

SHAWN E. DRANEY (4026)  
SCOTT H. MARTIN (7750)  
DANI CEPERNICH (14051)  
SNOW, CHRISTENSEN & MARTINEAU  
10 Exchange Place, 11<sup>th</sup> Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145  
Telephone: (801) 521-9000  
Facsimile: (801) 363-0400  
e-mail: [sed@scmlaw.com](mailto:sed@scmlaw.com)  
[shm@scmlaw.com](mailto:shm@scmlaw.com)  
[dnc@scmlaw.com](mailto:dnc@scmlaw.com)  
*Attorneys for Salt Lake City Corporation*

RECEIVED

FEB 24 2014

WATER RIGHTS  
SALT LAKE

---

IN THE OFFICE OF THE UTAH STATE ENGINEER

---

RE: WATER RIGHT NUMBERS )

) **PETITION TO STAY**

57-7800 (a28548) )

KEVIN TOLTON )

and )

57-10317 (a28545) )

JUDITH MAACK )

---

Pursuant to Utah Code § 63G-4-405(1) and (2) and Utah Administrative Code R.655-6-18(B),<sup>1</sup> Salt Lake City Corporation (SLC) petitions the State Engineer for a stay of its January 9, 2014, Orders in the informal adjudicative proceedings of Permanent Change Application Numbers a28548 (Water Right Number 57-7800) and a28545 (Water Right Number 57-10317).

On February 7, 2014, SLC filed a Petition for Judicial Review and Complaint seeking, among

---

<sup>1</sup> Utah Code § 63G-4-405(1) provides that “the agency may grant a stay of its order or other temporary remedy during the pendency of judicial review, according to the agency’s rules.” Rule 655-6-18(B) provides, “The Division may grant a stay of its order or other temporary remedy during the pendency of judicial review on its own motion, or upon petition of a party pursuant to the provisions of Section 63G-4-405.”

Utah Code § 63G-4-405(2) requires that SLC first “petition the agency for a stay . . . unless extraordinary circumstances require immediate judicial intervention.”

SCANNED

other things, a trial *de novo* of the informal adjudicative proceedings under Utah Code §§ 63G-4-402 and 73-3-14, and to quiet title.

SLC requests that the State Engineer stay its January 9 Orders during the pendency of the judicial review proceedings. Consistent with the State Engineer's practice, the Orders should be stayed until important title and forfeiture questions involved in the Change Applications and Orders are resolved. These issues are the subject of SLC's Second Cause of Action in the litigation. Next, the January 9 Orders involve the important question of whether the time of use of Little Cottonwood Creek rights can be changed—namely, turning a seasonal right into a year-round right. Issuing a stay would save the State Engineer time and valuable resources, as other parties are likely to file applications based on the notion that the time of use of such rights can be changed. Finally, a stay is needed in order to prevent unnecessary and avoidable damages that will occur if Mr. Tolton, Mrs. Maack, or third parties proceed in reliance on the Orders and the district court ultimately denies the change applications.

**I. CONSISTENT WITH THE STATE ENGINEER'S PRACTICE, THE JANUARY 9, 2014, ORDERS SHOULD BE STAYED UNTIL THE IMPORTANT TITLE AND FORFEITURE QUESTIONS INVOLVED IN THE CHANGE APPLICATIONS ARE RESOLVED.**

Mr. Tolton and Mrs. Maack's Change Applications involve important questions of title and forfeiture that are the subject of SLC's Second Cause of Action. These questions include: (a) whether the ownership of *all* of the South Despain first primary rights at issue were transferred as an appurtenance to Lot 31 of the Little Cottonwood Creek Subdivision; and (b) whether any of the South Despain Ditch rights Mr. Tolton and Mrs. Maack might claim have been lost by forfeiture, abandonment, or adverse possession. Both of these questions are the subject of SLC's Second Cause of Action in the litigation.

**A. There is a serious question of whether all of the George Despain family's portion of the South Despain Ditch rights were, or even could have been, transferred as an appurtenance to Lot 31. The State Engineer's staff recognized as much.**

The January 9, 2014, Orders were based, in part, on the notion that "Title documents were submitted to the Division to update ownership of the certificated right (57-7800) . . . to Lynn Christensen Biddulph." (Maack Order at 4, ¶ D; Tolton Order at 5, ¶ D.) However, the notion that all of the George Despain family's portion of the South Despain Ditch rights were transferred as an appurtenance to Lot 31 is seriously questioned.

