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BEFORE THE OFFICE OF THE UTAH STATE ENGINEER
UTAH DIVISION OF WATER RIGHTS

In the Matter of Change Application a35402 (89-1285, 89-1513, 89-74) filed by Kane County Water Conservancy District; and In the Matter of Change Application a35874 (09-462) filed by San Juan County Water Conservancy District	**REQUEST FOR RECONSIDERATION OF STATE ENGINEER ORDERS ON CHANGE APPLICATIONS 09-462 (a35874) AND 89-74 (a35402)**

Pursuant to Utah Code 63G-4-302, The Healthy Environment Alliance of Utah ("HEAL Utah"), Utah Rivers Council, Center for Biological Diversity, Holiday Expeditions, Moab Rafting and Canoe Company, New You Day Spa, Utah Chapter of the Sierra Club, Bill and June Adams, Tom and Pamela Mooney, Naomi Franklin, Richard Spotts, Martha Smythe, Christine Oravec, Lisa Rutherford, Paul Van Dam, Amy and Matt Trebella, Kathleen Corr, Norm Guice, Waid and Cheri Reynolds, Tim Vetere, Jay Vetere, Greg Vetere, Mitchell B. Vetere, Bob Quist,

and Dasch Houdeshel ("Protestants") respectfully submit this request for reconsideration of the State Engineer's decisions in the above-referenced change applications. The State Engineer issued his Orders on Change Applications a35402 (89-1285, 89-1513, 89-74) and a35874 (09-462) (hereafter referred to collectively as "the Orders") on January 20, 2012. Because the Orders were largely identical as to the two change applications, and since the applications were consolidated into one administrative hearing, this request for reconsideration addresses issues that pertain to both Orders and the subject change applications are collectively referred to herein as the "Change Applications". The parties to the applications include the owners of the water rights: Kane County Water Conservancy District and San Juan County Water Conservancy District, as well as the lessee of the water rights Blue Castle Holdings. All three parties are referred to herein as the "Applicants."

PROCEDURAL BACKGROUND

1. Applicants filed Change Application a35402 (89-74) on March 30, 2009. The application was advertised beginning April 28, 2009 and Protestants HEAL Utah and Bill and June Adams timely protested the change application of May 25, 2009.

2. Applicants filed Change Application a35874 (09-462) on August 27, 2009. The application was advertised beginning September 15, 2009 and Protestants HEAL Utah and Bill and June Adams timely protested the change application of October 14, 2009.

3. A joint hearing was held on both Change Applications on January 12, 2010, in Green River. Protestants attended and participated in the hearing. Based on the numerous issues raised by the Change Applications and the volume of information presented by Applicants at the

hearing, the State Engineer agreed to keep the administrative record open and to allow Protestants to submit supplements to their protests by March 1, 2010.

4. Protestants HEAL Utah and Bill and June Adams timely filed a Supplement to Protest on March 1, 2010.

5. The other Protestants joining in this Request for Reconsideration filed their protests to the Change Applications individually.

6. Applicants filed a response to the supplemental protests on June 2, 2010.

7. The State Engineer issued Memorandum Decisions approving both Change Applications on January 20, 2012.

8. Although named as individual Protestants on the Supplement to Protest, Bill and June Adams were not recognized as separate Protestants by the State Engineer's Orders. The Orders were not served on them individually, and they were apparently classed as "members of HEAL", with no acknowledgement of their specific water rights and issues identified by the Supplement to Protest. *See* Supp. to Protest at 4 (describing the Adams' particular water rights and interests in opposing the Change Applications).

I.
INTRODUCTION

As frequently noted throughout this process, the State Engineer is the only government official in Utah who has an opportunity to weigh in on the proposed nuclear power plant. The State Engineer's Orders seek to defer the office's statutory responsibility for evaluating the merits of a proposed change application, and presume that other agencies (primarily the federal

