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

In the Matter of Permanent
Change Application No. a37400
(Water Right No. 09-2349)

| PROTEST and
| HEARING REQUEST
|
| May 24, 2011

Living Rivers hereby submits a timely PROTEST and request for a HEARING, pursuant to Utah Code Ann. §73-3-7, regarding Application for Permanent Change of Water No. a37400 (Application) and filed by the San Juan Spanish Valley Special Service District (SJSVSSD or Applicant) at: 4775 Sunny Acres Lane in Moab, UT 84532, and received by the Salt Lake Office of the Division of Water Rights on April 27, 2011.¹

We assume the intended purpose of the water change application is to provide development opportunities in upper Spanish Valley in San Juan County by providing 5,000 acre-feet (annually) for municipal water use.

The original point of diversion for this water right is the San Juan River in San Juan County, Utah. The point of diversion is proposed to be transferred to three possible and/or combined places, namely: 1) ground-water sources in upper Spanish Valley of San Juan County and in close proximity of Grand County, Utah; 2) the area of Kane Springs in San Juan County; 3) a point of diversion to withdraw water directly from the Colorado River in Grand County.

These proposed ground- and surface water withdrawals are considered part of Utah's entitlement under the Colorado River Compact of 1922 and the Upper Colorado River Basin Compact of 1948.

¹ <http://www.riversimulator.com/Resources/farcountry/Utah/SanJuanCounty/SpanishValleyChangeApplication.pdf>

1. Standing

Living Rivers is a public interest, non-profit organization dedicated to the restoration of Colorado River ecosystems that are presently damaged by excessive diversions and pollution. Living Rivers is located in Moab, Grand County.

Members and staff of Living Rivers are “persons interested” for the purposes of Utah Code Ann. §73-3-7.

2. Utah Code Ann. §73-3-8

The SJSVSSD Application fails to address any of the criteria that the State Engineer must consider when approving a water right appropriation or change application.

For example, Utah Code Ann. §73-3-8 lays out the criteria for the approval of a water right appropriation or change application. Section 73-3-8 states, in pertinent part:

(1) (a) It shall be the duty of the state engineer to approve an application if:

(i) there is un-appropriated water in the proposed source;

(ii) the proposed use will not impair existing rights or interfere with the more beneficial use of the water;

(iii) the proposed plan is physically and economically feasible, unless the application is filed by the United States Bureau of Reclamation, and would not prove detrimental to the public welfare;

(iv) the applicant has the financial ability to complete the proposed works; and

(v) the application was filed in good faith and not for purposes of speculation or monopoly.

(b) (i) If the state engineer, because of information in the state engineer's possession obtained either by the state engineer's 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, stock watering, power or mining development, or manufacturing, or will unreasonably affect public recreation or the natural stream environment, or will prove detrimental to the public welfare, it is the state engineer's duty to withhold approval or rejection of the application until the state engineer has investigated the matter.

(ii) If an application does not meet the requirements of this section, it shall be rejected.

To our present knowledge, there is nothing in the Application to demonstrate that there is un-appropriated water in the proposed source; the proposed use will not impair existing rights nor interfere with more beneficial use of the water; the proposed plan is physically and economically feasible; the applicant has the financial ability to complete the proposed works; the application was filed in good faith and not for the purposes of

speculation of monopoly; the Application will not interfere with more beneficial uses; the Application will not unreasonably affect public recreation or the natural stream environment; and the Application will not prove detrimental to the public welfare.

Normally, when a government regulatory agency has criteria that must be addressed as a basis for agency action, the applicant must submit information responsive to those criteria. If the information is incomplete, the agency does not accept the application until it is, and the agency does not notice the application for public comment, challenges, or hearing requests until an acceptable application has been submitted.

The Division of Water Rights can fail in its duty if it does not require an applicant to provide any information that addresses the criteria in Section 73-3-8(1)(a) or is pertinent to the withdrawal and use of the water for such a large, expensive, and complex project. So, an interested person does not know if the information that the State Engineer might rely on is complete, relevant, and accurate.

In this instance, it appears the State Engineer lacks the required information on which to base any findings responsive to the requirements of Utah Code Ann. §73-3-8.

Therefore the Application must be rejected.

3. Un-appropriated water in the proposed source

Section 73-3-8(1)(a)(i) requires sufficient un-appropriated water for the proposed appropriation or change.

The State Engineer must evaluate the availability of un-appropriated water in the proposed source over the long term. The State Engineer must identify and assess the factors that could impact the availability of an adequate water supply for the proposed use—over the full life of the project. Such factors would include drought, impacts from climate change, icing on the river, use limitations imposed by federal and state agencies authorizing the use of Colorado River Basin water, agreements and compacts affecting the use of Colorado River water, potential blockage, effect of existing and proposed water-control structures, and site and regional hydrological conditions.