As the State Engineer is well aware, water rights are conveyed as an appurtenance to the land where the water is being used at the time of conveyance, unless expressly reserved in the deed to the land, or earlier separately conveyed. Utah Code § 73-1-11(2)(a). In the 1970s, the Bentleys (successors in interest to the George Despain family in terms of land and water rights) and Saunders and Sweeney, Inc. subdivided the lands that had belonged to the George Despain family into the Little Cottonwood Subdivision. The Subdivision lots were sold shortly thereafter without reservation of any of the rights that may have been appurtenant to those lands.

Accordingly, any South Despain Ditch rights<sup>2</sup> were conveyed as appurtenant to the land where the water was being used at the time of conveyance. There is no support for the position—and it is physically impossible that—all of the George Despain family's rights in the South Despain Ditch were used on the .36-acre Lot 31 at the time of conveyance.

---

<sup>2</sup> Importantly, the Bentleys had previously conveyed an interest in the land and water rights to Saunders and Sweeney, Inc. The Bentleys and Saunders and Sweeney, Inc. subsequently sold any water rights they had relating to lands under the South Despain Ditch to Sandy City. Accordingly, there were no South Despain Ditch rights remaining that could be conveyed with the Subdivision lots. An adjudication in which it was concluded otherwise is not binding on SLC, as SLC was not a party to that proceeding.

Regardless, the notion that *all* of the George Despain family's portion of the South Despain Ditch rights were transferred as an appurtenance to a single lot—Lot 31—is unsupported.

The untenability of this notion was explained by the State Engineer's staff in response to the request for title update:

*Although Mr. Saunders indicates that he moved the uses to the lot that Lynn Christensen (Biddulph) owns, no change application was made to relocate the water right upon the legal record. Additionally no change application was made to return the point of diversion and source to the creek for diversion through the pipeline that Salt Lake City agreed to provide or the original South Despain Ditch. According to the subdivision plat on this file, Lot 31 that was deeded to various successors and finally to Lynn Christensen covers about .36 acre which would not accommodate all of the uses under the certificate. It would appear that the grantees to the lands where the other houses and the well are or were located would have been conveyed their proportionate interest in the water rights unless it was reserved in the land deeds or conveyed in other deeds prior to the land sales. It is confusing to see where the water right is used at all now that other suppliers are servicing the area.*

(Mar. 23, 1999, Letter from Marge Tempest, State Engineer File at 71-72, attached as Ex. A (emphasis added).)

In its Petition for Judicial Review and Complaint, SLC seeks to quite title to the winter South Despain Ditch rights. Specifically, SLC seeks a declaration that Mrs. Biddulph, as owner of Lot 31, had title at most to only a fraction of the George Despain family's portion of the South Despain Ditch rights she claims, and that were updated in the State Engineer's database. As a result, Mrs. Biddulph could have conveyed at most only a tiny fraction of what is being claimed by Mr. Tolton and Mrs. Maack.

**B. There is a serious question of whether any South Despain Ditch rights Mr. Tolton and Mrs. Maack claim have been lost by forfeiture, abandonment, or adverse possession.**

In its Second Cause of Action, SLC asserts that any South Despain Ditch rights Mr. Tolton and Mrs. Maack claim have been lost by forfeiture, abandonment, and adverse possession. Several facts support this conclusion.

First, as acknowledged by the State Engineer's staff, the .36-acre Lot 31 "would not accommodate all of the uses under the certificate." In the State Engineer's August 4, 2000, Memorandum Decision approving Permanent Change Application Number a24463, the State Engineer approved diversion of .0625 cfs of water for "the irrigation of .73 acre from April 1 to October 31, the watering of 15 cattle or equivalent, and the domestic purposes of three families in the SW1/4 NW1/4 of Section 12, T3S, R1E, SLB&M." Again, Lot 31 is only .36 acre. Also, there is no indication of any stock watering use. The lot simply cannot support the full use of the right claimed.

Second, from the time of development of the Little Cottonwood Subdivision,<sup>3</sup> all of the lots in the Subdivision have been served water by Sandy City. As the State Engineer's staff recognized in 1999, "It is confusing to see where the water right is used at all *now that other suppliers are servicing the area.*" (Mar. 23, 1999, Letter, Ex. A (emphasis added).)

