FRIENDS of GREAT SALT LAKE

150 South 600 East, Suite 5D • Salt Lake City, UT 84102 • (801) 583-5593 • www.fogsl.org

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

Re: **Protest** of Water Right Application # A84064 (Water Right: 13-4105), Mango-Spiral Jetty LLC

Submitted electronically

I. Introduction

FRIENDS of Great Salt Lake (FRIENDS) is an interested party pursuant to Utah Code Ann. § 73-3-7 and hereby protests Application Number A84064 (Water Right: 13-4105) made by Mango-Spiral Jetty (Mango) to appropriate 240 acre-feet of groundwater in the immediate vicinity of Great Salt Lake for "mining." For the reasons stated below, the Mango application fails to meet the requirements under the law and should be rejected.

As the State Engineer is fully aware, the local, national and international value of Great Salt Lake, its open water, islands, associated wetlands, playas, mudflats and uplands provide critical habitat for over 10 million migratory birds, represented by nearly 338 different avian species. These birds rely on the Lake and its critical food sources such as brine shrimp, brine flies, and aquatic vegetation while they rest, stage and nest during their migratory journeys.

Approximately 30 percent of the waterfowl migrating along the Pacific Flyway depend upon Great Salt Lake wetlands. For these migrants, the Lake provides a critical food supply, allowing them to restore depleted energy reserves and fuel up for the rest of their migrations, sometimes doubling their body weight before they leave. In recognition of its role in these international flights, Great Salt Lake is designated as one of only eight sites with a "hemispheric" designation – as opposed to regional or international designation – of the 40 Western Hemisphere Shorebird Reserve Network sites in the United States.

The importance of Great Salt Lake to the birds of the Americas is borne out by the sheer numbers that depend on its resources, including:

- 60 to 80 percent of the world's population of Wilson's Phalaropes;

- One of the two largest staging concentrations of Eared Grebes in North America;
- The world's largest breeding population of White-faced Ibis and California Gulls;
- Over half of the entire breeding population of Snowy Plovers west of the Rocky Mountains;
- More than three quarters of the entire western population of Tundra Swan;
- One of the three largest breeding colonies of American White Pelicans; and,
- One of the ten largest wintering populations of Bald Eagle in the lower 48 states.

Not surprisingly, hundreds of thousands of bird watchers comb the shores of Great Salt Lake to be rewarded with incredible views of feeding, flying and nesting birds that journey thousands of miles to gorge on the bounty of our nation's largest inland "sea." The Lake also attracts recreationists enjoying other water-based activities such as sailing, boating, rowing, floating, wading and kayaking. Others hike, ride horseback and mountain bike to enjoy scenery, solitude and wildlife. Great Salt Lake also supports a robust community of waterfowl enthusiasts who not only enjoy hunting but are working to preserve and protect Utah's waterfowl, its unique and rich habitat and its rich heritage.

II. FRIENDS of Great Salt Lake

FRIENDS of Great Salt Lake has, as its mission, the preservation and protection of the Great Salt Lake ecosystem and seeks to increase public awareness and appreciation of the Lake through education, research, advocacy and the arts. The organization has long been involved in the protection and restoration of Great Salt Lake and its ecosystems, advocating for ways in which the public may enjoy these resources by fishing, birdwatching, boating, photographing, hiking and studying these natural areas. On behalf of its members, FRIENDS of Great Salt Lake frequently participates in agency processes related to the management of the Lake, including protesting applications for appropriation of water from the Great Salt Lake watershed. FRIENDS considers this participation to be critical to its mission and to be valuable as a means of influencing the administration of the Lake and of protecting and preserving the Lake ecosystem and opportunities for recreation that depend on the health of that ecosystem.

