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State of Utah
DEPARTMENT OF NATURAL RESOURCES
Division of Water Rights

MICHAEL R. STYLER
Executive Director

KENT L. JONES
State Engineer/Division Director

ORDER OF THE STATE ENGINEER
For Permanent Change Application Number 41-3687 (a38665)

Permanent Change Application Number 41-3687 (a38665), in the name of Daggett County was filed on January 18, 2013, to add points of diversion, place of use and nature of use of 8,000 acre-feet (af) of water as evidenced by Water Right Number 41-3687. Heretofore, the water has been diverted from a surface source located South 1115 feet and West 2055 feet from the NE Corner of Section 15, T2N, R22E, SLB&M. The water was stored in Flaming Gorge Reservoir, from January 1 to December 31, having a capacity of 4,000,000 acre-feet, a dam height of 502 feet, and inundating 44,740 acres. The water was used for municipal purposes within the service area of Dutch John Town.

Hereafter, it is proposed to divert 8,000 acre-feet of water from the same point as heretofore and from additional points located: (1) Surface - North 922 feet and West 984 feet from the E¼ Corner of Section 10, T21S, R16E, SLB&M (Green River Pump Station); (2) Surface - South 303 feet and West 1090 feet from the E¼ Corner of Section 10, T21S, R16E, SLB&M (Green River Pump Station); (3) Surface - South 1285 feet and West 1105 feet from the NE Corner of Section 10, T21S, R16E, SLB&M (Green River Pump Station); and (4) Surface - South 1160 feet and East 150 feet from the NW Corner of Section 2, T22S, R16E, SLB&M (Green River Pump Station). The water is to be stored in Flaming Gorge Reservoir the same as heretofore. The nature of use of the water is the same as heretofore but adding the following uses: the indoor domestic requirements of 30 equivalent domestic units from January 1 to December 31, municipal purposes within the service area of Daggett County, and mining and industrial purposes. The place of use of the water will remain the same as heretofore, but adding all or portion(s) of T21S, R18E; T21S, R19E; T21S, R20E; T22S, R18E; T22S, R19E; T22S, R20E; T23S, R19E; and T23S, R20E; all in SLB&M. The applicant, Daggett County, is leasing all or a portion of the water right to Pinnacle Potash International, Ltd (PPI), developer and agent for the project. An average flow of 11.05 cubic feet per second (cfs) would be required to produce the 8,000 acre-feet of volume on an annual basis.

Notice of the application was published in the Vernal Express on May 22 and 29, 2013, and in The Times-Independent on May 23 and 30, 2013. Protests were received from Living Rivers, Grand Water & Sewer Service Agency, and United States Bureau of Reclamation. Hearings were held on September 26, 2013, in Daggett County and on September 27, 2013, in Emery County. Grand Water & Sewer Service Agency withdrew their protest at the September 27, hearing in Emery County.

In their protest to the application, Living Rivers, referred to the statutory criteria for approval or rejection of an application contained in Utah Code Ann. §73-3-8(1), provided their views of the approval criteria, and argued the application should not be approved. The applicant provided testimony at the hearing arguing that the application meets all criteria for approval.

Action on an application to appropriate by the State Engineer is governed by the provisions of Utah Code Ann. §73-3-8(1), which states:

> ***(1) (a)*** *It shall be the duty of the State Engineer to approve an application if:*
> *(i) there is unappropriated water in the proposed source;*
> *(ii) the proposed use will not impair existing rights or interfere with the more beneficial use of the water;*
> *(iii) the proposed plan is physically and economically feasible, unless the application is filed by the United States Bureau of Reclamation, and would not prove detrimental to the public welfare;*
> *(iv) the applicant has the financial ability to complete the proposed works; and*
> *(v) the application was filed in good faith and not for purposes of speculation or monopoly.*
>
> ***(b)*** *(i) If the State Engineer, because of information in the state engineer's possession obtained either by the State Engineer's own investigation or otherwise, has reason to believe that an application to appropriate water will interfere with its more beneficial use for irrigation, domestic or culinary, stock watering, power or mining development, or manufacturing, or will unreasonably affect public recreation or the natural stream environment, or will prove detrimental to the public welfare, it is the State Engineer's duty to withhold approval or rejection of the application until the State Engineer has investigated the matter.*
> *(ii) If an application does not meet the requirements of this section, it shall be rejected.*

The State Engineer has reviewed the application, the information provided at the hearings, and has conducted additional investigation as directed by statute. The standard by which the State Engineer evaluates applications seeking approval is the "reason to believe standard" outlined in *Searle v. Milburn Irrigation Co., 2006 UT 16, 133 P.3d 382.*

All of these issues along with the State Engineer's analysis are summarized and discussed in the following subsections listed by the individual criterion cited in §73-3-8(1) UCA.

