



protecting the forests and watersheds of canyon country

P.O. Box 298 • Moab, Utah 84532 • 435-259-5640
www.redrockforests.org

October 14, 2009

Kent L. Jones
State Engineer
Division of Water Rights
P.O. Box 146300
Salt Lake City, Utah 84114-6300
E-mail: kellyhorne@utah.gov

RE: Application No. a35874 (Water Right Nos. 09-462)

Dear Mr. Jones:

I have attached Red Rock Forests' objections to and Protest in the above Water Right Permit Transfer Application. The original was e-mailed to you on the date of this letter and the \$15.00 filing fee has been provided to you on the date of this letter under separate cover. Please contact me if you have any questions. Thank you.

Sincerely,



Harold Shepherd, Executive Director

RECEIVED
OCT 20 2009
WATER RIGHTS
SALT LAKE

Harold Shepherd
Issues Director
Red Rock Forests
P.O. Box 331
Moab, UT 84532
Telephone: 435.259.5640
FAX: 907.235.6668

Original to
electronic copy

**OFFICE OF THE STATE ENGINEER
DIVISION OF WATER RIGHTS
STATE OF UTAH**

Received
Oct. 14. 2009
Kff

In the Matter of
Application No. a35874 (Water Right Nos. 09-462)

:
:
:
:

PROTEST
October 14, 2009

[HEARING REQUESTED]

Red Rock Forests (RRF), hereby object to and PROTEST, pursuant to Utah Code Ann. §73-3-12, the above noted San Juan County Water Conservancy District (SJCWCD or Applicant) water right transfer application 09-462 (A35874) (Transfer Application). Red Rock Forests, located in Moab, Utah, focuses on the health of the La Sal Mountains, Abajo Mountains, and the Canyonlands Basin of southeast Utah. Red Rock Forests' mission is to protect the long-term health and viability of these high elevation forests. They provide critical summer forage for wildlife and support a rich diversity of plant life.

This Protest is filed on the following grounds:

1. Protestor is a "person interested" for the purposes of Title 73 Chapter 3 of the Utah Code which deals with appropriation of water.
2. The purpose of the requested water right permit (the Permit) is an industrial use for a, yet to be approved, 2-unit Nuclear Power Plant in the vicinity of Green River, Utah and all other associated uses. The San Juan County Water

RECEIVED
OCT 20 2009 ✓
WATER RIGHTS
SALT LAKE

Conservancy District (SJCWCD) filed an Application for Permanent Change for Water Rights for water right 09-462 (a35874) on August 27, 2009. The change application proposes to change the point(s) of diversion, place of use, and nature of use for 24,000 acre feet of water to provide water from the Green River for Transition Power Development LLC's (TPD) proposed 2-unit nuclear power reactor west of the City of Green River. The SJCWCD also proposes a storage reservoir. The Transfer Applications do not satisfy the statutory criteria in Utah Code Ann. §73-3-12 that governs the approval of Transfer Applications for an application to appropriate water resources, as discussed below.

3. This Protest is based on the duties of the State Engineer as mandated by Utah Code Ann. §73-3-8(1). Specifically, “[i]f the state engineer, because of information in his possession obtained either by his 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, stockwatering . . . or will unreasonably affect public recreation or the natural stream environment, or will prove detrimental to the public welfare, it is his duty to withhold his approval or rejection of the application until he has investigated the matter. If an application does not meet the requirement of this section, it shall be rejected.” Utah Code Ann. §73-3-8(1) (emphasis added).
4. The applicant is seeking the right to totally consume the water sought to be appropriated. The point of diversion is on North 1100 feet and East 2300 feet from the SW Corner of Section 26, T41S, R19E, SLB&M. The place of use is within the Service area of the San Juan County Water Conservancy District.

