

David M. Wahlquist (3349)  
Benson L. Hathaway, Jr. (4219)  
Thomas K. Checketts (9161)  
Adam D. Wahlquist (12269)  
**KIRTON McCONKIE**  
50 East South Temple, Suite 400  
Salt Lake City, Utah 84111-1004  
Telephone: (801) 321-4890  
Email: [dwahlqui@kmclaw.com](mailto:dwahlqui@kmclaw.com)  
Email: [bhathaway@kmclaw.com](mailto:bhathaway@kmclaw.com)  
Email: [tchecketts@kmclaw.com](mailto:tchecketts@kmclaw.com)  
Email: [awahlquist@kmclaw.com](mailto:awahlquist@kmclaw.com)

Craig M. Call (0538)  
Jonathan Call (13662)  
**ANDERSON CALL & WILKINSON, P.C.**  
*A PROFESSIONAL CORPORATION*  
999 North Washington Blvd.  
Harrisville, UT 84404  
Phone: (801) 859-2255  
Email: [kanderson@andersoncall.com](mailto:kanderson@andersoncall.com)  
Email: [ccall@andersoncall.com](mailto:ccall@andersoncall.com)  
Email: [jcall@andersoncall.com](mailto:jcall@andersoncall.com)

*Attorneys for Plaintiffs*

---

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR  
WASHINGTON COUNTY STATE OF UTAH

---

WASHINGTON TOWNHOMES, LLC, a  
Utah Limited Liability Company; HOMES  
BY HARMONY, INC., a Utah Corporation;  
COTTON MEADOWS, LLC, a Utah Limited  
Liability Company; SALISBURY  
DEVELOPERS, INC., a Utah Corporation;  
SALISBURY DEVELOPMENT, LC, a Utah  
Limited Liability Company; IVORY  
SOUTHERN LLC, a Utah Limited Liability  
Company and related entities; PERRY  
HOMES UTAH, Inc., a Utah Corporation;  
HENRY WALKER CONSTRUCTION OF  
SOUTHERN UTAH, LLC, A Utah Limited  
Liability Company; and John Doe Plaintiffs  
1-1000 on their behalf and other similarly  
situated individuals,

Plaintiffs,

v.

WASHINGTON COUNTY WATER  
CONSERVANCY District, a Utah special service  
district and John Doe Defendants 1-10;

Defendants.

**FIRST AMENDED COMPLAINT**

Civil No. 130500465

Judge Jeffrey C. Wilcox

Pursuant to Utah Rule of Civil Procedure 23, Plaintiffs, WASHINGTON TOWNHOMES, LLC, a Utah limited liability company; SALISBURY DEVELOPERS, INC., a Utah corporation; HOMES BY HARMONY, INC., a Utah corporation; SALISBURY DEVELOPMENT, LC, a Utah limited liability company; COTTON MEADOWS, LLC, a Utah limited liability company; IVORY SOUTHERN LLC, a Utah limited liability company and related entities, PERRY HOMES UTAH, Inc., a Utah corporation; HENRY WALKER CONSTRUCTION OF SOUTHERN UTAH, LLC; and John Doe Plaintiffs 1-1000 on their behalf and for a class of other similarly situated individuals and entities, (collectively "Plaintiffs") for claims against Defendants, Washington County Water Conservancy District, a political subdivision of the State of Utah ("WCWCD"), and John Doe Defendants 1-10 (collectively, the "Defendants") allege as follows:

### **JURISDICTION**

1. The District Court has original jurisdiction to hear challenges to impact fees pursuant to Utah Code Ann. §§ 11-36a-703(2)(c) and 78A-5-102.

### **VENUE**

2. Venue is properly located in the Fifth Judicial Circuit Court pursuant to Utah Code Ann. § 78B-3-307 in that the Defendant WCWCD has its principal place of business in Washington County, State of Utah.

### **PARTIES**

3. WASHINGTON TOWNHOMES, LLC is a duly organized Utah limited liability company with its principal office in Utah County, State of Utah.

4. HOMES BY HARMONY, INC. is a duly organized Utah corporation with its principal office in Utah County, State of Utah.

5. COTTON MEADOWS, LLC is a duly organized Utah limited liability company with its principal office in Utah County, State of Utah.

6. SALISBURY DEVELOPMENT, LC is a duly organized Utah limited liability company with its principal office in Utah County, State of Utah.

7. SALISBURY DEVELOPERS, INC. is a duly organized Utah corporation with its principal office in Utah County, State of Utah.