FRIENDS of Great Salt Lake has staff and members who regularly use and enjoy and will continue to use and enjoy Great Salt Lake for bird-watching, boating, photographing, hiking and studying natural areas. FRIENDS, its staff and its members are harmed and will be harmed by the State Engineer's approval of this application. As such, FRIENDS' staff and members are "persons interested" for the purposes of Utah Code Ann. § 73-3-7. *See Bonham v. Morgan*, 788 P.2d 497, 502 (1989) ("Section 73-3-7 permits 'any person,' not just a water user or an owner of vested rights, to protest the granting of an application under title 73"). The organization protests this application because it fails to meet the basic requirements necessary for approval pursuant to Utah Code Sections 73-3-2 and 73-3-8.

III. Legal Framework

The stated purpose for this application is "mining." As such, the applicant is required by law to provide certain information in its application pursuant to Utah Code Ann. § 73-3-2(2)(c), in addition to the information provided in subsection 73-3-2(1)(b). That information includes

"the name of the mine and the mining district in which it is situated," as well as the nature of the mine and "the place where the water is to be returned to the natural stream or source." Utah Code Ann. § 73-3-2(2)(c). Further, subsection 73-3-2(1)(b)(viii) requires the applicant to provide "other facts that clearly define the full purpose of the proposed appropriation."

In evaluating the application, the State Engineer must first determine if "there is unappropriated water in the proposed source" pursuant to Utah Code Ann. § 73-3-8(1)(a)(i) and whether or not "the proposed use will [] impair existing rights or interfere with the more beneficial use of the water." Utah Code Ann. § 73-3-8(1)(a)(ii). Next, the State Engineer must determine whether or not the proposed use would "prove detrimental to the public welfare," pursuant to Utah Code Ann. § 73-3-8(1)(a)(iii)(B). Additionally, the State Engineer must determine whether the proposed plan "is physically and economically feasible," pursuant to subsection 73-3-8(1)(a)(iii)(A), whether Mango has "the financial ability to complete the proposed works," pursuant to subsection 73-3-8(1)(iv), and whether "the application was filed in good faith and not for the purposes of speculation," pursuant to subsection 73-3-8(1)(a)(v).

On top of the subsection (1)(a) requirements, Section 73-3-8(1)(b) states that on the basis of "information in the state engineer's possession obtained either by the state engineer's own investigation or otherwise," the State Engineer is obligated to withhold approval of an application that may "unreasonably affect public recreation or the natural stream environment, or will prove detrimental to the public welfare" until she investigates the matter fully. Furthermore, if the evidence suggests that the application "does not meet the requirements of this section" – if it unreasonably affects public recreation or the natural stream environment, or proves detrimental to the public welfare, for instance – the application "shall be rejected." Section 73-3-8(1)(c).

These provisions put the burden of persuasion on the applicant throughout the application process to prove to the State Engineer that no harm will result from appropriation of this water. *Searle v. Milburn Irrigation Company*, 2006 UT 16, ¶ 53 133 P.3d 382, 395. In *Searle*, the Utah Supreme Court determined that an applicant bears the burden of establishing that a requested change in water use meets the criteria of Section 73-3-8(1)(a). *Id*. Specifically, the applicant must persuade the State Engineer that there is no reason to believe that the appropriation will fail to satisfy the section (1)(a) factors. 2006 UT 16, ¶¶ 45, 53, 57. This is true even if the application is unopposed. *Id*. at ¶ 57. If the applicant cannot meet this burden, or if a protestor produces evidence that undermines the reasonableness of the applicant's "no reason to believe" assertions, the application must be rejected. *Id*. at ¶ 56.[1]

[1] The Utah Supreme Court has also confirmed that the State Engineer's consideration of the public interest trumps any determination of whether unappropriated waters are available. *Tanner v. Bacon*, 136 P.2d 957, 962 (Utah 1943) ("[O]ur statutes expressly provide that the State Engineer shall reject applications under specified conditions, in the interest of the public welfare, even though all of the waters of the stream covered by the application have not been appropriated.").

