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IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

IN THE MATTER OF THE GENERAL
DETERMINATION OF ALL THE RIGHTS
TO THE USE OF WATER, BOTH
SURFACE AND UNDERGROUND,
WITHIN THE DRAINAGE AREA OF THE
UTAH LAKE AND JORDAN RIVER IN
UTAH, SALT LAKE, DAVIS, SUMMIT,
WASATCH, SANPETE, AND JUAB
COUNTIES IN UTAH

GENERAL CASE FILE

**MEMORANDUM IN SUPPORT OF
STATE ENGINEER'S MOTION TO
APPOINT A MASTER IN THE UTAH
LAKE AND JORDAN RIVER GENERAL
ADJUDICATION**

Civil No. 360057298

Judge Laura Scott

Kent L. Jones, P.E., Utah State Engineer, through counsel, respectfully submits this Motion to appoint a Master – pursuant to U.R.C.P. Rule 53 – in the Utah Lake and Jordan River general adjudication. A (proposed) Order is submitted for the Court’s consideration. This Memorandum, Motion, and (proposed) Order is served on the parties by publication pursuant to the Court’s order dated July 8, 2015. That Order further specifies the date opposing memoranda and reply memoranda are due and a hearing on the motion is scheduled on October 19, 2015 at 1:30 PM. The July 8, 2015 Order is attached as **Exhibit 1**.

I. INTRODUCTION AND BACKGROUND

Water rights general adjudications are statutory civil actions intended to investigate, define, and ultimately confirm with a court decree all water rights within a specified drainage basin or its component divisions and sub-divisions. *See generally Jensen v. Morgan*, 844 P.2d 287, 289-90 (Utah 1992) (describing the overall statutory general adjudication purpose and process).

The general adjudication in the Utah Lake and Jordan River drainage began as a lawsuit between Salt Lake City and over two thousand defendants. *Salt Lake City v. Anderson*, 148 P.2d 346, 347 (Utah 1944). Eventually, the Utah Supreme Court converted the case to a general adjudication “because the scope and character of this water suit made it a suit for adjudication of a comprehensive river system.” *Id.* at 349. On September 1, 1944, on remand from the Utah Supreme Court, this Court ordered the State Engineer to make a determination and adjudication of all rights to the use of water of Utah Lake and Jordan River and their tributaries in Utah and Salt Lake Counties. On June 21, 1972, the Court issued an order clarifying that the adjudication area includes all the rights to the use of water, both surface and underground, within the drainage area of Utah Lake and Jordan River and their tributaries in Utah, Salt Lake, Davis, Summit, Wasatch, Sanpete, and Juab Counties.

Because the basin for this general adjudication is large and includes thousands of water rights, the State Engineer divided his investigations and recommendations (in the form of Proposed Determinations) into smaller sub-drainages, focusing on one or a few areas at a time. *See generally* Utah Code § 73-4-1(3) (authorizing the State Engineer to divide a general adjudication into divisions and subdivisions). Once the State Engineer completes his investigations and prepares Proposed Determinations, claimants have the opportunity to object to the Proposed Determinations pursuant to Utah Code § 73-4-11(3). In essence, each objection is a “sub-suit” within the general adjudication. Many of those Objections remain outstanding, while others are resolved. Dividing the general adjudication area into sub-drainages made the adjudication more manageable but resulted in varying stages of completion for each area. For example: the Heber Valley has yet to be investigated and surveyed; the Salt Lake County West Division has five Proposed Determinations filed with the court and pending objections thereon; and the Orem Subdivision is currently being investigated and surveyed by the State Engineer’s staff.

In total, the State Engineer has prepared eighteen Proposed Determinations (PDs) in the Utah Lake and Jordan River general adjudication. For each PD, the State Engineer, in accordance with Utah Code § 73-4-11, filed a copy with the court and served claimants of record either with a copy of the PD or with instructions on how to obtain an electronic copy. These instructions informed each claimant of its right to contest the PD by filing an objection with the clerk of the district court within 90 days of receiving the PD. Some of those objections have been withdrawn or settled with Court confirmed amendments to the PD. Others were litigated and ultimately resolved by the Court; however, approximately 150 objections currently remain outstanding and

pending.¹ To assist the Court in resolving these objections and the anticipated objections to forthcoming Proposed Determinations, the State Engineer requests that the Court appoint a Master pursuant to U.R.C.P. Rule 53 and Utah Code § 73-4-14.

II. ARGUMENT

a. Appointment of a Master is authorized by U.R.C.P. Rule 53 and Utah Code § 73-4-14.