8. IVORY SOUTHERN LLC is a duly organized Utah limited liability company with its principal office in Salt Lake County, State of Utah,

9. PERRY HOMES UTAH, INC. is a duly organized Utah corporation with its principal office in Salt Lake County, State of Utah.

10. HENRY WALKER CONSTRUCTION OF SOUTHERN UTAH, LLC is a duly organized Utah limited liability corporation with its principal office in Davis County, State of Utah.

11. The John Doe Plaintiffs 1-1000 are individuals or entities who paid impact fees, as defined hereafter, but whose identities are not yet known. Efforts are underway to identify all persons and entities that have paid impact fees to Defendant during the relevant time period.

12. Defendant WCWCD is a political subdivision of the State of Utah, organized as a district, the principal offices of which are located within Washington County, State of Utah.

13. The principal business and function of the Defendant WCWCD, for purposes of this matter, is to obtain, treat, distribute and otherwise provide culinary and secondary water for homes, businesses, institutions, and other consumers of water in Washington County (the "Service Area").

14. The John Doe Defendants are persons or entities whose identities are presently unknown who may be necessary to join in the litigation for whatever reason, or who may share liability with the WCWCD for the causes of action set forth below.

### **GENERAL ALLEGATIONS**

15. The Utah Impact Fees Act found at Utah Code § 11-36a-101 *et seq.* (the "Act") prohibits any local political subdivision from imposing an impact on new developers of real property which does not comply with the requirements of the Act.<sup>1</sup>

16. The Act dictates that “before imposing an impact fee, each political subdivision . . . shall . . . prepare an impact fee facilities plan<sup>2</sup> [“Plan”] to determine the public facilities required to serve development resulting from new development activity”. Utah Code § 11-36a-301(1).

17. Among other things, the Act requires that the Plan: (a) identify the existing level of service provided by the existing system to its users, (b) establish a proposed level of service, (c) identify any excess capacity to accommodate future growth at the proposed level of service, (d) identify demands placed upon the existing public facility by new development activity at the proposed level of service, and (e) consider all revenue sources to finance the impacts on system improvements. Utah Code § 11-36a-302(1), (2).

18. The Act also requires any political subdivision intending to impose an impact fee to prepare an impact fee analysis (“Analysis”) that meets the following requirements: (a) identify the anticipated impact on or consumption of any existing capacity of a public facility by the anticipated development activity; (b) identify the anticipated impact on system improvements

---

<sup>1</sup> The version of the Act applicable to the claims asserted herein is the version of the Act in force at the time any given impact fee was paid. However, with respect to claims relating to the failure to timely expend or improperly expended impact fees—i.e, the Third Claim for Relief (h) and (i)—by stipulation of the parties, the 2018 version of the Act will apply, and such claims will be limited to impact fees paid on or after May 8, 2010.

<sup>2</sup> Known as “capital facilities plan” under the version of the Act in effect in 2006.

required by the anticipated development activity to maintain the established level of service for each public facility; (c) demonstrate how the anticipated impacts are reasonably related to the anticipated development activity; (d) estimate the proportionate share of the costs for existing capacity that will be recouped and the costs of impacts on system improvements that are reasonably related to the new development activity; (e) identify how the impact fee was calculated; (f) identify the cost of system improvements for each public facility; (g) identify the manner of financing for each public facility, such as user charges, special assessments, bonded indebtedness, general taxes, or federal grants; (h) identify the relative extent to which development activity will contribute to financing the excess capacity of and system improvements for each existing public facility, by such means as user charges, special assessments, or payment from the proceeds of general taxes; (i) determine the relative extent to which development activity will contribute to the cost of existing public facilities and system improvements in the future; (j) determine the extent to which the development activity is entitled to a credit against impact fees because the development activity will dedicate system improvements or public facilities that will offset the demand for system improvements, inside or outside the proposed development; and (k) determine the time-price differential inherent in fair comparisons of amounts paid at different times. Utah Code § 11-36a-303, 304.

19. The Act further requires that in calculating an impact fee, a political subdivision shall use realistic estimates of the cost of future improvements and disclose the assumptions underlying those estimates in the Analysis. Utah Code § 11-36a-305.

20. The Act requires that any person or entity preparing the Plan and the Analysis certify, among other things, that the Plan and Analysis: (a) include only the costs of public facilities allowed under the Act and have actually been incurred or are projected to be incurred within six years after the day on which each impact fee is paid; (b) do not include costs of

operation and maintenance of public facilities; (c) does not include the cost of facilities that will raise the level of service above that provided to existing users of the system; and (c) comply in every relevant respect with the Act. Utah Code § 11-36a-306.