RECEIVED

OCT 20 2009

WATER RIGHTS
SALT LAKE

5. The location of the proposed point of diversion is in an area that has several senior water rights and is near the Green River. The Green River provides year-round water, except in times of extreme drought. This river is currently being used by senior water users and by a variety of native fish and wildlife. In particular, the area provides habitat for the following state-sensitive species: pronghorn, ferruginous hawk, big free-tailed bat, western red bat, ringtail cat, dwarf shrew, Townsend's big-eared bat, and the Virgin River montane vole. In fact, part of the reason the proposed use will prove detrimental to the public welfare is because "four endangered species including the humpback chub..., bonytail..., Colorado pikeminnow..., and razorback sucker" depend on the Colorado River for critical habitat.¹

In addition, the Utah Division of Wildlife Resources states that water developments, such as the proposed use in this case, may proceed in the Basin only in accordance with federal and state laws.² An endangered species is one that is "in danger" of extinction throughout all or a large portion of its habitat. Because these fish are so rare, they are protected by state laws and the federal Endangered Species Act (ESA).³ In passing the ESA, Congress reflected society's belief that rare species should be saved whenever possible.⁴ Specifically, recover of the endangered fishes requires that use and development of water from the

¹ U.S. Fish and Wildlife Service, OPERATION OF FLAMING GORGE DAM, FINAL ENVIRONMENTAL IMPACTS STATEMENT, FINAL BIOLOGICAL OPINION, pp. 18-56, (SEPTEMBER 2005) and FINAL PROGRAMMATIC BIOLOGICAL OPINION FOR BUREAU OF RECLAMATION'S OPERATIONS AND DEPLETIONS, OTHER DEPLETIONS, AND FUNDING AND IMPLEMENTATION OF RECOVERY PROGRAM ACTIONS IN THE UPPER COLORADO RIVER ABOVE THE CONFLUENCE WITH THE GUNNISON RIVER, pp. 19-35, (DECEMBER 1999).

² Utah nonnative fish management questions and answers (UDWR Q&A)-
http://wildlife.utah.gov/fishing/nonnative/q_and_a.html.

³ 16 U.S.C. § 1533.

⁴ 16 U.S.C. § 1531, et seq.

RECEIVED

OCT 20 2009

WATER RIGHTS
SALT LAKE

Upper Colorado River Basin may proceed only in compliance with the ESA. As in the case of the Application in this case, since 1988, the U.S. Fish and Wildlife Service has applied the ESA to 756 water projects depleting approximately 1,725,000 acre-feet of water in the Upper Colorado River Basin.⁵ This has occurred in the form of status of fish populations and recovery actions such as flow management, habitat restoration, nonnative fish management, and stocking of endangered fish. The fact, the Application will clearly impact the ESA listed species in the Upper Basin is illustrated by the fact that, since the early 1900s “the installation of dams, removal of water for human use, ... have contributed to the decline of native species.”⁶ In fact, as early as the 1970’s, the State, itself that water diversions such as the one proposed by the Applicant are detrimental to these species.⁷

In addition, minimum streamflows ensure and increase public recreation in the area, including commercial, and non-commercial rafting tours and trips on the Green and Colorado Rivers in Labyrinth, Stillwater, and Cataract Canyons. These activities generate a significant economic base in the communities of Green River, Moab, and elsewhere in the State of Utah.

6. The proposed point of diversion would potentially have an adverse impact on the existing instream flows for the Green River that belong to the American public. Impairment of these flows would impact not only the existing rights of current water permit holders, but would also unreasonably affect the natural environment,

⁵ UDWR Q&A.

⁶ *Id* (emphasis added).

⁷ U.S. Fish and Wildlife Service, Power-Point Presentation-Upper Colorado Endangered Fish Recovery Program, p. 2 2009. (<http://www.waterrights.utah.gov/meetinfo/m20090930/jana1.ppt>).

RECEIVED

OCT 20 2009

WATER RIGHTS
SALT LAKE

public recreation, and the habitat of the existing fish and wildlife in the area, which ultimately belongs to the American public. Such flows and habitat impairment would be detrimental to the public welfare.

7. Utah Code Ann. §73-3-8(1) dictates that applications must be rejected if approval would result in the impairment of existing water rights, or interfere with more beneficial uses of water -- such as stockwatering, municipal and agricultural uses, and providing habitat for state-sensitive fish and wildlife species and other fish and wildlife. When combined with the fact that climate change is increasing the risk of U.S. crop failures, depleting the nation's water resources, and contributing to outbreaks of invasive species and insects, the water right permit requested (Permit) will directly and negatively affect agriculture and livestock in central Utah. According to a report compiled by 38 scientists with the U.S. Department of Agriculture, the effects of climate change and other problems for the agricultural and forestry industries will persist for at least the next 25 years. AP, Feds: Climate Change Will Threaten Livestock Water Supply for Years (May 28, 2008). According to the report, drought-strained forests in the West and Southeast are easy prey for tree-killing insects like bark beetles. Snow in the Western mountains is melting earlier, making it more difficult for managers overseeing a long-established system of reservoirs and irrigation ditches that serves Western states. *Id.* Further, the Southeast doesn't have the same kind of storage system because rain historically has been more consistent. Current weather disruptions have the region struggling with drought. Rising carbon dioxide levels are changing the metabolism of grasses and shrubs on range land, decreasing the protein levels in

