valuable benefit under the contract and, without more facts regarding the circumstances in 1977, we cannot say there is necessarily "an overall imbalance in the obligations and rights imposed by the bargain"[3] or that the terms are "so one-sided as to oppress or unfairly surprise an innocent party." Bekins Bar V Ranch, 664 P.2d at 462 (internal quotation marks omitted). Thus, we decline to declare the Well Lease void due to unconscionability.[4]

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3. An imbalance in the obligations and rights of the parties is only one factor to be used in determining unconscionability. See Bekins Bar V Ranch v. Huth, 664 P.2d 455, 461-62 (Utah 1983). A simple imbalance in the contract terms, without more, does not invalidate a contract. See id. at 459 ("With a few exceptions, it is still axiomatic in contract law that persons dealing at arm's length are entitled to contract on their own terms without the intervention of the courts for the purpose of relieving one side or the other from the effects of a bad bargain. Parties should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side." (citation and internal quotation marks omitted)).

4. The Association also argues that the Well Lease is unconscionable as applied to it because it was never a party to the Well Lease and is not a successor or an assign of Bagley. Although we see nothing in the record to indicate that the Association was ever a party to the Well Lease, the Association has failed to preserve this argument. We have reviewed the record references supplied by the Association, but we see no place where this argument was preserved. See State v. Brown, 856 P.2d 358, 361 (Utah Ct. App. 1993) ("Utah courts require specific objections in order to bring all claimed errors to the trial court's attention to give the court an opportunity to correct the errors if appropriate. . . . An oblique reference to an issue in

(continued...)

III. Breach of the Well Lease

¶16 The Dansies allege that the trial court erred by dismissing their breach of contract claims, which were based on the Association severing the two water systems. In dismissing the claims, the trial court relied on the 1986 PSC order--the Association was a public utility and the PSC did have jurisdiction over the Association at the time the alleged breach occurred--and determined that because the Dansies had refused to pay the required fees, the Association did not breach its obligations under the Well Lease by severing the water systems. The court further determined that the Dansies had failed to prove damages proximately caused by the alleged breach. We affirm the dismissal of the breach of contract claims based on this failure to prove damages.

¶17 The trial court determined: "The Dansies failed to prove any damages proximately caused by the separation of the two water systems. The Dansies further failed to mitigate any other alleged damages." This determination was based on findings that (1) "[t]he Dansies had several water sources to draw from when the Association disconnected its water system"; (2) "[t]he Dansies allowed their Lot 51 orchard to die from lack of watering"; (3) "[t]he Dansies did not lose money on the East 80 property as a result of the Association's disconnection from its water system"; (4) "[n]o Dansies lost landscaping as a result of the Association's disconnection from it[s] water system to the Dansies"; and (5) the Dansies refused offers from Herriman Pipeline Company and Kennecott to serve the Dansies' lands. The Dansies do not argue that the findings do not support the trial court's conclusion but, instead, argue that the record evidence does not support these findings.

¶18 "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Utah R. Civ. P. 52(a). "'A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" State v. Walker, 743 P.2d 191, 193

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4. (...continued)
the absence of an objection to the trial court's failure to rule on the issue does not put that issue properly before the court." (citations and internal quotation marks omitted)). Further, the Association has not argued any exception to this rule. Thus, we cannot consider this argument in our decision.

(Utah 1987) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)).

¶19 The Dansies' argument regarding damages essentially reargues the facts that were before the trial court. "However, a party challenging a trial court's factual finding must do more than merely reargue the evidence supporting his or her position; rather, the party is required to first marshal the evidence in support of the finding." Sigg v. Sigg, 905 P.2d 908, 913 n.7 (Utah Ct. App. 1995) (citing Shepherd v. Shepherd, 876 P.2d 429, 432 (Utah Ct. App. 1994)); see also Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896, 899 (Utah 1989) ("To mount a successful challenge to the correctness of a trial court's findings of fact, an appellant must first marshal all the evidence supporting the finding and then demonstrate that the evidence is legally insufficient to support the findings even in viewing it in the light most favorable to the court below.").

