

BEFORE THE DIVISION OF WATER RIGHTS

<p>In The Matter Of: Gino Foianini</p> <p>RESPONDENT</p>	<p>ORDER FORBIDDING USE OF WATER</p> <p>SEAA No. 1330 DISTRIBUTION ACCOUNT NO. 102864 WATER RIGHTS: 41-3481 et al.</p>
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I. STATEMENT OF LAW AND JURISDICTION

1. The Division of Water Rights (“Division”) issues this Order Forbidding Use of Water (“Order”) under UTAH CODE ANN. § 73-5-4. This Order is exempt from the Utah Administrative Procedures Act in accord with UTAH CODE ANN. Subsection 63G-4-102(2).
2. The State Engineer, as the director of the Division, is charged with the general administrative responsibility over the waters of the State. UTAH CODE ANN. § 73-2-1.
3. The Division administers the waters of the state under the direction of the State Engineer. UTAH CODE ANN. §§ 73-2-1 and 73-2-1.1.
4. The State Engineer is authorized to enact rules governing water distribution systems, water commissioners, water measurement and reporting that are consistent with UTAH CODE ANN. Chapter 73-5, “Administration and Distribution.” UTAH CODE ANN. § 73-2-1(5)(a) and 73-2-1(5)(b).
5. “Distribution Order” means an Order of the State Engineer interpreting the water rights included within a Distribution System, confirming priorities of water rights, giving instruction or direction regarding the regulation, distribution, and/or measurement of water based on those water rights, and may order the installation or repair of measuring devices, head gates, and control structures as authorized by UTAH CODE ANN. Chapter 73-5. Distribution Orders are enforceable under the provisions of UTAH CODE ANN. §§ 73-2-25 and 73-2-26. UTAH ADMIN. CODE R. 655-15-4 (e).
6. “Enforcement Tag” means an orange tag attached by a water commissioner to or near a control structure or water measuring device in situations where the water user is ordered to comply with the water commissioner's regulation and distribution of water. An enforcement tag constitutes a distribution order and is enforceable in the same manner. UTAH ADMIN. CODE R. 655-15-4 (j).

7. "Point(s) of Diversion" means that location or locations where water is delivered and regulated to the water user in the Distribution System; which point(s) is associated with a Distribution Account. The Distribution Account holder of record is deemed to be the current water user at the Point(s) of Diversion.
8. "Respondent" means any person to whom the Division issues a Notice or Order pursuant to authority granted under UTAH CODE ANN. Chapter 73-5.
9. "Violation," as used in this Order, means any action taken by the Respondent, the Respondent's agent, or any person acting under the direction or authority of the Respondent, intended to circumvent or avoid the restrictions on water use ordered herein. Such action may include but is not limited to removal or alteration of an Enforcement Tag placed by a duly appointed official of the Division.
10. UTAH CODE ANN. § 73-5-4 (6) states in part: *If a water user refuses or neglects to construct or install the controlling works or measuring device after 30 days' notice to do so by the state engineer, the state engineer may:*
 - (a) *forbid the use of water until the user complies with the state engineer's requirement; and*
 - (b) *commence enforcement proceedings authorized by Section 73-2-25..*
11. This Order constitutes a Distribution Order in accord with the provisions of UTAH ADMIN. CODE R655-15-4.
12. UTAH CODE ANN. § 73-2-25 states, in part: *The state engineer may commence an enforcement action under this section if the state engineer finds that a person violates a written distribution order from the state engineer.*

II. STATEMENT OF FACTS

1. The Respondent is the Distribution Account holder.
2. On Sep 21, 2009 and on June 14, 2010 a Control Structure Notice ("Notice") was mailed to the Respondent at the address of record.
3. The Notices recited certain facts pertaining to the control structure at the Point(s) of Diversion and/or Regulation of Respondents deliveries, which facts are herewith incorporated into this Order.
4. The Notice directed the Respondent to correct certain deficiencies associated with the facilities and methods of operation used to divert and/or measure and regulate water at the Point(s) of Diversion and other bypass locations within 283 days of the date of the first

Notice.

5. The Notice informed the Respondent that if the required deficiencies were not corrected within the time allowed, the Division would issue an Order Forbidding the Use of Water until the corrections were made.
6. An inspection of the control/ water measurement facilities at the Point(s) of Diversion was conducted on June 4, 2009.
7. As of the date of this Order, the Respondent has not corrected the deficiencies associated with the facilities used to divert and/or measure water at the Point(s) of Diversion as directed in the Notice.

