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IN THE SIXTH JUDICIAL DISTRICT COURT FOR WAYNE COUNTY,
STATE OF UTAH

In the Matter of the General
Determination of the Right to the Use of
Water, Both Surface and Underground,
for the Drainage of the Colorado River in
Utah and Exclusive of the Green River
and Virgin River.

Memorandum in Support of the
Petition for Interlocutory Determination

Escalante Subdivision

Civil No. 435

Judge: _____

New Escalante Irrigation Company ("New Escalante") is an interested party to the above-entitled general adjudication suit ("the Escalante Adjudication"), which remains pending before this Court. New Escalante supplies water for the irrigation of land and is the holder of water rights within the Escalante River drainage. A Proposed Determination for the Escalante Subdivision of this lawsuit was filed with this Court on July 1, 1969, and a Pre-Trial Order was issued on July 27, 1977, but a final decree has never been issued.

A dispute has arisen regarding water rights that should be resolved in the Escalante Adjudication. This dispute is an appropriate one for an interlocutory

determination, inasmuch as it involves less than all the parties to the Escalante Adjudication. This dispute has recently been placed before the District Court in Piute County under the name *Otter Creek Reservoir Company, et al. v. New Escalante Irrigation Company*, Civil No. 010600014. New Escalante has moved the court to dismiss that action or, in the alternative, to stay it pending resolution of the matters raised in this Petition.

BACKGROUND

The State of Utah has adopted a method of determining and adjudicating all claims to water within a particular drainage system. See, Utah Code Ann. §§ 73-4-1, et seq. This procedure was necessitated by the increasing demands for water as the State developed and a corresponding need to define and settle the individual water right claims among the users of a common source of supply. The general adjudication process was adopted to provide a method of avoiding the piecemeal determination of rights between individual users on a stream system and to provide a permanent record of all such rights by decree. *Smith v. District Court*, 256 P. 539 (Utah 1927).

Once an adjudication has been initiated, the State Engineer gives notice to all water users of record and gives further notice by publication. Utah Code Ann. § 73-4-4 (1953). Thereafter, water users must submit claims, outlining their respective claims to the use of water. Utah Code Ann. § 73-4-5 (1953). The State Engineer's office also is required to prepare a hydrographic survey of the river system and evaluate the various

water user's claims. Utah Code Ann. § 73-4-3 (1953). After evaluation of all claims, maps, records and files, the State Engineer creates a Proposed Determination of Water Rights for that drainage. Utah Code Ann. § 73-4-11 (1953). Any water user who is dissatisfied with the Proposed Determination is provided an opportunity to file an objection thereto with the district court, and the court is empowered to hear evidence and render judgment as to those objections. Utah Code Ann. §§ 73-4-13 and -15 (1953). If no objections are raised, the district court may enter judgment in accordance with the Proposed Determination. Utah Code Ann. § 73-4-12 (1953). The Escalante Adjudication has been ongoing in this Court since 1958. A Proposed Determination for this case was filed on July 1, 1969, but no final decree has been entered.

In part, because of the lengthy nature of the general adjudication process, the Utah legislature, in 1948, enacted § 73-4-24 of the Utah Code. This section allows for the resolution of disputes involving less than all the parties while a general adjudication is still pending. Any such resolution is entered as an interlocutory decree subject to modification by the court in order to "fit into" the final decree.

This process is applicable here to resolve questions about New Escalante's rights to water that it has continuously diverted and used for more than a century. This diversion was documented by the hydrographic map prepared in connection with the proposed determination in this matter, but it has not been otherwise addressed.

NEW ESCALANTE IRRIGATION COMPANY'S CLAIM

New Escalante petitions this Court to determine and confirm its rights to the water it has used continuously for more than 100 years.¹ The first non-Native Americans settled in the Escalante, Utah area in 1875. Shortly thereafter, in an effort to supplement their meager water supply in an extremely arid location, early residents began construction of a ditch and embankment near the summit of Griffin Top, in the Escalante Mountains, which served to direct spring snow melt to a point where it would drain into North Creek, a tributary of the Escalante River. This water, without the settlers' efforts, would have otherwise flowed eventually into the East Fork of the Sevier River. The water was then put to use irrigating farms and pastures of the Escalante drainage. New Escalante and its predecessor, the Escalante Irrigation Company, have made continuous and uninterrupted use of this water since that time. The diversion works are obvious and have been regularly maintained.

