Could dispute over water rights derail Utah oil shale plant?

By Jennifer Yachnin

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Environmentalists trying to stop a planned eastern Utah oil shale plant are accusing an Estonian-owned company and a local electric cooperative of violating state laws in a bid to hold onto a 3.5-billion-gallon water right.

Utah's Division of Water Rights will hold the first hearing today in a challenge to Enefit American Oil's lease of a 10-million-gallon-per-day water right on the Green River, a tributary of the Colorado River.

The nonprofit Grand Canyon Trust alleges that a 30-year lease struck between Enefit, the Salt Lake City-based arm of Estonian-owned Eesti Energia AS, and Deseret Power amounts to a violation of Utah law and would allow the company to hold onto an otherwise expired water right.

"Deseret Power is unlawfully holding it so that Enefit can use the water to mine and process oil shale," said Grand Canyon Trust staff attorney Michael Toll.

Deseret Power did not respond to a request for comment, and an Estonia-based representative for Enefit did not respond to questions in time for publication.

Environmental and public health groups have long sought to block Enefit's "South Project" in the Uinta Basin, billed as the nation's first oil shale production plant.

Enefit plans to strip mine 9,000 acres south of Vernal, Utah, and would process up to 50,000 barrels of oil shale per day at the plant.

Toll said the water-intensive process can use up to four barrels of water for every barrel of oil produced. "Oil shale mining and processing is extremely thirsty," he said.

A coalition — including the Grand Canyon Trust, along with other groups like the Center for Biological Diversity, the Sierra Club and Utah Physicians for a Healthy Environment — filed a lawsuit in 2019 challenging an Interior Department decision permitting pipelines and power lines needed for the project to cross federal lands.

That case, which remains pending in the U.S. District Court for the District of Utah, alleges that the Bureau of Land Management and the Fish and Wildlife Service failed to comply with the National Environmental Policy Act and the Endangered Species Act in their reviews of the permits (Greenwire, May 17, 2019).

The new challenge, which will be decided by Utah's Division of Water Rights — an agency within the state's Department of Natural Resources — was spurred by documents disclosed in the federal lawsuit.

In a June 2016 letter to the Bureau of Land Management responding to its draft environmental impact statement, Enefit asked for a revision to a description of its water right, or its legal entitlement to a portion of the public's water.

In the letter, Enefit noted that it holds an "exclusive contractual right to use said water for the intended industrial use, in the amount indicated."

That caught the attention of the Grand Canyon Trust, Toll explained, because Enefit had previously sold its water right.

Although the company once owned a 3.5-billion-gallon right to the Upper Colorado River basin, it transferred that right to Deseret Power in 2013 for just $10.
Under Utah water law, water rights must be put to "beneficial use" within 50 years or the water right returns to the public.

"Its predecessors had filed the application for that water right in 1965," Toll explained. "So in 2013, Enefit was on the doorstep of losing its water right."

Instead, Enefit sold that right to Deseret Power, which as a generation and transmission power cooperative is eligible under an exception in the state law to apply for an extension.

According to a 2013 document, Deseret Power required the extension to use the water for a then-planned 25-year expansion of its Bonanza Power Plant in Uintah County. At that time, the project included a single 500-megawatt coal-fired generating unit.

But the document also alluded to "other entities … pursing the possible development of additional natural resources and industrial operations in the vicinity of the Bonanza Plant site."

"In addition to direct water usage at the Bonanza Plant, [Deseret Generation & Transmission] anticipates that any remaining water allowed for diversion from DG&T's water rights may be put to beneficial use in one or more of these development endeavors," says the document.

But the Grand Canyon Trust alleges that Deseret Power violated state law because it had already contracted all of the water rights it bought from Enefit back to the company.

"They made certified sworn statements that they needed all that water to meet the public's future power demand," Toll said. "Our argument in filing this administrative protest with the state engineer's office is Deseret Power is not meeting it's legal obligation to put the water to beneficial use."

The Grand Canyon Trust is now asking the state to revoke that water right, effectively turning the flows back to the public pool. That water could then be used by more junior water rights holders, or those individuals who may not be able to draw their full water right during the persistent drought that has shrunk the Colorado River basin.

The agency must first determine, however, whether the nonprofit group has standing to bring the complaint.

In a January letter to Utah's state engineer, Deseret Power defended its decision to assume the water rights, arguing they will be needed in the future.

"Electricity demand throughout Deseret Power’s service area and the State of Utah will increase in the future. This point is undisputed," wrote Richard Hall, an attorney with the Salt Lake City-based law firm Stoel Rives LLP, representing the cooperative.

He continued: "While the electric generation landscape has changed considerably since 2015, to meet future demands, Deseret Power still anticipates a second generating unit (and possibly a third generating unit) will be constructed at the Bonanza Power Plant … over the next 30 years."

The letter did not address any lease or other agreement with Enefit.

Deseret Power has argued that the Water Rights Division should dismiss the protest, saying the complaint should have either been filed after the initial sale or should wait until 2025, when the power company is due to submit its "proof of beneficial use."

The power company has likewise argued that Grand Canyon Trust does not have standing as a Utah "water user" to bring the complaint, which is co-signed with the Moab-based PVR Inc., a ranch with water rights in Utah.

If the complaint moves forward, environmentalists are hopeful it could complicate Enefit's planned processing plant.

"A project of this size is relying almost exclusively — almost 99 percent — on a single water right," Toll said. "That inherently makes it very important to its plans."