The State Engineer requests that the Court appoint a Master pursuant to U.R.C.P. Rule 53 and Utah Code § 73-4-14. “The court may appoint a [M]aster in an action” and refer “[a]ny or all of the issues in an action” to a Master. U.R.C.P. 53(a). Here, the State Engineer requests that the Court appoint a Master to hear objections to the Proposed Determinations.

In non-jury actions, in absence of written consent of the parties, Masters may only be appointed “upon a showing that some exceptional condition requires it.” U.R.C.P. 53(b). Water right general adjudications are actions in equity. 844 P.2d at 291. Accordingly, the general adjudication is an action to be tried without a jury. *Failor v. MegaDyne Med. Products, Inc.*, 2009 UT App 179, ¶ 12, 213 P.3d 899, 905 (“The distinction between issues triable at law and those triable in equity serves to delineate the scope of the right to a jury trial under our case law.”) *quoting*, *Zions First Nat'l Bank v. Rocky Mountain Irrigation, Inc.*, 795 P.2d 658, 661 (Utah 1990). Thus, appointment of a Master in this case requires a showing that some exceptional condition requires it.

Utah’s Supreme Court held that in looking for an exceptional condition, not to focus “on the category into which the issue falls, but to consider the facts underlying the referred

¹ One of the reasons for this backlog of objections is the failure of objectors to actively push their objections along. *In re General Determination of Rights to the Use of Water*, 110 P.3d 666, *fn.* 4 (Utah 2004) (noting that an objector has an obligation to litigate its own objection).

issue” *Plumb v. State*, 809 P.2d 734, 741 (Utah 1990). However, the Legislature designated general adjudications cases as those of an exceptional nature such that the use of Masters was anticipated and authorized in these statutory civil actions. Utah Code § 73-4-14 (“The court may appoint . . . [M]asters . . . in all proceedings for the determination of the rights of claimants to the water of a river system or water source”). Furthermore, the Utah Lake and Jordan River general adjudication is particularly well suited for a Master.

b. The Utah Lake and Jordan River general adjudication is particularly well suited for a Master because of: the large number of parties, the substantial number of outstanding objections, and the anticipated objections to forthcoming Proposed Determinations.

There are over 29,000 parties in the Utah Lake and Jordan River general adjudication holding water rights of record. A map of the general adjudication area is attached as **Exhibit 2**. This general area includes much of the Wasatch Front’s population center in Salt Lake, Utah, and Wasatch counties and 29,000 parties is only an approximation of the number of water right owners of record. Many ownership interests have been split because of the subdividing and development of land, and in many instances, the water is appurtenant to the land. *See generally* Utah Code § 73-1-11. Therefore, the number of parties is likely greater than the 29,000 parties of record, and more will be identified as the State Engineer proceeds with making further investigations and producing additional PDs in this region.

Water users have filed approximately 150 objections to the 18 PDs and 2 addendums; these objections remain outstanding. The Court cannot enter a judgment confirming the rights in a given PD until all of the objections to that PD are either resolved or dismissed. Utah Code §§ 73-4-12, -15. Consequently, these pending objections are holding up the confirmation of

uncontested water rights for thousands of parties. The State Engineer has made substantial progress in negotiating settlements to resolve some of these objections and litigating others. However, through proactive case management a Master could greatly assist the parties, the Court, and the State Engineer in resolving the objections; especially as the State Engineer increases his efforts in this region. Moreover, other western states have successfully utilized Masters in similar water right general adjudication proceedings. John E. Thorson, et. al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams, Part II*, 9 U. Denv. Water L. Rev. 299, 476 (2006) (recognizing the use of Masters or referees in Arizona, Colorado, New Mexico and Wyoming in general adjudication proceedings and recommending their use in other states).

In the past the State Engineer has spread his resources across the eleven general adjudications pending throughout the State of Utah. Soon, the majority of the efforts and resources will focus on proceeding with this Utah Lake and Jordan River region and producing more PDs. Thus, it is anticipated that more parties will be filing objections. A Master would assist the Court in overseeing the resolution of both the outstanding objections and the forthcoming objections, through proactive case management.

c. Appointment of a Master is beneficial to the Court and the parties because the Master could actively manage the cases, hear disputed factual issues, make recommendations to the Court, and assist the Court with hearing the claims of pro se litigants.

A Master dedicated to resolving objections could more actively manage and encourage resolution of the objections. Active case management might include holding regular status conferences, which, considering the number of parties in this general adjudication, could quickly

overburden a Court with an otherwise full docket. As part of the case management, a Master could encourage the parties to engage in settlement negotiations and assess the status of those negotiations through these periodic status conferences.