In 1936, a decree was entered in the adjudication of the waters of the Sevier River. New Escalante was not a participant in that adjudication, nor is it clear that it was given an opportunity to object to the proposed determination before the decree was entered. Neither is it clear that the waters in question here were directly addressed by the parties or the court in that adjudication. New Escalante believes, and therefore alleges, that they were not addressed therein. It also appears that the land on which

¹ This summary is provided to document New Escalante's entitlement to the interlocutory process provided by statute. Evidence on these and related points will be offered at the initial or subsequent hearing on the Petition, as directed by the Court.

New Escalante's diversion occurs was not included in the hydrographic mapping conducted in the early 1920's by the State Engineer's office for the Sevier Adjudication proceedings.

New Escalante was a participant in the Escalante Adjudication. Perhaps because the waters in question originate elsewhere, or maybe due to ministerial mistake, New Escalante did not file a formal water user's claim for the specific waters at issue, nor did it assert a written objection to the Proposed Determination of Water Rights filed in 1969 on that basis. It is clear, however, that the hydrographic maps prepared by the State Engineer for the Escalante Adjudication included a depiction of the ditch used to divert the water and that there were no other users or claimants for that water. Although the reasons these waters were not specifically addressed are unclear, it cannot be contested that New Escalante's water use continued open and unabated from the late 1800's through the active periods of the Sevier and Escalante Adjudications, and until the present time. In 1992, New Escalante filed a diligence claim with the State Engineer for the purpose of documenting and confirming its rights to use these waters.

New Escalante asserts that its interest in the waters at issue in this matter is not adverse and will not work any prejudice to any interested party of the Escalante Adjudication. No injury will be suffered by any interested party of the Escalante Adjudication should this Court enter an interlocutory decree in favor of New Escalante.

New Escalante also alleges that an award of the claims it hereby asserts, while claimed to be adverse to certain parties within the Sevier River drainage,² cannot result in any real injury to those Sevier River drainage parties, as the water in question has continuously been diverted into the Escalante basin for more than 100 years, likely as many as 50 years prior to the establishment of the water rights claimed under the Sevier River decree. Simply put, these waters have never been beneficially used or claimed in the Sevier River drainage. In contrast, a determination that New Escalante is not entitled to make use of the waters at issue would substantially impact this agriculturally-dependent community's long-standing ability to irrigate throughout the summer growing season.

ARGUMENT

As stated previously, Utah Code Ann. § 73-4-24 grants the district court the discretion to entertain disputes as to water rights, that arise during the pendency of a general adjudication, where less than all of the parties to the adjudication are parties to the petition. *Murdock v. Springville Municipal Corp.*, 878 P.2d 1147 (Utah 1994) (hereafter *Murdock I*). The Utah Supreme Court stated in *Murdock I* that while §§ 73-4-11 through -15 "provide the procedure for contesting water rights after issuance of the proposed determination, nothing in those sections or in section -24, explicitly or implicitly, precludes the court from hearing a section -24 petition at that point." The Court continued, finding that the procedure provided in subsections 11 through 15 "is

²

See, *Otter Creek Reservoir Company* action referenced above.

not the exclusive means of relief after a proposed determination has been issued but that when a section -24 petition has been filed after the entry of the proposed determination, it is within the trial court's discretion whether to entertain the petition. *Murdock I*, 878 P.2d at 1150.

The Utah Supreme Court also provided some guidance as to how this discretion should be exercised by the trial court, stating that it "should be exercised with the objective of providing the plaintiffs with a reasonably prompt resolution of the issues raised in their section -24 petition." *Id.*; *Murdock v. Springville Municipal Corp.*, 982 P.2d 65 (Utah 1999) (hereafter *Murdock II*).

In *Mitchell v. Spanish Fork West Field Irrigation Co., et al.*, 265 P.2d 1016 (Utah 1954), the Utah Supreme Court upheld the trial court's award of water to Mitchell, who--during the pendency of the adjudication of the water rights to the Utah Lake Drainage Area--had asserted an adverse user claim to water against downstream water users in the Spanish Fork River drainage. The defendants argued that the adjudication statutes mandated that the adjudication court may only hear disputes over water between individual parties to an adjudication within the context of the pending adjudication, and that allowing separate determination of disputes between parties who were involved in a general adjudication would undermine the adjudication statutes' purpose of preventing piecemeal litigation of water rights on a single river system.

The Utah Supreme Court failed to see this interlocutory process as contrary to the purposes of the general adjudication statutes and found that litigation can even be

further complicated by forcing parties to determine their disputes in the general adjudication proceeding. *Mitchell*, 265 P.2d at 1019.

