

Bret F. Randall



January 25, 2016

Judge Laura Scott  
Special Master Application  
Matheson Courthouse  
450 South State Street  
P.O. Box 1860  
Salt Lake City, UT 84114-1860

**Re: Special Master Appointment – Statement of Interest**

Dear Judge Scott:

I am pleased to submit the following Statement of Interest in the Special Master (“Master”) position in the general determination of water rights matter for the Utah Lake and Jordan River drainage, Civil No. 360057298. The invitation requests information regarding my interest in the position; my experience as to case management and litigation as well as to Utah water law; potential conflicts of interests or economic interests; and my proposed compensation. Each issue is addressed in turn.

**INTEREST IN POSITION**

This general adjudication is a significant matter involving important property rights impacting varied private and public interests. This appointment would offer me a high degree of professional and personal satisfaction. I have the demonstrated capacity and experience to perform this appointment with skill, timeliness, care, fairness, and transparency. I am happy to make a long-term commitment to work as an independent Master in this matter at reasonable rates, as explained more fully below.

**EXPERIENCE**

As shown in my résumé (Tab A), I have devoted my career to technical areas of law, primarily environmental and natural resources, including real property and water law. My practice has also involved litigation of disputed matters in state and federal courts as well as administrative litigation before state and federal regulatory agencies. Following a judicial clerkship in the U.S. District Court for the District of Idaho, I have been practicing law full time in Utah since 1994.

### **Litigation and Case Management Experience**

The experience most relevant to the Master assignment involves my appointment as a part-time Administrative Law Judge (“ALJ”) for the Utah Department of Environmental Quality (“UDEQ”) in a system that is equivalent to the Master role here. In 2012, the Utah legislature amended the Utah Code to remove the various environmental boards from the role of adjudicating disputed permitting, enforcement, and similar matters in favor of a new system involving ALJs. In this new system, the Executive Director of UDEQ appoints an ALJ to manage disputed matters arising in the various UDEQ divisions, to undertake review of administrative records and otherwise receive evidence, to conduct formal hearings, and to render proposed dispositive orders for the Executive Director. The ALJ is granted jurisdiction to decide all non-dispositive issues and to make recommended orders to the Executive Director as to dispositive matters. The Executive Director may accept, modify, or remand the proposed dispositive action. Appeals are taken directly to the Utah Court of Appeals. *Compare* Utah Code Ann. §§ 19-1-301 - 301.5 *with* U.R.C.P. 53. Like a Master, the ALJ stands in the shoes of the Executive Director to manage complex, multi-party disputes that would otherwise consume significant time and resources were the Executive Director to manage these disputes directly.

Since 2013, I have received eight ALJ appointments, all involving heavily litigated, multi-party matters arising in technical areas of law and involving extensive administrative records. Of these appointments, five are now resolved at the ALJ level. The attached documents are provided because they represent the kinds of work product I would produce as Master here:

1. PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND MEMORANDUM DECISION AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT, In re EnergySolutions, LLC Groundwater Quality Discharge Permit No. UGW450005 Notice of Violation and Compliance Order, Docket No. UGW14-04 (January 4, 2016).
2. ALJ REQUEST FOR SUPPLEMENTAL BRIEFING, In re Amendment 16 to Utah Radioactive Material License #UT2300249, Docket No. DRC-2014-00316 (December 8, 2015) (“In Re Amendment 16”).
3. ORDER ON PETITIONER’S MOTION TO STRIKE (GROUND WATER PERMIT), In re Sunnyside Cogeneration Associates Ground Water Discharge Permit, No. UGW070002 (March 19, 2015) (“In re Sunnyside Cogeneration Associates”).
4. ORDER ON MOTION TO SUPPLEMENT INITIAL RECORD, In re Amendment 16 (March 17, 2015).

5. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER ON THE MERITS, In re Approval Order No. DAQE-AN101230041-13, Holly Refining & Marketing Company-Woods Cross, LLC, Heavy Crude Processing Project (March 11, 2015) (“In re Holly Refining”).
6. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED DISPOSITIVE ACTION, In re Intent to Approve: Waxy Crude Processing Project: N10335-0058 (UDAQE-IN103350058-12) and Gasoline Loading Limit at TLR: N10335-059 (UDAQE-IN103350059-12), Tesoro Refining and Marketing Company (September 9, 2014) (“In re Tesoro Refining”).
7. ORDER CLARIFYING MARSHALING REQUIREMENT, In re Holly Refining (April 17, 2014).
8. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER REGARDING PETITIONERS’ MOTION REQUESTING STAY OF APPROVAL ORDER, In re Holly Refining (March 25, 2014).
9. ORDER ON PETITION TO INTERVENE, In re Sunnyside Cogeneration Associates (February 19, 2014).
10. ORDER ON OBJECTIONS TO THE ADMINISTRATIVE RECORD, In re Tesoro Refining (May 23, 2013).
11. Various examples of scheduling and case management orders.

In these cases, I have proactively set and managed case schedules, dealt with procedural and evidentiary matters, conducted hearings of record, and have so far rendered (in five of these matters) timely, detailed, and complete final recommended orders for consideration by the Executive Director. To date, the Executive Director has adopted, in full, all of my recommended orders.

These samples include examples of my treatment of several issues of first impression under Utah law, such as the standard of review in permit review adjudicative proceedings for recommended decisions on the merits<sup>1</sup> as well as for requests for stay.<sup>2</sup> Similarly, the appointment of a Master in a general adjudication of water rights in Utah is novel and I would expect to encounter a variety of important matters of first impression.

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<sup>1</sup> See, e.g., Findings of Fact, Conclusions of Law, and Proposed Dispositive Action (Tab 6) at 5-8.

<sup>2</sup> See proposed order on stay motion (Tab 8) at 13-14.

Also included is a specific example of my treatment of an important and novel procedural matter. From the outset of my first appointment, I imposed, *sua sponte*, a requirement that petitioners marshal evidence in order to satisfy their burden of proof or, alternatively, under my statutory authority to rule on non-dispositive matters.<sup>3</sup> Although this requirement was not found in the code or the procedural rules, I imposed it *sua sponte* because I was facing an enormous administrative record with dozens of objections in an extraordinarily complex matter arising under an air permit. I perceived from the beginning how important it would be for the petitioners to marshal the evidence in order to satisfy their burden of proof and to assist me in my review of the vast record. But most important, I wanted to avoid any possible argument that the ALJ had an independent duty in a permit review adjudicative proceeding to review the administrative record apart from the portions of the record specifically brought to the ALJ's attention by the petitioning party. The marshaling requirement was later imposed in other cases and was subject to objections and litigation.<sup>4</sup> Subsequently, the Utah legislature amended the statute to adopt the requirement that petitioners marshal for the ALJ all relevant evidence from the administrative record.<sup>5</sup> Marshaling is now required by the Utah Code in permit review adjudicative proceedings.

This example is highlighted to show that as Master here I will likewise pay particularly close attention to burdens of proof, standards of review, and procedural issues. I have found that doing so thoughtfully in the beginning of any adjudication promotes the interests of fairness, efficiency, and transparency.

### **Utah Water Law Experience**

I have broad experience with Utah water law. Throughout my career, I have represented many clients in real estate matters, mergers and acquisitions, financings, and trust and estate matters that involve water rights, including water right title and conveyancing issues, water right title insurance, water right security interests, and so forth. I also deal with water right appropriations, change applications, and conveyancing in connection with industrial and mining operations and project and other real estate development matters.

My experience has included all types of water rights, ranging from diligence claims to new appropriations, groundwater and surface water rights, interests in water and irrigation companies, as well as water services provided by private and public water utilities. I also have experience as to interference matters, including my current representation of property owners in interference litigation pending in the Second Judicial District Court and, early in my career,

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<sup>3</sup> See Findings of Fact, Conclusions of Law, and Proposed Dispositive Action (Tab 6) at 8-16.

<sup>4</sup> See Order Clarifying Marshaling Requirement (Tab 7).

<sup>5</sup> See Utah Code Ann. § 19-6-301.5(14)(b).

representation of a water conservancy district in administrative litigation before the State Engineer on a large and controversial change application.

