

2016

**Enervest, Ltd. Successor in Interest to Bill Barrett Corp., Appellant,  
vs. Michael Carson, Appellee**

Utah Supreme Court

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**IN THE SUPREME COURT OF THE STATE OF UTAH**

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IN THE MATTER OF THE GENERAL  
DETERMINATION OF ALL THE  
RIGHTS TO THE USE OF WATER  
BOTH SURFACE AND  
UNDERGROUND WITHIN THE  
DRAINAGE AREA OF THE UINTAH  
BASIN AND THE LOWER GREEN  
RIVER BASIN IN UTAH.

NINE MILE CREEK DIVISION

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ENERVEST, LTD, successor in interest to  
Bill Barrett Corp.,

Appellant,

vs.

MICHAEL CARLSON,

Appellee.

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**REPLY BRIEF  
OF APPELLANT ENERVEST, LTD.**

**APPELLATE CASE NO. 20160394**

(District Court Case No. 560800056)

*Appeal from a summary judgment  
of the Eighth District Court,  
Judge Samuel P. Chiara*

Justin P. Matkin - 8847  
Matthew E. Jensen – 10693  
PARR BROWN GEE &  
LOVELESS  
101 S. 200 E., Suite 700  
Salt Lake City, UT 84111  
Telephone: 801-532-7840  
jmatkin@parrbrown.com  
mjensen@parrbrown.com

*Counsel for Appellee Michael  
Carlson*

Benjamin J. Jensen – 14216  
Sarah M. Shechter – 15357  
ASSISTANT ATTORNEYS  
GENERAL  
UTAH ATTORNEY GENERAL  
1594 W. North Temple,  
#300  
Salt Lake City, UT 84116  
Telephone: 801-538-7227  
bjensen@utah.gov  
sshechter@utah.gov

*Counsel for Appellee Utah  
State Engineer*

John H. Mabey, Jr. – 4625  
David C. Wright – 5566  
Jonathan R. Schutz – 13352  
MABEY WRIGHT & JAMES, PLLC  
175 South Main, # 1330  
Salt Lake City, Utah 84111  
Telephone: (801) 359-3663  
jmabey@mwjlaw.com  
dwright@mwjlaw.com  
jschutz@mwjlaw.com

*Counsel for Appellant EnerVest,  
Ltd.*



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## INTRODUCTION

It is undisputed that the irrigators diverted water exactly as depicted in the PD without regard to Minnie Maud or a company service area. It is undisputed that the PD assigns specific water rights to each property and that this manner of irrigation has persisted for more than 100 years—since at least 1913. It is this history of water use Carlson is determined to undo. He insists on a rewind to 1902 to retrofit this zombie corporation with a life and a scope and a power it never had in real life. This, because in 1998 he acquired shares in a corporation formally dissolved in 1974.

Carlson raises four principle arguments to protect this result. First, defying his stipulation, he challenges EnerVest's appellate standing. He next defends the judgment, and contends EnerVest did not preserve an argument (that the summary judgment is inconsistent with the PD) and that if preserved, this argument improperly expands the proceeding below. Finally, Carlson invokes equity-based "alternative grounds" to affirm.

## ARGUMENT

### *A. EnerVest has appellate standing.*

#### **1. Carlson stipulated to standing.**

Section 24 standing requires a water use “claimant,” “a valid, timely objection,” and the claimant’s “direct interest” in it. Utah Code §73-4-24(1). The parties so stipulated: “EnerVest and [Carlson’s] predecessors ... did not [object to the PD] ... both parties have standing ... because they are claimants to the use of water and have a direct interest in ... the pending Objections. (R(2)-262-265)(Carlson brf., Addendum G). Carlson further stipulated that this action “is the proper process to resolve the Objections and the parties’ related disputes.” (R(2)-263).

He does not claim that the stipulation is unenforceable. It is. *In re E.H.*, 2006 UT 36, ¶52, 137 P.3d 809 (“[I]n Utah standing acquired by stipulation is enforceable.”).<sup>1</sup> Upon court acceptance, it is ““an estoppel upon the parties”” and ““conclusive of all matters necessarily included”” within it. *Yeargin v. State*, 2001 UT 11, ¶20, 20 P.3d 287 (citations omitted). The stipulation “has all the binding

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<sup>1</sup> *In re E.H.* “[did] not [conclude] that a court must always honor [stipulated standing][:] neither d[id] [it] categorically reject the notion that standing, unlike jurisdiction, can arise from an agreement.” 2006 UT 36, ¶52.

effect of findings of fact and conclusions of law ... upon the evidence.” *Id.* (citations omitted).

The Objections are not resolved because the case—the section 24 proceeding now on appeal—is not over.

## **2. EnerVest has statutory standing.**

Fundamentally a case in equity, *In re General Det.*, 355 P.2d 64, 66 (Utah 1960), this general determination is a “statutory process created to confer legitimacy on those claiming lawful ownership based on beneficial use of the public waters ... [based on] prior appropriation.” *Penta Creeks, LLC v. Olds*, 2008 UT 25, ¶7, 182 P.3d 362. Water users on the system assert their claims. Utah Code §73-4-5. The State Engineer evaluates them based largely on a hydrographic, *i.e.*, water use, survey, §73-4-11(1)(a), followed by a proposed determination (PD) of rights for the area, *id.* §73-4-11 (*see, e.g.*, R(2)-1015-32). The hydrographic surveys record beneficial use, showing irrigated land and, here, the landowners. (R(2)-1586-1593).<sup>2</sup>

A claimant may object to the PD and litigate. §§73-4-11, -12. *See also Eden Irrig. v. District Court*, 211 P. 957, 960 (Utah 1922)(“dissatisfied” claimants may

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<sup>2</sup> Until modified by the court and unless a prior decree governs, water is distribute according to the PD, as submitted or as modified, until the decree is entered. §73-4-11(3).



object). Several claimants timely objected, (R(2)-940-944, 946-948, 950-954), for which section 73-4-24 permits expedited resolution. Although rewritten in 2010, this section permits what it always has — “a reasonably prompt resolution of the issues raised ....” *Murdock v. Springville Mun. Corp.*, 878 P.2d 1147, 1150 (Utah 1994)(discussing prior version). See *In re Uintah Basin*, 2006 UT 19, ¶55, 133 P.3d 410 (“Section 24 authorizes this court to hear and determine the dispute ....”)(internal quotations and citations omitted).

EnerVest claims the use of water rights 90-24 and 90-196 identified in the PD. (R(2)-1586-96). Although its predecessor did not object, that is no bar to resolution of other timely objections in which EnerVest “has a direct interest.” §73-4-24(1). It plainly meets that test, as Carlson and the State Engineer stipulated. (R(2)-262-265). Like Carlson, EnerVest is a successor in interest to a claimant; its rights are at issue. (R(2)-263).

Carlson argues that EnerVest lost appellate standing because objectors Hammerschmid Trust and Motte, did not also appeal. (Carlson brf. 18-22). Carlson’s appellate standing theory fails for three reasons. First, §73-4-16(1) guarantees “a right of appeal from a final judgment of the district court” consistent with §78A-3-102 (this court’s jurisdiction). That appeal “shall be on

the record made” below “and may as in equity cases be on questions of both law and fact.” §73-4-16(2). Having a “direct interest” in the Objections, and having litigated them with Carlson’s blessing, EnerVest enjoys the same appellate rights as any party on the losing end of summary judgment. Utah Code §§73-4-24(1), 73-4-16; Utah R. App. P. 3, 4.<sup>3</sup>

Second, section 24 standing depends on a claimant’s “direct interest” in an objection, not who joins it on appeal from a decision on that objection. §73-4-24(1). Section 73-4-16 does not limit who may appeal, requiring only a “final judgment ....” Carlson’s “proper party” theory (Carlson brf. 20), forces the statute to say something it plainly does not—that a claimant with a direct interest in an objection may litigate to final judgment but then have no appeal right unless joined by an objector. Carlson’s unwritten requirement negates section 24’s express and only test—a “direct interest” in the objection. §73-4-24(1).<sup>4</sup>

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<sup>3</sup> Carlson’s argument is strange, and dangerous. According to him, had the court granted EnerVest’s motion, he—as a claimant and not an objector—would have no appellate standing.

<sup>4</sup> Carlson relies on *Washington Cnty., etc. v. Morgan*, 2003 UT 58, ¶¶7-10, 82 P.3d 1125, apparently comparing the Water Conservancy Act and the entire general determination chapter, §73-4, *et seq.* *Washington* is no help. There, the district tried to leverage the statute that created it into omnibus standing. This court disagreed, explaining that the Act did not create an “express grant of power to enforce” beneficial use . . . nor . . . to appeal the state engineer’s decisions on

Third, this appeal is a “continuation of the underlying proceeding.” *Friends, etc. v. Dep’t. of Nat. Res.*, 2010 UT 20, ¶13, 230 P.3d 1014. This is not a new case requiring rebooted standing. For example, appellate rulings become “law of the case” on remand. *UDOT v. Ivers*, 2009 UT 56, ¶12, 218 P.3d 583 (citations omitted). This “mandate rule” is a “branch of [] law of the case []” and “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.” *Id.* (emphasis added). The mandate rule makes no sense if trial and appellate proceedings are distinct actions. It is all the same case.