Where objections cannot be settled, the Master could set deadlines and preside over factual disputes. Disputes over water involve complicated factual questions that a Master could hear and make recommendations to the Court. Assisting the Court with factual questions would also help clarify the legal questions for ultimate resolution of the objections.

Of the thousands of parties in a general adjudication, many of the individual water users elect not to hire an attorney, and if they file an objection, represent themselves *pro se*. Parties unfamiliar with the judicial process and the rules of civil procedure can also place an added burden on the court. Allowing the Master to hear these objections by *pro se* litigants in the first instance preserves the Court's resources. Notably, the appointment of a Master would not adversely affect the rights of any parties.

d. Appointment of a Master will not adversely affect the parties because the Master's recommendations are subject to review and confirmation by the Court and the legislature has appropriated funding for a Master.

U.R.C.P. Rule 53 requires that a Master prepare a report, serve it on the parties, and file it with the Court. After receiving a copy of the Master's report, the parties have an opportunity to challenge the Master's report. U.R.C.P. 53(e). The Court also retains the authority to "adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions." U.R.C.P. 53(e)(2). Thus, the Court maintains adequate supervision over the objections such that parties are not adversely affected by the Master's appointment.

In recognition of the Legislature's view that Masters are appropriate and useful in general adjudications, the Legislature has recently provided an ongoing appropriation for funding Masters. *See* Utah Code § 73-4-14. If the parties were forced to compensate the Master they might be adversely affected, but in this instance, the Legislature has appropriated funds to pay for a Master to oversee a general adjudication. To ensure that the parties are not harmed if the Legislature eventually commits these funds to another resource in the future, the State Engineer requests that appointment of a Master remain contingent on legislative funding.

III. REQUESTED PROCEDURE

The State Engineer requests that the Court consider the appointment of the Master in two phases: 1) this Motion to appoint a Master, and, if the Court elects to appoint a Master, a determination of the Master's duties and powers in the form of an order of reference; and 2) the appointment of an individual Master in this case and objections to that individual's appointment. The determination to appoint a Master and the Master's duties and powers, is an initial decision and the main subject of this Motion. Once, and, if the Court determines it will appoint a Master², one or a few specific Masters could be proposed and the parties will have an opportunity to object as provided in the rules of civil procedure. *See* U.R.C.P. 53(f) ("A party may object to the appointment of any person as a [M]aster on the same grounds as a party may challenge for cause any prospective trial juror in the trial of a civil action. Such objections must be heard and disposed of by the court in the same manner as a motion.")

IV. CONCLUSION

For the reasons specified herein, the State Engineer respectfully requests that the Court grant

² Counsel recognizes that appointing a Master is a decision for the Court. *Baker v. Holland Furnace Co.*, 81 P.2d 1114 (Utah 1938) (trial court has discretion in whether or not to appoint a [M]aster).

the motion to appoint a Master in the Utah Lake and Jordan River general adjudication. A Master is appropriate in this case because Utah Code § 73-4-14 contemplates the appointment of a Master, the specific circumstances in this case are exceptional conditions, a Master will assist the Court and the parties in obtaining timely relief (a final determination of their water rights), and appointment of a Master will not adversely affect the parties. A proposed order is submitted for the Court's and the parties' consideration and reference.

Dated this 13th day of July, 2015.

SEAN D. REYES
UTAH ATTORNEY GENERAL

/s/ Benjamin J. Jensen
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Exhibit 1

July 8, 2015 Order

The Order of Court is stated below:

Dated: July 08, 2015
04:55:21 PM

/s/ Laura Scott
District Court Judge



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UTAH LAKE AND JORDAN RIVER IN
UTAH, SALT LAKE, DAVIS, SUMMIT,
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GENERAL CASE FILE

**ORDER ALLOWING SERVICE BY
PUBLICATION OF THE MOTION TO
APPOINT A MASTER IN THE UTAH
LAKE AND JORDAN RIVER GENERAL
ADJUDICATION**

Civil No. 360057298

Judge Laura Scott

This matter came before the Court on the Motion of Kent L. Jones, P.E., Utah State Engineer, through counsel, for an order approving service by publication of motion to appoint a Master in the Utah Lake and Jordan River general adjudication.