My longstanding environmental practice also involves watersheds, hydrogeology, surface and ground water discharges, storm water management, and related matters. In all of the foregoing matters, I regularly employ and work with technical professionals. All of this experience has provided me with a sound understanding of engineering and other technical issues relating to water rights and the important role filled by the State Engineer and the Utah Division of Water Rights.

In sum, I am familiar with the substantive laws governing water rights in Utah as well as the underlying policies relating to these laws. I am also familiar with the substantive and procedural laws governing the general determination and adjudication of water rights. I have sufficient water law background and experience to fulfill—with skill and proficiency—all of the responsibilities of Master in this matter without the need for a significant “learning curve” as expressed by some of the parties’ comments to the motion to appoint a Master.

#### **POTENTIAL CONFLICTS OF INTEREST AND ECONOMIC INTERESTS**

I have no economic interests in the property rights at issue in this adjudication. Based on available information, I am not aware of any past or present personal conflicts of interest that would present issues with my appointment as Master. While I do have broad experience with Utah water law, I do not presently represent nor have I represented in the past any party in connection with this general adjudication, nor do I currently represent clients with large water rights within the general adjudication boundaries.<sup>6</sup>

That said, the submissions to the Court disclose that this general adjudication involves more than 29,000 water rights of record. Many of these have been subdivided over the years and the current owner information does not appear to be complete. Moreover, the State Engineer has yet to perform several Proposed Determinations in populated areas. Finally, all of these water right interests are subject to future conveyances and transactions. As a result, this matter presents a situation where it would be impossible for me or anyone else to clear all potential conflicts while affiliated with a law firm with a client base within the adjudication boundaries. Having considered all of the submissions to the Court regarding the Master role here, I appreciate the importance of a Master who does not have direct or indirect conflicts, including so-called business conflicts. The recommended decisions of the Master should be above

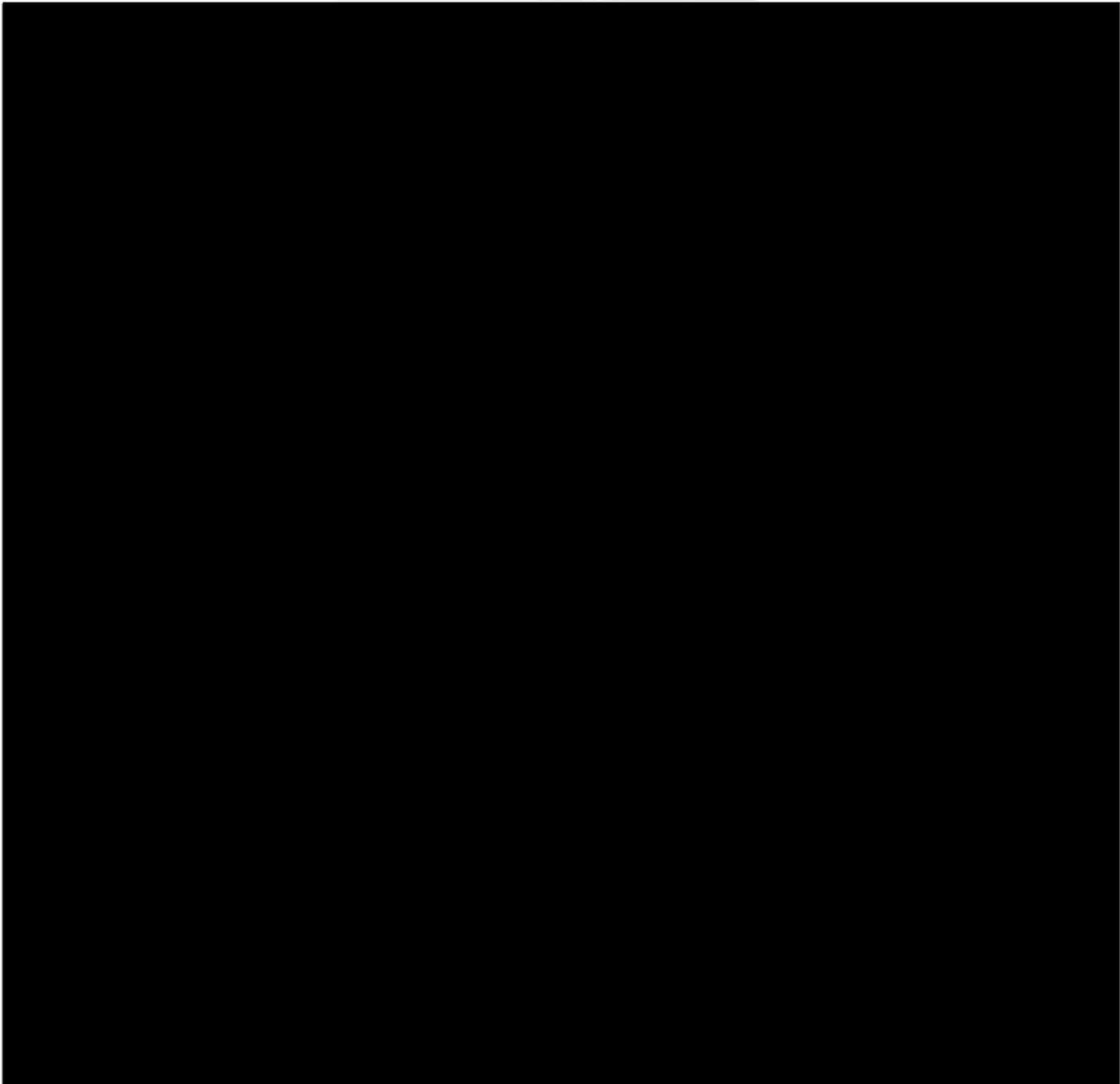
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<sup>6</sup> While I have represented a few clients in the past with large water rights within the adjudication boundaries, none of these past engagements related to this general adjudication. As a result, I am not privy to confidential information that would impair my ability to serve as Master under Rules 1.6 or 1.9, Utah Rules of Professional Conduct.