Finally, Mr. Tolton and Mrs. Maack have not shown that any portion of their claimed water rights have been used by others in a manner that would preserve them.

Consistent with long-standing practice, the State Engineer should issue a stay of the January 9 Orders until these title issues have been resolved.

**II. THE STATE ENGINEER SHOULD STAY THE JANUARY 9, 2014, ORDERS UNTIL THE IMPORTANT QUESTION OF WHETHER THE TIME OF USE OF LITTLE COTTONWOOD CREEK RIGHTS CAN BE CHANGED IS RESOLVED. DOING SO WILL CONSERVE THE STATE ENGINEER'S TIME AND VALUABLE RESOURCES.**

The January 9 Orders raise the important question of whether the time of use of Little Cottonwood Creek rights can be changed. In approving Mr. Tolton and Mrs. Maack's Change Applications, the State Engineer changed the South Despain Ditch rights at issue from summer

---

<sup>3</sup> The subdivision plat was recorded 8-23-1978, attached as Ex. B.

rights to year-round rights. SLC maintains that this change in time of use is contrary to law. This claim is the subject of SLC's Third Cause of Action.

Until the question of whether the time of use of Little Cottonwood Creek rights can be validly changed is resolved, the January 9 Orders establishing that they can are likely to have wide-reaching effects. SLC anticipates that numerous Little Cottonwood Creek right holders may file change applications seeking to change the time of use of their rights in reliance on the State Engineer's January 9 Orders. Resolution of these applications will require the State Engineer and its staff—as well as interested parties—to expend a great deal of time and valuable resources. This would be done in the shadow of the very real prospect that at the conclusion of the litigation, it will be clear that the time of use of Little Cottonwood Creek rights *may not* be changed. If this is in fact the result, the State Engineer and its staff will be left having spent time and resources addressing an issue it need not ever have addressed. Even worse, it is possible that the district court's resolution of SLC's Third Cause of Action would require further action on the part of the State Engineer and its staff in order to reconcile the change application proceedings that had taken place during the pendency of the litigation with the district court's ultimate determination.

Given the likelihood that other Little Cottonwood Creek right holders will seize on the State Engineer's allowance of a change in time of use contained in its January 9 Orders, it will promote agency economy and conservation of resources to stay those Orders pending conclusion of the litigation.

### III. A STAY WILL PREVENT UNNECESSARY AND AVOIDABLE DAMAGES AND IMPAIRMENT.

In its January 9 Orders, the State Engineer approved Permanent Change Application Numbers a28545 and a28548, allowing a maximum annual diversion of .373 acre-foot of water under each application. It is not unreasonable to expect that Mr. Tolton and Mrs. Maack, in reliance on the Orders, will begin the process of attempting to construct the dwellings and water-related infrastructure described by the State Engineer.<sup>4</sup> Indeed, “[a]fter an application is approved, the applicant is then empowered to construct all necessary works and use the water in the manner contemplated by the change application.” *Searle v. Milburn Irrigation Co.*, 2006 UT 16, ¶ 23, 133 P.3d 382.

However, in light of the Petition for Judicial Review filed by SLC, it is possible—and, in SLC’s opinion, likely—that upon *de novo* review, Mr. Tolton and Mrs. Maack’s Change Applications will be denied. If the Change Applications are denied yet Mr. Tolton and Mrs. Maack had begun seeking necessary approvals and permits in reliance on the State Engineer’s Orders, they—and various state, local, and federal agencies—will have incurred unnecessary and avoidable costs and irrevocably committed valuable resources. As just one example of an area in which unnecessary resources may be spent, take the issue of a sewer connection for the proposed development. Salt Lake County Health and Safety Ordinances expressly prohibit holding tanks and septic systems in “zone II source water protection areas,” which is the classification applicable to the POD and POU under the Change Applications. Mr. Tolton and Mrs. Maack may, in reliance on the January 9 Orders, begin attempting to address this issue, costing not only

---

<sup>4</sup> As thoroughly set forth in SLC’s Protest to Mr. Tolton and Mrs. Maack’s Applications and the supplemental material submitted by SLC, the proposed development is not feasible for several reasons. However, this fact does not preclude the possibility that Mr. Tolton and Mrs. Maack will begin expending resources *attempting* to execute the development.

them, but state and local agencies as well, valuable time and resources. And this is only one of many regulatory hurdles that must (but likely cannot) be surmounted. Any effort to do so, and the attendant cost and time required on the part of Mr. Tolton, Mrs. Maack, and state, local, and federal agencies will be better spent *after* resolution of the judicial review proceedings when it is clear whether the Change Applications have been approved.

