

PROTEST

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Fee Rec'd BY: ONLINE

September 12, 2023

Protestant: Rob Dubuc FRIENDS of Great Salt Lake
150 S 600 E, Ste 5D
Salt Lake City, UT 84102

RE: Protest of Water Right Application 13-4097

See attached letter

Rob Dubuc FRIENDS of Great Salt Lake

Enclosure

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WATER RIGHTS

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FRIENDS *of* GREAT SALT LAKE

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

September 12, 2023

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 # F83873 (Water Right: 13-4097), Waterleaf Resources LLC; **Comment** on Change Application # T50645 (Water Right: 15-306), Salt Pointe Land Company

Submitted via email

I. Introduction

FRIENDS of Great Salt Lake (FRIENDS) is an interested party pursuant to Utah Code Section 73-3-7 and hereby protests Application Number F83873 (Water Right: 13-4097) made by Waterleaf Resources LLC (Waterleaf) to appropriate 225,000 acre-feet of Great Salt Lake water for the extraction of lithium, and comments on Change Application Number T50645 (Water Right: 15-306) made by Salt Point Land Company to use 100 acre-feet of Great Salt Lake water for the pilot plant associated with Waterleaf's project. For the reasons stated below, the Waterleaf 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 plants 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 Section 73-3-8, including evidence of an approved royalty agreement pursuant to Section 73-3-8(3)(a).

III. Legal Framework

The State Engineer is obligated, on the basis of “information in the state engineer’s possession obtained either by the state engineer’s own investigation or otherwise,” 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. Utah Code Ann. Section 73-3-8(1)(b). 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 – the application “shall be rejected.” *Id.* 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 five 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

However, unlike Section 73-3-8(1)(a), Section 73-3-8(1)(b) places an additional duty on the State Engineer to investigate potential adverse impacts to the Lake environment, recreation and the public interest. Pursuant to this duty, if the State Engineer has reason to believe that an application may prove detrimental to recreation, the aquatic environment or the public welfare, she has a duty to withhold approval of the application until she has undertaken an independent investigation of the matter. Utah Code Ann. Section 73-3-8(1)(b). If, based on this investigation, the State Engineer concludes that the applied for use would, in fact, have such a detrimental impact, she is required to reject the application. Utah Code Ann. Sections 73-3-8(1)(b) & (c).

Further, Sections 73-3-8(1)(a)(i), (iii) and (iv) require that the application be granted only if “there is unappropriated water in the proposed source,” the proposal “is physically and economically feasible . . . [and] would not prove detrimental to the public welfare” and “the applicant has the financial ability to complete the proposed works.”

Finally, Utah Code Ann. Section 73-3-8(3)(a) states: “Before the approval of any application for the appropriation of water from navigable lakes or streams of the state that

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.”).

contemplates the recovery of salts and other minerals therefrom by precipitation or otherwise, the applicant shall file with the state engineer a copy of a contract for the payment of royalties to the state.” In order to obtain a royalty agreement from the Division of Forestry, Fires and State Lands (DFFSL), Waterleaf must meet the criteria outlined in Utah Code Ann. Section 65A-6-4, including 65A-6-4(6)(b). Section 65A-6-4(6)(b) requires Waterleaf to (1) demonstrate the commercial viability of their technology, (2) certify that the operation will not negatively impact the biota and chemistry of Great Salt Lake, and, (3) obtain an acknowledgement from DFFSL and the Department of Environmental Quality (DEQ) that the operation will not negatively impact the biota or chemistry of Great Salt Lake.

IV. Argument: The Waterleaf Application for 225,000 Acre-Feet Must be Rejected.

Waterleaf’s application for Water Right # 13-4097 does not meet the requirements of Section 73-3-8 and must be rejected. DFFSL has yet to determine the path that companies must take in order to obtain a royalty agreement to extract lithium from Great Salt Lake, and the State Engineer must ensure that such a royalty agreement is in place before approving Waterleaf’s application. *See* Utah Code Ann. § 73-3-8(3)(a). The same is true for the change application associated with Water Right # 15-306. Waterleaf must also identify a single point of diversion and, as important, a point of discharge, and the company must obtain a discharge permit from the Utah Division of Water Quality (DWQ). At this point, the State Engineer does not have the information she needs to approve Waterleaf’s application pursuant to Section 73-3-8, and while the same could be said for the change application associated with Water Right # 15-306, an argument could be made to allow the pilot plant to proceed. However, Waterleaf has no basis, and offers no justification, for its request to divert 225,000 acre-feet of Great Salt Lake water.

A. Waterleaf Does Not Have the Required Royalty Agreement with the State.

To begin, FRIENDS protests Waterleaf’s application because it is premature. Pursuant to Utah Code Ann. § 73-3-8(3)(a), the State Engineer may not approve Waterleaf’s application until the company obtains the required royalty agreement with DFFSL, which it does not have and which it cannot obtain at this time. Prior to the company being able to obtain a royalty agreement to extract lithium, DFFSL must complete the rulemaking process related to changes made to mineral leases and royalty agreements under Utah Code Ann. § 65A-6-4 during the 2023 legislative session (HB513). Among those changes is the requirement that Waterleaf demonstrate to DFFSL the commercial viability of its proposed project, and certify that the process proposed by the company will not negatively impact the biota or chemistry of Great Salt Lake. *See* Utah Code Ann. § 65A-6-4(6)(b). What exactly Waterleaf must do to meet those requirements has yet to be determined by DFFSL. Further, Waterleaf must obtain an endorsement from DEQ certifying that the company’s assertion that its operation will not negatively impact the biota or chemistry of Great Salt Lake is in fact true. *Id.* Again, what exactly Waterleaf must do to obtain that endorsement has yet to be determined by DEQ. Because of that, until DFFSL and DEQ complete their rulemaking process related to the HB513 changes, it is impossible for Waterleaf to enter into the required royalty agreement and therefore its application is premature. The state engineer should reject the application on this basis and require the company to resubmit its application if it is successful in obtaining a royalty agreement with the state in the future.

