

SNOW, CHRISTENSEN & MARTINEAU P.C.

SALT LAKE CITY • ST. GEORGE

February 15, 2013

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VIA HAND DELIVERY

Kent L. Jones, P.E.
Utah State Engineer
Utah Division of Water Rights
1594 West North Temple, #220
Salt Lake City, Utah 84116-3156

RECEIVED
FEB 15 2013
WATER RIGHTS
SALT LAKE SC

Re: Response to Dan Jensen's Letter dated February 8, 2013
Water Right Nos. a28357 (57-10315); a28541 (57-10316); a28546
(57-10318); a28547 (57-10319); a28545 (57-10317); a28548 (57-
7800) (all from Mother Right 57-7800)

Dear Mr. Jones:

This letter responds to Mr. Jensen's letter to you dated February 8, 2013. We have always regarded Mr. Jensen as a friend and colleague. Everyone appearing before the state engineer should be as professional and competent. We believe we have cleared the air a bit with Mr. Jensen. We feel compelled to discuss that with you.

In our requests for reconsideration of the order regarding Dr. Tolton's change application, a28548, we asked that copies be included in your office's files for Mr. Jensen's clients' pending change applications, as well as Mrs. Maack's change application. The six change applications described above are identical, excepting only slight differences in proposed place of use in the Albion Basin, and proposed points of diversion. A principle reason for including the requests for reconsideration in the other files was so your office would mail copies to all parties. We assumed that would be done, and thus Mr. Jensen would receive a copy in the normal course of events. Copies of our requests for reconsideration were not included in all six files, and Mr. Jensen did not receive copies from the state engineer's office. We regret making the assumption that he would receive copies. In the future Mr. Jensen will be copied on everything by us directly. No ex parte communication was intended or expected.

Mr. Jensen has previously raised the issue of whether it is procedurally acceptable to discuss the change applications of his clients when discussing the Tolton and Maack change applications. We have previously responded with a lengthy discussion of relevant authority that supports our view that this is perfectly appropriate. We attach our letter to you dated September 14, 2011 which was



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Brian P. Miller
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P. Matthew Cox
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Matthew W. Starley
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submitted in response to Mr. Jensen's September 9, 2011 letter. We believe Mr. Jensen's position to be incorrect as a matter of law, but our focus here is more about addressing the question of propriety of acting on our understanding of the law.

As a pure practical matter, the six applications are based on equal portions of the same mother right. Virtually all issues relating to one change application also relate to the others, necessarily. Neither we nor our clients created the relationships among the six change applications. In our view Mr. Jensen does the equivalent of asking that we pretend we see the emperor's fine new suit. We feel compelled to reject any notion that we should act out of pretense. It is not what lawyers are about.

The misaligned timing of the processing of these two related groups of change applications was a decision made without our clients' consent and over our objection. That decision should not prejudice our clients, but it has more than a little potential to do so. As lawyers we are duty bound to act within the rules as we understand them to minimize any such prejudice. Often that means contesting procedure as well as substance. Our acting on our studied understanding of appropriate procedure is not only appropriate, but mandated by our duties to zealously and competently represent our clients.

Mr. Jensen has graciously apologized for the comment that we acted unethically. That apology was accepted, with our reiteration of our abiding personal and professional regard for Mr. Jensen.

Thank you for your kind consideration.

Very truly yours,

SNOW, CHRISTENSEN & MARTINEAU



Shawn E. Draney
Scott H. Martin

SHM:lsj
Enclosure
cc: All Applicants and Protestants
2369679

SNOW, CHRISTENSEN & MARTINEAU P.C.

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September 14, 2011

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Utah State Engineer
Utah Division of Water Rights
1594 West North Temple, #220
Salt Lake City, UT 84116-3156

Re: Water Right No. 57-10319
Change App. No. a28547
County: Salt Lake
Applicant: William S. Hoge
c/o Daniel A. Jensen

Water Right No. 57-10318
Change App. No. a28546
County: Salt Lake
Applicant: Marvin A. Melville
c/o Daniel A. Jensen

Water Right No. 57-10315
Change App. No. a28537
County: Salt Lake
Applicant: The Butler
Management Group
c/o Daniel A. Jensen

Water Right No. 57-10317
Change App. No. a28545
County: Salt Lake
Applicant: Judith Maack

Water Right No. 57-10316
Change App. No. a28541
County: Salt Lake
Applicant: Mark C. Haik
c/o Daniel A. Jensen

Water Right No. 57-7800
Change App. No. a28548
County: Salt Lake
Applicant: Kevin Tolton

Dear Mr. Jones:

I am responding to the September 9, 2011 correspondence from Mr. Jensen, the lawyer representing the applicants named above – excepting, of course, Dr. Tolton and Mrs. Maack. In his correspondence Mr. Jensen asserts that consolidating the record of the Tolton/Maack applications into the record of his clients' applications was "completely inappropriate." In the same vein, he asserts our supplementation of the record was "inappropriate" to the extent it went into the file regarding the applications of his clients before the hearing regarding his client's applications. I am writing to respectfully disagree with my colleague, and to urge that the procedural decisions of the hearing officer in question stand.