government) will ensure that Applicants comply with all necessary environmental, financial, and legal requirements. This approach is contrary to the State Engineer's duty to approve an application ***only if*** the requirements of the Utah Code are met. *See* Utah Code Ann. § 73-3-8. The fact that the Change Applications represent only the first in a long list of permitting approvals necessary for the proposed plant does not reduce the standard of review or alter the investigatory duties of the State Engineer. To the contrary, the difficult and complex issues raised by the Change Applications highlight the importance of thoroughly investigating all issues pertaining to the statutory criteria contained in Utah Code Ann. sections 73-3-3 and 73-3-8. Deferring to subsequent permitting processes and other agencies on critical issues such as the natural stream environment, or the amount of water necessary for safe shut-down of the proposed nuclear plant, ignores the fact that those issues remain squarely and uniquely within the jurisdiction of the State Engineer.[1] *See Bonham v. Morgan*, 788 P.2d 497, 502 (Utah 1989) (addressing the responsibility of the State Engineer to investigate issues relating to the requirements of section 73-3-8 when acting on change applications). If the State Engineer truly plans to defer to federal agencies such as the NRC to be the fact-finder on critical issues such as public safety and welfare, the State Engineer should withhold approval until it can review the NRC's findings and apply them to Utah's statutory requirements.

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[1] In effect, the State Engineer's willingness to cede responsibility on important water rights issues to the Nuclear Regulatory Commission permitting process is an unprecedented cessation of the State of Utah's long cherished exclusive sovereignty and control of jurisdiction over state water rights. The implications of the decision to allow federal agencies to exercise decision-are broad and undermine future claims of exclusive jurisdiction under the line of cases that follow the United States Supreme Court's seminal decision in *Nebraska v. Wyoming*, 325 U.S. 589 (1945). *See e.g. California v. United States*, 440 U.S. 59 (1978); *In re Bear River Drainage Area*, 2 Utah 2d 208, 271 P.2d 846 (1954).

Not only does the State Engineer opt to rely on future decisions by other agencies, but he grants the Applicants all benefit of the doubt by accepting unsubstantiated and self-serving assertions as a factual basis for the Orders. In fact, the State Engineer clearly is required to make a determination based not on trusting the Applicants or subjective agreement with their claims, but "grounded in ***evidence*** sufficient to make that belief reasonable." *Searle v. Milburn Irrig. Co.*, 2006 UT 15, ¶ 45, 133 P.3d 382 (emphasis added); *see also id.* at ¶ 54 (reiterating that the burden of persuasion remains on the applicant). In addition to the conceded gaps in information submitted by the Applicants, new evidence has come to light undermining the Applicants' credibility on significant issues such as their ability to finance the project.

Lacking sufficient evidence, the State Engineer either should have denied the change applications, or withheld approval in order to permit further investigation of the significant open issues. *See, e.g. Badger v. Brooklyn Canal Co.*, 922 P.2d 745 n.10 ("the State Engineer has a ***duty*** to withhold approval if it appears there is reason to believe that the enumerated requirements have not been met, and ultimately to deny the application if further investigation more conclusively reveals the same.") (emphasis added); *see also* Utah Code Ann. § 73-3-5 (State Engineer has statutory duty to examine the application and determine whether additional information is needed before further processing). To proceed as the State Engineer did in issuing the Orders ignores the statutory duties of his office, as well as the incumbent obligation to serve the people of the State of Utah in thoroughly evaluating any proposed uses of water.

III.
ISSUES AND FACTS RELATING TO STATE ENGINEER REVIEW CRITERIA

A. Section 73-3-8: Lack of Unappropriated Water in the Proposed Source/Harm to Natural Stream Environment/Interference with Other Users.

The State Engineer's Orders approving the Change Applications expressly recognize the complexity of issues raised by the diversion and use of water proposed under both applications. In particular, the unique factual circumstances underlying each Change Application creates a situation in which the findings relating to one statutory element necessarily impact the findings relating to other statutorily prescribed criteria. This is especially true with respect to the issues of unappropriated water, detrimental impacts to the natural stream environment, and interference with existing water rights. The Orders fail to properly recognize the factually inherent interrelationship among the criteria by ignoring findings under one criterion that undermine the basis for the findings under the others.

A primary example involves the specific findings made by the State Engineer with respect to the impacts on the natural stream environment. In that section, the State Engineer finds that:

> A review of historical flow measurements recorded at the USGS Green River Utah flow monitoring station shows that during drought years flows at the station have typically fallen below the 1,300 cfs base flow target recommended by USFWS.