Since the Colorado River Compact was negotiated in 1922, the annual yield of the Colorado River has been reduced naturally by over 2 million acre-feet (maf).² Since 1948, when the Upper Colorado River Basin Compact was negotiated, the annual yield of the Colorado River has only averaged 14.5 maf.³ This declining trend is expected to continue beyond the next century as a result of human activities that cumulatively load the atmosphere with greenhouses gases.

² <http://www.riversimulator.org/Resources/Graphs/CoRivFlowVolumeLeesFerryUSGS2005.jpg>

³ <http://www.riversimulator.org/Resources/Graphs/NaturalFlow50yearAverage.pdf>

It is reasonable to assume that a full 10% reduction in the annual stream flow of the Colorado River will occur by the time this proposed project begins construction, and a 20% reduction will likely occur in 50-years.

The Colorado River system cannot function properly with a 10% reduced annual yield of 13.5 maf; especially a 20% reduction to 12 maf, which will render an impossible situation that will assuredly lead to complex legal struggles that will include the State of Utah.⁴

Considering this cumulative impact, it would be appropriate for the State Engineer to fully consider a worst-case scenario occurring within the next 100-years. Specifically, the State Engineer must evaluate how this proposed water withdrawal in a time period of severe water shortages would likely contribute harm toward pre-existing water users in the State of Utah.

For example, the State Engineer should consult with the National Oceanic and Atmospheric Administration (NOAA) in Boulder, Colorado, as a cooperating agency in this regard. These scientists have completed the task of reconciling the various results of general circulation models that were developed to help water managers prepare for the long-term effects of global warming on the water supply of the Colorado River, with the conclusion that a 20% reduction is likely by 2057.⁵

Recent studies by the Bureau of Reclamation in compliance with the SECURE Water Act of 2009 confirm the work of climate change scientists mentioned above.⁶

We also remind the State Engineer that the seven states of the Colorado River basin and the Bureau of Reclamation will soon complete a process of determining a water budget for the Colorado River water supply. The program is called the Colorado River Basin Study.⁷ It would be reasonable for the State Engineer to wait for the outcome of this basin study before granting additional appropriations from the Colorado River, since this study is obligated to consider the impacts of climate change to the annual yield of the Colorado River. The State Engineer should wait for the completion of this study in order to help protect applicants and existing water right holders from future economic burdens based on future water supply uncertainties.

The State Engineer must obtain and consider all relevant data and information related to all aspects of the planned life of the project and the amount of time before the water will actually be put to use. This is also necessary if the Application is approved, because

⁴ <http://www.riversimulator.org/Resources/Graphs/UpperBasinPercentageWith20PercentReductionClimateChange.jpg>

⁵ <http://www.riversimulator.org/Resources/ClimateDocs/Rajagopalan2009.pdf>

⁶ <http://www.riversimulator.org/Resources/USBR/SECUREWaterReport.pdf>

⁷ <http://www.usbr.gov/lc/region/programs/crbstudy.html>

any approval decision must state "the time within which the construction work must be completed and the water applied to beneficial use." See Utah Code Ann. § 73-3-10(5). This date must be realistic.

4. Impairment of existing rights or interference with the more beneficial use of the water

Section 73-3-8(1)(a)(ii) requires that the proposed use will not impair existing rights or interfere with the more beneficial use of the water.

As discussed above, the proposed withdrawal has the potential to impair all of the existing water uses and water rights in the event of a severe drought.

The appropriation of water could adversely impact existing uses and rights. The proposed project would interfere with other recreational, agricultural, and municipal uses of the water. It would adversely impact the native fish and other wildlife habitats, including the habitat of endangered fish species that are unique to the Colorado River Basin: Colorado pikeminnow, razorback sucker, bonytail chub, and humpback chub.

The proposed withdrawal use has the potential to impact the Upper Colorado River Endangered Fish Recovery Program. The State Engineer must consult with the participants in the Upper Colorado River Endangered Fish Recovery Program and state and federal agencies that have responsibilities for the health and well being of the Colorado River Basin and the wildlife that depends on it.

Intake structures kill fish and aquatic organisms. The withdrawal of the water lowers the water level, which could impact spawning areas and fish habitat, particularly during low flow conditions.

5. Physical feasibility

Section 73-3-8(1)(a)(iii) requires that "the proposed plan is physically . . . feasible."

The SJSVSSD has not presented any technical information about the specific design of the amount of water is sufficient for the proposed project. Information must be available about the expected (and maximum) design rate of removal of water from the Colorado River to replace water losses from circulating water systems.

It is assumed the Application would divert water from the Colorado River for storage in a reservoir. It is not known if there is a suitable site for a storage reservoir or if the capacity of the reservoir is sufficient for the multiple water demands of the proposed project. This technical information must be provided to the State Engineer.