§73-3-8 (1)(a)(i) Unappropriated Water in the Proposed Source

Living Rivers protest asserts that there is insufficient unappropriated water in the proposed source, which is the main stem of the Green River, located near the City of Green River, Utah. The Green River is tributary to the Colorado River and the Green River drainage is a major part of the Colorado River Basin. The protest contends that the Colorado River Basin is over-appropriated and no new appropriations should be made. The future availability of water was also questioned. The protest cites the possible negative effects of potential greater climate variability.

Colorado River Allocation and Climate Variability

The Colorado River is managed and operated under compacts, Federal laws, court decisions and decrees, contracts, and regulatory guidelines collectively known as the "Law of the River." When the Colorado River Compact of 1922 (Compact) was negotiated, the river's average annual flow from 1896 to 1921 at Lee Ferry was thought to be about 17 million acre-feet. Recent evaluations show the river's naturalized flow at Lee Ferry[1] to be about 15.0 million acre-feet over the period 1906-2008.[2] Utah may deplete 23% of the flow allocated to the Upper Colorado River Basin States. The Compact apportions to the Upper Basin States 7.5 million acre-feet of depletion per year provided that an average of 7.5 million acre-feet per year is available to the Lower Colorado River Basin States, as measured at Lee Ferry, and treaty obligations to Mexico are satisfied. Considering current hydrology, Mexican treaty obligations, and other law of the river issues, the Upper Basin may be left with a dependable supply of approximately 6.0 million acre-feet of which Utah's share of the river is currently estimated to be about 1.4 million acre-feet per year. To date, the Upper Basin States have met all of their downstream obligations under the Compact and Law of the River.

Stream flow estimates for the Colorado River Basin, reconstructed from tree ring records spanning hundreds of years, appear to show greater variability in the hydrologic cycle than what has been documented in the historical record of flow measurements.[3] The reconstructed flow record appears to show periods of extreme drought sustained over longer periods of time than any drought documented since the late nineteenth century.

Estimates of long term (1568-1961) mean flow at Lee Ferry, based on the stream flow reconstructions, range from 13.0 million acre-feet to 14.7 million acre-feet. The two most recent reconstructions, Woodhouse et al., published in 2006, (1490-1997) and Meko et al., published in 2007 (762-2005) both arrive at 14.7 million acre-feet as the long term mean flow.[4] Climate projection models appear to predict a wide range of future climate conditions. Predictions from current models range from a slight increase in Colorado River Basin precipitation to a greater than 30% decrease in annual runoff.[5]

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[1] Also sometimes referred to as Lees Ferry or Lee's Ferry. Data for the stream gage at this location from 1921 to present can be obtained from the USGS (the gage is named USGS 09380000 Colorado River at Lees Ferry, AZ).

[2] U.S. Department of the Interior, Bureau of Reclamation. 2011. *Interim Report No. 1, Colorado River Basin Water Supply and Demand Study, Status Report.* p. SR-2
On the Web at: http://www.usbr.gov/lc/region/programs/crbstudy/Report1/StatusRpt.pdf

[3] Meko, D.M., C.A. Woodhouse, C.A. Baisan, T. Knight, J.J. Lukas, M.K. Hughs, and M.W. Salzer. 2007. *Medieval Drought in the Upper Colorado River Basin.* Geophysical Research Letters 2007 34(5), L10705, doi: 10.1029/2007GL029988.

[4] Western Water Assessment, *Colorado River Streamflow, A Paleo Perspective,* Comparison of the Lees Ferry Reconstructions: Online, http://wwa.colorado.edu/treeflow/lees/difference.html, accessed September 2012.