> The process of marshaling is . . . fundamentally different from that of presenting the evidence at trial. The challenging party must temporarily remove its own prejudices and fully embrace the adversary's position; [the challenging party] must play the devil's advocate. In so doing, appellants must present the evidence in a light most favorable to the trial court and not attempt to construe the evidence in a light favorable to their case. Appellants cannot merely present carefully selected facts and excerpts from the record in support of their position. Nor can they simply restate or review evidence that points to an alternate finding or a finding contrary to the trial court's finding of fact.

Chen v. Stewart, 2004 UT 82, ¶ 78, 100 P.3d 1177 (citations and internal quotation marks omitted).

¶20 In their brief, the Dansies simply set forth the evidence supporting their position, provide the opposition's response to that evidence, and argue that the latter was not credible. Such does not meet the "rigorous and strict" marshaling requirement. Id. ¶ 79. Further, the determination of credibility is for the fact finder, and our review on appeal is much more limited. See 438 Main St. v. Easy Heat, Inc., 2004 UT 72, ¶ 75, 99 P.3d 801 ("When reviewing a district court's findings of fact on appeal, we do not undertake an independent assessment of the evidence presented during the course of trial and reach our own separate findings with respect to that evidence. Rather, we endeavor only

to evaluate whether the court's findings are so lacking in support that they are against the clear weight of the evidence."). Thus, because the Dansies do not adequately marshal the evidence, we affirm the trial court's findings and conclusions regarding failure to prove damages proximately caused by the alleged breach, see Chen, 2004 UT 82, ¶ 80, and we therefore affirm the dismissal of the breach of contract claims, see Eleopulos v. McFarland & Hullinger, LLC, 2006 UT App 352, ¶ 10, 145 P.3d 1157 ("A breach of contract claim requires four essential elements of proof, one of which is damages.").[5]

IV. Improvements to the Water System

¶21 In one short paragraph, the Association argues that the trial court erred in relying exclusively on the 1986 PSC order's calculation of "rate base" to determine the amount to be awarded to the Dansies for improvements made to the water system. The Association claims that deficiencies in the order make it insufficient evidence to support the award amount. First, the Association asserts that it is not clear that the figure of $16,334.99 reached by the PSC was confined to the correct time period--1981 through 1985. But the PSC order is amply clear on this point, stating that "all improvements . . . prior to 1981 [we]re not includeable [sic] in the rate base" and then prefacing the calculation of rate base with the language "For improvements made from 1981-1985, we find as follows." Second, the Association asserts that "it is not certain . . . whether Foothills recovered some or all of the improvements through water rates." But the Association points to no evidence presented below that would indicate that the order's figure was in any way incorrect or that a portion of the amount was recovered through water rates. The PSC order was, as the trial court noted, "the only credible evidence before the court." Thus, although the order was not binding on the court, see supra note 2, the court was free to use the order as evidence of the value of the improvements, and the content of the order was therefore sufficient to support the amount awarded. Hence, we affirm the amount awarded as reimbursement for improvements.

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5. Moreover, the Dansies do not directly address the trial court's finding regarding their failure to mitigate, i.e., that other entities had offered to service the Dansies' property. This is another ground for affirmance. See generally Mahmood v. Ross (In re Estate of Ross), 1999 UT 104, ¶ 31, 990 P.2d 933 ("[U]nder the doctrine of avoidable consequences the nonbreaching party has an active duty to mitigate his damages, and he 'may not, either by action or inaction, aggravate the injury occasioned by the breach.'" (quoting Utah Farm Prod. Credit Ass'n v. Cox, 627 P.2d 62, 64 (Utah 1981))).

V. Attorney Fees

¶22 The Well Lease contains an indemnification provision, which states:

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

The Dansies argue that because they succeeded in obtaining an award for reimbursement for improvements as well as a ruling that the Well Lease is an enforceable contract, the trial court should have awarded them attorney fees under the indemnification clause of the Well Lease.[6] We disagree.