reproach insofar as impartiality is concerned. I also foresee extensive and potentially long-term collateral litigation regarding impartiality unless the Master here is free of conflicts.

In light of the foregoing, if appointed as Master, I commit to place myself in an independent employment position so there will be no question about my impartiality. Working as an independent Master would simplify the adjudication process by eliminating conflict review and recusal issues. The scope and long-term nature of this appointment would make working independently both feasible and desirable for me personally, based on the rates presented below.

**PROPOSED BILLING STRUCTURE**



REFERENCES

While the invitation does not request references, I would like to offer an individual who is familiar with my service as ALJ for UDEQ:

Craig Anderson  
Chief, Environmental Division  
Utah Attorney General  
195 North 1950 West  
Salt Lake City, UT 84114-4810  
Telephone: 801-536-0286

CONCLUSION

This general adjudication brings to mind the maxim: "Justice delayed is justice denied." I respect the efforts of the Court, the State Engineer – Division of Water Rights, the Utah Office of the Attorney General, and the Utah legislature to facilitate closure of this matter. I have the demonstrated ability to produce, as a judge, large volumes of high quality work in complex, disputed, multi-party matters in technical fields, employing procedures that promote efficiency, transparency, and fairness. I have enough Utah water law experience that a significant "learning curve" will not be required. My written work product is detailed, precise, and transparent. My goal as judge is to ensure that there is no doubt of the exact issues of fact and law that I found to be dispositive of the dispute. My work as judge is intensive and comprehensive, often including references to important and sometimes dispositive issues of fact or law (or both) that were not brought to my attention by the parties but that I discovered through my independent legal research and evidence review. I would welcome the challenge of applying my hard-earned skills and expertise to efficiently manage and resolve objections in this complex and longstanding adjudication. To that end, I offer my long-term professional commitment to serve as independent Master at reasonable rates, on a part-time to full-time basis. For the convenience of the Court, a copy (CD) of my application materials is included in the front cover of this binder.

I appreciate the Court's consideration and would be happy to address any questions.