21. The Act further requires that a political subdivision wishing to impose an impact fee pass an impact fee enactment before imposing the fee. Utah Code § 11-36a-401.

22. The Act prohibits the political subdivision from expending impact fees other than for system improvements identified in the Plan. Utah Code § 11-36a-602(1).

23. The Act requires that the political subdivision expend or encumber impact fees for permissible uses within six years of their receipt, unless it identifies in writing an extraordinary and compelling reason why the fees should be held longer than six years and provide an absolute date by which the fees will be expended. Utah Code § 11-36a-602(2).

24. In 2006, WCWCD engaged Lewis, Young, Robertson & Burningham, Inc. to prepare a Plan and Analysis in anticipation of WCWCD's enactment of an impact fee.

25. Lewis, Young, Robertson & Burningham, Inc. prepared and submitted a "Regional Water Capital Facilities Plan and Impact Fee Analysis" dated October 2006 ("2006 Plan and Analysis"). Exhibit A.

26. The 2006 Plan and Analysis assumes that WCWCD must be able to provide .89 acre feet of water (800 gallons per day) for each residence constructed, or for each commercial, industrial or institutional use that is equivalent to a residence ("Equivalent Residential Unit or "ERU"). Exhibit A at p. 9.

27. The 2006 Plan and Analysis identifies thirteen future capital projects estimated to cost \$852,935,455. Exhibit A at p. 10.

**FIGURE 3: FUTURE CAPITAL PROJECTS AND PROPORTIONATE SHARE**

Future Capital Projects	Construction Year		Attributable to Impact Fees	Costs to Impact Fees
	Costs	State/ Federal Grants		
<b>Water Source</b>				
Ash Creek	\$ 12,715,147	0%	100%	\$ 12,715,147
Well Development (recharge)	4,074,000	0%	100%	4,074,000
Water Acquisition (15k) Ag conversion	12,674,931	0%	100%	12,674,931
Wastewater Reuse	25,516,825	0%	100%	25,516,825
<b>Water Treatment</b>				
Quail Creek WTP (Additional 40 Mgd)	\$ 54,517,716	0%	100%	\$ 54,517,716
Water Treatment/ Lake Powell #1 (20 Mgd)	33,876,117	0%	100%	33,876,117
Water Treatment/ Lake Powell #2 (20 Mgd)	40,624,441	0%	100%	40,624,441
Water Treatment/ Lake Powell #3 (20 Mgd)	48,717,072	0%	100%	48,717,072
<b>Pipeline/Transmission</b>				
Lake Powell Pipeline/ Fort Pearce Reservoir	\$ 562,361,591	0%	100%	\$ 562,361,591
Sullivan Well Completion	1,555,500	0%	100%	1,555,500
Crystal Creek	6,689,508	0%	100%	6,689,508
Canal Piping/ Washington Fields/Warner Res./ Ag Dev	46,112,606	15%	85%	39,195,716
By-Pass Line	3,500,000	0%	100%	3,500,000
<b>Capital Project Totals</b>	<b>\$ 852,935,455</b>			<b>\$ 846,018,564</b>

28. One of those projects is identified as the Lake Powell Pipeline/Ft. Pearce Reservoir project and three other projects are identified as Water Treatment/ Lake Powell #1, Water Treatment/ Lake Powell #2 and Water Treatment/ Lake Powell #3. The 2006 Plan and Analysis estimates these four projects (“Lake Powell Pipeline Projects”) will cost \$685,579,221, constituting 80.37% of the total estimated cost of all future capital improvements. *Id.*

29. The 2006 Plan and Analysis anticipates that construction of the Lake Powell Pipeline/Ft. Pearce Reservoir project would begin in 2015 with the majority of project construction costs incurred by the end of 2018. Exhibit A at p. 11.