According to Carlson, however, and without any authority, §73-4-24 creates standing for a “claimant” in the district court, only to take it away on appeal—what Carlson calls “the rest of the potential judicial process,” relegating the claimant to “an amicus.” (Carlson brf. 22, n.16). Nonsense. EnerVest has the statutory right to litigate objections in which it has a direct interest. Having lost, and like any other litigant civil or criminal, it may appeal. §73-4-16; Utah R. App. P. 3, 4.<sup>5</sup> Its “direct interest” in the now overruled objections has not vanished.

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change applications” where the district’s own use would not be affected. *Washington*, 2003 UT 58, ¶¶8-9.

<sup>5</sup> Carlson is correct that the failure to object to a PD typically forecloses a challenge. (Carlson brf. 18-21). See *U.S. Fuel Co. v. HCIC*, 2003 UT 49, ¶19, 79 P.3d

### 3. EnerVest has common law standing.

“[S]tanding ... assure[s] the procedural integrity of [judgments] by requiring that the parties ... have a sufficient interest in the subject matter of the dispute and sufficient adverseness that the legal and factual issues ... will be thoroughly explored.” *Terracor v. Utah Bd., etc.,* 716 P.2d 796, 798 (Utah 1986). If standing is challenged on appeal, the party “must show ... standing under the traditional test in [the action below].” *Chen v. Stewart*, 2005 UT 68, ¶50, 123 P.3d 416 (citations omitted).

The first common law element is that EnerVest incur “some distinct and palpable injury [giving it] a personal stake in the outcome ....” *Terracor*, 716 P.2d at 799 (citations omitted). EnerVest claims a right to use water from Minnie Maud Creek. (R(1)-4101-4102). That claim is directly at issue and plainly affected by the Objections. *See generally Plain City Irr. Co. v. Hooper Irr. Co.*, 51 P.2d 1069, 1072 (Utah 1935)(“[I]f a claimant ... ha[s] objections or [its] rights could be affected adversely, [the claimant is] entitled to notice ... otherwise [it is not] bound by the judgment.”); Utah Code §73-4-13.

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945. In that distinguishable case, however, there were no timely objections, allowing the district court to enter judgment based on an unobjectionable PD. *Id.* ¶19.

As a water right claimant in the water source, EnerVest is a party to this general determination. Its rights are at issue thanks to the Objections and Carlson's response to them. That is, by virtue of Minnie Maud share ownership, and not beneficial use, Carlson claims to own 60.12% of all the water rights, two of which are approved for use only on EnerVest's land (EnerVest rights 90-24 and 90-196). (EnerVest brf., Addendum 7). Carlson seeks to take over the use of water he's never previously used on land he's never owned or irrigated and probably never stepped foot on. He claims 60% of water rights used by others and their successors on their own land for more than a century. (*Compare* R(2)-1586-93 and Addendum 7, *with* R(2)-957-60). The dispute could hardly be sharper.

Standing is further permitted "if no one else has a greater interest in the outcome ... and the issues are unlikely to be raised at all unless that particular [party] has standing ...." *Terracor*, 716 P.2d at 799. Motte and Hammerschmid did not appeal because they could not afford it. Their objections are no less legitimate, so EnerVest, with the same argument and "direct interest" continues the effort.<sup>6</sup>

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<sup>6</sup> Carlson notes that EnerVest did not ask the court to reverse its denied MSJ. (Carlson brf. 14). That ruling "is not a final decision on the merits of that issue ...

Finally, standing is available for anyone to litigate “unique” issues “of such great public importance that they ought to be decided in furtherance of the public interest.” *Id.* Exploiting a century of ambiguous corporate history and sacrificing Minnie Maud’s substance to its form so that he can take title to more water than he or his predecessors ever used, Carlson’s theory undermines a fundamental public interest.

In Utah, the beneficial use of water and the rights that come with it are about as important as it gets. Water is *the* resource. Its value is “inestimable,” and “beneficial use” its lodestar. *Delta Canal Co. v. [Vincent]*, 2013 UT 69, ¶¶19-25. This public resource is subject only to the right to use it. Utah Code §73-1-1. That right (not the water itself) constitutes private property. §57-1-1(3).

The historical development of our water law indicates that rights to the use of water are firmly grounded upon three things: (1) initiative in discovering useable water resources, (2) industry in taking overt action to bring the water under control for the purpose of putting it to a beneficial use, and (3) diligence in continuing the use thus established.

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unless the ... ruling clearly states otherwise and ... can properly resolve an issue with finality.” *Dunlap v. Stichting Mayflower Mtn.*, 2005 UT App 279, ¶2, 119 P.3d 302 (citations omitted). The parties cross-moved, (R(2)-778-874; 881-988; 997-1068), “implicitly contend[ing] that [each] is entitled to judgment as a matter of law, but that if the court determines otherwise, factual disputes exist [precluding summary] judgment” for the other side. *Wycalis v. Guardian Title*, 780 P.2d 821, 825 (Utah App. 1989), *cert. denied*, 789 P.2d 33 (Utah 1990). EnerVest appealed the final judgment (R(2)-1908-1910), not a non-final, non-appealable, non-judgment.

*Weber Basin etc. v. Gailey*, 328 P.2d 175, 178 (Utah 1958).

These principles “constitute the only recognized foundation upon which rights in water can be created and maintained.” *Id.* Concerning the water used by Mottes, Hammerschmids, and EnerVest, and their predecessors, Carlson has done precisely none of these things. Neither he nor his predecessors diverted and beneficially used that water. Rather, his only “initiative” was to purchase, in 1998, shares in a corporation formally dissolved in 1974, (R(1)-4140-4141; R(2)-1068), expecting to leverage the shares into rights to water others diverted and used on their own land.

This proceeding and EnerVest’s position furthers the public policy that those who divert and beneficially use water earn the right to continue. *Eskelsen v. Town*, 819 P.2d 770, 775 (Utah 1991)(“An appropriative water right depends on beneficial use for its continued validity.”). As a “claimant” with a “direct interest,” EnerVest seeks to enforce the underpinning on which all Utah water use is based and thereby has standing to litigate these “unique” issues of “great public importance.” *Terracor*, 716 P.2d at 799.

***B. The Deed cannot support waiver.***

**1. Minnie Maud’s “legal existence” does not overcome the restriction on its effectiveness regardless of the Deed.**

Carlson argues, correctly, that Minnie Maud achieved “legal existence” but contends that EnerVest did not, and now cannot, challenge that ruling. (Carlson brf. 23-26). The company’s acceptance of the Deed is, therefore, at worst *ultra vires* and voidable, according to Carlson. *Id.* This is Carlson’s best argument, but he still misses the mark.

First, if by “legal existence,” Carlson means that a corporate entity was recognized based on code-compliant Articles, then there is nothing to challenge. EnerVest makes the point in its opening brief. (Brf. 18). That is only the first question, however, to determine whether the entity was “effective,” whether it had any corporate *power*, and whether it was authorized to own property in 1902 (the Deed), or the water rights in 1964, via the PD.

No corporation may act “in any way not authorized in its . . . articles . . . or bylaws.” *Okelberry v. West Daniels Land Assoc.*, 2005 UT App 327, ¶14, 120 P.3d 34 (citation omitted). It can do only what its shareholder-approved articles permit. *Thompson v. McFarland*, 82 P. 478, 480 (Utah 1905). That limit is strictly enforced. *Zion’s Bank v. Tropic, etc.*, 126 P.2d 1053, 1054 (Utah 1942).



The Articles are clear. Only one thing could animate Minnie Maud—3000 shares from the unpaid portion of the authorized total of 8,000. (R(2)-806). The Deed on which Carlson and the district court rely does not do that. It reflects only 2,377 “paid up” shares, about which the Articles are also explicit. *Id.* Minnie Maud had no function without 3,000 shares *in addition to* the 2,377 exchanged for the Deed. *Id.* Evidently, the venture depended on a certain critical mass. The point, however, is that the Deed names a grantee powerless to accept it, because its creators explicitly said so. The PD likewise names a water right “owner” that was not “effective” for that, or any, purpose. (R(2)-1015-1032).<sup>7</sup>

Arguing *ultra vires*, Carlson is more right than he realizes. “Ultra vires” means “beyond the powers.” Black’s Law Dictionary 1755 (10th ed. 2014).<sup>8</sup> Everything was *ultra vires* for Minnie Maud. “*Ultra vires*” is a lot like what

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<sup>7</sup> *Southam v. South Despain Ditch Co.*, 2014 UT 35, 337 P.3d 236 is instructive. There, a party acquired shares in violation of bylaw-based restrictions on share transfers. The company argued and the district court agreed that the restrictions were enforceable, meaning that the sale was void. *Id.* ¶¶6-7. This court affirmed, holding that Utah Code §16-6a-606 required enforcement of the restrictions. *Id.* ¶¶17, 23.