(Order of the State Engineer on Permanent Change Application Number 89-74 (a35402) (hereafter, "89-74 Order") at 19; *see also* Order of the State Engineer on Permanent Change

Application Number 09-462 (a33874) at 19).[2] The decision further finds that "[a]pproval of this application has the potential to exacerbate the low flow situation." *Id.* Based on the Flaming Gorge Operating Plan, those base flows must remain undiverted in the Green River to satisfy the requirements of the Endangered Species Act. *See* Operation of Flaming Gorge Dam, Final Environmental Impact Statement (September 2005) ("Operating Plan") at Table 2.6. *See also* Record of Decision for the Operating Plan at 6.[3]

The factual finding by the State Engineer that approval of the Change Applications "has the potential to exacerbate the low flow situation" forms the basis for a reason to believe that the applications will detrimentally impact the natural stream environment. More significantly, the finding confirms that there is no unappropriated water in the source because of the legal requirement that the remaining water be left undiverted under the Operating Plan. *Id.* In other words, flows in the Green River that form part of the base flow requirements are legally unavailable to subsequent appropriators.

Given the express finding that water levels in the Green River can fall below legally mandated minimum base flow requirements, there is no justifiable basis for concluding that Applicants have met their burden of showing that there is unappropriated water in the source. In

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[2] Since the two Orders are largely identical regarding the issues discussed herein, for simplicity this Request for Reconsideration will refer primarily to page citations in the 89-74 Order.

[3] The Record of Decision states: "Implementation of the Recovery Program's 2000 Flow and Temperature Recommendations, in concert with other Recovery Program actions, **is intended to avoid jeopardy and assist in recovery**. By implementing the 2000 Flow and Temperature Recommendations, Reclamation is taking the steps necessary **to avoid jeopardizing the continued existence of the endangered species from the operation of Flaming Gorge Dam** and to voluntarily and cooperatively take steps to facilitate recovery of the fish, which, in turn, will support the continued and further utilization of the Federal facilities to aid in the development of the states' Compact apportionments." Record of Decision at 6 (emphasis added).

fact, contrary to that statutory prerequisite, any diversion and use of water under the Change Applications during such critical low-flow periods would violate the Endangered Species Act and interfere with the water rights held for such purposes by the Bureau of Reclamation.[4] Under the burden of proof requirements of *Searle*, Applicants have not, and cannot, meet their burden of demonstrating unappropriated water in the source when considered in light of the admitted parameters of the proposed beneficial use.[5] *See Searle,* 2006 UT at ¶ 54.

Similarly, the conclusion made in the State Engineer's Orders that the diversion and use of water under the Change Applications will not interfere with the rights of others is not supported given the fact that the State Engineer has not fulfilled the statutory obligation to fully investigate impacts of the proposed change. Protestants have repeatedly raised concerns over the ability of Applicants to respect the priority system established by Utah law. Specifically, Protestants have expressed concern over the ability of the proposed nuclear power plant to respect priority cuts based on the relatively late priority of the water rights. As evidenced by the lack of information or data contained in the Memorandum Decisions, the State Engineer has

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[4] In its January 14, 2010 letter to the State Engineer concerning the Change Applications, the U.S. Fish and Wildlife Service specifically referenced the conservation agreement to which the State of Utah is a party and clearly states that the diversions contemplated under the Change Applications would undermine the agreement and threaten the endangered species through all reaches of the Green River ecosystem. Similarly, the Utah Division of Natural Resources expresses its concerns about the potential impacts of the Change Applications and reaffirms that Utah's legal right to use the water under the Colorado River Compact is subject to the requirements of the Endangered Species Act, which requirements specifically include the releases to meet target flows from Flaming Gorge Reservoir. *See* U.S.C 1533(b)(5)(A)-(E).

[5] At the public hearing on the Change Applications, the nuclear power expert for Applicants, Mr. Nils Diaz, testified: "With nuclear power plants, they are basically base load facilities, so there's generally very constant power production that equates to a constant water demand for the plant." *Green River Transcript* at 73:24 to 74:2. When asked if the proposed plant could shut off water diversions, Mr. Diaz testified: "That will not happen. You will not cut off completely a power plant from water." *Id.* at 116:18-19.

made no factual determination of the quantity of water required to be stored at the facility in order to safely and effectively shut down the nuclear power operations.