SJSVSSD has not purchased proposed suitable sites for an intake structure, reservoir, and treatment plants; it may not have an option to purchase such sites, and little is known about the numerous site aspects relevant to the project; for example, hydrology,

geology and seismic conditions, local meteorology, flood potential, emergency planning, ecological systems and biota, water availability, and other requirements.

The feasibility of the use of Colorado River water, based on intakes, pipelines, settling ponds, reservoir storage and the like are all important factors affecting the feasibility of the total project. The Application does not contain any information about these kinds of problems and required mitigation strategies.

The State Engineer must have this information in order to evaluate the feasibility of the project. A pipeline would be required to transfer the water from the Colorado River to the proposed reservoir—across land that has private and government ownership. Easements must be secured for such water works and none of this information is provided for the State Engineer to properly assess the application.

6. Flooding Potential

Until annual, 100-year, and paleoflood information has been made available and thoroughly reviewed by the State Engineer, the Application should not be approved.

7. Radionuclides

Until the pollution impacts from the remediation of the uranium mill site along the Colorado River near Moab has been made available and thoroughly reviewed by the State Engineer, the Application should not be approved.

8. Financial ability to complete proposed works

Section 73-3-8(1)(a)(iv) requires a finding that "the applicant has the financial ability to complete the proposed work." There is no information in the Application regarding the entity that will complete the proposed work and make use of the water.

There is no information in the Application or that is available to the public elsewhere that demonstrates that SJSVSSD is financially able to purchase the site, pay for the water, and develop the project. The State Engineer must require documentation that SJSVSSD has the financial resources to complete the proposed water works. 8.3. Utah Code Ann. § 73-3-11 addresses the question of the financial ability of the applicants. Section 73-2-11 states:

73-3-11. Statement of financial ability of applicants.

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. If the applicant is not a corporation, he may require a showing as to the names of the persons proposing to make the appropriation and a showing of facts necessary to enable him to determine whether or not they are qualified appropriators and have the financial ability to carry out the proposed work, and whether or not the application has been made in good faith.

9. Speculation

Section 73-3-8(1)(a)(v) requires a finding that "the application was filed in good faith and not for purposes of speculation." At this time there is no information that demonstrates that SJSVSSD has provided such information.

Section 73-3-11 also addresses the question of good faith and should be considered.

The State Engineer should request the necessary data and information to enable him to determine whether or not the SJSVSSD is operating in good faith and in not appropriating the water for purposes of speculation.

10. Effect on public recreation

The Colorado River is used extensively for commercial and non-commercial recreation. Recreation on land and water is an important part of the economies of Grand County. For example, water intake structures in the Colorado River could create a boating hazard. Since there is no information in the Application about the effects on public recreation, the State Engineer must seek and consider information about the potential impacts of this project to public recreation.

11. Effect on natural stream environment

The State Engineer must identify and evaluate the impacts of the withdrawal of water over the lifetime of the project. For example, the State Engineer must consider the impacts of the intake structures and the withdrawal of water during a drought and flooding situations. The State Engineer must consider the impacts to the biota in the river, birds and other wildlife, endangered species, the deposition of sand and sediments, and other aspects of the natural stream environment.

12. Supplement to protest

Protestors reserve the right to supplement this protest in writing or at the hearing as additional information becomes available.

13. Conclusion

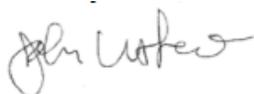
Based on the information that is currently available in the Application, the

State Engineer must reject the Application, because the Application does not meet the requirements of Utah Code Ann. 73-3-8.

The State Engineer must obtain all of the necessary information that would enable him to fully address all of approval criteria set forth in Utah Code Ann. §§ 73-3- 8(1), 73-3-8 (2), and 73-3-11.

The State Engineer must make that information available to protestors in a timely manner so that protestors will have an opportunity to review and respond to the new information that is submitted.

Respectfully submitted, this 24th day of May, 2011.



John Weisheit
Living Rivers Conservation Director
Colorado Riverkeeper

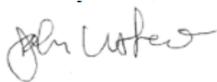
Attachment: Check #174 dated 5/24/11 for \$15.00 for the filing fee of this protest.

CERTIFICATE OF MAILING

I hereby certify that I sent an electronic copy and mailed, First Class, a copy of this Protest and Request for Hearing regarding Change Application No. a37400 and with the required fee to:

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

Dated May 24, 2011



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Conservation Director
Living Rivers

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174
97-7728/3243

5/24/11 Date

Pay to the Order of UTAH DIVISION OF WATER RIGHTS
FIFTEEN DOLLARS 15.00

GRAND COUNTY CREDIT UNION
P.O. BOX 1047
25 NORTH MAIN
MOAB, UT 84532

Dollars Security Features: See Back

For PROTEST FILING FEE John W. Hines

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