**FIGURE 4: PROPOSED FINANCING COSTS**

Bond Issue	Par Amount	Project Proceeds	Total Debt Service	Debt Service Included in Fee*
Series 2004 - St George	\$ 31,750,000	\$ -	\$ 52,328,220	\$ 52,328,220
Series 2005	28,695,000	27,977,053	59,227,975	58,481,775
Series 2008	31,930,000	31,131,147	65,909,275	63,427,950
Series 2012	37,470,000	36,530,524	77,344,725	71,630,550
Series 2014	45,955,000	44,801,947	94,857,700	86,492,175
Series 2015	156,950,000	153,022,455	323,972,350	295,303,425
Series 2016	141,485,000	137,945,664	292,042,825	270,453,900
Series 2017	146,720,000	143,049,653	302,854,550	276,156,200
Series 2018	186,895,000	182,218,607	385,783,250	351,773,100
Series 2024	41,670,000	40,624,441	86,012,650	71,106,625
Series 2029	49,970,000	48,717,072	103,153,075	74,517,400
<b>Totals</b>	<b>\$ 899,490,000</b>	<b>\$ 846,018,564</b>	<b>\$ 1,843,486,595</b>	<b>\$ 1,671,671,320</b>

\* Debt Service Included In Fee is the actual debt service costs included in the calculation of the impact fees. The cost included in the fees is lower than the Total Debt Service as the model considers the prepayment of debt when sufficient impact fee fund balances are accumulated.

30. Except for a small amount to be paid from a federal grant for the Canal Piping/Washington Fields/Warner Res./Ag Dev project, the 2006 Plan and Analysis allocates 100% of the cost of all thirteen future capital improvement projects to new development. Exhibit A at p. 10.

31. In 2006, WCWCD adopted a resolution (“2006 Resolution”) imposing impact fees (“Impact Fees”) on all developers of real property in the Service Area in the amounts recommended in the Plan and Analysis. Exhibit B.

32. Thereafter, WCWCD collected the Impact Fees directly from developers or through municipalities acting as WCWCD’s agents, as a condition of the issuance of a building permit or filing of a plat, without which, property within the Service Area cannot be developed.

33. Plaintiffs include landowners who own or have owned real property located within the Service Area that they have developed or are in the process of developing, or in which they have an interest, and who were required to pay the Impact Fees or will have an obligation in the future to pay the Impact Fees as a condition of the use and development of their property.



34. Plaintiffs have paid the Impact Fees within one year of the date of the filing of this action, or thereafter.

35. WCWCD published a document entitled “Facts” which contains the following chart setting forth the actual consumption of water per capita in the Service Area by year from 1995 through 2011:

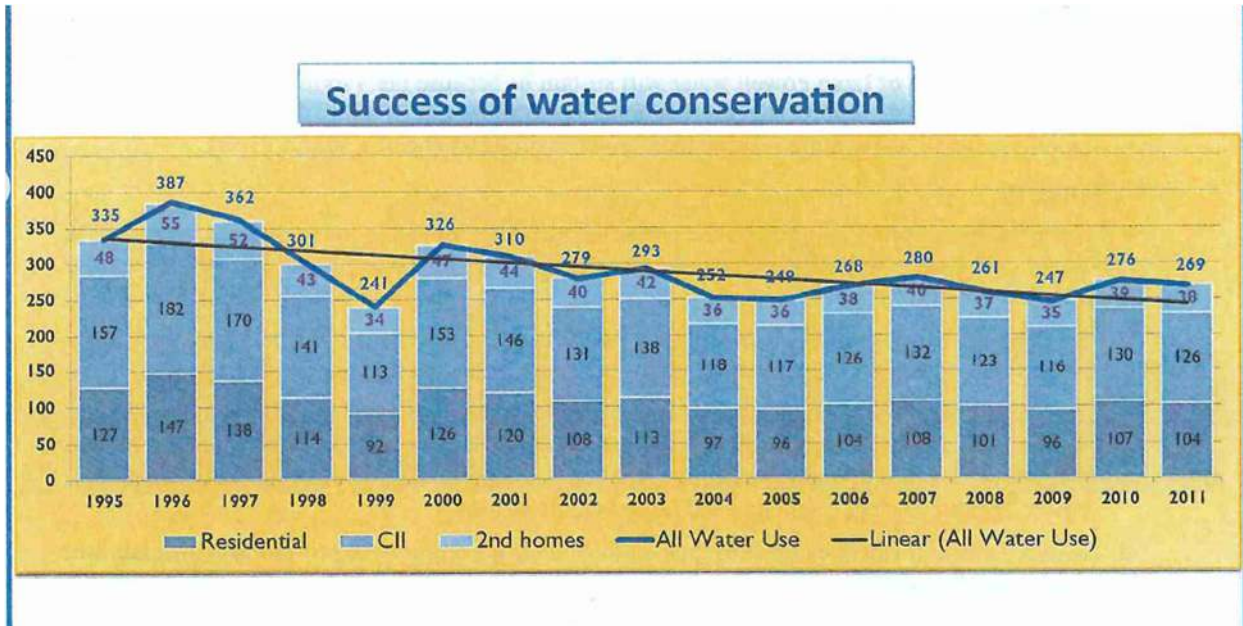


Exhibit C.