Of note is the fact that the water rights for the lands in question in *Mitchell* had previously been adjudicated and a decree had been issued, fixing the respective rights of the parties on the Spanish Fork River. *Mitchell*'s predecessors had failed to file claims in the earlier adjudication for a portion of the lands irrigated by the Plaintiff, but this did not prevent the court from proceeding to allow *Mitchell* to pursue his adverse user claim.

In *Jensen v. Morgan*, 844 P.2d 287 (Utah 1992), the Utah Supreme Court ruled on a case which is instructive of the discretion granted to the district court to hear petitions under § 73-4-24. In that case, *Jensen* had filed water user claims in the San Rafael Adjudication, but failed to object to a supplement to the proposed determination when one of his claims was disallowed by the state engineer. More than three years later, *Jensen* filed a petition under Utah Code Ann. § 73-4-24, challenging the recommended disallowance of his claim and also challenging the granting of a BLM water user's claim. He also asserted that his petition should not be time-barred because he was not properly served with notice of the proposed determination.

Jensen had also filed a change application based on the same certificate of appropriation, which was denied by the State Engineer. *Jensen* separately challenged this denial in the district court, but failed to prosecute that action until the two-year time period for doing so had almost expired. The trial court granted motions to dismiss both

of Jensen's actions, finding that Jensen had been properly served and that he had failed to file timely objections to the proposed determination and that he had failed to prosecute the State Engineer's denial of his change application in a timely fashion.

Significantly, the State Engineer had recommended that Jensen's claim to the water be disallowed for non-use, because he had not exercised the right for more than 30 years before he filed his Water User's Claim. Jensen's claims were thus spurious. There was very little, if any, possibility that they should ever be granted or approved by the court, or recommended as part of the proposed determination by the State Engineer. The court was thus justified in exercising its discretion and declining to entertain an interlocutory determination.

The factual history in *Jensen* is in sharp contrast to the situation of New Escalante. New Escalante has continuously made use of the water in question, has filed a diligence claim documenting this water right, and requires that this Court exercise its discretion and allow New Escalante's Petition for an interlocutory order confirming its long-standing and essential rights.

As noted above, the Utah Supreme Court stated that the adjudication proceedings found in Utah Code Ann. §§ 73-4-11 through 15 are not the exclusive remedy for asserting a claim to water and that nothing, "explicitly or implicitly precludes the court from hearing a section -24 petition" after a proposed determination has been filed. *Murdock I*, 878 P.2d at 1150. Reiterating this position in the subsequent continuation of this case, the high court suggested that the lower state courts "should

[exercise their discretion] with the objective of providing the plaintiffs with a reasonably prompt resolution of the issues raised in their section -24 petition.” The claims of the Otter Creek parties can be adjudicated within the context of this section -24 proceeding.³

This discretion is not inconsistent with the more recent holding in *Jensen*. Indeed, the Utah Supreme Court did not discuss *Murdock I* therein and did not find an absolute bar to entertaining such a petition. Finding only that the trial court in *Jensen* did not err in dismissing the petition for those reasons, the high court’s holding allows the continued exercise of discretion by state trial courts to entertain such disputes between users of water in appropriate cases.

CONCLUSION

For these reasons New Escalante respectfully submits that this Court should exercise its discretion to hear New Escalante’s petition under Utah Code Ann. § 73-4-24 and enter its interlocutory decree confirming New Escalante’s historical right to use of the water in question.

³Evidence that Otter Creek’s claims can be determined within this proceeding is found in Utah Code Ann. § 73-4-24, as it distinguishes persons with a direct interest in the dispute from water users on the system being adjudicated. Notice must be given to “[a]ll persons who have a direct interest in said dispute...as is required by the 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...reasonably calculated to give notice to all water users on the system.”

DATED this 22nd day of August, 2001.

CLYDE SNOW SESSIONS & SWENSON

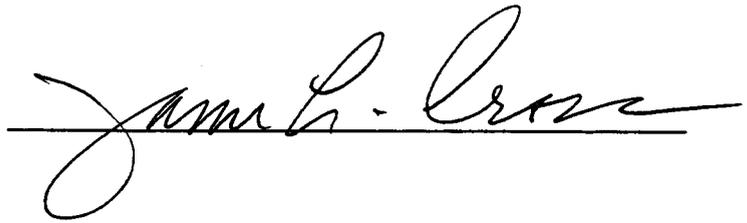
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Memorandum in Support of the Petitioner for Interlocutory Determination to be mailed, postage prepaid, to the following this 22nd day of August 2001:

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A handwritten signature in cursive script, appearing to read "James L. Cross", is written over a horizontal line.