IV. Argument: Mango's Application Must be Rejected.

As outlined in detail below, Mango's application for Water Right # 13-4105 falls far short of the statutory requirements and must be rejected. In addition to the application failing to meet the basic requirements of Utah Code Ann. §§ 73-3-2(1)(b)(viii) and 73-3-2(2)(c), it must also be rejected because it fails to meet the requirements of Utah Code Ann. § 73-3-8(1).

A. The Application Fails to Disclose the Necessary Information Related to Its Intended Use as Required by Utah Code Ann. §§ 73-3-2(2)(c) and 73-3-2(1)(b)(viii).

To begin, this application fails on its face because Mango ignored the requirement outlined in Utah Code Ann. § 73-3-2(2)(c)(i) that "the application shall show . . . the name of the mine and the mining district in which it is situated[.]" From a more practical perspective, the application also fails to disclose the "nature" of the mine, as required by Utah Code Ann. § 73-3-2(2)(c)(ii). Describing the nature of the proposed mine in the application is essential for the State Engineer to have a clear understanding of how Mango intends to use the water and to determine whether the water will be used beneficially. Is this a consumptive, evaporative use of the water, or will there be a return flow from the mine? This is an important detail because if there is return flow, Utah Code Ann. § 73-3-2(2)(c)(iii) requires the application to disclose "the place where the water is to be returned to the natural stream or source."

Further, the application must be rejected because it fails to comply with Utah Code Ann. § 73-3-2(1)(b)(viii), which requires Mango to provide "other facts that clearly define the full purpose of the proposed appropriation." Instead, the application only specifies that the proposed beneficial use is "mining." Of interest, the point of diversion proposed by Mango is the same point of diversion as that associated with applications for water rights 13-4106 (60 acre-feet; mining), 13-4107 (240 acre-feet; irrigation), and 13-4108 (240 acre-feet; irrigation). In addition to failing to disclose the nature of the mine and how the diverted water is to be used, Mango also fails to disclose how those proposed water rights are associated with each other and, because the point of diversion is the same, how Mango intends to segregate the water used for mining from the water used for irrigation.

In addition to the application failing to meet the statutory requirements, the complete lack of information in the application prevents FRIENDS from being able to properly exercise its due process right to meaningfully comment on this application pursuant to Utah Admin. Code R655-6. Therefore, because the application fails to comply with both subsections 73-3-2(2)(c) and 73-3-2(1)(b)(viii) and because this lack of information deprives FRIENDS of its due process rights, the application must be rejected.

B. There is No Unappropriated Water in the Great Salt Lake Basin.

In addition to failing to meet the requirements of subsections 73-3-2(2)(c) and 73-3-2(1)(b)(viii), the State Engineer must reject the application because it does not meet many of the Section 73-3-8(1) factors that must be considered. To begin, before the State Engineer may approve an application, she must first have reason to believe that there is unappropriated water in

the source. Utah Code Ann. § 73-3-8(1)(a)(i). However, because all new appropriations in the Great Salt Lake Basin have been suspended, this application must be denied.

On November 3, 2022 Utah Governor Cox issued a proclamation "Suspending New Appropriations of Surplus and Unappropriated Waters in Great Salt Lake Basin" (Proclamation). *See* Utah-Proclamation-No.-2022-01.pdf. The Proclamation cites to the "significant financial investments" that the state has undertaken to address declining water levels of Great Salt Lake and suspends the right to appropriate both surface and groundwater in the Great Salt Lake Basin.

