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DISTRICT COURT

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Lake Bottom Irrigation Company,
Magna Water District,
Payson City,
Salem City,
Spanish Fork City, and
South Farm LLC*

IN THE THIRD DISTRICT COURT, STATE OF UTAH
IN AND FOR SALT LAKE COUNTY

In the matter of the General Determination of the Rights to the Use of All the Water, both Surface and Groundwater, within the Drainage Area of Utah Lake and Jordan River in Utah, Salt Lake, Davis, Summit, Wasatch, Sanpete and Juab Counties

Subcase:
Strawberry Water Users Association
v.
United States of America

**OBJECTION TO STATE ENGINEER'S
PROPOSED DETERMINATION AND
RECOMMENDATION OF THE RIGHTS
TO THE USE OF RETURN FLOW FROM
WATER IMPORTED FROM THE UINTA
BASIN TO UTAH VALLEY BY THE
STRAWBERRY VALLEY PROJECT**

Civil No. 360057298 (51-1-1)

Honorable Judge Kate Toomey

INTRODUCTION

The State Engineer's Proposed Determination and Recommendation of the Rights to the Use of Return Flow from Water Imported from the Uinta Basin to the Utah Valley by the Strawberry Valley Project (the "Proposed Determination") is a departure from existing Utah

Law, is not consistent with the law of most other prior appropriation states that have addressed the issue, and is at odds with sound public policy. Lake Bottom Irrigation Company, Magna Water District, Payson City, Salem City, Spanish Fork City, and South Farm LLC (the “Objectors”) have water rights that will be adversely affected if the Court adopts the Proposed Determination. The Objectors therefore respectfully request that the Court reject the Proposed Determination and confirm the existing law that a water importer, like any appropriator, may reuse water up to the consumptive limits of its water right so long as it maintains control of that water and so long as the water does not mingle with the naturally occurring water within the basin.

I. Objectors’ Water Rights Will Likely Be Impaired If the Court Adopts the Proposed Determination

A. Lake Bottom Irrigation Company owns water right numbers 55-6931, 55-6932, 55-6933, 55-6934, 55-6939, 55-6940, 55-6940, 55-6941, and 55-11013. Upon reason and belief, adoption of the Proposed Determination will result in impairment of these water rights because the Proposed Determination would give credit to the Strawberry Valley Project (“SVP”) for water that may or may not actually return to Utah Lake, thereby potentially enlarging the SVP water rights.

B. Magna Water District owns water right numbers 59-1226, 59-1228, 59-1285, 59-1286, 59-1288, 59-1289, 59-1295, 59-1679, 59-1709, 59-1833, 59-2504, 59-2506, 59-2507, 59-2509, 59-2510, 59-2512, and other water rights. Upon reason and belief, adoption of the Proposed Determination will result in impairment of these water rights because the Proposed

Determination would give credit to the Strawberry Valley Project (“SVP”) for water that may or may not actually return to Utah Lake, thereby potentially enlarging the SVP water rights.

C. Payson City owns water right numbers 51-1266, 51-1313, 51-1711, 51-1762, 51-1763, 51-1765, 51-2694, 51-3781, 51-6272, 51-7052, 51-7113, 51-7400, 51-7555, 51-7572, 51-7580, and other water rights. Upon reason and belief, adoption of the Proposed Determination will result in impairment of these water rights because the Proposed Determination would give credit to the Strawberry Valley Project (“SVP”) for water that may or may not actually return to Utah Lake, thereby potentially enlarging the SVP water rights.

D. Salem City owns water right numbers 51-1035, 51-1336, 51-2374, 51-2721, 51-2878, 51-6189, 51-6661, 51-7092, 51-7093, 51-7094, 51-7095, 51-7096, 51-7160, 51-7337, 51-7520, and other water rights. Upon reason and belief, adoption of the Proposed Determination will result in impairment of these water rights because the Proposed Determination would give credit to the Strawberry Valley Project (“SVP”) for water that may or may not actually return to Utah Lake, thereby potentially enlarging the SVP water rights.