[5] Bureau of Reclamation. 2011. *SECURE Water Act, Section 9503(c) – Reclamation Climate Change and Water 2011.* p. 25-36; see also: National Research Council. 2007. *Colorado River Basin Water Management – Evaluating and Adjusting to Hydroclimate Variability.* The National Academies Press. p. 85-91

To date, the Upper Basin States have met all of their downstream obligations under the Compact and Law of the River. It is estimated that Utah water users currently deplete approximately one million acre-feet annually, which represents an underutilization of Utah's share of the Colorado River allocation. The underlying water right associated with this change application is an approved appropriation that has not yet been developed. Approval of this change application does not constitute a new appropriation of water within the Colorado River Basin although it does constitute a new diversion demand on the Green River at Green River, Utah, which is part of that Basin.

The Upper Colorado River Basin Compact of 1948, Article IV, provides for curtailment of use by the Upper Basin States in the event they cannot meet the requirement outlined in Article III(d) of the Colorado River Compact. Curtailment quantities and timing are to be determined by the Upper Colorado River Commission based on the principles outlined in Article IV. Each State will administer the curtailment within its own borders. Although Utah is not currently using its full apportionment of the Colorado River, State Engineer water right records indicate over 2 million acre-feet of depletion is potentially possible if all approved applications and water rights of record are fully exercised. The State Engineer cannot rule out the possibility that curtailment may be necessary in the future but notes that, whether implementation of curtailment procedures is the result of hydrologic factors or increases in water use, its implementation would be a reflection that Utah is placing the maximum amount of water possible under the law of the river to beneficial use. The State Engineer believes that result is consistent with statutory objectives and the water policies of the state.

Utah has and will continue to meet its Compact obligations on the Colorado River. The approval of this change application does not guarantee the applicant water in the future except as may be available to the applicant under the respective priority of the underlying application. Should curtailment under the Compact be necessary, this application, like all others in the Colorado River Drainage in Utah, is subject to priority distribution under the direction of the State Engineer. Even though under curtailment conditions water rights will be administered based on priority, the potential for rights to be curtailed is not a reason to deny this application.

Substantial water resource development work has been completed throughout the Colorado River Basin to place water to beneficial use. Significant storage projects, Federal, State and private, have been constructed since 1922 that currently allow for storage of four times the mean annual flow of the river.[6] The flexibility provided by storage reservoirs in capturing above average flows on good water years allows the Upper Basin States to meet their Compact obligations to the Lower Basin States during drier periods.

Local Appropriation of the Green River at Green River, Utah

The Green River in the vicinity of the City of Green River, Utah, has never been regulated by priority due to a shortage of water. The annual mean flow of the Green River, as measured at

[6] Bureau of Reclamation. 2011. *SECURE Water Act, Section 9503(c) – Reclamation Climate Change and Water 2011.* p. 19

USGS Station Number 09315000 at Green River, Utah for the full historical record of the station (years 1895-99, years 1906-2010) is 6,048 cfs with an annual mean volume of 4,381,000 acre-feet.[7] Based on the historical flow records at this station, there has not been a time when there was not water sufficient for this application to be diverted at the defined points of diversion.

To illustrate the availability of water on the Green River, there are approximately 139 approved water rights for irrigation, municipal or industrial use from the Green River with points of diversion located between the confluence of the Price River and the confluence with the Colorado River. The total of water rights that consume all or part of the water diverted in this segment of the river are approved to divert approximately 400 cfs or 125,000 acre-feet of water. The estimated total depletion from these diversions is 56,500 acre-feet. The major water users along this stretch of the Green River are agricultural in nature which result in large return flows to the river. If all of the existing approved or certificated rights were currently in use, the total depletion to the Green River would be about 1.29% of the volume measured at the Green River station. However, almost all of these depletions occur above the USGS Green River station and represent depletions of water additional to the volumes of water measured there. Although flows less than 500 cfs have been measured at the Green River gage, it has never been necessary to regulate Green River water rights by priority.

Sub-Section Conclusions

Water right laws in Utah were written specifically to address shortages in water supply and establish a priority system to protect senior rights during times of shortage. In times of physical water shortage, water rights in Utah are regulated according to the Prior Appropriation Doctrine. As stated in statute, *"...the one first in time shall be first in rights."* §73-3-1(5) Utah Code Ann. The Prior Appropriation Doctrine is the statutory directive used by the State Engineer to address variability in water supply whether it is a seasonal shortage, annual shortage, potential Compact shortage or the potential for reduced water supply due to greater climate variability.