While it has been argued that water sources tributary to the North Arm (Gunnison Bay) are not included in the Proclamation because they are not specifically called out, the title and stated intent of the Proclamation, as well as the cited recommendation from the State Engineer, was to suspend *all* new appropriations within the Basin, including those impacting the North Arm. There are no factual or policy justifications for concluding that the intent of the Proclamation was to exclude tributaries to Gunnison Bay. Gunnison Bay constitutes sovereign land that falls within the surveyed meander line of the Lake. It is, and always has been, an integral part of Great Salt Lake. Further, as the Great Salt Lake Commissioner noted in his Strategic Plan, "the policy of the state is to keep the UP (Union Pacific) causeway breach open so as to allow the exchange of water between Gilbert and Gunnison Bays." The Great Salt Lake Strategic Plan (Strategic Plan), at 29; Great Salt Lake Strategic Plan - Great Salt Lake (utah.gov). Additionally, the recently signed House Bill 453 (2024) directed the Division of Forestry, Fires & State Lands to manage the UP berm "with an objective of equalizing the elevations of Gilbert Bay and Gunnison Bay to be within two feet of each other." HB453, Lines 1224-27. Clearly then, extracting water that would naturally flow into Gunnison Bay will have a direct, negative impact on the water and salinity levels of Gilbert Bay. Given that the stated intent of the Proclamation is to cover the entire Great Salt Lake Basin, that Gunnison Bay is a hydraulically-connected and integral part of Great Salt Lake, and that it is the stated policy to manage the water levels of Gunnison Bay and Gilbert Bay conjunctively, the State Engineer must interpret the Proclamation as prohibiting the extraction of groundwater beneath Promontory Peninsula and deny this application.

Even assuming that sources tributary to the North Arm are not included in the Proclamation, it is probable that at least some of the groundwater Mango intends to extract is tributary to either Bear River Bay or Gilbert Bay, and is therefore covered by the Proclamation. While both the Utah Geological Survey (UGS) and the U.S. Geological Survey (USGS) are undertaking significant efforts to model existing well data in order to better understand the groundwater contribution to Great Salt Lake, the fact is that there is only limited mapping and understanding of the groundwater systems beneath Promontory Peninsula. Because of this lack of understanding, and because the application does not specify whether Mango intends to extract groundwater from a shallow, perched aquifer, or the deeper confined aquifer, there is no basis to assume that the groundwater Mango seeks to pump is only tributary to the North Arm. Given this uncertainty, the State Engineer must assume that the groundwater Mango intends to withdraw is tributary to Bear River Bay or Gilbert Bay, or both, and deny the application on that basis.

C. The Proposed Use Will Impair Existing Rights and the More Beneficial Use of the Water.

A requirement for approval of the application is the determination by the State Engineer that the proposed use will not impair existing rights or interfere with the more beneficial use of the water. Utah Code Ann. § 73-3-8(1)(a)(ii); *see also* § 73-3-8(1)(b). Regarding the first consideration, because of the probability that the proposed groundwater source is connected to Bear River Bay and/or Gilbert Bay, the impact on existing water rights is uncertain. As noted above, the UGS and USGS are both conducting studies with the goal of developing a clear understanding of the groundwater connections to Great Salt Lake, to include the groundwater beneath Promontory Peninsula.

Further, the recently passed House Bill 453 requires the State Engineer to create a water distribution plan for Great Salt Lake, including the North Arm. That distribution plan must be completed by October 1, 2025. Until that distribution plan is completed, and until the UGS and USGS studies are completed, there is no basis for the State Engineer to conclude that the proposed use will not impair existing Great Salt Lake water rights.

In addition to determining whether this proposal will impair existing water rights, the State Engineer must also determine whether it will interfere with the more beneficial use of the water. Utah Code Ann. § 73-3-8(1)(a)(ii) *see also* § 73-3-8(1)(b). As the Governor made clear in his Proclamation, and as outlined in more detail below, the state has spent years' worth of effort and hundreds of millions of dollars investing in a variety of measures to bring more water to Great Salt Lake, all of which will be nullified by continued withdrawals from the Lake. Because approving this application will undermine the State's current, more beneficial objective of getting more water to the Lake, it must be denied as interfering with the more beneficial use of that water.

