

PROTEST

PROTEST FEE PAID

\$15.00 18-01516

Fee Rec'd BY: ONLINE

March 30, 2018

Protestant: Charles Holmgren, Chairman Utah Board of Water Resources
PO Box 146201
Salt :Lake City Utah 84114-6201

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WATER RIGHTS
ONLINE

RE: Protest of Water Right Application 41-3747

A hearing is requested.

The Utah Board of Water Resources (Board) holds water rights in the Green River Basin above Lake Powell and protests the water right application (A81080, 41-3747) of Water Horse Resources, LLC to appropriate and divert water on the Green River below Flaming Gorge Reservoir. Application A81080 (Application) is an export application and fails to meet the requirements of Utah Code 73-3a-108. Further, that Utah Code section requires compliance with Utah Code 73-3-8; this Application also fails to meet the requirements of that section. Besides being an export application, which allows Utah water to be used in another state, this Application creates additional complications because Utah and Colorado are parties to both the Colorado River Compact (CR Compact), which apportions Colorado River water to both the Upper and Lower Colorado River basins, and the Upper Colorado River Compact (UB Compact), which governs relations between Upper Basin states like Utah and Colorado in allocating the Upper Basin share of the River and in meeting delivery requirements to Lower Basin states.

First, the Board points out how this appropriation application is very unusual. It requests a huge amount of water, 76 cfs or 55,000 acre feet from Utah, its precious water resources, for some unknown use in Colorado. And although Application A81080 states it will withdraw water under Colorado, its allocation under the UB Compact, Water Horse Resources (Applicant) does not explain what authorizations it has from the State of Colorado to ensure the withdrawal is actually allocated to Colorado, its portion rather than Utah, its portion. The UB Compact clearly states, "The consumptive use of water by the United States of America or any of the agencies, instrumentalities or wards shall be charged as a use by the State in which the use is made; provided that such consumptive use incident to the diversion, impounding, or conveyance of water in one State for use in another shall be charged to the latter State." Article VII of the Upper Colorado River Compact. The application refers to using part of Colorado, its apportionment under the Compact but gives no evidence that the State of Colorado, which holds the apportionment under the Upper Colorado River Compact, concurs in or approves this use.

The Green River, below the Point of Diversion, runs entirely inside Utah, where it meets the Colorado River. The Application, if granted, would allow Colorado to benefit from the development, economic opportunities, and public well-being benefits that accrue from water resources at Utah, its expense. The Applicant, with this odd Application, desires to withdraw Utah water, using a Utah Appropriation and Export Application, as part of Colorado, its share of the Colorado River. Even if the Applicant has or acquires whatever Colorado permits or authorizations would ensure the water taken is not allocated to Utah, its share of the Colorado River, the Application will have huge impacts in Utah. Utah, its allocation of water under the Compact is 1.369 million acre-feet which is already developed or covered by applications to appropriate in Utah. This water will be withdrawn (albeit in priority) physically above all Utah uses. And if Colorado does authorize this Utah Application as part of its Colorado River allocation, there is at least the question of how this Application would be regulated if the Upper Basin states implement curtailment, a system of allocating shortages if the Upper Basin cannot meet its obligation to Lower Basin states. Even if Colorado authorizes the withdrawal as part of its allocation, there is no assurance in the Application that Colorado agrees to comply with Utah, its priority system in allocating these shortages.

Second, the Application should not be granted because when subsections (B) and (C) of 73-3a-108(1)(b)(i), which requires the State Engineer to evaluate the public, its welfare and Utah, its compact obligations, are examined in light of Utah Code 73-3a-108(2), it is clear the supply and water quality of Utah, its water would be impacted on the Green River and Utah, its current and future demands of the Green and Colorado Rivers are increasing because Utah water needs are increasing and the population is growing.

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Third, the Application is not ,Äúconsistent with Utah,Äôs reasonable water conservation policies or objectives[.],Äù Utah Code 73-3a-108(1)(b)(B). Because the Application requests uses for Irrigation, Stockwatering, Domestic, Municipal, Mining, Power, and ,ÄúOther,Äù uses, it provides no assurance that these uses in Colorado, presumably under Colorado conservation policies, would comply with Utah,Äôs conservation policies or objectives.

Fourth, the water cannot ,Äúbe transported, measured, delivered, and beneficially used in the recipient state.,Äù Utah Code 73-3a-108(1)(b)(ii). Nothing in the vague Application outlines actual beneficial uses in Colorado. No contracts or other types of agreements are provided demonstrating that Colorado can beneficially use the water, or for what beneficial uses it would be employed.