Sincerely,



Bret F. Randall

**Bret F. Randall**

April 18, 2016

Judge Laura Scott  
Special Master Application  
Matheson Courthouse  
450 South State Street  
P.O. Box 1860  
Salt Lake City, UT 84114-1860

**Re: Special Master Appointment – Confirmation of Interest**

Dear Judge Scott:

In response to the Court's supplemental notice letter, this is to confirm my high level of interest in Master position. I will stand on my Statement of Interest, subject to one modification:

The delay in the selection process has provided me with time to contemplate various issues relating to this matter. I would like to take this opportunity to share with the Court (and with others reviewing my proposal) some basic facts that appear from the record as well as some general observations about what I see as important procedural issues facing the Court and the Master at this time.

First, all of the objections are quite old. Of the 160 pending objections, 149 were filed in or before 1986, meaning that **93% are at least 30 years old.** Of these 149, about 105 actually date to the mid to late 1970s, meaning that **65% of all of the objections are nearly 40 years old.** The oldest objections are over 40 years old. Even the most recent 11 objections date to 1990—some **26 years ago.**

Second, valid contact information for objecting parties appears to be quite limited. Based on my review of a large number of the oldest objections, I note the following: Contact information is limited, often non-existent, and even where provided, many of the

1970s and 1980s-era mailing addresses are not likely to be valid. Of the handful of objections I reviewed that were filed by attorneys, I did not find any who are still practicing law—and, in any event, many of their law offices appear to be defunct. Finally, the contact information in the DWR’s database appears to be just as stale as in the objections.

A third category of issues relates to the objecting parties’ presumed successors in interest. Because this general adjudication is in the nature of an *in rem* proceeding, it would appear to me that the potential interests of any successors to the objecting parties should be taken into account. With the passage of between 25 and 40 years since objections were filed, many of the individual objecting parties are certainly deceased by now. Where objecting parties may still be living, it is likely that a large number of them no longer own the water rights, claims, and associated real property that were at issue in their objections. Yet their presumed successors, for whatever reason, have not appeared in the adjudication and assumed responsibility for the objection or claim that relates to the real property they now own. For objecting parties who are deceased, this appears to be the case: Their real property and associated water rights and claims are certainly owned by other persons at this time but in many (if not most) cases, such current ownership information has not been provided to the Court.

The foregoing facts suggest that any process intended to result in the final resolution of all pending objections in this matter would give rise to important procedural due process issues that deserve thoughtful evaluation, input from all parties, and direction from the Court.<sup>1</sup> More specifically, it is evident to me that the most important initial task for the Master (and the Court) will be to develop fair and appropriate notice of adjudication procedures that are in harmony with due process requirements relating to *in rem* and quasi *in rem* proceedings. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Graham v. Sawaya*, 632 P.2d 851 (Utah 1981).

At the same time, it is expected that the State Engineer’s future submission of proposed determinations in populated areas may generate many new objections in this matter. Thus, another important initial task for the Master will be to establish and implement fair procedures to adjudicate new objections, a function that will necessarily compete for limited time and resources.

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<sup>1</sup> Whatever procedures are adopted here will likely have widespread precedential impact throughout the state. The DWR database identifies some 480 unresolved objections in general adjudications statewide. Most of these appear to date from the 1960s and 1970s. The oldest objections date to 1956. Utah Division of Water Rights, Adjudication Status page: <http://www.waterrights.utah.gov/adjstatus/default.asp> (last visited April 18, 2016).

The Honorable Laura Scott  
April 18, 2016  
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Having successfully managed a growing number of complex adjudications in the Utah DEQ's new ALJ-based program, I would welcome the challenge and opportunity of serving as a fully independent Master in this adjudication. I have been able to complete my ALJ cases quickly and cost-effectively, employing fair procedures, receiving and evaluating evidence, identifying and applying legal principles, and generating comprehensive written work product intended for evaluation by others. I am prepared to conduct, in short order, an initial meeting of the parties as anticipated in Rule 53(d)(1), U.R.C.P. and get right to work on a proposed form of notice of further proceedings and related matters.

I appreciate the Court's consideration.