RECEIVED

OCT 20 2009

WATER RIGHTS
SALT LAKE

plants eaten by cattle. Permits for industrial uses that consume large amounts of water like the one in question will exacerbate such impacts. The Utah Division of Water Resources, for example, has predicted that the amount of depletion will soon exceed the state of Utah's entitlement under the Colorado River Compact and additional planned water diversions such as the one in question, will most certainly cause the state to exceed its allocation.⁸ Once the state exceeds its Colorado River allocation, agricultural water uses, instream flows and other existing water rights will suffer by being cut off by court orders issued under the Colorado River Compact or purchase of such water rights by industrial uses such as the proposed use in this case.

8. Utah Code Ann. §73-3-8(1) requires that applications must be rejected if the State Engineer has information or has reason to believe that the appropriation of water will affect public recreation, the natural spring environment, or prove detrimental to the public welfare. The impairment of these River flows in the Green River and elsewhere would decrease the value of public recreation in the Southeastern Utah area, by limiting the sources and/or amounts of water flow for recreational users. The impairment of these natural stream environments, therefore, must not be allowed. In addition, these natural flows are critical to the continued existence of native fish and wildlife in this area.

In addition, warmer, drier weather is altering the biodiversity of deserts in

⁸ Utah Department of Natural Resources, Water Rights Division, Upper Colorado River Basin Current Policy and Issues Utah Division of Water Rights, pp. 4-5 (September 2009):
(file:///C:/Documents%20and%20Settings/Terry%20Shepherd/Local%20Settings/Temporary%20Internet%20Files/Content.IF5/OI4I303O/upper_colorado%5B1%5D.ppt#292.1.Slide 1)

RECEIVED
OCT 20 2009
WATER RIGHTS
SALT LAKE

the Southwest and the high, colder deserts of Utah. Plants and animals already living in extreme conditions face threats from wildfires and nonnative species. The Permit would add to these impacts through the impairment of these flows. Consequently, the loss of such fish and wildlife habitat would certainly be detrimental to the public welfare, since the point of diversion is on public lands, and these flows and the habitat they afford pass through public lands, which belongs to all of the citizens of the United States.

In addition, there is a high probability that water appropriated pursuant to the Application will become polluted by the proposed industrial use (uranium power generation), will likely contaminate ground water resources in the area, and will present a clear threat to public health and welfare in the immediate area. Even the most recent technologies for uranium tailings disposal and containment have not been proven to be safe.

In addition, based on the fact that the appropriator will consume the entire 24,000 acre feet of water diverted, the Permit would impact water rights held by the senior and other water right holders. Any proposed use of water that has a clear potential to be detrimental to the public welfare should not be approved without supporting evidence to the contrary. The State Engineer, therefore, is required to reject the SJWCD application under § 73-3-8(1).

The Application states that the water would be used for an industrial use for a uranium processing facility and all associated uses. However, no such facility exists yet and the applicant has invested less than 3% of the total anticipated cost of construction in the proposed power plant. There is no evidence

RECEIVED
OCT 20 2009
WATER RIGHTS
SALT LAKE

that SJCWCD intends to build or operate a uranium facility or any other industrial complex, or that it will put the water to beneficial use. The Application appears to be for the sole purpose of increasing the value of SJCWCD's property, so that the agency can subsequently sell the property to another mining or other company. The State Engineer should not condone this type of speculation in water and must thoroughly prevent such offensive precedent.

Utah Code Ann. § 73-3-8(1)(a)(i) requires sufficient unappropriated water for the proposed appropriation. That such water is not available for the Application is illustrated by the fact that water needs in Utah are increasingly clashing with reality. The State has already doled out 180,000 rights to tap rivers and dig wells, but there is not enough water to honor them all. In fact, after the State Engineer Jerry Olds, seeing Wayne County perilously close to the deadline, last year approved a farmer's request for transfer of 50,000 acre-feet per year of Fremont River water to the Green River — one of the largest water-right transfers in recent State history. The farmer now can draw on the Green River — about 60 miles upstream from where the right exists — for Wayne County's Fremont River allocation and may irrigate more than 16,000 acres across three counties.