The only reference contained in the Orders is the statement of Applicants that "the requirement for water storage capacity is 30 days of water for safe shutdown and cooling." (89-74 Order at 14). Based on the limited information contained in the Orders, it appears that the 2,000 acre-feet of storage requested under the Change Applications amounts to less than half of the storage requirements of the proposed facility.[6] *See also infra,* section E (further discussing the apparently insufficient water storage). In that case, safety concerns would dictate that diversions continue in order to protect citizens and the environment from failure within the reactor. This inability to respect priority cuts would necessarily interfere with other senior water rights on the river as well as impact the natural stream environment through the diminution of base flows under the Operating Plan.[7] Because of the interrelationship between the physical and legal parameters governing the safe operation of the nuclear facility and the flows in the river, the failure of the Orders to fully address and set forth the sufficiency of storage undermines the legal basis for the approvals.

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[6] Based on Applicants testimony at the hearing that the plant requires a continuous minimum flow of 70 cfs. *Green River Transcript* at 73. *See also* Orders at 1 (stating that: "[i]n clarifying the application, BCH submitted information stating the plant would require about 70 cubic feet per second (cfs) of flow and all water diverted would be depleted."), ^*See also supra,* fn. 2.

[7] For example, it is a foreseeable that a situation could arise in which base flows in the Green River are less than the base flow requirements triggering the legal obligation under the priority doctrine to cut of water rights on the Green River. Without the ability to shutdown the reactor safely and reliably due to insufficient storage, Applicants would continue to divert and use water while other, senior water rights, including those owned by Protestants are required to stop diverting and using water. Under these facts, Applicants continued use of water would directly interfere with the senior rights located above and below the plant's point(s) of diversion. Such use would also necessarily result in the unlawful appropriation and use of water.

B. Section 73-3-8(1)(a)(iv): The Applicant Lacks the Financial Ability to Complete the Proposed Works

Although the Applicants are not required to have acquired all of the funds necessary for full construction, their ability to secure funding and continue to capitalize the project is directly relevant to the statutory prerequisite of "the financial ability to complete the proposed works." Utah Code Ann. § 73-8-3(a)(iv). Particularly given the significant costs involved in this particular project, the Applicants' financial status, and representations regarding their ability to secure funding are essential. As acknowledged by the State Engineer, Applicants estimate the projected costs of constructing the proposed nuclear plant at $12-18 billion, with the cost to secure an Early Site Permit from the NRC at an additional $100 million. (89-74 Order at 12). Applicants provided a "capital schedule for the licensing" which projects that even in the short-term, Applicants need significant funding, e.g. $10 million in 2010, $21 million in 2011, and $26 million in 2012. (District's Response to Supp. Protests at 15). At a minimum, the State Engineer should have ascertained whether the Applicants have sufficient funding or investment commitments to meet the capital schedule for licensing. The Orders contain no analysis on this critical detail at all.

This type of omission is particularly notable when information recently came to light (after the Orders) indicating that one of Applicants' primary investors is being investigated by the SEC for fraud and financial wrongdoing. (*See, e.g* Salt Lake Tribune, "Feds: Company Backing Utah Nuclear Plant Is a Fraud", January 26, 2012).[8] Among other things, the investor,

[8] Accessed Feb. 7, 2012 at http://www.sltrib.com/sltrib/politics/53385458-90/state-blue-castle-leaddog.html.csp.

LeadDog Capital L.P. ("LeadDog"), is accused of persuading elderly investors to invest in penny-stock companies that LeadDog secretly owned, and then refusing to return most of the money after complaints. Although Applicants now claim that they never completed the funding agreement with LeadDog, this only brings into question the credibility of their representations to the State Engineer, as well as the viability of the project's funding. Applicants represented to the State Engineer they had entered into an agreement with LeadDog to provide up to $30 million (and never corrected that representation). (89-74 Order at 12). However, the SEC found that LeadDog actually had assets far less than that alleged commitment – in September 2009, LeadDog had assets of $3.9 million, and in July 2010 (one month after it allegedly pledged $30 million to Applicants), LeadDog had only $4.25 million. (*See* SEC Complaint).[9] This change represents a $30 million shortfall (30% of the $100 million needed for just the permitting and licensing phase), yet the State Engineer stated to the Salt Lake Tribune that he "may have signed off on the application anyway." (Jan. 26, 2012 Tribune article).