E. Spanish Fork City owns water right numbers 51-1200, 51-1250, 51-1495, 51-1559, 51-1562, 51-1750, 51-1751, 51-2328, 51-2826, 51-3483, 51-5523, 51-6299, 51-6300, E72, E1661, and other water rights. Upon reason and belief, adoption of the Proposed Determination will result in impairment of these water rights because the Proposed Determination would give credit to the Strawberry Valley Project (“SVP”) for water that may or may not actually return to Utah Lake, thereby potentially enlarging the SVP water rights.

F. South Farm LLC owns water right numbers 59-1197 and 59-5392. Upon reason and belief, adoption of the Proposed Determination will result in impairment of these water

rights because the Proposed Determination would give credit to the Strawberry Valley Project (“SVP”) for water that may or may not actually return to Utah Lake, thereby potentially enlarging the SVP water rights.

II. The Proposed Determination Is a Departure from General Utah Return Flow Law and Is at Odds with the Majority Position of Other Prior Appropriation States

In Utah, an appropriator of water rights has the right to divert water from the natural environment and beneficially use the water. Utah Code Ann. § 73-3-1. Most beneficial uses of water, including irrigation, do not fully consume the water used. This typically results in the unconsumed portion of the water (i.e., the return flow) returning to the natural environment for appropriation by others. If an appropriator can maintain possession and control of the water, it can reuse the water up to the consumptive limits of the water right. Once the water leaves the possession and control of the appropriator and returns to the natural environment, however, the water loses its identity as appropriated water and is subject to appropriation by another appropriator. The sensibility and public policy advantages of this long-held rule are readily apparent. This rule encourages and facilitates efficient use of Utah’s scarce and valuable water resources and makes it available for multiple uses.

The Proposed Determination suggests creation of an exception for imported water to the general law of Utah that prohibits recapture of water once it has been released to the natural environment and commingled with naturally occurring waters. Such an exception is not supported by existing Utah law, is not good public policy, and is contrary to the majority position of other prior appropriation states that have addressed the issue. The conclusions in the State Engineer’s Proposed Determination are based almost entirely on the following recitation of

purportedly Utah Law: “Utah law holds that non-tributary water and its return flow are distinct from tributary water and are not a source of water for appropriations of tributary water, even if the non-tributary water is commingled in natural streams with tributary water.” Proposed Determination ¶ 4. Contrary to the Proposed Determination’s assertion, however, the Utah Supreme Court has made clear that this issue has not “been squarely addressed by [the Utah Supreme Court]” and “is a subject that will deserve full briefing and careful consideration.” *Strawberry Water Users Ass’n v. Bureau of Reclamation*, 2006 UT 19, ¶¶ 58–59, 133 P.3d 410.¹ Indeed, the purpose of this case is to address this issue. To assist the Court in assessing the merits of the Proposed Determination, the remainder of this Part will discuss the background principles of Utah return flow recapture law and the law of other prior appropriation states with regard to recapture of return flow from imported water.

Under Utah law, an appropriator of water in Utah may use, recapture, “and reuse the water so long as it is within the appropriator’s control.” *Strawberry Water Users Ass’n*, 2006 UT 19, ¶ 50 (citing *Estate of Steed v. New Escalante Irr. Co.*, 846 P.2d 1223, 1225 (Utah 1992)). “But once the water has passed to the land of another and out of the control of the user, it is subject to . . . appropriation by others.” *Id.* (citing *Smithfield W. Bench Irrigation Co. v. Union Cent. Life Ins. Co.*, 142 P.2d 866, 868 (Utah 1943)). Furthermore, the Utah Supreme Court has stated as follows:

“Water permitted to escape after it has been appropriated by one, and which finds its way into the natural channel of a stream from which it was taken or into the

¹ The State Engineer is the director of the Division of Water Rights and has responsibility “for the general administrative supervision of the waters of the state and the measurement, appropriation, apportionment, and distribution of those waters.” Utah Code Ann. § 73-2-1. The Utah Legislature has not, however, delegated any policy making powers to the State Engineer. *See id.*

channel of another stream cannot be reclaimed by the original appropriator against subsequent appropriators (users) who have made use of it.”