Having reviewed the documents in support of the motion and considered the arguments, the Court Orders and directs that:

1. the motion to appoint a Master in the Utah Lake and Jordan River general adjudication be served by publication on the parties;
2. the form of the publication attached to the State Engineer's ex parte motion is approved;
3. anyone wishing to oppose the appointment of a master shall have 30 days from the last date of publication;
4. the State Engineer shall have 30 days from the last day for filing opposing memoranda to reply; and
5. a hearing on the motion to appoint a master is set on **October 19, 2015 at 1:30 PM** in at the Third District Court in Salt Lake City located at 450 South State Street in room S32.

BY THE COURT
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Exhibit 2

Utah Lake and Jordan River general adjudication area

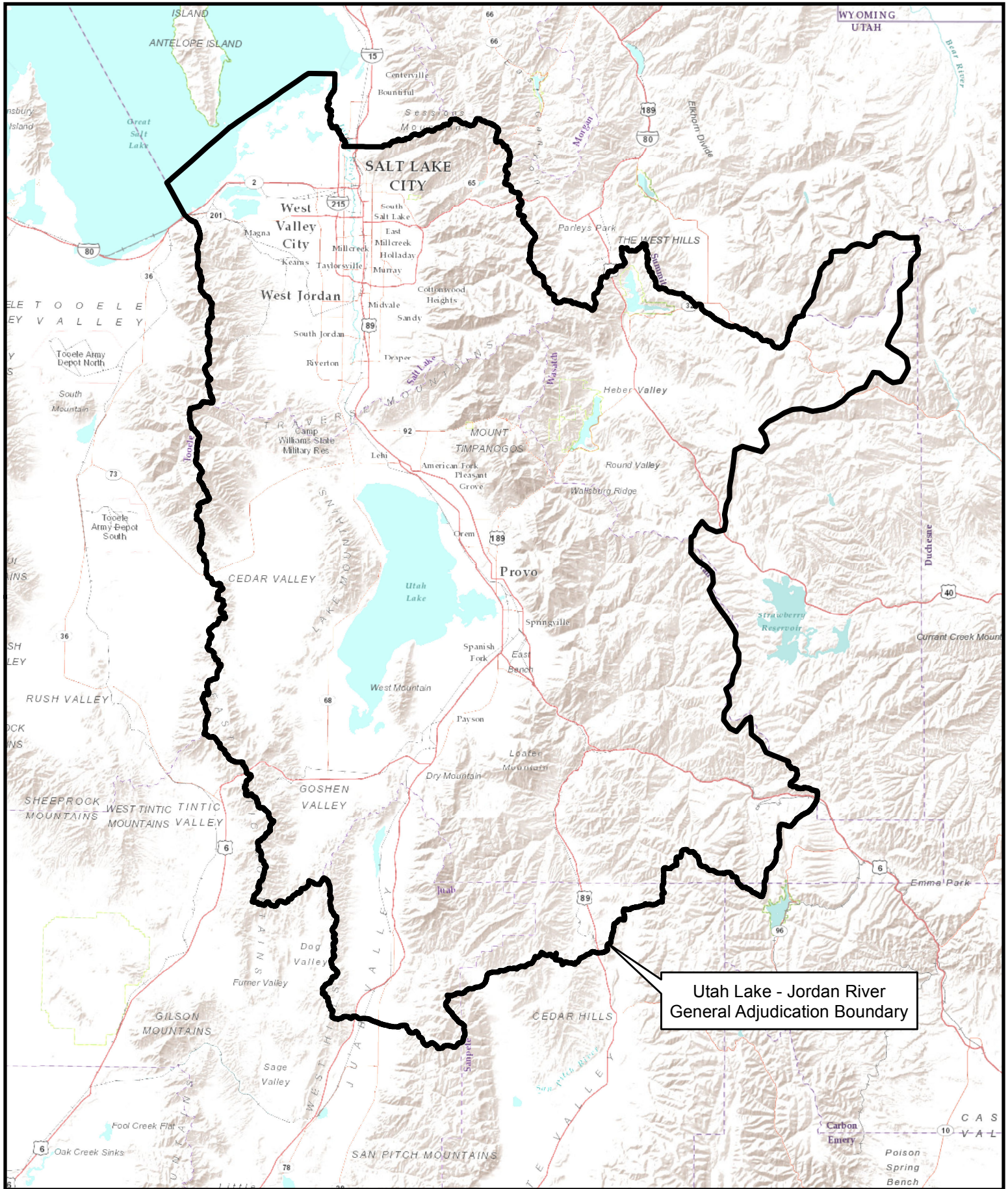


EXHIBIT 2

Utah Lake - Jordan River General Adjudication Boundary