Setting aside LeadDog, the State Engineer references $72 million as having been secured or the subject of in-progress negotiations. (87-74 Order at 12). It is not clear that any of this figure can be substantiated. Of the $72 million, approximately $50 million is from an unnamed private equity fund (the term sheet was not provided), and the remaining $22 million is from "utilities that ***could*** complete agreements with Blue Castle." (District's Response to Supp. Protests at 15) (emphasis added). The Orders apparently rely on Applicants' statement that term-sheets have been signed with 17 different utilities, yet none of those have been provided either.

[9] http://www.sec.gov/litigation/admin/2011/33-9277.pdf

Given the lack of substance behind the $30 million Applicants promised from LeadDog (whether they actually thought they had a deal with LeadDog or not), the State Engineer would be remiss in not investigating beyond the superficial representations of Applicants and seeking at least some "reason to believe" that Applicants are on-track for at least the $100 million they require in the short-term for licensing, to say nothing of the $18 billion ultimately needed for plant construction.

Based on the record evidence, in examining financial ability, the State Engineer can only conclude that Applicants lack the financial ability to complete their project.[10]

C. Section 73-3-8(1)(a)(iii): The Proposed Plan Is Not Physically and Economically Feasible.

Even if Applicants can secure adequate funding to proceed, the State Engineer has failed to sufficiently evaluate whether the proposed nuclear plant is physically and economically feasible, pursuant to Utah Code section 73-3-8(1)(a)(iii). In the past, the State Engineer has consistently rejected applications as not physically or economically possible where the application lacked "any evidence of contracts, permission or support for gaining access to facilities, lands or customers." *See, e.g. Western Waters, LLC v. Olds*, 2008 UT 18 at ¶ 8. In this case, the State Engineer apparently opted to defer to Applicant's assurances regarding future contracts and permits, rather than relying on evidence sufficient to ground a "reason to believe".

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[10] Subsequent to the State Engineer issuing the Orders, Applicants have made statements to the media introducing the specter of another source of funding, Willow Creek, LLC. This source was not considered by the State Engineer in its Orders. However, it is worth noting that this appears to be as vague and unsubstantiated as other assertions made by Applicants. Applicants have provided no details (other than their initial teaser) as to the amount of the funding, the financial ability of Willow Creek to provide said funding, etc. In short, there is no record evidence that supports Willow Creek as an evidentiary basis for financial viability sufficient to satisfy Applicants' burden under Utah law.

a. Not Physically Feasible

The two primary issues raised by Protestants on this factor were the inability of applicant to qualify for all necessary federal and state permits, as well as the failure to have acquired any land for the nuclear plant site. The State Engineer's Orders neglect to address any specifics regarding the reasons Applicants may fail in their permitting attempts, noting only that Applicant "believes it has the right and capability to apply for an NRC license, and specifically for an ESP." (89-74 Order at 10.) With respect to Applicants' failure to acquire the land in question, the State Engineer again gave Applicants full benefit of the doubt (as opposed to their statutory burden of persuasion) by deeming it sufficient that "Emery County has indicated that it intends to facilitate the sale of this property to BCH as soon as BCH remits full funding of the purchase price of the lots." (89-74 Order at 10.). This statement is little more than a highly qualified ("intends" to "facilitate" the sale is hardly "has agreed to sell") statement of future intent contingent on the very funding that is in doubt. If Applicants currently possess the funding, there is no reason they could not have completed the purchase and shored up their representations of feasibility. Further, the State Engineer concedes that "permits, land acquisition, final design and cost estimates for the project have not been completed," yet concludes that it is physically feasible based on "what has been proposed and the existence of other similar facilities…." (89-74 Order at 12). Absent any NRC review or determination regarding the development of the site for nuclear generation, Applicants can only speculate as to physical feasibility of their proposal. It is unclear why the State Engineer feels it necessary to approve these Change Applications

pending so many unresolved details, rather than exercise his statutory right and duty to withhold approval pending further developments, including NRC approval.