III. ORDER

On the grounds and for the reasons summarized herein, and pursuant to the authority of UTAH CODE ANN. §73-5-4, the Respondent is hereby ordered to comply with the following requirements:

1. The Respondent is hereby **ORDERED TO CEASE THE USE OF WATER** at the Point(s) of Diversion as described in the Notice and as described in the water rights listed above. UTAH CODE ANN. Subsections 73-5-4(5)(a) and 73-5-9(3).
2. This ORDER shall remain in effect until the deficiencies in the control and/or measurement devices at the Point(s) of Diversion and other locations as described in the Notice have been resolved.
4. Before attempting to take any water at the Point(s) of Diversion, the Respondent shall advise the Water Commissioner of having complied with the requirements of the Notice.
5. The Water Commissioner shall confirm satisfactory compliance with the Notice before any water is distributed at the Point(s) of Diversion described in the Notice.

IV. ADDITIONAL AGENCY ACTION

1. If there is a violation of this Order, as defined herein, the Division may commence an enforcement action in accordance with UTAH CODE ANN. § 73-2-25.
2. If determined to be in violation of this Order, the Respondent will be subject to administrative penalties in accordance with UTAH CODE ANN. § 73-2-26, including fines not to exceed \$5,000 per day for knowing violations or \$1,000 per day for unknowing violations, and for replacement of up to 200% of water taken in violation of the Order. In

addition, the Respondent may be liable for reimbursement of all expenses incurred by the Division in investigating and stopping the violation.

V. RESPONDENT PARTICIPATION

1. To participate in this proceeding, you must comply with each and all of the requirements listed in Section III. ORDER, herein, *or*:
2. Submit *written* information and evidence documenting that the Respondent named is neither the party owning the captioned water right nor the holder of the referenced Distribution Account.
 - a. The *written* information must provide facts supporting the Respondent's allegations or defenses and must identify the party to whom water right ownership and Distribution Account responsibility was transferred; and
 - b. Must be received by the Division **within fourteen (14) days of the date of this Order.**

VI. RESPONDENT FILINGS

All Respondent's filings concerning this action, whether to document compliance with the Order or to provide information and evidence, shall be directed to the Division. Such filings shall reference the SEAA number noted herein and may be submitted in either of two ways:

1. Filings submitted *only* by mail must be ***received*** in the office of the State Engineer by the designated due date. All filings submitted by mail should be directed to:

Division of Water Rights
Attn: Ben Anderson, P.E., Distribution Engineer
1594 West North Temple St, Suite 220
PO Box 146300
Salt Lake City, UT 84114-6300

2. Filings submitted by telephone facsimile transmission (fax) must be addressed as for mailing and must be ***received*** in the office of the State Engineer by the designated due date by transmission to: **(801) 538-7467**.

The receiving fax machine will imprint a time/date stamp on the received document, but no confirmation of receipt will be provided to the sender. **The signed original documents must also be submitted to the Division by regular mail using the address information above. The signed original documents must be *postmarked* no later**

than the designated due date.

VII. FURTHER INFORMATION

Questions concerning this ORDER should be referred to:

Robert W. Leake, P.E.
Regional Engineer
Vernal Office/Eastern Region
Utah Division of Water Rights
(435) 781-5327

Ben L. Anderson, P.E.
Water Rights Distribution Engineer
Utah Division of Water Rights
(801) 538-7469

1594 W North Temple Ste 220
P.O. Box 166300
Salt Lake City, UT 84104-6300

Dated this 7th day of July, 2010



Ben Anderson, P.E.
Distribution Engineer

U.S. Postal Service™ Delivery Confirmation™ Receipt

Postage and Delivery Confirmation fees must be paid before mailing.
Article Sent To: (to be completed by mailer)

DELIVERY CONFIRMATION NUMBER:

0308 2040 0001 6219 9247

(Please Print Clearly)
Gino Foianini
1248 CO RD 238, Lyman WY 82937

Postmark
Here

Mailed
7/7/10

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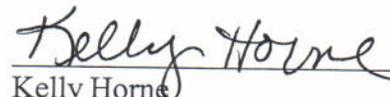
PS Form 152, May 2002

(See Reverse)

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 7 day of July, 2010, I mailed a copy of the foregoing Order by U.S. Priority Mail Service, Delivery Confirmation requested, to the following:

Gino Foianini
1248 CO RD 238
Lyman, WY 82937



Kelly Horne
Division of Water Rights
Field Services Secretary

cc: Robert Leake, Regional Engineer
Todd Covolo, Henry's Fork Water Commissioner