Id. (emphasis original) (quoting *Wrathall v. Johnson*, 40 P.2d 755, 766 (Utah 1935)). Finally, after water has been used and is “commingled with the waters in the natural water table[,] it has lost its identity as irrigation water and is no longer owned by the [irrigators] as such.” *Id.* (emphasis and second alteration in original) (quoting *Stubbs v. Ercanbrack*, 368 P.2d 461, 464 (Utah 1962)). Given these clear recitations of the law of return flow, the Proposed Determination is, in essence, suggesting that this Court create a new exception for imported water to these general principles. The Court should not heed this suggestion.

Most of the prior appropriation states that have squarely addressed this issue have determined that return flow from imported water should not be treated any differently than any other return flow that has commingled with the natural environment. For example, the Montana Supreme Court has held that after imported water has percolated through the ground and into a native stream, the importer no longer has any right to recapture the imported water. *Rock Creek Ditch & Flume Co. v. Miller*, 17 P.2d 1074, 1080 (Mont. 1933). Similarly, under Nebraska law, an importer of water may *not* recapture the return flow from the imported water if the return flow has percolated through the ground and commingled with native stream water. *Northport Irrigation Dist. v. Jess*, 337 N.W.2d 733, 738–39 (Neb. 1983). Finally, the New Mexico Supreme Court has held that “[w]hen an artificial or natural flow of surface water, through percolation, seepage or otherwise, reaches an underground reservoir and thereby loses its identity as surface water, such waters become public . . . and are subject to appropriation in accordance with applicable statutes.. *Kelley v. Carlsbad Irrigation Dist.*, 415 P.2d 849, 853 (N.M. 1966).

Additionally, in the context of reusing effluent, the New Mexico Supreme Court held that “once the effluent actually reaches a water course or underground reservoir,” it cannot be recaptured. *Reynolds v. City of Roswell*, 654 P.2d 537, 540 (N.M. 1982).

The only state that follows the new rule urged in the Proposed Determination is Colorado. But its position with respect to return flow from imported water is established by the Colorado Legislature through statute. *See* Colo. Rev. Stat. Ann. § 37-82-106 (1979). Neither the Utah Legislature nor even the appellate courts of Utah have enacted the new policy urged by the State Engineer. Furthermore, experience in Colorado has shown the challenges associated with trying to quantify return flow. In *Public Service Company of Colorado v. Willows Water District*, the Colorado Supreme Court reviewed a decision allowing an importer to recapture 10% of the imported water from a native stream because an expert opined that that quantity of return flow had percolated through the ground into the stream. 856 P.2d 829, 830 (Colo. 1993). The Colorado Supreme Court affirmed the trial court because the issue of whether the calculation of return flow was sufficiently reliable had not been preserved. *Id.* at 831. The Court noted, however, that had it been the original factfinder, it may not have found the method of calculating return flow sufficiently reliable. *Id.* at 835. As discussed below in Part III, calculation of return flow is an inexact science that will likely result in impairment of water rights within the Jordan River Drainage.

Based on existing Utah law and decisions from the majority of states that have addressed this issue, this Court should reject the Proposed Determination, which allows SVP to recapture or exchange its return flow after it has commingled with existing water in the natural hydrologic system. Instead, the Court should rule that an importer of water, like any other water right

holder, has the right to capture and reuse the water only so long as it maintains control of that water.

III. Adoption of the Proposed Determination Would Likely Cause Impairment of Existing Rights and Unfair Costs to the State and Other Water Users.

The Court should not adopt the Proposed Determination in this case because its adoption would result in a significant risk of impairment to existing water rights and significant costs to both water users and the state. It is not clear how or to what extent the SVP intends to establish the amount of return flow that makes it to Utah Lake. The Bureau of Reclamation has filed Application to Appropriate A71269 for 49,200 acre-feet of SVP return flow, and Strawberry Water Users Association and High Line Canal have filed Exchange Application E3760 seeking diversion of 15,600 acre-feet based on the alleged return flows to Utah Lake. Under either application, the return flows claimed are both large and unsubstantiated.