36. The chart demonstrates that in both 2006 when WCWCD enacted the 2006 Impact Fee and 2011, the last year reported in the chart, the residential water consumption per capita in the Service Area was 142 gallons per day.

37. On June 15, 2018, WCWCD issued a press release titled “Washington County Reduces Water Use” reporting the average residential potable water use per capita in Washington County was 143 gallons per day in 2015. Exhibit D.

38. The 2010 US Census for Washington County calculates that the average household in Washington County was 2.94 persons per household.

39. Assuming that the average household and water usage in Washington County is typical of that in the Service Area, the average water consumption per household is approximately 2.94 persons per household x 143 gallons per person per day = 420.42 gallons per day per household, rather than the 800 gallons per household per day assumed in the Plan and Analysis.

40. Section 11-36a-601 of the Act requires WCWCD to issue annual reports to the Utah State Auditor identifying amounts collected from impact fees by project and amounts expended by project.

41. WCWCD issued an Impact Fee Expenditure Report 2006-2017 (“2017 Report”) showing the amounts collected for and expended on each project by year during the ten-year period of the 2017 Report. Exhibit E.

42. The 2017 Report shows that WCWCD collected \$118,719,817 under the 2006 Impact Fee enactment between 2006 and 2017.

43. Multiplying the percentage of total future costs allocable to the four Lake Powell Pipeline Projects (80.37%) by the amount of impact fees collected yields a product of \$95,415,116.92 ostensibly collected for the Lake Powell Pipeline Projects.

44. The 2017 Report shows that during the ten-year period from 2006 through 2017, WCWCD expended only \$8,095,215 on the Lake Powell Pipeline Projects.

45. Therefore, WCWCD has collected approximately \$87,319,901 for the Lake Powell Pipeline Projects which have not yet been expended for those projects.

46. Of the amounts collected but not expended for the Lake Powell Pipeline Projects, at least \$22,564,753 were collected but not used for their intended use within six years of collection.

47. WCWCD has neither obtained the requisite approvals for nor begun actual construction of the Lake Powell Pipeline.

48. It is questionable whether the Lake Powell Pipeline will ever be built.

49. The Report also discloses that between 2006 and 2017, WCWCD expended substantial funds on projects not identified in either the Plan or the Analysis.

**FIRST CLAIM FOR RELIEF**

(Taking - U.S. Constitution)

50. The foregoing paragraphs are incorporated by reference.

51. The Fifth Amendment to the Constitution of the United States provides: "nor shall private property be taken for a public use without the payment of just compensation."

52. A property owner attempting to develop his or her undeveloped or under developed property within the Service Area may not do so with paying the Impact Fees imposed by the Defendants.

53. The imposition of the Impact Fee on Plaintiffs is disproportionate and not based on an essential nexus between a legitimate governmental purpose and a burden imposed on that purpose by Plaintiffs' development of real property within the Service Area.

54. The Impact Fees therefore violate the provisions of the Fifth Amendment to the Constitution of the United States.

55. Plaintiffs have been damaged as a result of the aforesaid constitutional violations.

56. Plaintiffs are entitled to recover from WCWCD the damages they have incurred as a result of WCWCD's violations of the Takings Clause of the Fifth Amendment in an amount to be established at trial, together with interest, costs and attorneys' fees to the extent permitted by law.

**SECOND CLAIM FOR RELIEF**  
(Taking - Utah State Constitution)

57. The foregoing paragraphs are incorporated by reference.

58. Article 1, Section 22 of the Constitution of the State of Utah provides that private property shall not be taken or damaged for a public use without the payment of just compensation.

59. An exaction is an unlawful taking and violates Article 1, Section 22 if it is not roughly equivalent or proportionate to the burden that is imposed by development upon the governmental entity which is imposing the exaction.

60. An exaction further violates Article 1, Section 22 when there is no essential nexus between the exaction and the burden created by the development.

61. A public entity may not impose exactions on development based on anticipated water demands which are remote in the future and are not created by the person upon whom the exactions are imposed.

62. The exactions imposed on Plaintiffs by the Defendants' 2006 Impact Fee violates Article 1, Section 22 of the Constitution of the State of Utah because it is not roughly equivalent, nor roughly proportionate, to the burdens imposed on the Defendants' infrastructure by Plaintiffs' development activities, and because it lacks an essential nexus between the exaction and the burden created by the development to the extent it is based on remote anticipated water demands.