The diversion of water sought under this change application does not constitute a new appropriation of water within the regional Colorado River Basin system since the appropriation being changed is from a tributary to the Colorado River. It does constitute a new localized diversion demand on the Green River, which is part of that Basin.

When an application to appropriate is approved, the applicant acquires the right to appropriate the water. Under Utah law, the water is not actually appropriated until it is placed to use for some beneficial purpose. If all of the approved applications to appropriate in the Colorado River Basin were actually in use for some beneficial purpose, then the basin would truly be over appropriated. Until that time, however, the basin is not, in fact, over appropriated.

Utah has and will continue to meet its Compact obligations on the Colorado River. The approval of this change application does not guarantee the applicant water in the future except as may be available to the applicant under the respective priority of the underlying application. Should

[7] USGS. 2010. *Water-Data Report, 2010, 09315000 GREEN RIVER AT GREEN RIVER, UT*

curtailment under the Compact be necessary, this application, like all others in the Colorado River Drainage in Utah, is subject to priority distribution under the direction of the State Engineer. Even though under curtailment conditions water rights will be administered based on priority, the potential for rights to be curtailed is not a reason to deny this application.

To supply 8,000 acre-feet per year at a constant rate would require a diversion rate of 11.05 cubic feet per second. It is the opinion of the State Engineer that there is unappropriated water in the Green River at the proposed point of diversion to serve this application.

The State of Utah recognized some time ago the highly variable nature of flow in the Colorado River and has set reasonable expectations as to the total volume of water it may be able to develop. "Subtracting the compact and treaty guaranteed annual apportionments to the Lower Basin of 7.5 million acre-feet and Mexico of 1.5 million acre-feet, and recognizing the impacts of sustained drought periods, the Upper Basin is left with an estimated dependable supply of about 6.0 million acre-feet. As a result, Utah's allocated share is reduced from 1.7 million acre-feet to approximately 1.4 million acre-feet (Anderson, 2002)."[8] The State Engineer believes Utah will be able to develop its 23% share of at least 6.0 million acre-feet which is approximately 1.4 million acre-feet. It is estimated that Utah water users currently deplete approximately 1.0 million acre-feet annually, which represents an underutilization of Utah's share of the Colorado River allocation.

The Bureau of Reclamation completed the *"Colorado River Basin Water Supply and Demand Study"* in December of 2012. The purpose of the study "was to define current and future imbalances in water supply and demand in the Basin...over the next 50 years (through 2060) and to develop and analyze adaptation and mitigation strategies to resolve those imbalances."[9] The study did not result in a decision on how these imbalances should be met but provides a technical foundation and a range of solutions that may be considered by water managers throughout the Basin. The study recognized current shortages and imbalances occurring today. The two most significant are that the Upper Basin deals regularly with shortages based on the availability of annual streamflow and the Lower Basin has a demand for water that is currently above their 7.5 million acre-feet basic apportionment. The study estimates that 60% of the increased demand from 2015 to 2060 will be from the Lower Basin even though their current demand exceeds their basic apportionment. However, even under the rapid growth scenario, the study estimates, Utah's demand would grow by only 300,000 acre-feet by 2060.[10] If the study is correct and Utah continues to grow rapidly over the next 50 years, Utah's total estimated usage would be 1.3 million acre-feet in 2060, far short of the 1.7 million acre-feet allocated by the Compact and still 100,000 acre-feet short of the 1.4 million acre-feet the State Engineer believes Utah can utilize given current hydrologic conditions. The study indicates that targeted investment in water

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[8] Anderson, D.L., *Utah's Perspective, The Colorado River.* Utah Division of Water Resources, 2nd Edition, May 2002, p. 5

[9] *Colorado River Basin Water Supply and Demand Study,* U.S. Department of the Interior, Bureau of Reclamation, December 2012, p. ES-2

[10] *Colorado River Basin Water Supply and Demand Study, Technical Report C – Water Demand Assessment,* U.S. Department of the Interior, Bureau of Reclamation, December 2012, p. C-26

conservation, reuse and augmentation can improve the reliability and sustainability of the Colorado River system to meet current and future water needs through 2060 and beyond.