Sincerely,

Bret F. Randall

# BRET F. RANDALL

## SENIOR COUNSEL

**Senior attorney with 22 years of experience managing complex, diverse legal matters and projects requiring innovation, judgment, and leadership.** Over 10 years at large, multi-jurisdictional law firms. Strong mining, natural resources, corporate, commercial contracting, public lands, and environmental background and skills. Strategic risk management and claim and litigation management skills. Longstanding health and safety law background, including MSHA. Highly successful record managing technical project teams in complex, multi-party processes, including engineering, environmental, and business professionals, geologists, toxicologists, engineers, and economic analysts. Superior oral and written communication, analytical, problem-solving, and decision-making skills. Proven record working effectively with all levels of management, customers, public officials, and federal, state, and local governmental representatives and community groups.

## CAREER HIGHLIGHTS

### MINING & ENERGY SECTOR (RISK MANAGEMENT, COMMERCIAL OPERATIONS, M&A)

- **Serve as outside general counsel for Lisbon Valley Mining Co., LLC:**
  - ✓ Led company through recapitalization and mining restart that included change in ownership control and high-profile Chapter 11 bankruptcy process; company went from 35 employees with only weeks to liquidation to 150 employees operating under a 15-year mine plan.
  - ✓ Support mine exploration and expansion project involving federal and state lands, NEPA, supplemental EIS, private, federal (Mine Act of 1872), and SITLA mineral and surface rights, water rights, and access to develop 1.5 billion pounds of additional copper resources.
  - ✓ Responsible for risk management and commercial contracts with trade vendors and contractors, commodity contracting, UCC, futures contracts, as well as related commercial dispute resolution processes.
  - ✓ Represent company on MSHA and employment law matters, including training, investigations, and litigation.
  - ✓ Regularly advise on business and corporate structure and governance matters.
- **Achieved operational status for new short line railroad company to operate 14-mile spur on behalf of mining company;** served as liaison for STB, FRA, AAR; responsible for all commercial contracts and tariffs; successfully represented new operator in federal litigation by terminated rail operator challenging STB operational authority and change in control.
- **Led commercial contracting for Midwest Generation's six coal power plants in Illinois and supported Intermountain Power (LADWP) operations,** including 22+ million tons of coal procurement and transportation annually; ancillary commercial, logistical, and construction contracts and development of contract and term sheet forms; coal combustion byproduct management; and commercial dispute management and resolution.
- **Lead public company's legacy mine site management program (discontinued operations)** in Washington, Nevada, Missouri, and other jurisdictions.
- **Provided environmental health and safety - energy regulatory support for industry-leading energy sector merger and acquisition transactions** involving electrical generation and transmission assets, tens of thousands of miles of interstate and intrastate transmission and distribution pipelines for gas and hazardous liquids, including ancillary storage, refining, and compression assets, and LNG projects. Transactions included substantive FERC and PSC, pipeline safety, environment, health, safety issues, and contract drafting.
- **Represented Utah sand and gravel operators on mining and environmental permitting,** compliance, and new project development including planning, zoning, conditional use permitting, and commercial relationships.
- **Represent cogeneration (combined heat power) developer on multiple projects,** including project development, PURPA, certificate, non-recourse project finance, construction management, PPA, O&M, fuel supply-related matters.
- **Advise various exploration and development stage mine projects;** environmental and mine-permitting, reclamation bonding, water rights, MSHA matters, and local land use; assemble and manage project consulting teams.
- **Supported public electric power entity in development of new regional electric generating station;** negotiated and drafted dozens of Power Purchase Agreements to support municipal bond financing.

### NOTABLE ENVIRONMENTAL AND REAL ESTATE (BROWNFIELDS) REPRESENTATIONS

- **Led administrative defense of state total maximum daily load (TMDL) for water-quality-impaired reservoir** under federal Clean Water Act, resulting in successful settlement for municipal treatment client.