D. Mango Has Failed to Show that What it Proposes is Physically and Economically Feasible, Pursuant to Utah Code Ann. § 73-3-8(1)(a)(iii)(A) or that It Has the Financial Ability to Complete the Proposed Works, Pursuant to Utah Code Ann. § 73-3-8(1)(a)(iv).

While Mango may very well have the necessary financial resources to complete the proposed works – whatever those might be – as required by Utah Code Ann. § 73-3-8(1)(a)(iv), and while what Mango proposes may very well be physically and economically feasible, as required by Utah Code Ann. § 73-3-8(1)(a)(iii)(A), the complete lack of information in the application makes such a determination impossible. In the absence of these required demonstrations, the State Engineer must deny this application.

E. The Proposed Use Will Be Detrimental to the Public Welfare.

The importance of Great Salt Lake to the public welfare is evident, and the State has made protecting and preserving Great Salt Lake a priority. The Lake "protects Utahns' quality of life in many ways: the very air we breathe, the water we drink, and the food we eat." Strategic Plan, at 3. In October, 2022, the Lake fell to a new record low, and "[a]s the water level dropped,

salinity spiked, threatening an ecosystem that supports over 10 million migratory birds and a brine shrimp industry that helps feed tens of millions of people around the world." *Id.* As a result of this declining water level, "the state experienced serious adverse consequences" including "significant ecologic impacts" and "direct human consequences." *Id*., at 8.

In facing this threat, the state has "responded with significant public investments and policy changes," and "is actively working to enhance conservation efforts." *Id*., at 3, 12. Those efforts include focused regional conservation goals, a $250+ million investment in secondary water metering, landscape conversion incentive programs, water saving device rebates, integrated land use and water planning, at least $300 million in agricultural conservation efforts, in addition to $40 million spent to fund a Great Salt Lake water trust and numerous other legislative initiatives, regulatory changes, agency efforts and dedicated expenditures, in addition to the Governor's Proclamation suspending all new appropriations in the Great Salt Lake Basin. *See Id*., at 12-14; *see also* Proclamation.

In short, the state leadership has made it clear that anything that undermines the protection and preservation of Great Salt Lake is detrimental to the public welfare, including this proposed groundwater withdrawal. Therefore, because this withdrawal will negatively impact Great Salt Lake, the proposed use will be detrimental to the public welfare and the application must be denied pursuant to Utah Code Ann. § 73-3-8(1)(a)(iii)(B). *See also* Utah Code Ann. § 73-3-8(1)(b).

F. Mango has Failed to Show that this Application Was Filed in Good Faith and Not for the Purposes of Speculation or Monopoly, as Required by Utah Code Ann. § 73-3-8(1)(a)(v).

Because of the lack of specifics in this application, there is no basis for the State Engineer to conclude that the application was filed in good faith and not for the purposes of speculation or monopoly as required by Utah Code Ann. § 73-3-8(1)(a)(v). It is entirely possible that the purpose of this application is simply to hold a place in line before all appropriations within the Great Salt Lake Basin are permanently closed, or that Mango is attempting to enhance the value of the subject property. In any case, the burden is on Mango to demonstrate to the State Engineer that the application was filed in good faith and that Mango actually intends to move forward in an expeditious manner to perfect this water right. However, in the absence of this demonstration, the State Engineer has no basis for assuming that Mango has met this requirement and the application must be denied.

V. Relief Requested

For the reasons stated above, FRIENDS respectfully requests that the State Engineer reject Mango's application associated with Water Right # 13-4105. Mango's application fails to disclose the information required by Utah Code Ann. §§ 73-3-2(2)(c) and 73-3-2(1)(b)(viii) and fails to meet the requirements of Utah Code Ann. § 73-3-8. FRIENDS requests that the State Engineer deny the application and require the company to resubmit it if and when it is able to address those deficiencies.

Respectfully submitted March 25, 2024.

/s/ Rob Dubuc

Rob Dubuc
General Counsel, FRIENDS of Great Salt Lake
robd@xmission.com
801.529.3964