<sup>8</sup> And “[u]nauthorized; beyond the scope of power allowed or granted by a corporate charter or by law.” Black’s, at 1755.

Hammerschmids, Mottes, and Keel have been saying since the 1950s. (R(2)-928-35; 1052-66; 1317-22).<sup>9</sup>

Invoking *Ockey v. Lehmer*, 2008 UT 37, ¶18, 189 P.3d 51, Carlson argues that the deed is merely voidable. (Carlson brf. 24-25). The flaw, however, is that no one had authority to either ratify the deed or pursue voidability, except perhaps the Deed's grantors. Minnie Maud certainly could not.

## **2. The Deed cannot as a matter of law waive the Share Requirement.**

Second, and this goes also to the district court's ruling (*see* Carlson brf. 26-30), the Deed does not waive anything, certainly not expressly. Although waiver can be implied, it must always be "distinct." *Soter's, Inc. v. Deseret Fed., etc.*, 857 P.2d 935, 937 (Utah 1993). Sensibly, that "requirement" means that waiver must be "clearly intended ...." *Id.* at 940. An ambiguous waiver is no waiver, certainly not on summary judgment. If not express, the "totality of the circumstances" must support "the inference of [waiver]." *Id.* at 941. If based on a "writing, and no extrinsic evidence of the meaning of ambiguous terms is presented, waiver is a question of law ...." *Lane Myers Constr., LLC v. Nat'l City*

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<sup>9</sup> The parties flailed some in the district court as they grappled with what to do with Minnie Maud's ephemeral existence, such as *de jure* and *de facto* questions, (R(2)-2168-70), and its formal demise in 1974. The issues have crystallized on appeal.

*Bank*, 2014 UT 58, ¶49, 342 P.3d 749 (Durham, J., concurring). See, e.g., *Zions Bank v. Saxton*, 493 P.2d 602, 603 (Utah 1972)(express, written lien waiver).

The Deed is clear, saying nothing about the Share Requirement and reflecting only “paid up” stock. (R(2)-1279; EnerVest brf., Addendum 3). Carlson offers no defense for how an instrument, void or voidable, *ultra vires* or not, that reflects performance under one provision of the Articles (R(2)-805-06), waives performance under another, when the second—the Share Requirement—conditions the entire agreement. He avoids the paid versus unpaid share issue altogether.<sup>10</sup>

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<sup>10</sup> *Soter’s* wrestles with the distinctness element, wondering whether, if retained, waiver should require clear and convincing evidence. 857 P.2d at 942, n.6. The burden aside, EnerVest urges that distinctness be retained. Waiver is defined with muscular terms, “*intentional relinquishment of a known right*,” *Id.* at 939-940 (emphasis added), and should not be chipped away, whether involving constitutional rights of the accused, see *American Fork City v. Crosgrove*, 701 P.2d 1069, 1075 (Utah 1985)(Stewart, J., concurring), or property and contract rights, also constitutionally protected. Utah Const. Art. I §§1, 7, 22 (private property) and 1, 18 (contract). The distinctness element levels the playing field between contracting parties of unequal strength. Cf. majority opinion and dissent of Durham, J., in *Allen v. Prudential, etc.*, 839 P.2d 798 (Utah 1992).

### 3. Any inference of waiver is undermined by the facts.

Waiver is the “intentional<sup>11</sup> relinquishment<sup>12</sup> of a known<sup>13</sup> right.”<sup>14</sup> *Soter’s*, 857 P.2d at 939-940. Carlson’s theory cannot account for critical undisputed facts:

1. Minnie Maud Creek water users were already diverting and using their water. (R(2)-805-06). The only issue was the terms of incorporation. They determined the venture unworkable without critical mass, presumably to make it economical. That is why mutual irrigation companies form—“for convenience of operation and more efficient distribution ....” *Genola Town v. Santaquin City*, 80 P.2d 930, 936 (Utah 1938).
2. Later water users acquired land irrigated from the creek. The PD confirms this in exacting detail, identifying precise, irrigated acres, naming the owners thereof, and assigning *separate* water rights to each parcel, where water was diverted and the land farmed by people in no way dependent on Minnie Maud. (R(2)-1586-1593).

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<sup>11</sup> “Done *with the aim* of carrying out the act.” Black’s Law Dictionary 932 (10th ed. 2014)(emphasis added), *i.e.*, distinct?

<sup>12</sup> Abandonment. Black’s, at 1482.

<sup>13</sup> To “have in mind,” “acknowledged.” Oxford American Dictionary, 437 (1999).

<sup>14</sup> Interest, claim, or ownership. Black’s, at 1517.

3. Although the PD distributes water based on irrigated acres with separate water right numbers, (R(2)-1018-1031), the Articles state that water distribution was to be “in the proportion [of their shares],” (R(2)-806), again typical for such companies. *Genola*, 80 P.2d at 936 (water allocated “in proportion” to shares).
4. Carlson has never claimed to own more than 1,429 of the 2,377 issued shares (60%). (R(2)-959-60). The Articles, however, authorize 8,000 shares. (R(2)-803). His shares are just 18% of *that* total. Under his theory, however, relying solely on the 2,377 “paid up” shares, and ignoring the unpaid portion that mattered most to the original irrigators, he gets 60%, of the water across the board. (R(1)-4137, 4141).<sup>15</sup>

The facts on which Carlson relies to show waiver occur mostly between 1902 and 1911, about the time the dam failed. (Carlson brf. 27-29). Carlson argues that “[b]etween 1902 and 1955, the Incorporators and their successor

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<sup>15</sup> Carlson speculated below that the Share Requirement may have been satisfied with treasury stock issued to pay for reservoir work (R(2)-1007-08; 1621), which the Articles permit. (R(2)-806). If so, then his theory is further mired in uncertainty because he could not own 60%. He would own some percentage less than that depending on how many hypothetical treasury shares were issued. He abandons that argument here.

shareholders held and took record of corporate meetings.” *Id.* at 28. Not exactly. The minutes show spotty activity after those early years. In 1920, “less than a majority of the issued and outstanding stock of this company was present”; in 1951, “notice” was sent “but no one came”; “no one came” again in 1952, and in 1954 two showed. *Id.*, Addendum E.

Minnie Maud had at best a brief role in water distribution. While some clung to the corporate form, the irrigators diverted and used water without regard to the entity on land that was never defined or mapped as part of a company service area, and to which the PD assigns separate water rights.

*C. EnerVest preserved its argument concerning the PD.*

Carlson argues that EnerVest failed to preserve its argument that “the district court’s legal conclusion of waiver is inconsistent with the General Determination and the PD.” (Carlson brf. 30). He contends that EnerVest never “alert[ed] the district court that a ruling in [his] favor ... would be inconsistent with the [PD].” *Id.* at 31.

Preservation requires that the district court have “an opportunity to rule on an issue.” *Baird v. Baird*, 2014 UT 08, ¶20, 322 P.3d 728 (citations omitted). The issue must be timely, specific, and supported by “evidence or relevant legal

authority.” *Badger v. Brooklyn Canal Co.*, 966 P.2d 844, 847 (Utah 1998)(citation omitted).

Under the heading, “[t]he water users and the PD have always distributed water based on irrigated acres, not Minnie Maud shares,” (R(2)-1622), EnerVest argued at length that, although Minnie Maud was ostensibly formed consistent with irrigation companies generally (and cited cases, R(2)-1622-1623), and although the PD says Minnie Maud owns the water rights, the PD also maps and allocates water based on irrigated acres on individually owned land, with distinct water rights, (*see* R(2)-1586–93), rather than based on a single right used in a company service area, typical for mutual irrigation companies.

EnerVest argued that,

the PD assigns each of the water rights in the name of Minnie Maud to very specific properties on which the right may be used. The hydrographic survey maps ... identify these specific authorized places of use and their owners ... The PD’s allocation of water rights is acreage-based water use, which has nothing to do with Minnie Maud shares.

Thus ... the PD’s allocation of the water itself was based on irrigated acres belonging to specified individuals, not any actual or purported corporate shares—the rights are tied to acreage ....

(R(2)1622-23)(citations omitted). (See also R(2)-1625). EnerVest argued the point at length. (R(2)-2152-63).<sup>16</sup>

In other words, EnerVest argued below, and repeats here, that Carlson's theory that the corporation distributed water based on shares is inconsistent with the PD's mapping of and allocation to private property, identifying the owner-irrigators and assigning specific water rights to those properties, (R(2)-1586-93, 1622-23, 1625, 2152-63; EnerVest brf., Addendum 7; Addendum 8), including Carlson's own predecessor. *Id.* No Minnie Maud service area is defined or mapped.