- **Successfully managed scores of legacy mining sites in transformation of United Park City Mines Company's 5,000 acres** to support high-value residential, commercial and recreational uses; project included extensive administrative and regulatory interface with federal, state, and local government entities and had multiple real estate and project development issues; included complex, multi-party environmental liability and allocation issues, NRDs, and managing complex federal, state, and local community relationships.
- **Led technical team evaluating environmental risks posed to PPL Montana's downstream interests by removal of Thompson Falls Dam, Montana**; included development of extensive technical and legal comments opposing significant RD/RA Consent Decree.
- **Led innovative, integrated remediation-redevelopment project of former smelter (Midvale Slag-Bingham Junction)** that involved 400-acre NPL-listed site; directed/managed technical support team interfacing with EPA, state, local government regulators and community groups. Site now supports residential, TOD, commercial, and recreation uses. Supported TIF financing, site-specific zoning ordinance, and innovative institutional controls.
- **Represented Ogden City in BRAC transfer of 1,200 acre, NPL-listed site for redevelopment** — Defense Depot Ogden/Business Depot Ogden; work included extensive DoD and EPA negotiations on environmental risk allocation and management.

### LITIGATION – REPORTED CASES

*PPL Elec. Util. Corp.*, 145 FERC ¶ 61,053 (2013) (PURPA); *Hickman v. Gem Ins. Co.*, 299 F.3d 1208 (10<sup>th</sup> Cir. 2002) (ERISA); *WebBank v. Am. Gen. Annuity Serv. Corp.*, 54 P.3d 1139 (Utah 2002) (Uniform Commercial Code); *Hartje v. F.T.C.*, 106 F.3d 1406 (8<sup>th</sup> Cir. 1987) (Section 1983); *Ekotek Site PRP Committee v. Self*, 948 F.Supp. 994 (D. Utah 1996) (CERCLA); 932 F.Supp. 1319 (D. Utah 1996); 881 F.Supp. 1516 (D. Utah 1995); *State of Utah v. Wind River Petroleum*, 881 P.2d 869 (Utah 1994) (Utah Hazardous Substances Mitigation Act)

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### EXPERIENCE

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**DURHAM JONES & PINEGAR**, Salt Lake City, UT ■ 2008 – Present

#### HEAD: ENVIRONMENT, ENERGY, AND RESOURCES PRACTICE

**Environmental Law:** Substantive, multi-jurisdictional experience in regulatory permitting and compliance in solid and hazardous waste (RCRA, CERCLA); mine permitting, bonding, and reclamation on private, state, and federal lands; water pollution, wetlands (CWA, point source and stormwater permitting, TMDL defense, municipal pre-treatment); air pollution (CAA, Title V, NSR); public lands (state and federal - NEPA, FLPMA, ESA); pipeline safety; drinking water (SDWA); and related programs: EPCRA, TSCA, FOIA-GRAMA, APA; Environmental Health & Safety Management Systems (ISO 140001, OHSAS 18001). Extensive experience prosecuting and defending Superfund cost recovery and contribution matters including development of cost allocations involving complex, multiparty sites. **Energy:** Multi-jurisdictional experience in energy regulatory law, including the FPA, NGA, and PURPA. **Natural Resources:** Mining and minerals, water rights, state and federal lands (including NEPA).

**CHAPMAN & CUTLER: Partner**, Salt Lake City, UT (2006 – 2008) — Managed multijurisdictional, finance-oriented, transactional environmental and energy practice that included risk management, lender liability, forms and contracts.

**LEBOEUF, LAMB, GREENE & MACRAE, LLP: Senior Associate**, Salt Lake City, UT (1998 – 2005) — Played lead roles in nationally-prominent Superfund site investigation and redevelopment projects. Supported world-class energy sector merger and acquisition practice. Engaged in multi-jurisdictional environmental practice (permitting, compliance, liability and cost recovery).

**PARRY, MURRAY & MOXLEY: Associate**, Salt Lake City, UT (1993 – 1998) — Boutique environmental and litigation firm.

**HONORABLE LARRY M. BOYLE, U.S. DISTRICT COURT: Law Clerk**, Boise, ID (1993 – 1994) — Trial court-level clerkship.

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### EDUCATION & AFFILIATIONS

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**JURIS DOCTOR, *summa cum laude*** (top 1%), Brigham Young University, J. Reuben Clark Law School 1993  
*Order of the Coif, Note Comment Editor: BYU Law Review*

**BACHELOR OF ARTS**, Brigham Young University 1990

**MEMBERSHIPS:** Utah State Bar, Utah Mining Association, Federal Energy Bar Association, Urban Land Institute

**Foreign Language:** Spanish (including two year residency in Paraguay)