¶23 We will award attorney fees under the indemnity clause of the Well Lease only to the extent authorized in the Well Lease, i.e., those attorney fees that "arise out of" obligations "pursuant to" the Well Lease. It appears from the record, and the Dansies point to nothing indicating otherwise, that the amount for reimbursement of improvements was awarded under an unjust enrichment claim and did not arise out of rights or obligations pursuant to the Well Lease. And notwithstanding the trial court's determination that the Well Lease was an enforceable contract, the Dansies were ultimately unsuccessful on their breach of contract claims based thereon. Therefore, we affirm the trial court's refusal to award attorney fees under the indemnification clause of the Well Lease, and we accordingly decline to award attorney fees incurred on appeal.

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6. The Association primarily argues that attorney fees are inappropriate under the Well Lease because it is not a "successor" or an "assign" of Bagley. But as we have noted above, see supra note 4, this argument was not preserved below and we will not now reach it on appeal.

CONCLUSION

¶24 We affirm the trial court's holding that the Well Lease is an enforceable contract, being neither void as against public policy nor unconscionable. We further affirm the dismissal of the Dansies' breach of contract claims; specifically, we affirm the trial court's determination that the Dansies did not prove damages proximately caused by the separation of the water systems. As to the issue regarding the amount awarded as reimbursement for improvements, we see no error in the trial court's reliance on the PSC finding and affirm this award. Finally, because the Dansies did not ultimately prevail on their breach of contract claims and because their claim for reimbursement was not brought under the Well Lease, attorney fees are not appropriate below or on appeal. We therefore affirm the trial court on all issues.

James Z. Davis, Judge

¶25 WE CONCUR:

William A. Thorne Jr.,
Associate Presiding Judge

Gregory K. Orme, Judge

EXHIBIT "F"
Rodney Dansie Testimony

TARIFF

FOR

WATER SERVICE

HI-COUNTRY ESTATES PHASE I WATER COMPANY
124 HI-COUNTRY ROAD
HERRIMAN, UTAH 84096

State # 18147

This Tariff pertains only to customers of Hi-Country Estates Phase I Water Company within the boundaries of Hi-Country Estates Phase I, Beagley Acres, South Oquirrh subdivisions, and customers under special contract.

ANY OTHER POTENTIAL CUSTOMERS WANTING WATER FROM HI-COUNTRY ESTATES PHASE I WATER COMPANY WILL BE BY SPECIAL CONTRACT ONLY.

Copies of this Tariff are available from the Company for a nominal copying charge.

TABLE OF CONTENTS

A. SERVICE RATE SCHEDULE

1. Applicability: Applicable in entire service area to water service for culinary and domestic purposes at one point of delivery for use at a single dwelling unit.

2. Rate Schedule:

RATE SCHEDULE	
Base Rate (0 to 7,500 gallons)	$16.44
Overage Rate (per 1,000 additional gallons)	$1.50
Monthly Standby Fee	$4.50
Service Connection Fee	$750.00
Temporary Service Suspension Fee	$50.00
Reconnection Fee (after disconnection)	$200.00
Account Transfer Fee	$25.00
Meter Test Fee	$10.00
Customer Late Fee	$10.00
Security Deposit	$150.00
Returned Check Fee	$20.00

3. Base Rate: The base rate shall be charged to all customers receiving water from the Company's water system. The base rate applies to water usage less than or equal to the maximum amount allowed in the rate schedule. The base rate does not apply to those customers receiving water under special contract nor to those customers who have elected to temporarily suspend water service in accordance with §B.5.

4. Overage Rate: The overage rate applies to all customers receiving water from the Company's water system. When the customer uses more water than the maximum amount covered by the base rate, the additional usage shall be charged the overage rate. The overage rate does not apply to those customers receiving water under special contract nor to those customers who have elected to temporarily suspend water service in accordance with §B.5.