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<sup>16</sup> The term "service area" is not defined other than in the context of cases discussing it, but it is well understood. For mutual irrigation companies, it is essentially the footprint made up of shareholder land served by company water, and generally defines the authorized place of use. In *McMullin v. Public Serv. Comm'n*, 320 P.2d 1107 (Utah 1958), for example, this court affirmed the Commission's denial of a landowner's petition to compel an irrigation company to furnish culinary water to a proposed subdivision. The property was beyond the company service area, and furnishing water would imperil present and future service. *Id.* at 1107. The landowner argued that the service area boundaries were "uncertain" and that his property was "reasonably within the service area." *Id.* at 1108. The irrigation company constructed a pipeline to deliver culinary water to its stockholders "within a given area." *Id.* It argued that its responsibility extended "only within the area it is presently committed to serve" as designated on a map filed with the Commission. *Id.* This court agreed: because "the service area to which the [irrigation company] is already committed to serve" still had significant growth potential, adding the new land would imperil service "within the locality now covered." *Id.*



A reasonable inference exists when “there is at least a foundation in the evidence upon which the ultimate conclusion is based,” while “speculation” has “no underlying evidence to support [it].” *Heslop v. Bear River, etc.*, 2017 UT 5, ¶22, --P.3d-- (citation omitted). (R(2)-1388). Invoking those undisputed facts, EnerVest invited the district court to consider available inferences, and specifically that

[d]espite the attempt to incorporate, the condition precedent was not met, the water users (who would have been shareholders) allocated and used the water according to their acreage. That’s what Anderson states, what the answers in the 1957 litigation and Objections assert, what they stipulated to when staying the 1950’s litigation ... and it is how the PD memorialized actual water use.

(R(2)-1623)(exhibit cites omitted).

EnerVest explained below that , “[i]f Carlson’s theory that water should be allocated according to shares is taken to its logical conclusion, Carlson will own a portion of a water right that has always been, and may only be, used on property he neither owns nor claims to own.” (R(2)-1623)(evidence citations omitted).

***D. EnerVest did not expand the section 24 hearing.***

Carlson argues that EnerVest improperly expanded the section 24 hearing because one of its arguments—that “Minnie Maud’s ownership of the Water Rights is inconsistent with the [PD]”—was not raised in the Objections. (Carlson

brf. 32). Carlson misreads the Objections. The inconsistency problem is less an argument and more just further evidence that the PD got it wrong.

Amber Keel claimed to own water rights and objected accordingly:

(a) That said water rights are not owned by the Minnie Maud Irrigation Company as stated in the [PD].

(b) That said water rights are owned by Amber Keel by reason of the use of said waters for irrigation purposes and stock watering purposes upon the land set forth in said Water Users Claim . . . and the use continuously thereof to date

....

(R(2)-946; *see also* R(2)-2152-63).

The combined Sprouse-Hammerschmid Objection also illustrates:

(a) They objected “[f]or the reason that the water rights *to the said land* belonging to these objectors, and not to [Minnie Maud].”

(b) “That as a further objection these objectors allege that [Minnie Maud] has no right, title or interest in or to the said water rights *used upon the lands* of these objectors.

(R(2)-951-52)(emphasis added).

EnerVest’s arguments are entirely consistent with the Objections. They say the same thing—the users diverted the water to their own land without company involvement based on irrigated acres, not corporate shares or a company service area. (EnerVest brf., Addendum 6). The PD is correct in every respect, in other

words, except for naming the water right owner. This is precisely what the original Petition claimed—that the PD’s only error was naming Minnie Maud the owner of the water rights. (R(1)-4103-06). Carlson stipulated that (1) the petition (R(1)-4085-4154) “meets the statutory requirements of ... section 73-4-24”; and (2) “the Petition will facilitate a reasonably prompt resolution of the ... Objections,” satisfying Utah Code §73-4-24(4)(b). (R(2)-263).

Carlson argues that the PD water right allocation to specific land owned by the water claimants is irrelevant to the validity of the Deed. (Carlson brf. 32-33). That is misdirection. The Deed appears to have had no effect on the substance of the PD. That is, the PD identifies landowners and assigns specific water rights to their farms. Had Minnie Maud actually regulated that irrigation, we would expect the PD to identify a service area. That it does not, and that it assigns individual water rights to specific property, are among the facts compelling the inference that Minnie Maud was not operational—no role in water distribution (because the Share Requirement was neither met nor waived), and that “all the water users took their own water from their own places of diversion and this water was never regulated or controlled by the irrigation company.” *Id.*, Addendum C. The answers in the 1950’s litigation and the Objections say the

same thing. (R(2)-828-33, 928-35, 1052-66). The parties so stipulated when they stayed that action. (R(2)-1407-1415).<sup>17</sup>

*E. Laches and estoppel do not apply.*

Carlson invokes equity in the form of laches and estoppel. (Carlson brf. 33-39). He is correct that this general determination rests in equity, Utah Code §73-4-16; *In re Bear River*, 361 P.2d 407, 408-10 (Utah 1961), but that does not help him. Consistent with how general determinations work, this court explains that “[a] court of equity . . . cannot create rights, but is limited to determine what rights the parties have and whether or in what manner it is just and proper to enforce them.” *Spanish Fork, etc. v. District Court*, 104 P.2d 353, 359 (Utah 1940).<sup>18</sup>

Rooted in equity, laches requires one party’s “lack of diligence” and a “resulting” injury. *Fundamentalist Church, etc. v. Lindberg*, 2010 UT 51, ¶27, 238 P.3d 1054. It means “a defendant must establish both that the plaintiff

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<sup>17</sup> *St. George City v. Kirkland*, 409 P.2d 970 (Utah 1966), is mildly instructive. There, a company everyone agreed existed expired because apparently “everyone innocently forgot about the date the charter lapsed.” *Id.* at 971. The shareholders continued irrigating as they had and four years later formed a new company “with the same name . . . directors, shareholders and [share] allocation . . .” *Id.* This court held that the water users preserved their right to continue so long as the water was actually beneficially used. *Id.* at 972.

<sup>18</sup> General determinations are a kind of quiet title action, confirming rights based on beneficial use, not creating new rights. *See, e.g., In re Bear River*, 271 P.2d 846, 848 (Utah 1954).

unreasonably delayed in bringing an action and that the defendant was prejudiced by that delay.” *Borland v. Chandler*, 733 P.2d 144, 147 (Utah 1987).

First, laches is not available to Carlson. He already stipulated that the section 24 “Petition will facilitate a reasonably prompt resolution of the matters raised in the Objections” and that “[g]ranting the Petition does not prejudice the right of another claimant ...,” *i.e.*, him. (R(2)-263).

Second, equity cannot aid Carlson. For decades the irrigators diverted and used water on their land without company involvement. (Carlson brf., Addendum C)(“all the water users took their own water from their own places of diversion and this water was never regulated or controlled by the irrigation company.”). It was not until 1957 when Carlson’s predecessor (Davis) sued the other irrigators—seeking the same 60% allocation Carlson does (R(2)-1351-56)—that they had any reason to defend their historic use and assert Minnie Maud’s irrelevance. (R(2)-928-35, 1317-22; EnerVest brf., Addendum 5).<sup>19</sup> The Objections raise the identical issues. (*Id.*, Addendum 6). Until Davis sued, however, there was nothing to which to object.

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<sup>19</sup> Although Davis mentions Minnie Maud, it’s curious that he did not sue it for not delivering the water he believed he was entitled to based on his shares. (R(2)-921-926). That would have been his remedy. *Uintah Basin*, 2006 UT 19, ¶36. He sued individual water users who flatly denied any corporate affiliation. (R(2)-928-35, 1317-22, 1351-56; EnerVest brf., Addenda 4-5).

Estoppel is rooted in similar equity principles. Equitable estoppel requires (1) conduct or statements “inconsistent with” a later claim, (2) “reasonable action or inaction” by another, and (3) an “injury” traceable to the inconsistency. *Nunley v. Westates Casing Servs., Inc.*, 1999 UT 100, ¶43, 989 P.2d 1077 (quotations and citation omitted). “[A] party seeking equity [however] must do so with clean hands.” *LHIW, Inc. v. DeLorean*, 753 P.2d 961, 963 (Utah 1988). That is, “a party who seeks an equitable remedy must have acted in good faith and not in violation of equitable principles.” *Hone v. Hone*, 2004 UT App 241, ¶7, 95 P.3d 1221.<sup>20</sup>

Here, in the equity arena, Carlson is at great disadvantage. Consider what he attempted. He acquired Minnie Maud shares twenty-four years after it was formally dissolved (R(1)-4140-4141; R(2)-1068), apparently with scant due diligence, which is an aspect of good faith. See *Zions Bank v. Crapo*, 2017 UT 12, ¶35, -- P.3d -- (reasonable reliance requires “diligence to investigate the accuracy of the representation.”).