§73-3-8 (1)(a)(ii) Not Impair Existing Rights or Interfere with the More Beneficial Use of Water

Living Rivers protested the application on the grounds that it may interfere with existing approved and certificated water rights on the Green River and impact existing uses.

The State Engineer has authority to reject an application to appropriate water if it will impair existing rights. When considering a change application, it is not to be rejected for the sole reason that the change would impair a vested right. A change application may be approved with conditions designed to mitigate impairment or provide compensation to the affected party. (See UCA §73-3-3(7))

Water Right 41-3687 has a priority date of December 4, 2006. All water rights on the Green River with priority dates earlier than this date are senior in time to this right and are entitled to receive a full allocation of water prior to the applicant receiving any water under this right. Utah Code Ann. §73-3-3(8) provides that a change of an approved application does not affect the priority of the original application. Changes in point of diversion have the potential to impair existing rights. The State Engineer routinely addresses this issue by approving change applications with the condition they are subject to existing or prior rights. The condition can be thought of as regulating change applications (for localized interference issues) by priority based on the date the change application was filed, which for this application is January 18, 2013. Water Right 41-3687 will be administered and regulated by the Division of Water Rights in accordance with statute and the Prior Appropriation Doctrine ensuring that senior water rights are not impaired by this application in times of physical shortage of the water supply.

§73-3-8 (1)(a)(iii-v) Physically and Economically Feasible; Financial Ability to Complete the Proposed Works; Filed in Good Faith, Not for Speculation or Monopoly

Some of the protest remarks from Living Rivers revolve around the physical and economic feasibility of the proposed project; whether the applicant has the financial ability to complete the proposed works; and on the speculative nature of the proposed project.

The applicant's lessee, Pinnacle Potash International (PPI) submitted information relative to this criterion during the application process for Water Right 92-674, a Fixed-Time application acquired for the same project. The applicant requested in the hearing that information submitted by PPI for 92-674 be considered and included as part of this application. PPI had submitted information that it drilled an exploratory boring, Crescent State #32-22, in Salt Valley which represents a considerable capital investment. Drilling of the boring has been confirmed with the Division of Oil, Gas and Mining but PPI has not submitted a boring log. The applicant, doing business as Sabine International, Inc., entered into a Mineral Lease agreement with School and

Institutional Trust Lands Administration (SITLA) under Mineral Lease No. ML 51720 for over 10,000 acres in March 2010.

The applicant submitted additional financial information on February 21, 2013. The submittal stated that PPI was formed as a partnership in 2008 with initial capitalization of 12 million dollars. The initial capital was used in part to acquire over 60,000 acres of pending prospecting permits on Bureau of Land Management lands and 20,931 acres of SITLA potash leases on State lands within the Crescent Junction area. These funds were also used to obtain patents on 21 claims in the US, Canada and Russia; develop a rail design and secure a Memorandum of Understanding with Union Pacific Railroad for over seventeen miles of track to enable shipment of 8 million tons of potash; conduct substantial survey investigations; complete exploration wells; and as mentioned, complete one well to a depth of over 9,300 feet within the salt anticline. The submittal listed a number of business consultants and government agencies with which PPI has worked closely with during this phase of the project. The applicant projects in the submittal the need for additional funding beyond the initial capitalization of up to $50 million. The submittal indicates that PPI has developed a Confidential Information Memorandum to raise the additional capital, and is currently in the process of raising additional capital for the project.

PPI has shown an ability to secure patents, mineral leases, project capital, and additional funding as needed to complete real engineering, exploration and construction toward completion of the project. PPI is not required to have all of the financing in place for completion of the entire project at this stage of the process. PPI has a specific plan to utilize the water for a known beneficial purpose and does not intend to develop the water only to sell it to others. They have demonstrated an ability to move the project forward on a step-by-step basis.

The State Engineer is of the opinion that sufficient information has been submitted by the applicant's lessee to support a reason to believe the project is physically and economically feasible, the applicant has a phased business plan and sufficient financial ability to pursue development of the project, and the application has been filed in good faith.

§73-3-8 (1)(b)(i) Public Welfare / Recreation / Natural Stream Environment

Living Rivers protest raised concerns related to impacts on recreation in the Green River area. This largely focused on the possibility of reduced water flow that may affect river rafting outfitters and guides. The protest also related concerns that this project could potentially harm sensitive and endangered fish species.