The new policy urged by the Proposed Determination is fraught with practical difficulties. There are many factors that make it difficult, if not impossible, to calculate the actual return flow to Utah Lake. The hydrogeology at the place of use and between the place of use and Utah Lake will have a significant impact on how much return flow goes to Utah Lake and how much is lost or goes elsewhere. The hydrogeology will also affect how quickly, if ever, return flow makes it to Utah Lake. Furthermore, the irrigation methods and practices of individual SVP shareholders will impact the return flow quantities. Return flows from flood irrigation vary significantly in relation to return flows from more efficient methods of irrigation. Additionally, many shareholders have supplemental water rights. When and how much water is use under these supplemental water rights would also impact the quantity of return flow. Some

SVP shareholders may also waste water, which, depending on location and hydrogeology, could augment or diminish return flows to Utah Lake. Finally, changes in weather patterns on a year-to-year basis would impact the amount of return flow water.

Because of these and other variables, and because many of these factors depend on the individual shareholders, accurate calculation of the quantity of return flow that actually makes it to Utah Lake is, upon reason and belief, not possible. Ultimately, if the calculation is wrong and water is diverted in excess of the imported water, then all water users in the Jordan River Drainage are potentially adversely impacted. Indeed, such a circumstance would result in a new appropriation in a closed basin, and that appropriation would, based on the Proposed Determination, have priority over all other rights in the basin. This is at odds with foundational principles of the prior appropriation doctrine.

In addition to the inability to accurately determine the return flow amount, the costs of trying to do so will be enormous. The Proposed Determination requires an application whenever return flow is to be recaptured from the natural hydrologic system. Consideration of such an application would require substantial efforts on the part of both the applicant and the State Engineer. Additionally, to protect their water rights against impairment through inflated return flow estimates, other water users within the basin would be required to incur significant expenses to protest these applications by commissioning the necessary expert analyses, reports, and testimony. And the expenses would not be limited to a one-time expenditure, but would arise with each new application. Furthermore, these return flow calculations would require constant monitoring and updating based on the variables discussed above. Thus, the costs associated with

the system proposed in the Proposed Determination would be unfairly allocate in part to the State and to other water users.

Finally, the current state of the law already strikes the proper balance between offering significant advantages to imported water while still promoting full beneficial use of Utah's precious water resources. The law allows an importer of water to capture and reuse its return flows up to 100% consumption so long as it maintains control of that water and does not allow it to commingle with natural waters. See *Strawberry Water Users Ass'n*, 2006 UT 19, ¶ 50. By contrast, native water rights are limited to the consumptive values associated with the original beneficial use to which they were applied. Thus, if SVP wants to recapture its return flow, it is free to do so at the place of use before it returns to the natural hydrologic system. This would eliminate the need for any application with the state and put the cost burden on SVP as opposed to the other water users and the State of Utah. With respect to promoting beneficial use of the water, the law currently allows appropriators to divert from the natural environment without fear that a previous beneficial user somehow maintains ownership of a portion of the water. If the law were changed to allow such enduring ownership for imported water, it would frustrate the policy favoring the maximum beneficial use of water.

Ultimately, adoption of the Proposed Determination would harm Objectors and other typical water right holders in the Jordan River Drainage by creating a significant risk of impairment through miscalculation of return flows, by increasing the costs of protecting against such impairment, and by imposing an imaginary barrier to the full beneficial use of Utah's precious water resources. The costs of pursuing return flows should be born by SVP, not the State and other water users. The current rule, which allows recapture until return flows

commingle with natural waters, properly allocates these costs and protects against impairment of other water rights in the basin.

CONCLUSION

The Court should reject the State Engineer's Proposed Determination because it is a departure from background principles of Utah water law and because it would likely result in impairment of other water rights in the basin. The Court should instead rule that return flow from imported water can be captured and reused so long as the importer maintains control and does not allow the return flow to commingle with natural waters. Objectors reserve the right to submit additional briefing and evidence in support of this Objection.