B. Waterleaf Should Be Required to Identify a Single Point of Diversion.

Waterleaf's multiple-choice approach to identifying the point of diversion associated with their proposed water right is unacceptable and should be rejected. Equally unacceptable is the company's failure to identify where it intends to discharge its waste waters once the extraction process is complete.² While the State Engineer is required to determine whether Waterleaf's proposal would "unreasonably affect public recreation or the natural stream environment or will prove detrimental to the public welfare" pursuant to Section 73-3-8(1)(b), she cannot accomplish that task without knowing precisely where the points of diversion and discharge will be. The state engineer should reject the application on this basis and require the company to resubmit its application once it identifies the precise points of diversion and discharge and if the company can demonstrate that it will be successful in obtaining a UPDES permit for its discharge from DWQ.

C. The State Engineer Does Not Have the Information She Needs to Determine Whether the Waterleaf Application Meets the Section 73-3-8 Requirements.

As noted above, in line with the 65A-6-4(6)(b)(i) requirement that Waterleaf demonstrate its commercial viability, the State Engineer is required to determine whether the company's plan "is physically and economically feasible." Utah Code Ann. § 73-3-8(1)(a)(iii)(A). Nothing in the application submitted in support of the water right application addresses this point, and the State Engineer cannot ascertain the feasibility of Waterleaf's process without that additional information. Again, the application is premature because the company cannot demonstrate the economic feasibility of its process until it demonstrates the viability of its extraction method. While the concept of non-consumptive mineral extraction is an intriguing one, and while on the surface the company appears to have had some success with its South American pilot plant, the company has not demonstrated that its technology will work with Great Salt Lake brine or that its proposal is economically feasible at scale. Pursuant to Section 73-3-8(1)(a)(iv), the State Engineer must also determine whether the company "has the financial ability to complete the proposed works." Again, nothing in the application submitted in support of the water right application addresses this point, and the State Engineer is unable to make her required determination without that information. Therefore, the State Engineer should reject the application on this basis and require the company to resubmit its application once it provides the State Engineer with the information she needs to make these determinations.

D. Waterleaf Fails to Justify Its Request for 225,000 Acre-Feet.

Waterleaf offers no basis for the amount of water it seeks to appropriate from Great Salt Lake. While 225,000 acre-feet is a nice, round number, Waterleaf fails to justify this request. The State Engineer should reject this approach and instead require the company to support its application with evidence that demonstrates the amount of water it needs for commercial

² It should be noted that as part of the approval process necessary to commence operations, Waterleaf will be required to obtain a discharge permit from DWQ under the Utah Pollution Discharge Elimination System (UPDES) criteria.

production based on the physical capacity of its facility – which it has not designed or built. While the company is no doubt hopeful that its technology will work using Great Salt Lake brine, it has not shown that it can successfully process the hyper-saline North Arm brine. In order to demonstrate both its commercial viability, as required by Section 65A-6-4(6)(b)(i), and that the company’s plan “is physically and economically feasible,” as required by Utah Code Ann. § 73-3-8(1)(a)(iii)(A), the company must first demonstrate the success of its process through construction and operation of a pilot plant. Unless and until that happens, and unless and until the company has completed the design of its commercial facility, the company cannot offer anything more than an educated guess of the amount of brine it will be able to process annually. Until the company is able to show a factual basis for the amount of water it requests for its commercial facility, the State Engineer should reject the company’s application as premature.

E. Comments on the Change Application Associated with Water Right 15-306.

FRIENDS acknowledges that in order to demonstrate the viability of its commercial-scale project, the company must have access to enough water for its pilot plant, and therefore does not protest the change application associated with Water Right # 15-306. However, although the bar that the company must clear is lower for the change application, that bar still exists. That is especially true of the need to obtain a royalty agreement from DFFSL to include a certification that the operation of the pilot plant will not negatively impact the biota or chemistry of Great Salt Lake. *See* Utah Code Ann. § 65A-6-4(6)(b).

V. Relief Requested

For the reasons stated above, FRIENDS respectfully requests that the State Engineer reject Waterleaf’s application associated with Water Right # 13-4097. Waterleaf’s application is premature because the company has not yet obtained a royalty agreement for the extraction of lithium, fails to identify required points of diversion and discharge, fails to provide the State Engineer with the information necessary to convince the State Engineer that the company has met the requirements for approval under Section 73-3-8, and fails to justify its request for 225,000 acre-feet. 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 September 12, 2023.

/s/ Rob Dubuc

Rob Dubuc

General Counsel, FRIENDS of Great Salt Lake