In 1988, the Upper Colorado River Endangered Fishes Recovery Program (RIPRAP), a partnership created to recover the endangered Colorado pikeminnow, razorback sucker, humpback chub and bonytail fishes, was implemented as a cooperative effort to recover the endangered fish in the Upper Basin (Green and Colorado Rivers only) while providing for water development to proceed under state water law and applicable federal laws. This agreement provides participants with a "reasonable and prudent alternative" to avoid a jeopardy finding and to avoid the "likely destruction or modification of critical habitat" designated for the endangered

fishes[11]. Existing and continued diversions from the Colorado River Basin in Utah are allowed under the program. This program performs research to identify habitat needs for survival of the fish, sets goals aimed at recovery of the fish based on known science, and works to implement those goals within the framework of the laws and resources available to the partnership. Utah is a partner in this program. The State of Utah has submitted the *"Utah Work Plan 2010"* to the Recovery Program as an indication of the State's commitment to the Program, diligence to its completion, and sufficient progress with its tasks. The program has been successful in meeting the Endangered Species Act requirements by providing the elements necessary to be the reasonable and prudent alternative for successful Section 7 consultations with the U.S. Fish and Wildlife Service for Federal and local water projects. The success of this program has allowed continued water development in the Upper Colorado River Basin. The goal of the Recovery Program is to achieve naturally self-sustaining populations and protect the habitat and water flows on which they depend such that the fish can eventually be de-listed. This is accomplished through water leases and contracts, coordinated water releases from upstream reservoirs, efficiency improvements to irrigation systems, and re-operation of Federal dams and reservoirs. Program partners cooperatively manage water resources in accordance with State water law, individual water rights, and interstate compacts.[12]

The U.S. Bureau of Reclamation has been working cooperatively with the USFWS to develop an operation plan for flow releases from Flaming Gorge Dam to accomplish the goals of the Recovery Program. In September 2005, the USFWS released the *Final Biological Opinion on the Operation of Flaming Gorge Dam.* Under the proposed action, Flaming Gorge Dam would be operated to achieve the flow and temperature regimes recommended in Muth et al. (2000), while maintaining all authorized purposes of the Flaming Gorge Unit of the Colorado River Storage Project (CRSP), particularly those related to the development of water resources in accordance with the Colorado River Compact.

The Bureau of Reclamation's February 2006 Record of Decision (ROD) for operation of Flaming Gorge states:

> *"The purpose of the proposed action is to operate Flaming Gorge Dam to protect and assist in recovery of the populations and designated critical habitat of the four endangered fishes, while maintaining all authorized purposes of the Flaming Gorge Unit of the Colorado River Storage Project (CRSP), including those related to the development of water resources in accordance with the Colorado River Compact."*
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> *"This action is limited to the proposition that avoiding jeopardy and making progress toward recovery of listed fish facilitates the ability of the Upper Basin*

[11] See Fed. Reg. Critical Habitat Designation, *supra* note 1, at 13,384.
[12] Information obtained from the Recovery Program website: http://www.coloradoriverrecovery.org/

States to continue utilizing and further develop their Colorado River apportionments."[13]

Five different hydrologic conditions (wet, moderately wet, average, moderately dry and dry) based on forecasted runoff volume in any given year provide guidance for setting peak- and base-flow targets to achieve the desired hydrologic variability. An interagency technical working group is tasked to make the flow and temperature recommendations each year. The working group reviews precipitation, temperature, snow pack, streamflow conditions, water supply forecasts and climate forecasts. The U.S Fish and Wildlife Service (USFWS) requests releases from Flaming Gorge in order to comply with the 2006 ROD and 2005 biological opinion. Flaming Gorge is now being operated with the goal of achieving these recommended flows as often as possible while maintaining the other authorized purposes of the Flaming Gorge Dam and Reservoir. For example, in 2013, a significant drought year, the USFWS requested that base flow targets be augmented by as much as 40%, in addition, the Recovery Program requested releases to support the 2013 Larval Trigger Study Program. Reclamation committed to make releases necessary to meet these goals and held base flow releases during the summer months at 1100 cfs rather than 800 cfs resulting in a release of an additional 63,000 acre-feet from the reservoir.[14]

Sub-Section Conclusions

The State Engineer is of the opinion that due to downstream responsibilities under the Colorado River Compact there is and will continue to be sufficient flow in the Green River, both natural and released from Flaming Gorge, which will, during most periods, satisfy the flows recommended by the USFWS for endangered fish. As noted, additional flow releases are being made from Flaming Gorge Dam, during drought years, as per recommendations from the interagency technical working group to maintain recommended base target flows within acceptable ranges. Additionally, water releases under this change application will actually move water down the river from its originally proposed point of diversion thereby aiding efforts to maintain flow in the river through its first two critical reaches.