Respectfully Submitted this 13th Day of July, 2009



SMITH HARTVIGSEN, PLLC

J. Craig Smith

David B. Hartvigsen

Matthew E. Jensen

VERIFICATION

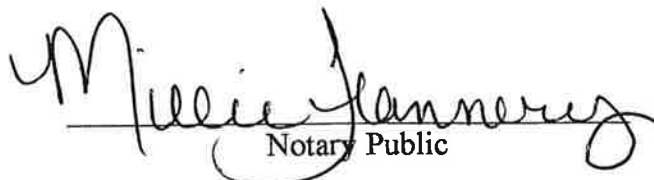
STATE OF UTAH)
 : ss.
COUNTY OF Utah)

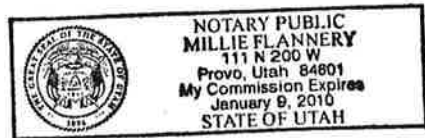
Eldon Packer, as President of Lake Bottom Irrigation Company, being first duly sworn, states under oath that he has read the foregoing **OBJECTION TO STATE ENGINEER'S PROPOSED DETERMINATION AND RECOMMENDATION OF THE RIGHTS TO THE USE OF RETURN FLOW FROM WATER IMPORTED FROM THE UINTA BASIN TO UTAH VALLEY BY THE STRAWBERRY VALLEY PROJECT**, that he knows and understands the contents thereof, that the facts found in Parts I.A, II, and III of said Objection are true and correct to the best of his personal knowledge, except as to any matter alleged on opinion and belief, and as to such matters, he believes them to be true, and that he executes this **OBJECTION** voluntarily of his own free will.

DATED this 13 day of July, 2009.



SUBSCRIBED AND SWORN this 13 day of July, 2009.


Notary Public



VERIFICATION

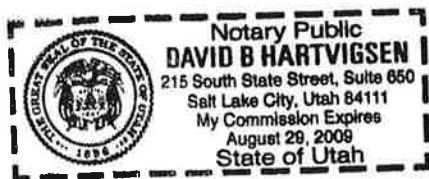
STATE OF UTAH)
 : ss.
COUNTY OF Salt Lake)

Brent Williams, as Operations Supervisor of Magna Water District, being first duly sworn, states under oath that he has read the foregoing **OBJECTION TO STATE ENGINEER'S PROPOSED DETERMINATION AND RECOMMENDATION OF THE RIGHTS TO THE USE OF RETURN FLOW FROM WATER IMPORTED FROM THE UINTA BASIN TO UTAH VALLEY BY THE STRAWBERRY VALLEY PROJECT**, that he knows and understands the contents thereof, that the facts found in Parts I.B, II, and III of said Objection are true and correct to the best of his personal knowledge, except as to any matter alleged on opinion and belief, and as to such matters, he believes them to be true, and that he executes this **OBJECTION** voluntarily of his own free will.

DATED this 13th day of July, 2009.

Brent Williams

SUBSCRIBED AND SWORN this 13th day of July, 2009.



David B. Hartvigsen
Notary Public

VERIFICATION

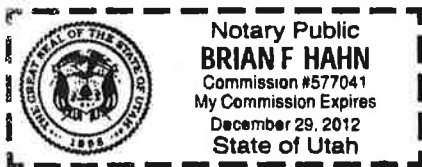
STATE OF UTAH)
 : ss.
COUNTY OF Salt Lake)

Burtis Bills, as Mayor of Payson City, being first duly sworn, states under oath that he has read the foregoing **OBJECTION TO STATE ENGINEER'S PROPOSED DETERMINATION AND RECOMMENDATION OF THE RIGHTS TO THE USE OF RETURN FLOW FROM WATER IMPORTED FROM THE UINTA BASIN TO UTAH VALLEY BY THE STRAWBERRY VALLEY PROJECT**, that he knows and understands the contents thereof, that the facts found in Parts I.C, II, and III of said Objection are true and correct to the best of his personal knowledge, except as to any matter alleged on opinion and belief, and as to such matters, he believes them to be true, and that he executes this **OBJECTION** voluntarily of his own free will.

DATED this 13th day of July, 2009.

Burtis Bills

SUBSCRIBED AND SWORN this 13th day of July, 2009.