b. Not Economically Feasible

The State Engineer's conclusion that the proposed nuclear plant is economically feasible relies on underlying findings that demonstrate the uncertain nature of the entire endeavor. For example, the State Engineer cites a 2008 Congressional Budget Office report that found that "investment in nuclear energy would be ***unlikely*** in the absence of carbon dioxide charges and the 2005 incentives." (89-74 Order at 11) (emphasis added). However, the report is referring to ***proposed*** carbon dioxide charges that, "***if enacted***, could further encourage the use of nuclear power...." (*Id.* (emphasis added)). Further, the report notes that "without the 2005 incentives, generating electricity with nuclear technologies would be roughly 30-35% more expensive than conventional coal and gas technologies." (*Id.*) The State Engineer makes no attempt to verify either the existence of the carbon dioxide charges or the availability of the 2005 incentives to Applicants, despite the recognition that these facts are crucial to whether the project is economically feasible. The State Engineer further acknowledges that the report *Annual Energy Outlook 2011* "states that increases in the estimated costs for new nuclear plants make new investment in nuclear power uncertain." (89-74 Order at 11).

The State Engineer concludes that "nuclear power ***may become more competitive*** with conventional fossil fuel power plants." (89-74 Order at 12 (emphasis added)). This type of reliance on changes that may happen in the "remote and uncertain future" fail to meet the statutory feasibility requirements, particularly in the face of such glaring gaps in the record as to

the final form, cost, funding and even ownership of the project. *See City of Hildale v. Cooke*, 2001 UT 56, ¶ 23, 28 P.3d 697 ("feasible development must not merely be in the realm of speculation because the land is adaptable to a particular use in the remote and uncertain future.").

D. Section 73-3-8(1)(a)(v): The Application Was Filed for Purposes of Speculation.

The State Engineer's conclusion that "there is no reason to believe the applicant intends only to monopolize the water resource or profit from speculation on its eventual use" ignores the record evidence that Applicants in fact intend to do just that – tie up a significant amount of water for decades, without any certainty that the water will ever be used for nuclear power generation. (89-74 Order at 14). This disregard for the facts is particularly striking given that the State Engineer acknowledged early in the Orders that the proposed project presents issues of first impression, such as:

> significant water development under applications originally approved nearly five decades ago, held without any development or use of water under protection of Utah Law by public entities to meet the reasonable future water requirements of the public, and now leased for a long period of time – perhaps the next 5 decades or more – to a private entity outside the service area of the public entities.

(89-74 Order at 3). Despite this astute recognition of Applicants' unique posture in this case, the State Engineer's Orders do not actually address this issue further. *Cf. Western Water, LLC. v. Olds*, 2008 UT 18, ¶8, 184 P.3d 578 (noting State Engineer's "thoughtful memorandum" decision rejecting application as filed for speculation where "the only proposed beneficial use for the water was a plan to sell it to others.") The other issues raised in this request for reconsideration only add to the speculative nature of the eventual use of the water covered by the Change Applications.

The State Engineer relies on Applicants' assertion that they do not plan to transfer the water leases, and "will be the entity that will put to beneficial use the leased water under the applications." (89-74 Order at 13). This description of Applicants' business model runs directly contrary to the statements made on the record at the Green River hearing. Specifically, Applicants conceded that because of the tremendous costs and expertise that nuclear construction requires, Blue Castle itself does not have the "wherewithal to build a nuclear power plant." *Green River Transcript* at p. 263: 5-7. Instead, an "owner-operator not yet identified" will construct, own and operate the proposed nuclear facility. *Id.* Nils Diaz further explained that "there will eventually be an owner-operator entity identified, and that owner-operator entity will be responsible to the Nuclear Regulatory Commission for the construction, operation of the plant, and that entity will receive federal scrutiny as to what its capabilities, experience, financial and everything..." *Green River Transcript* at 131: 11-18. Either Applicants have downplayed their "wherewithal" and expertise for building and operating a nuclear facility, or they intend to have a third party fulfilling that role. Put simply, they cannot have it both ways – it cannot be that NRC scrutiny and compliance requirements will be exacted of a third party owner-operator conveniently not yet in existence, but that Applicants themselves will be the only entity putting the water to use. The State Engineer cannot ignore these realities.

