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VIA HAND DELIVERY

Mr. Kent Jones, P.E.
State Engineer
Utah Division of Water Rights
1594 West North Temple
Suite 220
P.O. Box 146300
Salt Lake City, UT 84114-6300

Re: Upper Yampa Water Conservancy District's Protest of Water Horse Resources, LLC's Water Export Application No. A81080 (Water Right No. 41-3747)

Dear Mr. Jones:

The Upper Yampa Water Conservancy District ("Upper Yampa District") is a Colorado Water Conservancy District, organized pursuant to C.R.S. § 37-45-101 et seq. The Upper Yampa District was formed to develop and operate water conservation projects. The Upper Yampa District's boundaries include most of Routt County and a portion of Moffat County. The District owns an extensive portfolio of storage and surface water rights. This includes storage water rights in Stagecoach Reservoir and Yamcolo Reservoir, which receive water from the Yampa and Bear Rivers, and direct flow water rights on tributaries of the Yampa River. The Upper Yampa District files this protest to identify fatal deficiencies in Water Horse Resources, LLC's ("Water Horse") Application No. A81080 (Water Right No. 41-3747) ("Application");

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explain how the Application impairs the District's rights; and to respectfully request that the Utah Division of Water Rights ("Division") deny the Application. The District requests a hearing.

The Upper Yampa District's contact information for the purpose of this protest is Upper Yampa Water Conservancy District, c/o Graham Gilbert, Snell and Wilmer L.L.P., 15 West South Temple, Suite 1200, Salt Lake City, Utah 84101-1547, 801-257-1911, ggilbert@swlaw.com.

Water Horse Resources, LLC's Application for Water Export

Water Horse proposes to divert a total of 55,000 acre feet, at a maximum rate of 76 CFS, from two points of diversion located on the Green River. Water Horse plans to convey water from the points of diversion north into Wyoming, then east across a significant portion of that state, and finally south to cities and towns along Colorado's Eastern Slope. The proposed place of use spans hundreds of miles. The Application does not identify specific places of use within this vast area or explain how Water Horse will deliver water to specific places of use. The Application identifies a variety of potential beneficial uses, including irrigation, stockwatering, domestic, commercial, municipal, mining, industrial, and power uses. But it does not identify any specific users. Similarly, the Application does not allocate a particular diversion rate or quantity to any of the proposed beneficial uses.

Analysis

1. Utah Law

The Application fails to satisfy the requirements of Title 73, Chapter 3a of the Utah

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Code. According to section 73-3a-108(1) (“Section 108(1)”) of the Utah Code, the State Engineer shall not approve an application unless he finds that the “water can be . . . beneficially used in the recipient state.” Utah Code § 73-3a-108(1)(b)(ii). Water Horse has failed to demonstrate that water diverted under the Application can be beneficially used within Colorado. Indeed, the Application does not identify any contracts with water users or specific types or places of use for the water. This failure to demonstrate a beneficial use for the water also violates the prohibition on applications filed for purposes of speculation and monopoly. Utah Code § 73-3a-8(1)(a)(v).

As another example, an application for export must be “consistent with Utah’s reasonable water conservation policies or objectives.” Utah Code § 73-3a-108(1)(b)(i)(B). Water Horse has offered no explanation as to how it will operate the proposed diversion to comply with Utah’s conservation policies and objectives. This discussion provides two examples of the Application’s failure to comply with Section 108(1). Because it does not satisfy each criterion in Section 108(1), the Division must reject the Application. Utah Code § 73-3a-108(3).

The Application also fails to comply with the criteria set forth in section 73-3-8(1) of the Utah Code. For starters, Water Horse has not demonstrated that the proposed project is feasible. The Application provides a general pipeline alignment. This generic alignment is simply not sufficient to demonstrate that the proposed pumping stations, pipeline, inline hydroelectric facility, and ultimate delivery to end users are physically feasible. Similarly, Water Horse does not provide evidence in support of the project’s economic feasibility. In particular, the Application is void of data regarding the estimated project cost; Water Horse’s ability to finance

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the project; and whether Water Horse's water delivery rates will be competitive in Colorado.