Speaking of good faith, in his 2000 letter to the division of water rights, Carlson explains some, but only some, of the long history concerning these water

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<sup>20</sup> See *SLC Corp. v. Big Ditch Irr. Co.*, 2011 UT 33, ¶40, 258 P.3d 539 (“equitable estoppel is a disfavored remedy. It should be applied rarely, and only when necessary to avoid injustice”)(citations omitted).

rights. (R(1)-4137-41; Addendum 9). He mentions the 1950's Davis action (only the Davis complaint), but never discloses the competing legal positions or that Minnie Maud's existence and function were directly challenged. He downplays the case and begs its central issue, claiming it was merely "to resolve an ownership dispute over the use of water rights *owned by* [Minnie Maud]." (R(1)-4137)(emphasis added). He offers that the case ended in standstill, (R(1)-4138; R(2)-1414-1415), meaning that the "ownership dispute" was not resolved, but fails to mention that in 1957 the parties stipulated to water distribution, with Carlson's predecessor receiving water for 36% of the irrigated acres instead of 60% of the water rights he sought from the division. (R(2)-1407-1409). Minnie Maude had no hand in that water distribution.

Carlson mentions the ongoing general determination and the PD, but claims there were *no* objections. (R(1)-4139). The Objections, of course,—by the same parties to the Davis action—directly challenge his claim to water based on company shares and not his own or his predecessor's actual beneficial use, measured by irrigated acres. (R(1)-4137-4141; R(2)-940-944, 946-948, 950-954).

Though troubling, these omissions are not the worst of it. In a letter in which he seeks to "update" water right title (while this general determination

was still pending), Carlson again dissembles. (R(1)-4137-41; Addendum 9). His title chain starts with a farmer named Allred, whose property is mapped in the PD, with two water rights approved for use on that ground. (R(2)-1586-93). Carlson omits Allred, claiming that his title chain starts with a 1962 conveyance from Davis. (R(1)-4140)(a point EnerVest emphasized below--(R(2)-2152-57).

There is a reason for the omission: Allred's property is mapped, and his irrigation accounted for, in the PD, with two and only two water rights approved for use on that ground—rights 90-197 and 90-299. (R(2)-1586-93). Only that water was used beneficially on the ground Carlson acquired, and under the law, unless excepted, it passed by appurtenance. Utah Code §§73-1-10, -11. Acquiring shares in a dissolved corporation, however, Carlson hopes to leverage that position into title to 60% of *all* the rights. In other words, Carlson invites a peek at history to “update” title. Closer scrutiny reveals that his title chain involves specific property on which specific water rights are approved for use. Mentioning Allred would have drawn more attention to history than Carlson wanted.<sup>21</sup>

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<sup>21</sup> EnerVest's opening brief says Carlson “would acquire here more water than he could have ever had as a Minnie Maud shareholder.” (Brf. 39). This is embarrassingly wrong, missed in editing. It's just the opposite. Under his share theory, Carlson gets more water than he or his predecessors ever used. EnerVest,



The difference between what Carlson did and what EnerVest is doing is nowhere better illustrated than a comparison between Carlson’s letter, (R(1)-4137-41; Addendum 9), and the section 24 petition that started this case. (R(1)-4085-4154). Carlson cherry picks history, never disclosing that his claim (and Davis’s before him), (R(1)-4137-41; R(2)-1351-56, 1407-1415), was timely challenged, twice (in the Davis litigation and in the Objections), and still pending. Presumably, he expected (hoped?) the State Engineer would miss those challenges and “update” title, bypassing the general determination. So much for due process. The petition tells the story. (R(1)-4085-4107).

Furthermore, equitable estoppel is “a defense raised by a party against whom relief is sought when the other party misrepresented facts....” *Youngblood v. Auto-Owners Ins. Co.*, 2007 UT 28, ¶17, 158 P.3d 1088. Neither EnerVest nor its predecessors is even accused of, let alone found to have engaged in, any misrepresentation.

Carlson insists that “EnerVest should be estopped from now objecting to Minnie Maud’s ownership of the Water Rights” based on early corporate

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on the other hand, gets about the same amount under either a share- or acre-based allocation. EnerVest advocates the latter because it is the right course, based on beneficial use, and is consistent with the parties’ historic water use and the purpose of this general determination—the judicial recognition of beneficial use. *Penta Creeks*, 2008 UT 25, ¶7.

activities. (Carlson brf. 37-38). He gets it backwards. While Minnie Maud achieved *de jure* existence (lawful corporate form), it is more importantly true that the individual irrigators have for a century diverted water and irrigated their land based on acres identified in the PD (and since 1964, with distinct water rights approved for use on that land), and not corporate shares and not based on a company service area. (Carlson brf., Addendum C; EnerVest brf., Addenda 5-6).

EnerVest is not the party trying to change a century of beneficial water use and the rights that come with it. That's Carlson. He tried the back door, without telling the affected water users, knowing (or should have) that parties disputed Minnie Maude's efficacy and Davis' other claims in the 1957 litigation and in the Objections. (R(1)-4137-4141).<sup>22</sup>

Carlson's equity theories sow chaos because he exalts form—Minnie Maud's *de jure* existence—way over substance. Minnie Maud was contractually

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<sup>22</sup> He argues that Minnie Maud's existence or water right title went unquestioned until 1957. (Carlson brf. 38). Possibly true but not terribly persuasive. The Davis action may have raised it for the first time (EnerVest brf., Addendum 4), ending in a stay to await the PD (R(2)-1414), followed by the Objections on the same issue. (EnerVest brf., Addendum 6). In the meantime, before and after the PD, for more than 100 years, the irrigators controlled their own diversions. (*Id.*, Addenda 5-6; Carlson brf., Addendum C). EnerVest's predecessor (Christensen) may have thought Minnie Maud was effective, (Carlson brf. 38, Addendum F), but the timely Objections preserved the issue.

neutered. “It is the purpose of the law, [after all] and of the court in administering it, to do justice and to look through form to substance when necessary to accomplish that purpose.” *Dixon v. Stoddard*, 627 P.2d 83, 87 (Utah 1981).

Substantively, the PD assigns each water right to a precisely defined approved place of use, each owned and irrigated by separate parties.<sup>23</sup> For example, water rights 90-24 and 90-196 may be used only on land owned by EnerVest and its predecessors. (EnerVest brf., Addendum 7; R(2)-1586-1617; Addendum 8). Conversely, EnerVest and its predecessors have never owned or irrigated Carlson’s (or his predecessors’) land, which may be irrigated only with water rights 90-197 and 90-299. *Id.* Water right 90-24 may not be used on Carlson’s property, and 90-197 may not be used on EnerVest’s property.

Accordingly, for the parties to use fully the water on their land under Carlson’s theory, each would have to get State Engineer approval to change the approved place of use established by the PD. *See* Utah Code §73-3-3 (change applications). This is a terrible result at war with the very purpose of the general determination. A “key goal” of this process, after all, “is to remove doubts about

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<sup>23</sup> Concerning the approved place of water use, *see generally* *Ruth B. Hardy Rev. Trust v. Eagle Mtn. City*, 2012 UT App 352, 295 P.3d 188. *See also* Utah Code §73-3-3(a)(approved change required for new place of water use).

the validity of water rights.” *In re Rights to the Use of Water*, 2004 UT 106, ¶41, 110 P.3d 666. The PD does not allocate water use in the manner Carlson urges, because the parties never used water that way. (Carlson brf., Addendum C; EnerVest brf., Addenda 5-6). The parties will be forced into a series of overlapping changes so that, eventually, water use matches Carlson’s desired outcome.

Carlson’s theory guarantees inimical results. First, the adjudication of Minnie Maud Creek ends, not with a decree that memorializes a century of beneficial use, as all such cases are designed to do. It ends only after these overlapping change applications—changing the approved place of use—are approved. That is the only way to make Carlson’s theory work.

Second, he undermines one of the purposes of mutual irrigation company service areas by forcing these Minnie Maud “shareholders” to do exactly what this court long ago said they need not do: Shareholders are *not* required to seek State Engineer approval to change irrigation within a company service area. *Syrett v. Tropic, etc.*, 89 P.2d 474, 475 (Utah 1939). That is precisely what Carlson’s theory forces.

## CONCLUSION

This court should reverse.

April 4, 2017

**MABEY WRIGHT & JAMES, PLLC**

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David C. Wright

*Counsel for Appellant EnerVest, Ltd*

### **Certificate of Compliance with Rule 24(f)(l)**

I certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1)(A) and 24(g)(5)(A) because this brief contains 6,995 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).
2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 13 point Palatino Linotype.

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David C. Wright

### CERTIFICATE OF SERVICE

I certify that on April 4, 2017, two copies of the foregoing Reply Brief of Appellant were delivered to the following by regular mail, postage prepaid.