The State Engineer supports the Recovery Program. The Recovery Program has demonstrated that cooperative partnerships can be developed that will meet the goals of endangered fish recovery and allow continued development of water resources within the Colorado River Basin. The State of Utah through recovery program participation is attempting to provide uniform mitigation for all Utah water uses up to its compact allocation. Continued efforts are being made to identify additional flows and storage available on the system that can be used to augment flows from Flaming Gorge to Lake Powell. Water users seeking new developments on the main stem of the Green River may be required to participate in efforts to ensure new diversions from the river do not jeopardize the continued efforts to recover the endangered fish species.

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[13] Bureau of Reclamation. 2006. *Record of Decision, Operation of Flaming Gorge Dam, Final Environmental Impact Statement.*

[14] Information obtained from the Bureau of Reclamation website: http://www.usbr.gov/uc/water/crsp/wg/fg/fgcurrnt.html on November 25, 2013.

The State Engineer believes that continued development of Utah's share of the Colorado River can be achieved along with recovery of the endangered fish species native to the Colorado River system. The State Engineer is of the opinion that the natural stream environment and endangered fish habitat through this stretch of the river will not unreasonably be impacted by this application. It is also unlikely that the withdrawal of an additional 11.05 cfs of flow from the Green River will impact recreational rafting on the Green River.

Other Concerns Raised in Protest

Water Contracts from Flaming Gorge Dam

The U.S. Bureau of Reclamation (Reclamation) stated in its protest that Water Right 41-3687 is a segregated portion of Water Right 41-3470, which the United States provided Daggett County pursuant to the Dutch John Federal Property Disposition and Assistance Act of 1998 (Public Law 105-326) (Dutch John Act) and the Long Term Water Service Contract No. 01-WC-40-6860 (Water Service Contract). According to the Congressional authority of the Dutch John Act, and the conditions of the Water Service Contract, Daggett County and United States agreed to certain restrictions upon Utah Water Right 41-3470. Reclamation requested in their protest that any approval of Permanent Change Application a38665 (41-3687) be contingent upon the conditions of the Dutch John Act and the Water Service Contract.

It is the opinion of the State Engineer that this change application can be approved without adversely affecting existing rights. The applicant is put on notice that diligence must be shown in pursuing the development of this application which can be demonstrated by the completion of the project as proposed in the change application.

It is, therefore, **ORDERED** and Permanent Change Application Number 41-3687 (a38665) is hereby **APPROVED** subject to prior rights and the following condition(s):

1) The diversion and depletion of water under this application is limited to 8,000 acre-feet annually. The total rate of diversion from points of diversion near the City of Green River, Utah, as listed in the hereafter of this application, may not exceed 11.05 cfs. The annual quantity of water diverted near the City of Green River, Utah, is limited to the annual quantity stored and released under this application, from Flaming Gorge Reservoir.

2) Approval of this application is contingent upon the conditions of the Dutch John Act and the Water Service Contract from the Bureau of Reclamation.

3) The applicant shall install and maintain measuring and totalizing recording devices to meter all water diverted from the Green River and shall annually report this data to the Division of Water Rights Water Use Program.

4) Approval of this application is conditioned on the requirement that the applicant or its agent successfully completes the Section 7 Consultation with the U.S. Fish and Wildlife Service and complies with any conservation measures required.

5) Prior to altering any natural channel or constructing new diversion structures from the Green River, the applicant must file and receive approval of a Stream Alteration Permit with the Division of Water Rights pursuant to the requirements of Utah Code Ann. §73-3-29 and Rule R655-13 of the Utah Administrative Code. Stream Alteration Permits are received and processed by the Dam Safety Section of the Division of Water Rights, which may be contacted at (801) 538-7240. Additional information on permitting requirements for stream alteration activities can be obtained on the Division of Water Rights' website at http://waterrights.utah.gov.