5. Standby Fee: The standby fee applies to property owners within Hi-Country Estates Phase I, Beagley Acres, and South Oquirrh subdivisions who are not receiving water from the Company's water system.

6. Service Connection Fee: The Service Connection Fee shown in this tariff includes a meter, a meter box, a cover, and a valved service line to the property line. The service connection fee is a one-time charge.

7. Temporary Service Suspension Fee: Temporary service suspension is discussed in §B.5.

8. Reconnection Fee: The reconnection fee shall be charged to new or former water users who desire to receive water from the Company's water system. This charge applies only when the residence had previously been connected to, and received water from the Company's water system.

9. Account Transfer Fee: The account transfer fee shall be charged to all new property owners within Hi-Country Estates Phase I, Beagley Acres, and South Oquirrh subdivisions.

10. Meter Test Fee: Meter test fees are discussed in §B.4.

11. Customer Late Fee: The customer late fee shall be charged when any portion of a customer's account balance is thirty days or more delinquent. It is the customer's responsibility to ensure that payments for amounts due are *received by the Company before the account becomes thirty days delinquent.* Delinquency is defined in §C.3.

12. Security Deposit: In order to secure payment of water billings, the Company may require a security deposit from either an applicant or an existing customer. When a security deposit is required by the Company, such security deposit will be held to be a guarantee fund. The Company may also terminate service to the customer upon failure to pay a required security deposit. The Company shall place all customer deposits in a separate, interest bearing and federally insured account and return the deposit together with the interest accrued following twelve timely payments of monthly billings.

The deposit required of existing customers shall be based upon prior water usage over a 90 day period. The deposit required of new customers shall not exceed the amount shown in the rate schedule. At the time a customer discontinues service, the security deposit plus accrued interest will be applied to any arrears and to the final bill, with any excess refunded to the customer.

Security deposits when required, shall be due and payable on demand.

13. Returned Check Fee: When a check is returned to the Company for insufficient funds, the Company shall charge the customer the returned check fee.

B. Conditions of Service

1. Water Service Agreement : All current and new customers, along with current renters, shall be required to complete a Water Service Agreement. If a current Water Service Agreement is not on file, or if a new one is requested, the customer shall be required to provide a signed Water Service Agreement within 10 days of receipt of request. This includes all customers on the system. Water service may be terminated for failure to provide a signed Water Service Agreement. Water service will not be provided to new customers nor to account transfer customers until the Water Service Agreement has been signed.

2. Service Connection : Any party desiring to obtain a supply of water from the Company shall make application in writing. The meter and meter box will be located as directed by the Company. All materials furnished by the Company shall remain the property thereof. Excavation and installation shall be made by the Company from the main line connection to three feet beyond the meter.

No unauthorized person shall tap any water main or distribution pipe of the Company or insert therein any corporation stop, or any other fixture or appliance or alter or disturb any service pipe, corporation stop, curb stop, gate valve, hydrant, water meter or any other part of the waterworks system or attachment thereto. No unauthorized person shall connect or disconnect any service pipe to or from the mains or distribution pipes of said waterworks system nor to or from any other service pipe now or hereafter connected with said system; nor make any repairs to, additions to, or alterations of any such service pipe, tap, stop cock, or any other fixture or attachment connected with any such service pipe.

The owner or occupant of any building or premises entitled to the use of water from the Company shall not supply water to any other building or premises without written permission of the Company.

3. Service Line and Use Restrictions : Applicants for water service shall furnish, lay, and install, at their own expense, all that portion of the service not provided by the Company, subject however, to the supervision and inspection of the Company. Installation shall be inspected and approved by the Company before the service line trench is backfilled. All customers of the Company shall comply with all State of Utah Public Drinking Water Regulations and shall agree to install or have installed,

where required and enforced by the Utah Department of Health, Utah Plumbing Code, Hi-Country Estates Phase I Water Company and the Division of Public Utilities, all protective equipment, that may include, but not be limited to, backflow preventers , check valves, pressure reducing equipment, and shut-off valves.