Justin P. Matkin  
Matthew E. Jensen  
Parr Brown Gee & Loveless  
101 South 200 East, Suite 700  
Salt Lake City, UT 84111

Benjamin J. Jensen  
Sarah M. Shechter  
Assistant Attorneys General  
1594 West North Temple, #300  
Salt Lake City, UT 84116

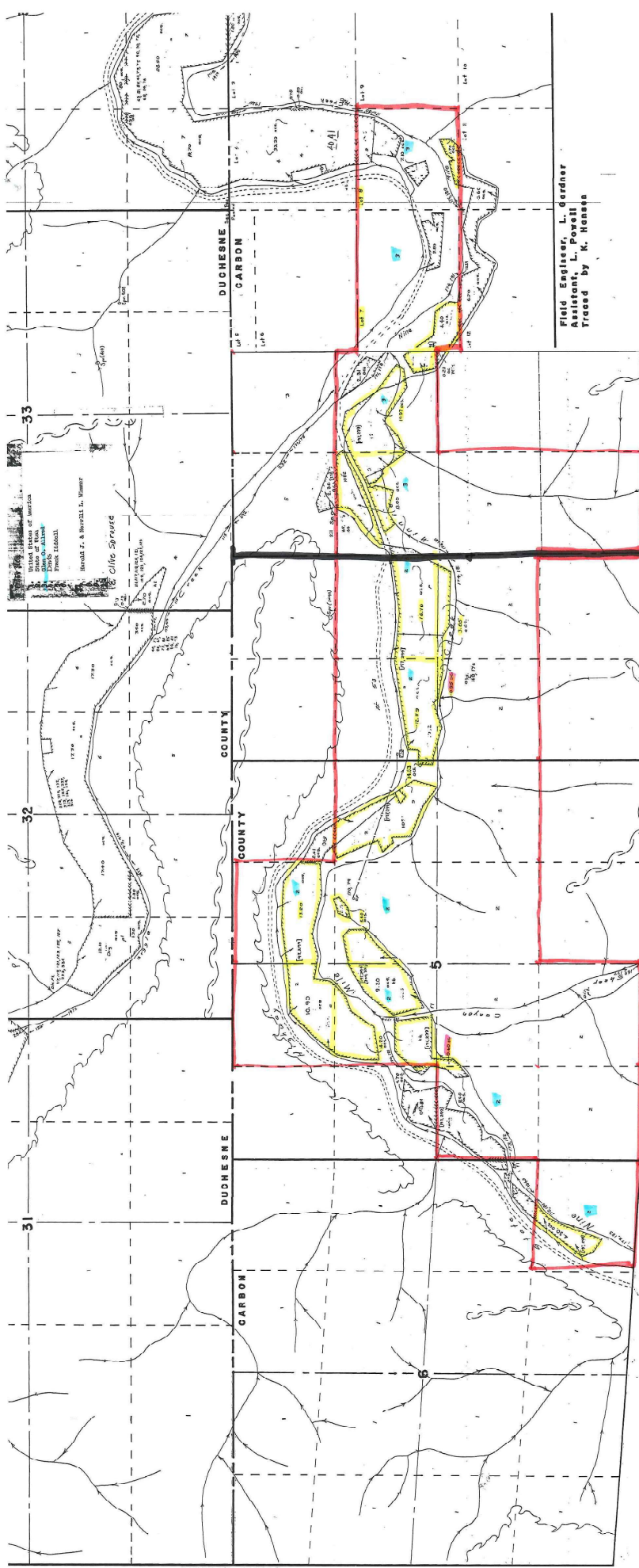
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## ADDENDUM

8. Color Maps from EnerVest's Summary Judgment Hearing Materials
9. Carlson's June 28, 2000 Letter to the State Engineer (R(1)-4137-41)
10. Determinative Statutes and Rules (Utah R. App. 24(a)(6))
  - a. Utah Code 73-4-24 (2006)

# Addendum 8





Field Engineer, L. Gardner, Assistant, L. Powell  
Traced by K. Hansen

Scale 1 inch = 500 Feet  
Surveyed 1959  
Traced 1960

Sheet 386b

DETERMINATION OF WATER RIGHTS, UTAH BASIN AND LOWER GREEN RIVER BASIN  
CARBOV, DAGGETT, DUCHESE, EMERY, GRAND, UTAH AND WASATCH COUNTIES, UTAH

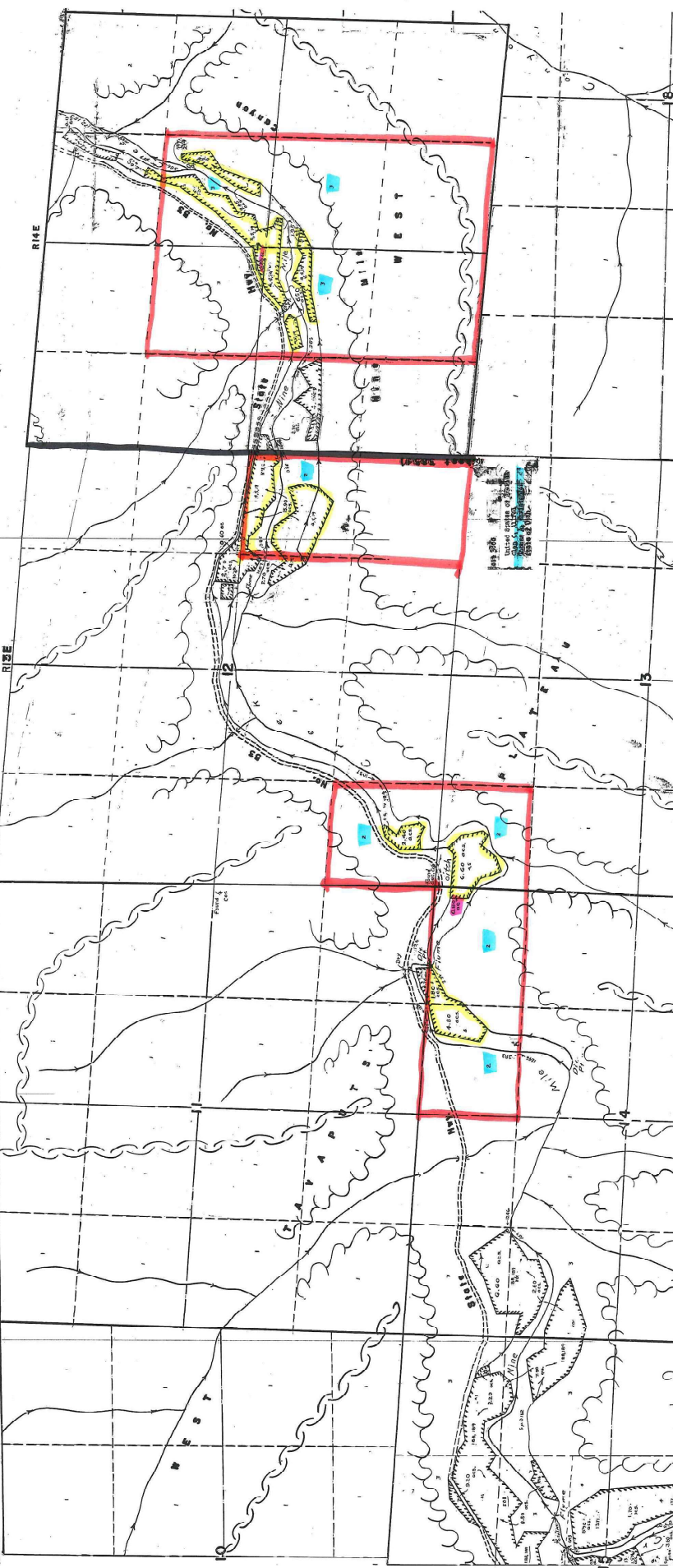
| CLAIM NO. | NAME & ADDRESS OF CLAIMANT   | SOURCE & TYPE OF RIGHT                     | PRIORITY DATE | FLOW C.F.S.        | POINT OF DIVISION   | PERIOD OF USE, inclusive |         | ANNUAL WATER ALLOWED  |  | PURPOSE, EXTENT & PLACE OF USE  | CLAIMS USED FOR PURPOSE DESCRIBED  | REMARKS | CLAIM NO. |
|-----------|--|--|---------------|--------------------|---|--------------------------|---------|-----------------------|--|---|--|---------|-----------|
|           |  |  |               |                    |   | FROM                     | TO      | FARM HEADGATE AC. FT. | DIVERSION FROM FARM AC. FT.  |   |  |         |           |
| 113       | David Devoe<br>Nine Mile via Price, Utah   | Nine Mile Creek, Diligence<br>Map 386-c    | 1885          |                    | Stock water at study on stream from point where stream enters NW 1/4 Sec. 7, T12S, R14E, S28M. Leave SE 1/4 Sec. 6, T12S, R14E, S28M. | June 1                   | Dec. 31 | See Remarks           | STOCKWATERING: 300 acres, 250 sheep, 15 calves. Flows nearly diversion under all claims mentioned, 1.36 ac. ft.      | For Claims Used for Purpose Described see Water User's Claim 65, Page 124, 1.36 ac. ft. | Diversion any, each, or all claims. Total nearly diversion under all claims mentioned, 1.36 ac. ft.  | 113     |           |
| 1559      | United States of America<br>Bureau of Land Management<br>Salt Lake City, Utah                  | Nine Mile Creek, Diligence<br>Map 386-c    | 1885          |                    | Stock water directly on stream from point where stream enters NW 1/4 Sec. 7, T12S, R14E, S28M. Leave SE 1/4 Sec. 6, T12S, R14E, S28M. | June 1                   | Oct. 15 | See Remarks           | STOCKWATERING: 700 sheep, 248 cattle - Park Unit. Flows nearly diversion under all claims mentioned, 27.66 ac. ft.   | For Claims Used for Purpose Described see Water User's Claim 1067, Page 103.            | Diversion any, each, or all claims. Total nearly diversion under all claims mentioned, 27.66 ac. ft.   | 1059    |           |
| 197       | Minnie Mauds Brigham Company<br>Ernest Davis<br>Nine Mile via Price, Utah                      | Minnie Mauds Creek, Diligence<br>Map 386-c | 1886          | 3.0<br>See Remarks | N. 1100 ft. W. 1870 ft. from E1 cor. Sec. 7, T12S, R14E, S28M.  | April 1                  | Oct. 31 | See Remarks           | STOCKWATERING: 1021 cattle and horses, 2720 sheep. Flows nearly diversion under all claims mentioned, 524.76 ac. ft. | 197, " , 299  | Same flow intermittently diverted at any, each, or all points of diversion. Rights covered by claims 24, 134, 136, 138, 139, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000 |         |           |
| 299       | Minnie Mauds Brigham Company<br>Ernest Davis<br>Nine Mile via Price, Utah                      | Minnie Mauds Creek, Diligence<br>Map 386-c | 1883          | 7.0<br>See Remarks | N. 1100 ft. W. 1870 ft. from E1 cor. Sec. 7, T12S, R14E, S28M.  | April 1                  | Oct. 31 | See Remarks           | STOCKWATERING: 1021 cattle and horses, 2720 sheep. Flows nearly diversion under all claims mentioned, 524.76 ac. ft. | For Claims Used for Purpose Described see Water User's Claim 24, Page 104.              | Diversion any, each, or all claims. Total nearly diversion under all claims mentioned, 524.76 ac. ft.  | 299     |           |
| 386       | Christensen, Thomas A.<br>Price, Utah  | Nine Mile Creek, Diligence<br>Map 386-c    | 1883          |                    | Stock water directly on stream from point where stream enters NW 1/4 Sec. 7, T12S, R14E, S28M.  | June 1                   | Dec. 31 | See Remarks           | STOCKWATERING: 1021 cattle and horses, 2720 sheep. Flows nearly diversion under all claims mentioned, 524.76 ac. ft. | For Claims Used for Purpose Described see Water User's Claim 24, Page 104.              | Diversion any, each, or all claims. Total nearly diversion under all claims mentioned, 524.76 ac. ft.  | 386     |           |
| 1558      | United States of America<br>Bureau of Land Management<br>P. O. Box 777<br>Salt Lake City, Utah | Nine Mile Creek, Diligence<br>Map 386-c    | 1883          |                    | Stock water directly on stream from point where stream enters NW 1/4 Sec. 7, T12S, R14E, S28M.  | June 1                   | Oct. 15 | See Remarks           | STOCKWATERING: 300 sheep, 248 cattle - Park Unit. Flows nearly diversion under all claims mentioned, 27.66 ac. ft.   | For Claims Used for Purpose Described see Water User's Claim 1067, Page 103.            | Diversion any, each, or all claims. Total nearly diversion under all claims mentioned, 27.66 ac. ft.   | 1058    |           |