Brian F Hahn
Notary Public

VERIFICATION

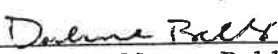
STATE OF UTAH)
 : ss.
COUNTY OF Utah)

J. Lane Henderson, as Mayor of Salem City, being first duly sworn, states under oath that he has read the foregoing **OBJECTION TO STATE ENGINEER'S PROPOSED DETERMINATION AND RECOMMENDATION OF THE RIGHTS TO THE USE OF RETURN FLOW FROM WATER IMPORTED FROM THE UTAH BASIN TO UTAH VALLEY BY THE STRAWBERRY VALLEY PROJECT**, that he knows and understands the contents thereof, that the facts found in Parts I.D, II, and III of said Objection are true and correct to the best of his personal knowledge, except as to any matter alleged on opinion and belief, and as to such matters, he believes them to be true, and that he executes this **OBJECTION** voluntarily of his own free will.

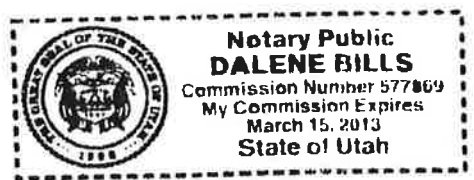
DATED this 9 day of July, 2009.



SUBSCRIBED AND SWORN this 9 day of July, 2009.



Notary Public



VERIFICATION

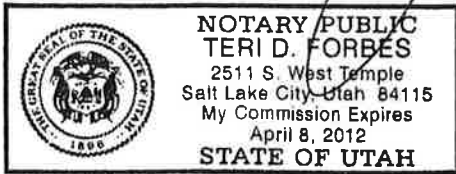
STATE OF UTAH)
 : ss.
COUNTY OF Salt Lake)


Donald E. Wallace, as Vice President of South Farm LLC, being first duly sworn, states under oath that he has read the foregoing **OBJECTION TO STATE ENGINEER'S PROPOSED DETERMINATION AND RECOMMENDATION OF THE RIGHTS TO THE USE OF RETURN FLOW FROM WATER IMPORTED FROM THE UINTA BASIN TO UTAH VALLEY BY THE STRAWBERRY VALLEY PROJECT**, that he knows and understands the contents thereof, that the facts found in Parts I.F, II, and III of said Objection are true and correct to the best of his personal knowledge, except as to any matter alleged on opinion and belief, and as to such matters, he believes them to be true, and that he executes this **OBJECTION** voluntarily of his own free will.

DATED this 13th day of July, 2009.



SUBSCRIBED AND SWORN this 13th day of July, 2009.





Notary Public

VERIFICATION

STATE OF UTAH)
 : ss.
COUNTY OF Utah)

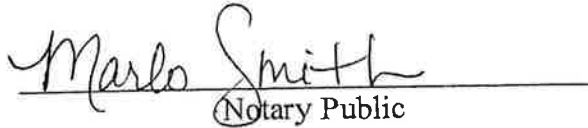
Joe Thomas, as Mayor of Spanish Fork City, being first duly sworn, states under oath that he has read the foregoing **OBJECTION TO STATE ENGINEER'S PROPOSED DETERMINATION AND RECOMMENDATION OF THE RIGHTS TO THE USE OF RETURN FLOW FROM WATER IMPORTED FROM THE UINTA BASIN TO UTAH VALLEY BY THE STRAWBERRY VALLEY PROJECT**, that he knows and understands the contents thereof, that the facts found in Parts I.E, II, and III of said Objection are true and correct to the best of his personal knowledge, except as to any matter alleged on opinion and belief, and as to such matters, he believes them to be true, and that he executes this **OBJECTION** voluntarily of his own free will.

DATED this 10th day of July, 2009.



SUBSCRIBED AND SWORN this 10th day of July, 2009.




Notary Public

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of July, 2009, I caused a true and correct copy of the foregoing *Objection to State Engineer's Proposed Determination and Recommendation of the Rights to the Use of Return Flow from Water Imported from the Uinta Basin to Utah Valley by the Strawberry Valley Project* to be mailed, via first-class U.S. mail, postage pre-paid to the following:

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