63. Plaintiffs have been damaged as a result of the aforesaid constitutional violations.

64. Plaintiffs are entitled to recover from WCWCD the damages they have incurred as a result of WCWCD's violations of Article 1, Section 22 of the Constitution of the State of Utah in an amount to be established at trial, together with interest, costs and attorneys' fees to the extent permitted by law.

**THIRD CLAIM FOR RELIEF**  
(Violation of Utah Impact Fee Act)

65. The foregoing paragraphs are incorporated by reference.

66. Defendants have violated the Act in at least the following ways:

a. Defendants have enacted the 2006 Impact Fee based upon the Plan and Analysis which inaccurately assumes that an average household uses 800 gallons of water per day when WCWCD data indicates that actual usage is only 420 gallons per day, in violation of Utah Code Ann. §§ 11-36a-302 and 305;

b. Defendants have enacted the 2006 Impact Fee based upon the Plan and Analysis which do not generally consider all revenue sources, including grants, bonds, inter-fund loans, impact fees and anticipated dedications of system improvements in the calculation of the impact in violation of Utah Code Ann. § 11-36a-302(2);

c. Defendants have enacted the 2006 Impact Fee based upon an analysis which fails to comply with the Act because it lacks a summary that is designed to be understood by a lay person, in violation of Utah Code Ann. § 11-36a-303;

d. Defendants have enacted the 2006 Impact Fee which recoups more than the WCWCD's costs actually incurred for excess capacity by using depreciated replacement value to calculate the impact fee in violation of Utah Code Ann. §§ 11-36a-202(1)(a)(iii) and 304;

e. Defendants have enacted the 2006 Impact Fee which is not roughly equivalent to the burden imposed upon Defendants' system by Plaintiff's development in violation of Utah Code Ann. §§ 11-36a-202(1)(a)(iii) and 304;

f. Defendants have enacted the 2006 Impact Fee which increases the level of service for existing users at the sole expense of new development in violation of Utah Code Ann. §§ 11-36a-202(1)(a)(ii) and 302(1)(b);

g. Defendants have enacted the 2006 Impact Fee which is based largely on the Lake Powell Pipeline Project which is speculative, remote, and not reasonably related to any need or burden caused by Plaintiffs' development activities in violation of Utah Code Ann. §§ 11-36a-202 and 304;

h. Defendants have collected the 2006 Impact Fee for projects, including, but not limited to, the Lake Powell Pipeline Project, which they have not expended for those projects within six years after collection in violation of Utah Code Ann. §§ 11-36a-602 (2018);

i. Defendants have expended Impact Fees for projects not identified in the Plan or Analysis Utah Code Ann. §§ 11-36a-602 (2018); and

j. Other ways which Plaintiffs expect to find during discovery.

67. Plaintiffs have been damaged as a result of Defendants' violations of Act.

68. Plaintiffs are entitled to recover from Defendants the damages they have incurred as a result of Defendants' violations of the Act together with interest, costs and attorneys' fees to the extent permitted by law.

### **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs pray for relief against Defendants as follows:

1. On Plaintiffs' First Claim for Relief, damages they have incurred as a result of WCWCD's violations of the Takings Clause of the Fifth Amendment in an amount to be established at trial, together with interest, costs and attorneys' fees to the extent permitted by law;

2. On Plaintiffs' Second Claim for Relief, damages they have incurred as a result of WCWCD's violations of Article 1, Section 22 of the Constitution of the State of Utah in an amount to be established at trial, together with interest, costs and attorneys' fees to the extent permitted by law;

3. On Plaintiffs' Third Claim for Relief, damages they have incurred as a result of Defendants' violations of the Act together with interest, costs and attorneys' fees to the extent permitted by law; and

4. On all claims for relief, such other and further relief as the Court deems just and proper.

DATED this \_\_\_\_ day of August, 2018.

KIRTON McCONKIE

---

David M. Wahlquist  
Benson L. Hathaway, Jr.  
Thomas K. Checketts  
Adam D. Wahlquist

ANDERSON CALL & WILKINSON, P.C.

---

Craig M. Call  
Jonathan W. Call  
*Attorneys for Plaintiffs*

**EXHIBIT A**

**2006 Plan and Analysis**



**EXHIBIT B**

**2006 Resolution**

**EXHIBIT C**

**2012 WCWCD Facts**

**EXHIBIT D**

**June 15, 2018 Press Release**

**EXHIBIT E**

**Impact Fee Expenditure Report 2006-2017**