Fifth, where Utah Code 73-3a-108(1)(b)(i)(A) requires the export Application meet the requirements in Utah Code 73-3-8, it does not comply with those requirements. Addressed above are the Board,Äôs arguments under Section 73-3-8(1)(a)(iii)(B) regarding the public,Äôs welfare. But the Application also fails to meet other subsections: Subsection 73-3-8(1)(a)(iii)(A) because it is not physically or economically feasible to take water from the Green River in Utah and pipe it over or around the Rocky Mountains for use on the ,ÄúFront Range Urban Corridor within the state of Colorado,Äù; Subsection 73-3-8(1)(a)(iv) because the applicant, which is a private entity, does not appear to have the backing of Colorado or the end users there, and does not appear to have the financial ability to complete the proposed works to deliver water over or around the Rocky Mountains itself; Subsection 73-3-8(1)(a)(iv) because the Application was filed for speculative purposes in Colorado and monopolistic purposes over a new supply of water in the thirsty ,ÄúColorado Front Range Corridor.,Äù Further, the Application will impact public recreation and the natural stream environment of the Flaming Gorge Reservoir and the entire Green River under Subsection 73-3-8(1)(b).

Finally the Board also disputes the availability of water below Flaming Gorge Reservoir on the Green River under Section 73-3-8(1)(a)(i). Environmental Flow targets for the Upper Colorado River Endangered Fishes Recovery Program control releases from Flaming Gorge for most of the year while providing and protecting downstream uses in Utah. Absent a contract with the United States Bureau of Reclamation for additional releases from Flaming Gorge Reservoir, there is little or no water available for diversion with the rare exception of very high spring flood releases. Application makes no reference to a contract with USBR and therefore no water is available because excess waters are stored in Flaming Gorge Reservoir and not released except to meet downstream and environmental uses.

Charles Holmgren, Chairman Utah Board of Water Resources

SUBSTITUTED AND AMENDED PROTEST

April 2, 2018

Protestant: Utah Board of Water Resources, and
Utah Division of Water Resources
c/o Eric Millis, Division Director
PO Box 146201
Salt Lake City, UT 84114-6201

RE: Protest of Water Right Application A81080 (41-3747)

The Utah Board of Water Resources (Board) holds water rights in the Green River Basin above Lake Powell and protests the water right application (A81080, 41-3747) of Water Horse Resources, LLC to appropriate and divert water on the Green River below Flaming Gorge Reservoir. The Division of Water Resources (Division), which administers the Board's water rights, likewise protests. Application A81080 (Application) is an export application and fails to meet the requirements of Utah Code 73-3a-108. Further, that Section in turn requires compliance with Utah Code 73-3-8; the Application also fails to meet those requirements. As an export application, which allows Utah water to be used in another state, this Application creates complications because Utah and Colorado are parties to both the Colorado River Compact (CR Compact) and the Upper Colorado River Compact ("Upper Basin Compact" or UB Compact). The CR Compact apportions Colorado River water between the Upper and Lower Colorado River basins while the Upper Basin Compact governs relations between Upper Basin states (such as Utah and Colorado) in allocating the Upper Basin share of the River and in meeting delivery requirements to Lower Basin states.

First, the Board and Division points out how this appropriation application is very unusual. It requests a huge amount of water – 76 cfs or 55,000 acre-feet from Utah's precious water resources, for some unknown use in Colorado. Thus, there is no reason to believe the water would be appropriated to meet a present beneficial use. *See* Utah Code 73-1-3 ("[b]eneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state"); *see also* Utah Code 73-1-1(3) (the legislature governs public water only for beneficial purposes) and Utah Code 73-3a-108(1)(b)(ii) (addressed below). And although the Application states it will withdraw water under Colorado's allocation under the UB Compact, Water Horse Resources (the Applicant) does not explain what authorizations it has from the State of Colorado to ensure the withdrawal is actually allocated to Colorado's portion of UB Compact water rather than Utah's portion. The UB Compact clearly states "The consumptive use of water by the United States of America or any of the agencies, instrumentalities or wards shall be charged as a use by

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the State in which the use is made; provided that such consumptive use incident to the diversion, impounding, or conveyance of water in one State for use in another shall be charged to the latter State.” Article VII of the Upper Colorado River Compact. The Application refers to using part of Colorado’s apportionment under the UB Compact but gives no evidence that the State of Colorado, which holds the apportionment, concurs in or approves this use or withdrawal of Colorado’s portion.

The Green River, below the Point of Diversion, runs entirely inside Utah, where it meets the Colorado River. The Application, if granted, would allow Colorado to benefit from the development, economic opportunities, and public well-being benefits that accrue from water resources at Utah’s expense. The Applicant desires to withdraw Utah water, using a Utah Appropriation and Export Application, as part of Colorado’s share of the Colorado River. Even if the Applicant has or acquires whatever Colorado permits or authorizations would ensure the water taken is not allocated to Utah’s share of the Colorado River, the Application will have huge impacts in Utah. Utah’s allocation of water under the Compact is 1.369 million acre-feet which is already developed or covered by applications to appropriate in Utah. Water under this Application would be withdrawn (albeit in priority) physically above all Utah uses. And if Colorado does authorize this Utah Application as part of its Colorado River allocation, there is at least the question of how this Application would be regulated if the Upper Basin states implement curtailment, a system of allocating shortages if the Upper Basin cannot meet its obligation to Lower Basin states. Even if Colorado authorizes the withdrawal as part of its allocation, there is no assurance in the Application that Colorado agrees to comply with Utah’s priority system in allocating these shortages. For these reasons, the State Engineer has no reason to believe the Application to appropriate water “does not impair” Utah’s ability to comply with interstate compacts under Utah Code 73-3a-108(1)(b)(i)(D). The Application should be rejected on that basis.