STATE OF UTAH  
OFFICE OF STATE ENGINEER  
R13E

R13E (Sheet 385)

HYDROGRAPHIC SURVEY  
UTAH BASIN, CARSON COUNTY  
SHEET 386

STATE OF UTAH  
OFFICE OF STATE ENGINEER  
R13E



(Sheet 385c)





DETERMINATION OF WATER RIGHTS, UTAH BASIN AND LOWER GREEN RIVER BASIN  
CARBON, DAGGETT, DUCHESE, EMERY, GRAND, UTAH AND WASATCH COUNTIES, UTAH

| CLAIM NO. | NAME & ADDRESS OF CLAIMANT  | SOURCE & TYPE OF RIGHT  | PRIORITY DATE   | FLOW C.F.S.        | POINT OF DIVERSION  | PERIOD OF USE, inclusive FROM TO | ANNUAL WATER ALLOWED DIVERSION FROM AC. FT. AC. FT. | PURPOSE, EXTENT & PLACE OF USE   | CLAIMS USED FOR PURPOSE DESCRIBED | REMARKS   | CLAIM NO. |
|-----------|---|---|-----------------|--------------------|---|----------------------------------|---|--|-----------------------------------|---|-----------|
| 5         | Chickens, Thomas A.<br>514 East 2nd North<br>Cres., Wm.                         | Nine Mile Creek<br>Application No. 24689<br>Cont. of App. 5082<br>Map 385-d | May 19,<br>1956 | 5.0                | S. 1760 N., W. 2130 E., from NE cor. Sec. 14, T12S, R13E, S12E. | April 1 Oct. 31                  | See Remarks   | REGULATION: 4.80 ac. NE1/4, 4.80 ac. NW1/4 Sec. 14, T12S, R13E, S12E.<br>SEE CLAIMS USED FOR PURPOSE DESCRIBED                           | 5, 24, 156                        | Diversion any, each, or all claims. Total yearly diversion under all claims mentioned 25 ac. or less.   | 5         |
| 24        | Minnie Maude Irrigation Company<br>c/o Ernest Davis<br>Nine Mile via Pite, Utah | Nine Mile Creek, Diligence<br>Map 385-d                                     | 1886            | 3.0<br>See Remarks | S. 1760 N., W. 2130 E., from NE cor. Sec. 14, T12S, R13E, S12E. | April 1 Oct. 31                  | See Remarks   | REGULATION: 4.80 ac. NE1/4, 4.80 ac. NW1/4 Sec. 14, T12S, R13E, S12E, or total acreage of 9.60.<br>SEE CLAIMS USED FOR PURPOSE DESCRIBED | 5, 24, 156                        | Season flow immediately diverted at any, each, or all claims covered by claims 24, 156, 158, 159<br>Diversion any, each, or all claims. Total yearly diversion under all claims mentioned 25 ac. or less.       | 24        |
| 156       | Minnie Maude Irrigation Company<br>c/o Ernest Davis<br>Nine Mile via Pite, Utah | Nine Mile Creek, Diligence<br>Map 385-d                                     | 1883            | 7.0<br>See Remarks | S. 1760 N., W. 2130 E., from NE cor. Sec. 14, T12S, R13E, S12E. | April 1 Oct. 31                  | See Remarks   | REGULATION: 1.80 ac. NE1/4, 4.80 ac. NW1/4 Sec. 14, T12S, R13E, S12E.<br>SEE CLAIMS USED FOR PURPOSE DESCRIBED                           | 5, 24, 156                        | Season flow immediately diverted at any, each, or all claims covered by claims 155, 157, 159, 161, 156<br>Diversion any, each, or all claims. Total yearly diversion under all claims mentioned 25 ac. or less. | 156       |

# Addendum 9

**PARR WADDUPS BROWN**  
**GEE & LOVELESS** *A Professional Corporation*

*Attorneys at Law*

DANIEL A. JENSEN

June 28, 2000

HAND-DELIVERED

Utah Division of Water Rights  
1594 West North Temple, Suite 220  
Salt Lake City, UT 84114

Re: Minnie Maud Reservoir and Irrigation Company  
Water Right Nos. 90-24, 90-184, 90-185,  
90-186, 90-187, 90-188, 90-189, 90-190,  
90-191, 90-196, 90-197 and 90-299

Ladies and Gentlemen:

Based on discussions with Jim Riley, I am submitting this request to update your records regarding ownership of a portion of the water rights now listed in the name of the Minnie Maude Irrigation Company, which rights allow diversion and use of water from Minnie Maud Creek (also known as Nine Mile Creek) in Carbon County.