E. Section 78-3-8(1)(a)(iii): Detrimental to Public Welfare

The State Engineer's findings on public welfare fail to reconcile Applicants' assertions with the record facts, and neglect to resolve critical issues regarding the safety and welfare of Utah's citizens. The public welfare criteria is broad and covers interrelated aspects of many of

the statutory criteria as well as the underlying policies of the State of Utah regarding highest and best use, as well as wise allocation of public resources. *See Tanner v. Bacon*, 103 Utah 494, 136 P.2d 957 (1943). Analysis of the impact of the Change Applications on public welfare should be a priority, yet it appears to play a relatively minor role in the State Engineer Orders.

First, The State Engineer primarily defers to the NRC, holding that "health and safety issues related to development of a nuclear power plant will be addressed by the NRC." (89-74 Oder at 16). Again, if the State Engineer has decided to rely on the NRC's findings, the State Engineer should simply withhold approval until it has a chance to review the NRC's findings (much as the State Engineer has delayed rulings until a particular survey or report issues). Additionally, the State Engineer appears to take comfort in Applicants' assertions that their project will never pose the same threat to public safety as the nuclear reactor in Fukushima, Japan, yet scarcely goes beyond the surface of those assertions.

For example, the Applicants claim that the their 2,000 acre-feet storage reservoir will meet requirements of "30 days of water for safe shutdown and cooling". (89-74 Order at 14). However, from the facts in the record, this seems questionable at best. According to Applicants, the plant will require 70 cubic feet/second to operate. That equates to 31,600 gallons per minute (gpm). Daily operation at 31,600 gpm requires 45,158,499 gallons per day (31,600 x 60 (minutes) x 24 (hours)). In terms of acre-feet, this equates to 138.58 acre-feet per day, or over 4,157 acre-feet for a thirty day supply. This is more than double the storage capacity of Applicants' proposed reservoir, yet the State Engineer accepts that there will be no detrimental effect on public welfare. The availability and effectiveness of contingency plans to protect the

public are particularly important given the State Engineer's finding that the Change Applications may "exacerbate the low flow situation" that exists below 1,300 cfs. (89-74 Order at 19).

Moreover, the State Engineer acknowledges that the water rights in question are very junior, and therefore conditions approval of the Change Applications on being subordinate to water rights held for use in the Central Utah Project (CUP). (89-74 Order at 16, 22). Tellingly, the State Engineer finds that the CUP "should not be placed at risk by water rights...that are not being used to supply water to the populations they represent." (89-74 Order at 16). There is no reason this logic should not apply to protection of all water right holders who may be affected by the demands of Applicants' nuclear project. It does not appear that protection of the CUP translates into protection of the welfare of other water users, nor does the State Engineer address the discrepancy between his concern for CUP water rights with priority, and those held by individual owners. In fact, given his finding that "Approval of this application has the potential to exacerbate the low flow situation",[11] there appears to be little basis for ignoring the potential harm to public welfare from the proposed consumption of water by Applicants' nuclear plant.

The benefit to Utahns is also overstated, as the State Engineer focuses on statements such as the governor's prioritization of "providing for the energy needs of the state,"[12] yet ignores the evidence given at the public hearing that the potential electricity generated will be sold to southern California and otherwise marketed out-of-state.

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[11] 89-74 Order at 19.

[12] 89-74 Order at 9.

Finally, the State Engineer further limits his findings by acknowledging the incomplete state of the record, noting that, "No definite plans for the facility and its water diversion, conveyance, or storage works have been developed such that the State Engineer can...make an engineering determination as to the adequacy of those works with respect to public welfare." (89-74 Order at 16). It is not clear how, despite these evidentiary holes, the State Engineer finds "reason to believe" that the use of water under the Change Applications will not be detrimental to public welfare. Again, where there is a dearth of information, the State Engineer is obligated to withhold approval, not grant it based on the hope that Applicants are right in their assertions, or that a federal agency will catch and prevent any detrimental effect on public welfare in Utah.

CONCLUSION

For all the foregoing reasons, the State Engineer should reconsider his decisions laid out in the Orders. At a minimum, the gaps in information submitted by the Applicants warrant further investigation, and withholding approval until further relevant details can be provided regarding the specifics of the plant, the available funding, the magnitude of the impact on river flows, resolution of (acknowledged) potential interference with other water right holders, and other unsettled issues. Based on the existing record and the analysis in the Orders, the State Engineer should deny the Change Applications as premature and inadequate to comply with Utah law, particularly for such a significant and long-term reservation of water.

DATED this 8th day of February, 2012.

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