The Company's customers shall keep all of the above equipment in good operating condition. In the event that such equipment becomes inoperable, the water service may be disconnected by the Company until such conditions are corrected.

It is recommended that each residential customer install a "Residential Dual Check Valve Backflow Preventer" in their water line downstream of their shutoff valve. This valve is designed to prevent polluted water from entering the potable water system by preventing the reverse flow of water in supply lines. This valve will also protect water heaters in case of pressure drop in main water lines. It is also recommended that the applicant provide a shut-off valve on each service line in an accessible location separate from the water meter box.

At locations within the service area, where the main line water pressure exceeds 80 psi, and where required by the Utah Department of Health, an approved pressure reducing valve must be installed by the customer to avoid damage to the customer's water system. This equipment is to be maintained and kept in good operating condition by the customer.

4. Metering of Service : All water delivered by the Company to its customers shall be metered through water meters. Meters may be checked, inspected or adjusted at the discretion of the Company. Only authorized representatives of the Company shall open meter boxes to turn on or off water except in case of emergency or when special permission is given by the Company.

The Company shall make a test of the accuracy of any service water meter upon request of the customer. The cost of the test is identified in the rate schedule sheet. When a customer requests a meter test within twelve months of the date of the last previous test, he may be required to pay the full cost of such a test if the meter is found to record from 97 to 103 percent accuracy under methods of testing that are satisfactory to the Company. Meters that are not within this accuracy range shall not remain in service.

If the meter fails to register at any time, the water delivered during such a period shall be billed at the minimum rate. In the event a meter is found to be recording outside the acceptable accuracy range, the Company will refund any over billing if the meter records at more than 103 percent of actual, and the customer will pay any under billings if the meter records at less than 97 percent of actual Correction of consumption and billing for inaccurate meters will be limited to six months immediately preceding the date of removal of the meter for testing, except in cases where tampering is evident or access has been denied.

5. Temporary Service Suspension : Service may be temporarily suspended by the Company when so requested by a Customer in writing. The term of such temporary service suspension shall not be less than three months nor longer than six months. During the period of suspended service, the customer shall be billed at the Standby rate. Service shall be restored only upon payment in full of the applicable Temporary Service Suspension Fee, shown in the rate schedule, and any past due amounts and required service deposits due from the customer.

6. Disruption Liability : The Company shall use reasonable diligence to provide continuous water service to its customers, and shall make a reasonable effort to furnish them with a clean, pure supply of water, but the Company shall not be held liable for damages to any water user by reason of any stoppage or interruption of his water supply caused by scarcity of water; accidents to works; temporary interruptions for alterations, additions, or repairs; acts of God; the acts of the customer; or other unavoidable causes.

7. Damage to Facilities : Costs of any damages resulting from the failure by the owner, agent or tenant to properly protect the water meter or other facilities of the Company installed upon the premises, shall be assessed against such owner, agent, or tenant. No one shall tamper with or remove the meter, or interfere with the reading thereof. When any Company equipment is damaged for any reason and where repair, replacement, and/or excavation is required to restore normal water system operation, the actual total cost of making such repairs must be paid in full before water service will be provided to the customer. The Company shall not be liable for any damage to customer property due to low water pressure in the main water lines.

8. Reading of Meters : All meters shall be read by the Company monthly (approximately the 23rd of each month) and charges shall be based upon meter readings except as provided for in § B.4 hereinabove. Customers are required to allow Company access to said meter for the purpose of

reading the meter. Customer's denial of access to Company for the purpose of reading the meter shall be cause for termination of service. During the winter months of November through February, meters shall be read as the weather and accumulated snow permit. In those months that the meters are not read, customers shall be billed at the minimum rate.

9. Discontinuance of Service : Any customer wishing to discontinue service shall notify the Company in writing so that the meter can be read for a final billing. Such final bill shall be due and payable upon receipt. When a customer permanently goes off the system and onto his own private water system, the Company shall shut off the Customer's service line at the meter box and remove the meter. If the customer later requests to be reconnected to the Company's system, the customer shall be required to pay the Reconnection Fee. When a customer leaves the system, the Company will assume that they are permanently leaving the system.