Also, it is possible that third parties will act in reliance on the belief that the properties have water available as described in the Orders without realizing that the underlying Change Applications may be denied in the judicial review proceedings. For instance, an out-of-state third party may purchase the property, to only later have the district court deny the Change Applications. In such instances, third parties will have incurred unnecessary and avoidable costs.

A more prudent course is to stay the January 9 Orders until conclusion of the judicial review, at which time it will be clear whether the result of the Orders will stand. Until that time, any reliance on the January 9 Orders carries with it the uncertainty created by the pending litigation. For this reason, no party will be prejudiced by a stay. Indeed, the only prejudice likely to occur is if the January 9 Orders are *not* stayed.

**CONCLUSION**

For these reasons, SLC respectfully requests that the State Engineer stay its January 9 Orders in the informal adjudicative proceedings of Permanent Change Application Numbers a28548 (Water Right Number 57-7800) and a28545 (Water Right Number 57-10317).

DATED this 20<sup>th</sup> day of February, 2014.

SNOW, CHRISTENSEN & MARTINEAU



---

Shawn E. Draney  
Scott H. Martin  
Dani Cepernich  
Attorneys for Salt Lake City





State of Utah  
DEPARTMENT OF NATURAL RESOURCES  
DIVISION OF WATER RIGHTS

Michael O. Leavitt  
Governor  
Kathleen Clarke  
Executive Director  
Robert L. Morgan  
State Engineer

1594 West North Temple, Suite 220  
PO Box 146300  
Salt Lake City, Utah 84114-6300  
801-538-7240  
801-538-7467 (Fax)

March 23, 1999

John W. Anderson  
Pruitt, Gushee & Bachtell  
Suite 1850 Beneficial Life Tower  
Salt Lake City, Utah 84111-1495

Dear Mr. Anderson:

Re: Water Right No. 57-7800 (Change  
a4178 based on 25% of South  
Despain Ditch Award, Morse  
Decree, 1910

The documents submitted to update title to the above change and award to Lynn Biddulph have been reviewed and discussed with the State Engineer's attorney. At present, our records show the above-mentioned water right in the names of Saunders and Sweeney Inc. (2/3) and Lynn Christensen (1/3). Your letter requests that the entire right be shown in the name of Lynn Christensen Biddulph.

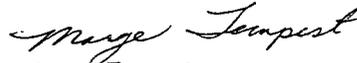
Review of the file indicates that at the time the change application was filed, it indicated that it covered all of the applicant's interest in the decree award. This water right was approved to divert the award from the proposed well for three families (1.35 acre-feet), 15 cattle or equivalent (0.42 acre-foot), and irrigation of 0.73 acre (3.65 acre-feet). Upon submittal of proof of beneficial use, the applicant represented that the well was being used for said purposes. The irrigation was shown as landscaping around the residences on the proof map. Upon certification, the water right was made appurtenant to that land described in the place of use map. Although Mr. Saunders indicates that he moved the uses to the lot that Lynn Christensen (Biddulph) owns, no change application was made to relocate the water right upon the legal record. Additionally no change application was made to return the point of diversion and source to the creek for diversion through the pipeline that Salt Lake City agreed to provide or to the original South Despain Ditch. According to the subdivision plat on this file, Lot 31 that was deeded to various successors and finally to Lynn Christensen covers about 0.36 acre which would not accommodate all of the uses under the certificate. It would appear that the grantees to the lands where the other houses and the well are or were located would have been conveyed their proportionate interest in the water right unless it was reserved in the land deeds or conveyed in other deeds prior to the land sales. It is confusing to see where the water right is used at all now

SCANNED

that other suppliers are servicing the area.

Based on this review of the file and the submitted documents, no change in the water right ownership record in this office has been made.

Yours truly,



Marge Tempest  
Specialist

pc: Lynn Biddulph  
3515 East Little Cottonwood Lane  
Sandy, Utah 84070