The Application does not address Water Horse's ability to secure the many permits required for a project of this magnitude. The Application acknowledges that Water Horse will have to obtain rights of way from the Bureau of Land Management ("BLM"), but it does not address any other permitting requirements. Water Horse will have to obtain federal permits or other authorizations from BLM, the Army Corps of Engineers, the Federal Energy Regulatory Commission, and the Bureau of Reclamation.¹ The federal permitting process will likely include an environmental impact statement under the National Environmental Policy Act, consultation under the Endangered Species Act, and section 404 permits under the Clean Water Act. The Application does not indicate that Water Horse has even started the federal permitting process. Moreover, there are persuasive reasons why Water Horse will not be able to secure the required permits. First, Water Horse has not explained how it will avoid detrimental impacts to the Upper Colorado River Endangered Fish Recovery Program ("Fish Recovery Program"). Second, the BLM is unlikely to grant rights of way for the proposed points of diversion because they are located in an area managed as suitable for designation as a Wild & Scenic River and the BLM has recommended this stretch of the Green River for designation as a Wild & Scenic River. Third, Water Horse's diversions will likely cause negative impacts to the Brown's Park National Wildlife Refuge and Dinosaur National Monument. Because the diversions proposed in the

¹ Water Horse will also have to obtain state and local permits and approvals and extensive rights of way before the proposed project may be constructed.

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Application pose a significant threat to public recreation and the natural stream environment, the Division should, at a minimum, defer action on the Application until Water Horse has secured the federal permits required for the project. Utah Code § 73-3-8(1)(b).

As another example, Water Horse asserts that there is sufficient water in the Green River to satisfy the Application, existing Utah water rights, and instream flows for the Fish Recovery Program. Section 73-3-8 of the Utah Code requires Water Horse to demonstrate that there is unappropriated water in the Green River. Water Horse's assertions fall short of this requirement. Water Horse offers no hydrologic analysis to document the availability of unappropriated water; no evidence that it has secured contracts from Flaming Gorge Reservoir necessary to satisfy the Application, existing water rights, and the Fish Recovery Program; and no explanation as to how the Application complies with established Division policies. Because the Application does not meet the requirements of Section 73-3-8 of the Utah Code, the Division must reject it. Utah Code § 73-3-8(c).

2. Colorado Law

The Application seeks to circumvent Colorado law. Water Horse asks the Division to "establish a priority date which will be relied upon for the purposes of water right administration, as and against all water rights making beneficial use of water allocated and apportioned to the state of Colorado." Water Horse also asserts that the 55,000 acre feet of diversions under the Application will count against Colorado's entitlements under the 1922 Colorado River Compact and the 1948 Upper Colorado River Basin Compact ("Upper Basin Compact"). In short, Water Horse asks the Division to approve a priority date effective against Colorado water rights and to

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allocate a portion of Colorado's compact entitlement without approval from Colorado.

Colorado has a well-developed system² for appropriation and administration of water rights. Colorado has also engaged in extensive state-wide water supply planning (e.g., Colorado Water Conservation Board basin roundtables). The Division lacks authority to grant priorities under Colorado water law or to allocate Colorado's compact entitlement. Instead of acting outside its authority, the Division should require Water Horse to secure approval of this appropriation under Colorado law before it acts on the Application. Doing so will allow Colorado to evaluate the application under state law and determine whether it is an appropriate use of the state's limited water supply and its compact entitlement. Presumably Water Horse is asking the Division to approve its water right without consulting Colorado because it knows that an application in Colorado would be denied. Colorado has a firmly established anti-speculation doctrine. Under this doctrine, a private entity "must have contractual commitments for any appropriations that are not planned for its own use, or the application will fail as unduly speculative." *Pagosa Area Water & San. Dist. v. Trout Unlimited*, 170 P.3d 307, 314-315 (Colo. 2007), as modified (Nov. 13, 2007) (*en banc*). Because Water Horse has no contractual commitments for its proposed appropriation, the Application would be denied in Colorado.

If approved, the Application will have detrimental impacts on the Upper Yampa District's rights. The Application is speculative and would tie up a significant portion of

² The system includes statutes, administrative rules, case law, an administrative agency (i.e. the Office of the State Engineer), and specialty water courts.

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Colorado's remaining entitlement under the Upper Basin Compact for undefined future uses. By doing so, the Application improperly interferes with the Upper Yampa District's ability to develop Colorado's Upper Basin Compact entitlement to serve actual users and beneficial uses. Furthermore, Water Horse's significant withdrawals from the Green River may impair the Upper Yampa District's existing water rights.

Conclusion

For these reasons, the Upper Yampa District respectfully requests that the Division deny the Application. The Upper Yampa District reserves the right to raise additional objections to the Application, and to present additional facts and argument, as more information is provided by Water Horse and others.

Very truly yours,

Snell & Wilmer



Graham J. Gilbert

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