According to the BLM, this project would threaten to dry up about 54 acre-feet of water (an acre-foot can supply one Utah household with water for a year) that it draws from downstream springs and underground wells near Hanksville. In addition, new wells the farmer proposes near Hanksville could intercept water before it reaches the Fremont and Dirty Devil Rivers, tributaries that flow to the Colorado. This could cause the Fremont to dry up before it reaches

RECEIVED
OCT 20 2009
WATER RIGHTS
SALT LAKE

Capitol Reef National Park and pose unacceptable risks to federally listed threatened and endangered species.

Further, in this case, in violation of the beneficial use doctrine and § 73-3-8(1)(a)(i), the 24,000 acre feet of water requested by the appropriator is far in excess of that generally required for a nuclear power plant of the type described in the application. Data and information regarding the water requirements for existing nuclear power plants and the contemplated power plant is needed before the State Engineer can approve the Application.

The state must provide and consider information regarding the amount of unappropriated water available and the long-term availability of water in the Green River to satisfy all water appropriations.

9. Utah Code Ann. § 73-3-8(1)(a)(iii) requires that the proposed plan for use of the water must be physically and economically feasible." SJCWCD's Application states that the water would be used for an industrial use for a uranium processing facility and all associated uses. The nuclear power plant would be located at a proposed industrial development site near Green River, Utah. In its Application, however, SJCWCD did not provide any information regarding the physical or economic feasibility of the proposed power plant. There is no information available to the public and the State Engineer at this time regarding the physical and economic feasibility of a large and complex nuclear power plant operation near Green River. Until the proposed site is fully characterized, information about the physical feasibility of the power plantsite will not be known.
10. Utah Code Ann. § 73-3-8(1)(a)(iv) requires a finding that "the applicant has the

RECEIVED

OCT 20 2009

WATER RIGHTS
SALT LAKE

financial ability to complete the proposed work." The Applicant has not provided any information to demonstrate that they are financially able to permit, construct, operate, and decommission the proposed nuclear power plant, including funds for the required surety to cover the costs of reclamation and long-term care.

11. Utah Code Ann. § 73-1-1 requires that any "appropriation must be for some useful and beneficial purpose." Similarly, Utah Code Ann. § 73-1-17 requires that the State Engineer may not certify a water right until, among other things, that the water appropriated has been put to a beneficial use..." This requires the applicant to establish that it "can and will put the conditionally appropriated water to beneficial use within a reasonable period of time." See e.g. *Pagoas Area Water and Sanitation District v. Trout Unlimited (In re Application for Water Rights)*, 170 P.3d 307 (Colo. 200&). Similarly, the appropriator may not merely possess or waste the water. Water right holders who fail to show continuous beneficial use of the water may lose the water right through abandonment or forfeiture. Utah Rev. State § 73-1-4.

These requirements are intended to ensure that the public's water resource is available to those who actually need water. David B. Schorr, *Appropriation as Agrarianism: Distributive Justice in the Creation of Property Rights*, 33 *Ecol. L.Q.* 3,9,22 (2005). In Utah, the restriction on speculation and waste is enforced by a recognition that the approval of an application is "only a preliminary step which gives the applicant the authority to proceed and perfect, if possible, the proposed appropriation by actual diversion and application of the water to a beneficial use. See *Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co.*, 104

RECEIVED
OCT 20 2009
WATER RIGHTS
SALT LAKE

Utah 202, 212--13, 135 P.2d 108, 113 (1943); *Little v. Greene & Weed Inv.*, 839 P.2d 791, 794 (Utah 1992).

The adoption of the Prior Appropriation Doctrine, by definition, required the appropriator to apply the water to beneficial use, thereby precluding speculative hoarding in hopes of future gain. Neuman, 28 Env'tl. L. 919, 963-64. "Because actual, beneficial use was required, no one could acquire all of the water and thereby monopolize a scarce and valuable resource. Nor could anyone speculate by holding water without using it, and then make a steep profit by selling to those who need it." *Id.* at 964. See *High Plains A & M. LLC v. Southeastern Colorado Water Conservancy Dist.*, 120 P.3d 710, 719 n.3 (Colo. 2005).

In this case, in violation of the beneficial use doctrine and § 73-1-1 and § 73-1-17, the amount of water requested is far in excess of that generally required for a nuclear power plant of the kind described in the application. Data and information regarding the water requirements for existing nuclear power plants and the contemplated power plant is needed before the State Engineer can approve the Application.