The following facts are taken from (1) the Articles of Agreement of Incorporation of the Minnie Maud Reservoir and Irrigation Company, and (2) a Complaint filed by Ernest E. Davis, Jr. on May 4, 1957 in the Seventh Judicial District Court for Carbon County to resolve an ownership dispute over the use of water rights owned by the Minnie Maud Reservoir and Irrigation Company (see attached copies). The Minnie Maud Reservoir and Irrigation Company (the "Company") was organized as a Utah corporation on March 27, 1902. The Company's water rights came from conveyances of the original shareholders' water rights in Minnie Maud Creek. The company issued 2,377 shares of stock and, as of 1957, the Company had seven shareholders with ownership as follows:

|                      |                          |
|----------------------|--------------------------|
| Ernest E. Davis, Jr. | 1,429 shares             |
| Thomas Christensen   | 199 $\frac{1}{2}$ shares |
| Bud Christensen      | 199 $\frac{1}{2}$ shares |
| T.F. Housekeeper     | 260 shares               |
| Amber Keel           | 182 shares               |
| Louis Motte          | 68 shares                |
| Bernard Iriart       | <u>39 shares</u>         |
| TOTAL                | 2,377 shares             |

These seven shareholders were all parties to the 1957 lawsuit.

CARL-DWR2.ca

185 South State Street • Suite 1300 • Salt Lake City, Utah 84111-1537  
Telephone (801) 532-7840 • Facsimile (801) 532-7750 • e-mail: [daj@pwlaw.com](mailto:daj@pwlaw.com)



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According to the Complaint, each shareholder received stock certificates in the above amounts. Ernest Davis was the largest shareholder, with 1,429 shares or 60.12% of the total issued and outstanding shares. The Company's water rights were used for irrigation and stockwatering in the Nine Mile Canyon area where Davis and the other shareholders owned land. As of 1957, Davis and his predecessors in interest had used his share of the Company's water rights for more than 70 years (well prior to the 1903 threshold date for diligence use).

The attached copies of the Company's articles of incorporation show that the Company was organized in 1902, that the articles were filed with the Carbon County Clerk on April 5, 1902 and with the Utah Secretary of State on April 11, 1902, and that the articles were again filed in Carbon County (together with Affidavits regarding oaths of office) on March 22, 1949, at which time Ernest E. Davis, Jr. was the Company's President and Director.

The Company, according to its articles of incorporation, was to last for a period of 100 years (until 2002). Annual shareholder meetings were to be held on the first Monday in March. Shareholders were to have water distributed to them in proportion to the amount of shares they owned, and there was only a single class of stock.

By 1958 the Complaint filed by Ernest Davis in 1957 was put on hold pending the outcome of a Proposed Determination of water rights by the State Engineer, which was to include the Company's water rights and the waters of Minnie Maud Creek and its tributaries. (See attached Stipulation filed May 15, 1958.)

By 1962, the 1,429 Davis shares were owned by the Davis family as follows: Certificate No. 48 issued to Olive M. Davis on March 7, 1949 for 10 shares; Certificate No. 51 issued to Devon Davis on August 7, 1962 for 10 shares; and Certificate No. 52 issued to Ernest Davis, Jr. on August 7, 1962 for 1,409 shares. Copies of these certificates are attached.

As contemplated in the Stipulation referenced above, the Division of Water Rights did complete a Proposed Determination of water rights for the drainage area that includes Minnie Maud Creek, and the determination lists the following water rights as being owned by "Minnie Maude Irrigation Company" (see attached excerpts):

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90-24  
90-184  
90-185  
90-186  
90-187  
90-188  
90-189  
90-190  
90-191  
90-196  
90-197  
90-299

These water rights were published in 1964 without any objections. No final decree has ever been entered and, I believe, none is expected in the near future. In addition to containing these water rights listed in the name of "Minnie Maude Irrigation Company," the Proposed Determination also lists several water rights in Minnie Maud Creek in the individual names of most of the persons who were parties to the 1957 lawsuit. This apparently resolved the central issue in the lawsuit that some of the parties owned water rights in Minnie Maud Creek separate and apart from their shareholder interests in the Company.

Unfortunately, the Company ceased to exist sometime after the 1964 Proposed Determination was published, leaving current ownership of the Company's water rights in limbo. Our search of the Utah Department of Commerce corporate records indicates that the Company does not currently exist. Moreover, a formal search by the Department of Commerce resulted in a conclusion that there are no official records whatsoever of the Company (see attached report dated September 8, 1997).<sup>1</sup> It appears that as the shareholders ceased to reside in the Nine Mile Canyon area the Company ceased to maintain its corporate affairs and became defunct sometime after 1964, although no official records can be located to explain or document this.

Our client, Michael Carlson, recently purchased the Wimmer Ranch property (including water rights), which includes the land,

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<sup>1</sup> A second requested search by the Utah Department of Commerce on July 17, 1998 under the full name of Minnie Maud Reservoir and Irrigation Company likewise found no current, closed or archived records.



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water rights and water shares formerly owned by the Davis family (and thereafter by the Wimmer family). On June 27, 2000 I filed with your office five Reports of Water Right Conveyance documenting the transfer of title from the Wimmers to Mr. Carlson. Those Reports and the deeds described below (see attached copies) show that the water rights corresponding to 1,429 of the 2,377 total issued shares of the Company, or 60.12% (i.e. the Davis shares), are now held by Mr. Carlson:

Warranty Deed dated November 12, 1962 from Ernest Davis, Jr., Olive M. Davis, Devon Davis and Jean R. Davis to W-M Ranches, Inc. (recorded in Carbon County at Book 81, page 274). This deed expressly transfers 1,429 shares of the Company to W-M Ranches, Inc.

Quit-Claim Deed dated August 1, 1968 from W-M Ranches, Inc. to Neville L. Wimmer and Harold J. Wimmer (recorded in Carbon County at Book 186, page 471). This deed expressly transfers 1,429 shares of the Company to Neville L. Wimmer and Harold J. Wimmer.

[The five Reports of Water Right Conveyance filed by Mr. Carlson on June 27, 2000 document various conveyances of the subject land and all appurtenant water rights from Neville L. Wimmer and Harold J. Wimmer (both of whom are now deceased) to Lily Mae Wimmer, trustee.]

Warranty Deed dated July 27, 1998 from Lily Mae Wimmer, successor trustee of the Neville L. Wimmer Revocable Trust dated June 11, 1981, to Michael M. Carlson (recorded in Carbon County at Book 414, page 129). This deed transfers the subject property and all appurtenant water rights, including "all of Grantor's interest in the Minnie Maud Reservoir and Irrigation Company and the water rights owned or used by said company, all shares of said company owned by Grantor or to which Grantor is entitled, and any interest owned by Grantor or to which Grantor is entitled in the water rights and other assets of said company now held by said company or arising from any termination or liquidation of said company, past or present, formal, informal or defacto."

Special Warranty Deed dated July 21, 1998 from Lily Mae Wimmer, successor trustee of the Neville L. Wimmer Revocable Trust dated June 11, 1981, to Michael M. Carlson (recorded in Carbon County at Book 414, page 132). This deed transfers

PARR WADDUPS BROWN GEE & LOVELESS

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various water rights appurtenant to the subject property, including water right Nos. 90-24, 90-184, 90-185, 90-186, 90-187, 90-188, 90-189, 90-190, 90-191, 90-196, 90-197 and 90-299, which are all of the water rights listed in the Proposed Determination as being owned by Minnie Maude Irrigation Company.

In light of the foregoing, would you please amend the Division's records to show Michael M. Carlson as the owner of 60.12% of water right Nos. 90-24, 90-184, 90-185, 90-186, 90-187, 90-188, 90-189, 90-190, 90-191, 90-196, 90-197 and 90-299. Would you also please prepare segregation filings to segregate Mr. Carlson's portion of those rights from the Company's portion. Finally, please send me copies of the segregation filings and written confirmation of the ownership changes as soon as they have been completed. Mr. Carlson's address is:

Michael M. Carlson  
14800 South 1300 West  
Bluffdale, UT 84065

This request is being submitted prior to the effective date of the Division's new Report of Water Right Conveyance rule, so I have not prepared a Report of Water Right Conveyance. Given the unusual history of these corporate rights, a standard Report of Water Right Conveyance form would not fit well anyway. This narrative explanation is provided instead.

Should you need any additional information, please let me know. Thank you for your help.

Very truly yours,

*Daniel A. Jensen*

Daniel A. Jensen  
Attorney for Michael M. Carlson

DAJ/ca  
Enclosures

cc: Michael M. Carlson

# Addendum 10

**Utah Code §73-4-24 (2006).**

§ 73-4-24. Dispute involving rights of less than all parties to general suit -- Petition -- Notice -- Hearing and determination -- Interlocutory decree

If, during the pendency of a general adjudication suit, there shall be a dispute involving the water rights of less than all of the parties to such suit, any interested party may petition the district court in which the general adjudication suit is pending to hear and determine said dispute. All persons who have a direct interest in said dispute shall be given such notice as is required by order of the district court and in addition thereto the district court shall require that notice of the initial hearing on said dispute be given by publication at least once each week for two successive weeks in newspapers reasonably calculated to give notice to all water users on the system. Thereafter the court may hear and determine the dispute and may enter an interlocutory decree to control the rights of the parties, unless modified or reversed on appeal, until the final decree in the general adjudication suit is entered. At that time the district court may after hearing make such modifications in the interlocutory decree as are necessary to fit it into the final decree without conflict.