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“Inappropriate” means not suitable or proper for the purpose or occasion, as in wearing sneakers to court. I respectfully submit that if the applicable law allowed the hearing officer to consolidate the records as he did, and allowed the hearing officer to approve supplementation as he did, then the hearing officer’s judgment as to whether doing so was suitable and proper for the purpose and occasion should control, absent a showing the hearing officer acted arbitrarily and capriciously.

Mr. Jensen does not cite to any statute, rule, or case law as support for his positions. I would appreciate an opportunity to respond to any substantive bases for his positions that Mr. Jensen might share in the future. I can only suppose Mr. Jensen may be relying on his experience with court proceedings. In court, the fact finder may only consider what is formally accepted into the record of the matter at hand (which may include previously consolidated matters with common fact issues). The fact finder cannot make an independent investigation. Unlike the fact finder in a court proceeding, the State Engineer, as you know, is directed to make an independent investigation and consider anything in his or her possession of relevance from any source:

If the state engineer, because of information in the state engineer's possession obtained either by the state engineer's own investigation or otherwise, has reason to believe that an application to appropriate water will interfere with its more beneficial use for irrigation, domestic or culinary, stock watering, power or mining development, or manufacturing, or will unreasonably affect public recreation or the natural stream environment, or will prove detrimental to the public welfare, it is the state engineer's duty to withhold approval or rejection of the application until the state engineer has investigated the matter.

Utah Code Ann. § 73-3-8(1)(b)(i). As you know well, this applies to change applications as well as applications to appropriate. *Bonham v. Morgan*, 788 P.2d 497 (Utah 1989).

The State Engineer’s rules allow the hearing officer to take notice of and consider as part of the record, many, many kinds of documents, including, “all Division files. . . .” Utah Administrative Code (UAC) R655-6-14 G.

~~The Utah Administrative Procedures Act confirms that documents may be received at any time by the hearing officer. Utah Code Ann. § 63G-4-204(3). The State Engineer’s rules incorporate this by reference. UAC R655-6-6 A. See UAC R655-6-6E authorizing the hearing officer to allow post-hearing submittals.~~

In short, the State Engineer's decision(s) regarding the change applications of Mr. Jensen's clients must take into consideration relevant matters contained in the file for the sister Tolton/Maack applications, whether the Tolton/Maack materials also go into the other files physically, or are incorporated by reference expressly, or not. The result is the same. The hearings at issue are "informal" administrative hearing, not court.

Mr. Jensen makes too much of what is in a particular file for another reason. Unlike a court proceeding, protecting the record for appeal is irrelevant. Any judicial review, of course, will be *de novo*, and will not be limited to a review of the decision in the context of the administrative record.

Mr. Jensen also cites no evidence of prejudice to Mr. Jensen or his clients that may result from the consolidation/supplementation procedures approved by the hearing officer. Again, I would appreciate an opportunity to respond to any information that addresses this point that Mr. Jensen may share in the future. Mr. Jensen appreciated the relevance of the Tolton/Maack hearing to the other very similar change applications. He sent his expert, Mr. Barnett, to observe the Tolton/Maack hearing. Mr. Jensen and his clients were advantaged by hearing and seeing the evidence against their applications well in advance of their hearing. The same is true of their receipt of Salt Lake City's supplementation in advance of their hearing. Mr. Jensen should timely receive matters submitted as to the Tolton/Maack applications, as such materials may influence the decision(s) as to the applications of Mr. Jensen's clients. Consolidation can only help him in this regard.

The process adopted by the hearing officer is a convenience to the protestants, as they will not feel compelled to repeat items of concern that are common to all of these applications. Most points of concern are common. The process adopted by the hearing officer promotes more efficient use of the State Engineer's limited staff resources for the same reason, reduction of repetition. The lack of protestant repetition seems to be yet one more advantage to Mr. Jensen and his clients.

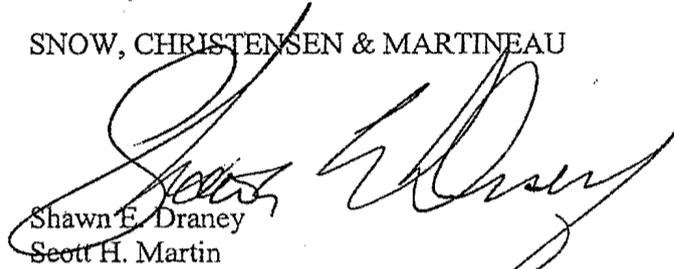
I respectfully submit the hearing officer was empowered by law to adopt the procedures at issue. I respectfully submit the hearing officer's judgment that such procedures were proper and suitable for the occasion was well founded. The hearing officer's judgment should stand.

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Thank you for your attention to this matter.

Sincerely,

SNOW, CHRISTENSEN & MARTINEAU



Shawn E. Draney
Scott H. Martin
Attorneys for Salt Lake City and Metropolitan
Water District of Salt Lake & Sandy

SED:sd

cc: Salt Lake City Public Utilities
Rusty Vetter
Metropolitan Water District of Salt Lake & Sandy
Dan Jensen
Pat Casaday
David Wright
Pat Shea
Dr. Tolton
Judith Maack
Mike Keller
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