Second, the Application should be rejected because it fails to meet Subsections (B) and (C) of 73-3a-108((1)(b)(i) (Export statute), regarding water conservation and public welfare. The Application is not “consistent with Utah’s reasonable water conservation policies or objectives[.]” Utah Code 73-3a-108(1)(b)(B). Because the Application requests uses for Irrigation, Stock-watering, Domestic, Municipal, Mining, Power, and “Other” uses, it provides no assurance that these uses in Colorado, presumably under Colorado conservation policies, would comply with Utah’s conservation policies or objectives. Likewise, there is no evidence that the Application is consistent with the public welfare of Utah residents. Further, these Subsections (B) and (C) must be examined in light of the factors listed in Utah Code 73-3a-108(2). With that lens, it is apparent the supply and water quality of Utah’s water would be impacted on the Green River. Utah’s current and future demands of the Green and Colorado Rivers are

increasing as populations grow in Utah. The Application should be rejected under these two Subsections of the Export statute.

Third, the water cannot “be transported, measured, delivered, and beneficially used in the recipient state.” Utah Code 73-3a-108(1)(b)(ii). Nothing in the vague Application outlines actual beneficial uses in Colorado. No contracts or other types of agreements are provided demonstrating that Colorado can beneficially use the water, or for what beneficial uses it would be employed. The Application should be rejected under this Subsection of the Export statute.

Fourth, where Utah Code 73-3a-108(1)(b)(i)(A) requires the export Application meet the requirements in Utah Code 73-3-8, it does not comply with that separate section. The Application fails to meet the following subsections: Subsection 73-3-8(1)(a)(iii)(A) because it is not physically or economically feasible to take water from the Green River in Utah and pipe it over or around the Rocky Mountains for use on the “Front Range Urban Corridor within the state of Colorado”; Subsection 73-3-8(1)(a)(iv) because the applicant, which is a private entity, does not appear to have the backing of Colorado or the end users there, and does not appear to have the financial ability to complete the proposed works to deliver water over or around the Rocky Mountains itself; and Subsection 73-3-8(1)(a)(iv) because the Application was filed for speculative purposes in Colorado and monopolistic purposes for water in the thirsty “Colorado Front Range Corridor.” Further, the Application will impact public recreation and the natural stream environment of the Flaming Gorge Reservoir and the entire Green River under Subsection 73-3-8(1)(b).

The State Engineer should reject the Application because a) it creates issues and complications with the CR and UB Compacts regarding Utah water used in Colorado; b) it fails to meet the criteria in Utah Code 73-3a-108; and c) there is no reason to believe the Application meets the requirements in Utah Code 73-3-8. Rejection is therefore mandated under Utah Code 73-3a-108(3) (“[i]f any application fails to meet any criteria of Subsection (1), it shall be rejected”) and Utah Code 73-3-8(1)(c) (“[i]f an application does not meet the requirements of this section, it shall be rejected”).

Sincerely,

Eric Millis



GARY R. HERBERT
Governor

SPENCER J. COX
Lieutenant Governor

State of Utah

DEPARTMENT OF NATURAL RESOURCES

MICHAEL R. STYLER
Executive Director

Division of Water Resources

ERIC L. MILLIS
Division Director

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TAT \$15.00
18-01583

April 3, 2018

Kent Jones, Utah State Engineer
1594 West North Temple, Suite 220
PO Box 146300
Salt Lake City UT 84114-6300

Re: Protests of Water Right Application A81080 (41-3747) from the Board of Water Resources

Mr. Jones,

A protest regarding Application A81080 (Application) in the name of the Board of Water Resources (Board) was filed with the State Engineer's office on March 30, 2018. That protest was filed prematurely. The Board, with its "Substituted and Amended Protest" dated April 2, 2018, wishes to substitute the March 30th protest with the attached for the State Engineer's consideration. The Substituted and Amended Protest is likewise amended to add the Division of Water Resources (Division) as a protestant. The requisite fee for the Division's protest is provided so both the Board and the Division will be protestants of record on the Application.

The Board and Division understand the prior protest may not be removed from the file but request the State Engineer consider the March 30th protest "withdrawn" and instead review the "Substituted and Amended Protest" from both the Board and the Division.

Please feel free to contact me if you have concerns or questions regarding this action.

Thank you,

Eric L. Millis, P.E.
Director

MD

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Filed on behalf of the Board of Water Resources and the Division of Water Resources.



SUBSTITUTED AND AMENDED PROTEST

April 2, 2018

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Utah Division of Water Resources
c/o Eric Millis, Division Director
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Salt Lake City, UT 84114-6201

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Sincerely,

Eric Millis

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