6) Approval of this change application does not grant any rights to use property not owned or controlled by the applicant or its agent. Acquisition of all necessary easements, rights of way or title to property must be made before construction is begun. No rights of trespass are inferred by this approval.

7) The applicant and its agents are required to comply with all applicable local, state, and federal statutes, ordinances, and rules required for construction of this project.

8) Because of the change in location for this water right, this right is hereby administratively renumbered as 92-678 (A30414bb) and this change application will be referenced as 92-678 (a38665).

As noted, this approval is granted subject to prior rights. The applicant shall be liable to mitigate or provide compensation for any impairment of or interference with prior rights as such may be stipulated among parties or decreed by a court of competent jurisdiction.

Inasmuch as this application proposes to divert water from a surface source, the applicant is required to contact the Stream Alteration Section of the Division of Water Rights at 801-538-7240 to obtain a Stream Alteration permit in addition to this Permanent Change Application.

This application is also approved according to the conditions of the current appropriation policy guidelines for the Colorado River Drainage, adopted March 7, 1990.

The applicant is strongly cautioned that other permits may be required before any development of this application can begin and it is the responsibility of the applicant to determine the applicability of and acquisition of such permits. Once all other permits have been acquired, this is your authority to develop the water under the above referenced application which under

Sections 73-3-10 and 73-3-12, Utah Code Annotated, as amended, must be diligently prosecuted to completion.

Inasmuch as the right upon which this change application is filed is not perfected, proof (as required under Section 73-3-16, UCA) is to be filed on Water Right Number 41-3687 now re-numbered to 92-678 (A30414bb). Proof is currently due on that appropriation on **October 31, 2015**. Proof or a request for extension of time must be acceptably filed on or before that date, otherwise the appropriation and all associated applications will lapse.

Proof of beneficial use is evidence to the State Engineer that the water has been fully placed to its intended beneficial use. By law, it must be prepared by a registered engineer or land surveyor, who will certify to the location, uses, and extent of your water right. Upon the submission of proof as required by Section 73-3-16, Utah Code, for this application, the applicant must identify every source of water used under this application and the amount of water used from that source. The proof must also show the capacity of the sources of supply and demonstrate that each source can provide the water claimed to be diverted under this right as well as all other water rights which may be approved to be diverted from those sources.

This approval is limited to the rights to divert and beneficially use water and does not grant any rights of access to, or use of land or facilities not owned by the applicant. This approval is limited to the rights to divert and beneficially use water and does not grant any rights of access to, or use of land or facilities not owned by the applicant.

Failure on your part to comply with the requirements of the applicable statutes may result in the lapsing of this permanent change application.

It is the applicant's responsibility to maintain a current address with this office and to update ownership of their water right. Please notify this office immediately of any change of address or for assistance in updating ownership.

Your contact with this office, should you need it, is with the Eastern Regional Office. The telephone number is 435-247-1514.

This Order is subject to the provisions of Administrative Rule R655-6-17 of the Division of Water Rights and to Sections 63G-4-302, 63G-4-402, and 73-3-14 of the Utah Code which provide for filing either a Request for Reconsideration with the State Engineer or an appeal with the appropriate District Court. A Request for Reconsideration must be filed with the State Engineer within 20 days of the date of this Order. However, a Request for Reconsideration is not a prerequisite to filing a court appeal. A court appeal must be filed within 30 days after the date of this Order, or if a Request for Reconsideration has been filed, within 30 days after the date the Request for Reconsideration is denied. A Request for Reconsideration is considered denied when no action is taken 20 days after the Request is filed.

Dated this 23rd day of December, 2013.

Kent L. Jones, P.E., State Engineer

Mailed a copy of the foregoing Order this 23rd day of December, 2013 to:

Daggett County
PO Box 219
Manila, UT 84046

Living Rivers
c/o John Weisheit
PO Box 466
Moab, UT 84532

Grand Water & Sewer Service Agency
c/o Dan Pyatt
PO Box 1046
Moab, UT 84532

United States Bureau of Reclamation
c/o Curtis A. Pledger, Area Manager
302 East 1860 South
Provo, UT 84606

Division of Water Rights
Stream Alteration Section

Division of Water Rights
Water Use Program

BY: _____
Sonia R. Nava, Applications/Records Secretary