10. Regulated Usage : Whenever the Company shall determine that the amount of water available to its distribution system has diminished to such a volume that, unless restricted, the public health, safety and general welfare is likely to be endangered, it may prescribe rules and regulations to conserve the water supply during such emergency. Such rules and regulations may include, but not be limited to, the restriction to certain hours for, or total prohibition of, the use of water for outdoor watering.

11. Demarcation of Ownership : The Company shall own the input supply line to the meter, the meter, the meter yoke, the meter box, and where installed the backflow preventer. The customer shall own all of the line from the point where such line attaches to Company owned equipment. The Company shall not be responsible for the repair or maintenance of customer owned lines.

C. Billing

1. Billing and Payments : Bills covering the charges shall be rendered monthly and shall be due 20 days after being rendered. If any customer neglects or refuses to pay the water service bill or any other obligation due to the Company by the due date of said bill, the account shall be considered delinquent and shall be governed by §E.

2. Standby Customer Billing: Standby billings shall cover the period of the previous month.

3. Delinquent Accounts

A. A bill which has remained unpaid beyond the statement due date is a delinquent account.
B. When an account is a delinquent account, the Company shall issue a written late notice to inform the account holder of the delinquent status. A late notice or reminder notice must include the following information:
1. A statement that the account is a delinquent account and should be paid promptly;
2. A statement that the account holder should communicate with the Company if he has a question concerning the account;
3. A statement of the delinquent account balance, using a term such as "delinquent account balance."
C. When the account holder responds to a late notice or reminder notice the Company shall investigate disputed issues and shall attempt to resolve the issues by negotiation. During this investigation and negotiation no other action shall be taken to terminate the water service if the account holder pays the undisputed portion of the account subject to the Company's right to terminate pursuant to §G, Termination Without Notice.

D. Facility Extension Policy

1. Definition : An extension is any continuation of, or branch from, the nearest available existing line of the Company, including any increase of capacity of an existing line to meet the customer's requirements.

2. Costs : The total cost of extensions, including engineering, labor, and materials, shall be paid by the applicants. Sufficient valves and fire hydrants must be included with every installation.

3. Construction Standards : Minimum standards of the Company shall be met, which standards shall also comply with the standards of the Utah State Bureau of Environmental Health. Pipe sizes shall be designated by the Company, but the size shall never be smaller than 6 inches in diameter. The pipeline shall be installed only along dedicated streets and highways.

4. Ownership : Completed facilities shall be owned, operated, and maintained by the Company, including and through the meters. Title to completed facilities shall be transferred to the Company before service shall be provided.

5. Temporary Service : The customer will pay the total cost for the installation and removal of any extension for service to a venture of a temporary or speculative nature. Such costs will be estimated and paid before work is begun on the extension.

E. Reasons for Termination:

1. Water service may be terminated for the following reasons:
   a. Nonpayment of a delinquent account that is 90 days old or older;
   b. Nonpayment of a deposit where required;
   c. Failure to comply with an order of the Company;
   d. Unauthorized use of or diversion of water service or tampering with wires, pipes, meters, or other equipment;
   e. Subterfuge or furnishing of false information in connection with obtaining water service;
   f. Failure to sign a Water Service Agreement (§B.1);
   g. Denial of access to the water meter for the purpose of reading said meter (§B.8).

2. The following shall be insufficient grounds for termination of service:
   a. A delinquent account, accrued prior to the commencement of a divorce or separate maintenance action in the courts, in the name of a former spouse, cannot be the basis for termination of the current account holder's service.
   b. Cohabitation of a current account holder with a delinquent account holder who was previously terminated for non-payment, unless the current and delinquent account holders also cohabited during the time the delinquent account holder received the Company's service, whether the service was received at the current account holder's present address or another address;
   c. When the delinquent account balance is less than $25.00, unless no payment has been made for two months;
   d. Failure to pay an amount in bona fide dispute before the Company.