12. Utah Code Ann. § 73-3-8(1)(a)(v) requires a finding that "the application was filed in good faith and not for purposes of speculation." The owner and operator of the nuclear power plant (TPD) has not shown that they retained personnel who have the expertise to fully carry out the proposed project. The State Engineer, therefore, cannot make a finding that the application was not filed for the purposes of speculation, until more information is available about SJCWCD and

RECEIVED
OCT 20 2009
WATER RIGHTS
SALT LAKE

its financial and other resources to carry out the proposed project.

Further, SJCWCD has not provided any information regarding the amount of water necessary to construct, operate, decommission, and reclaim a nuclear power plant. The amount of water requested is far in excess of the amount of water that is generally required for a nuclear power plant of the kind described in the application. Data and information regarding the water requirements for existing nuclear power plants and the contemplated power plant is needed before the State Engineer can approve the Application.

13. Under Utah Code Ann. §73-3-8(1), the State Engineer is obligated to investigate the potential adverse impacts that the proposed point of diversion would have on the holders of current water rights and current stockwatering, municipal, and agricultural uses, the impacts to the natural spring environments and instream flows, the adverse impacts to public recreation in this area, and the adverse impacts to the public welfare if these instream flows were impaired by the proposed point of diversion.

As the point of diversion is located on the Green River and, thus, will detrimentally impact the River it would prove to be a detriment to the public welfare and the River's instream flows. The State Engineer is compelled to insure that the current rate of water flowing instream remains unchanged as a result of new water diversions. Safeguards to protect the current flow rate must be included in the conditions of approval for any diversion of water from the Green River.

RECEIVED
OCT 20 2009
WATER RIGHTS
SALT LAKE

It is further noted that the State of Utah is facing potential cutbacks in water available from the Green River, in response to decade-long drought conditions, documented regional changes in hydrological conditions and future snowpacks due to climate change, and administrative management modifications pursuant to the Colorado River Compact and State water adjudication processes. Protestors therefore submit that the State Engineer's office has a responsibility to consider future water availability in light of these factors, prior to approving large, non-domestic appropriations of water.

14. Protestors also submit that as there is likely a high probability that water appropriated pursuant to the above Application will become polluted by the proposed industrial use (uranium processing), and that such polluted waters will present a clear threat to public health and welfare in the immediate area and for downstream users. Protestors thus submit that the Application should be rejected as the proposed use. Far from being the highest and best beneficial use of water, in reality it presents a hazard to public health and welfare.
15. Utah Code Ann. § 73-3-11 provides that:

Before either approving or rejecting an application the state engineer may require such additional information as will enable him properly to guard the public interests, and may require a statement of the following facts: In case of an incorporated company, he may require the submission of the articles of incorporation, the names and places of residence of its directors and officers, and the amount of its authorized and its paid-up capital.

Based on the fact that TPD has not demonstrated that it has the financial or other resources to successfully construct or operate the proposed power plant, the State

RECEIVED
OCT 20 2009
WATER RIGHTS
SALT LAKE

Engineer must exercise his/her authority to investigate the information required by § 73-3-11.

WHEREFORE, Protestors request that the State Engineer reject application – the Transfer Application for Water Right No. 09-462, as the applicant has failed to illustrate due diligence and the water diversion would interfere with more beneficial uses of the water.

Protestors further request a hearing in this matter. Protestors reserve the right to submit additional information and evidence at the hearing in support of this Protest. Protestors respectfully request to supplement this Protest with additional information in support of the Protest.

Dated October 14, 2009.

s/Harold Shepherd
Harold Shepherd, Executive Director
Red Rock Forests
P.O. Box 331
Moab, UT 84532

RECEIVED

OCT 20 2009

WATER RIGHTS
SALT LAKE

CERTIFICATE OF FAX AND MAILING

I hereby certify that I e-mailed and mailed, First Class, Return Receipt Requested, a copy of this Protest to:

Kent L. Jones
State Engineer
Division of Water Rights
P.O. Box 146300
Salt Lake City, Utah 84114-6300
E-mail: kellyhorne@utah.gov

Dated October 14, 2008.

s/Harold Shepherd
Harold Shepherd
Executive Director, RRF

RECEIVED
OCT 20 2009
WATER RIGHTS
SALT LAKE