F. Restrictions Upon Termination Practices The Company shall not employ termination practices other than those set forth in these rules. The Company shall have the right to employ or pursue legal methods to ensure collections of obligations due it.

1. Restrictions Upon Termination During Serious Illness : Water service may not be terminated and will be restored if terminated where termination will cause or aggravate a serious illness or infirmity of a person living in the residence. Water service will be restored or continue for one month or less as stated in §C.2.

Upon receipt of a physician's statement, either on a form obtained from the Company or on the physician's letterhead stationary, identifying the health infirmity or potential health hazard, the Company will continue or restore water service for the period set forth in the physician's statement or one month, whichever is less; however, the person whose health is threatened or illness aggravated may petition the Company for an extension of time.

During the period of continued service, the account holder is liable for the cost of water service. No action to terminate the service may be undertaken, however, until expiration of the period of continued service.

2. Restrictions Upon Termination to Residences with Life Supporting Equipment : The company shall not terminate service to a residence in which the account holder or a resident is known by the Company to be using a iron lung, respirator, dialysis machine, or other life supporting equipment. Account holders eligible for this protection can obtain it by filing a written notice with the Company. Thereupon, the Company shall mark and identify all meter boxes when this equipment is used.

G. Termination without Notice

Any provision contained in these rules notwithstanding, the Company may terminate water service without notice when, in its judgment, a clear emergency or serious health or safety hazard exists for so long as the conditions exist, or where there is unauthorized use or diversion of water service or

tampering with wires, pipes, meters, or other equipment owned by the Company. The Company shall immediately attempt to notify the customer of the termination and the reasons therefore.

H. Termination with Notice

1. At least ten calendar days prior to a proposed termination of water service, the Company shall give the account holder written notice of disconnection for nonpayment. The ten-day time period is computed from the date the notice is postmarked. The notice shall be given by first class mail or delivery to the premises and shall contain at a minimum the date on which payment arrangements must be made to avoid termination.

2. At least 48 hours prior to the time when termination of service is scheduled, the Company shall make good faith efforts to notify the account holder or an adult member of the household, by mail, by telephone or by a personal visit to the residence. If personal notification has not been made, either directly by the Company or by the customer in response to mailed notice, the Company shall leave a written termination notice at the residence. Personal notification, such as a visit to the residence or telephone conversation with the termination party, is required only during the winter months, October 1 through March 31. Other months of the year, the mailed 48 hour notice can be the final notice prior to termination.

3. For all residential premises when a person other than the occupant is the account holder and that fact is known to the Company, the Company shall post a notice of proposed termination on the premises in a conspicuous place and shall make reasonable efforts to give actual notice to the occupants by personal visits or other appropriate means at least five calendar days prior to the proposed termination. This notice provision applies to residential premises where the account holder has requested termination or the account holder has a delinquent bill. If nonpayment is the basis for the termination, the Company shall also advise the tenants that they may continue to receive water service for an additional 30 days by paying the charges due for the 30-day period just past.

4. Upon expiration of the notice of proposed termination, the Company may terminate water service.

I. Customer Requested Termination

1. A customer shall advise the Company at least three days in advance of the day on which he wants service disconnected to his residence. The Company shall disconnect the service within four working days of the requested disconnect date. The customer shall not be liable for the services rendered to or at the address or location after the expiration of the four days.
2. A customer who is not an occupant at the residence for which termination is requested shall advise the Company at least ten days in advance of the day on which he wants service disconnected and sign an affidavit that he is not requesting termination as a means of evicting his tenants. Alternatively, the customer may sign an affidavit that there are no occupants in the residence for which termination is requested, and thereupon the disconnection may occur within four days of the requested disconnection date.

J. Changes and Amendments: The right is reserved to amend or add to these rules and regulations as experience may show it to be necessary and as such amendments or additions are approved by the Company.