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PROTEST FEE PAID
19-043333
15.00

October 1, 2019

HEARING REQUESTED
Mr. Kent L. Jones, P.E.
State Engineer
Utah Division of Water Rights
1594 West North Temple, Suite 220
P. O. Box 146300
Salt Lake City, UT 84114

Re: Application for Permanent Change of Use 85-39 (a45058) filed by Kanab City Corporation

Dear Mr. Jones:

We represent the Taxpayer Association of Kane County ("Protestant"). Pursuant to Utah Code Ann. § 73-3-7 we submit this protest to Change Application Water Right No. 85-39 (a45058) ("Change Application") filed by Kanab City Corporation ("Applicant"). Protestant is a citizens group organized to protect taxpayer interests of Kane County.

The State Engineer must reject the Change Application because it fails to meet the approval criteria of Utah Code Ann. § 73-3-8. If approved, the Change Application will impair existing prior rights, interfere with more beneficial municipal uses, authorize SRS to hold water for speculative purposes and will be detrimental to the public welfare.

Moreover, Applicant's Water Service Agreement ("Agreement") with Southern Red Sands ("SRS") violates Article XI §6 of the Constitution of Utah and Utah Code Ann. §10-8-14. The City does not have 600 acre-feet ("AF") of water designated as "surplus product "under the Applicant's 40-year plan. In contrast, the Applicant has already dedicated this water to be a key asset needed to meet anticipated growth. As such, this water is not surplus, the Applicant does not have the legal ability to make this water available to SRS, and the Agreement is constitutionally void and unenforceable. For these reasons, the State Engineer must reject the Change Application.

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STANDING TO PROTEST

The Protestant has interests affected by the Change Application and has standing to bring this protest. Protestant is a citizens group organized to protect taxpayer interests of Kane County. The Applicant's management and stewardship of its water resources is a vital interest to the tax payers of Kane County. As such the Protestant is an interested party eligible to participate in the proceeding.

KEY CONTEXT AND BACKGROUND

The Applicant is a municipal corporation governed by the laws of Utah, more specifically Utah Code Title 10. Like most Southern Utah locations, the City has an arid climate with limited water supply. The Applicant's 40-year plan anticipates a 3.25% growth rate over the next 40 years. The population is expected to climb from 5000 people to almost 50,000 people. Moreover, the local economy is anticipated to shift away from traditional agriculture and more towards a recreation and service economy. Water will be needed to accommodate new and different societal needs. Outside its impacts to water, SRS's project threatens to bring air pollution from fugitive dust and increased truck traffic that will degrade the otherwise largely pristine area.

After public hearing and comment, in July 29, 2019 Applicant's City Council voted to enter into the Agreement to provide SRS a supply of up to 600 AF of water annually to be used for frac sand extraction at a proposed new mining operation several miles away from the City. The Applicant has no infrastructure, such as distribution pipes, and no physical ability to provide water service to SRS.

The Applicant intends to provide this water to SRS by modifying Water Right No. 85-39 through the Change Application. Water Right No. 85-39 has a 1965 priority date, which is a junior priority water right in this drainage. Water Right No. 85-39 is a supplemental right and although not presently in general use, the City is holding this water for the reasonable future needs of the Applicant's citizens.

The Change Application seeks to change the point of diversion from a municipal well north of the City to several new wells to be drilled approximately 5-6 miles away on a high plateau. The new points of diversion are located to the north and west of the City, at a significantly higher elevation. As the Agreement acknowledges, the SRS wells will develop water from the same aquifer that supplies the City's various municipal wells, and because it will capture that water upgradient from the City's wells, the probability of interference with the City's well is high, and that would adversely impact the citizens of Applicant that are dependent upon the Applicant for their culinary water service.

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THE CHANGE APPLICATION FAILS TO SATISFY UTAH CODE ANN. § 73-3-8 AND MUST BE DENIED

The Change Application must be rejected because it fails to meet the criteria for approval under Utah Code Ann. § 73-3-8. The Change Application fails on the following grounds:

1. The Applicant Has Not Proven There is Unappropriated Water at the Proposed Points of Diversion to Support the Diversion of 600 Ac-Ft Annually.

Under Utah Code Ann. 73-3-8(1)(a)(i) a change of use may only be approved if there is demonstrated unappropriated water at the proposed source of supply that can be used without interfering with the water rights of others. As noted by the State Engineer in his Memorandum Decision of 23 April 2004, 85-8 (a28068), the Kanab Creek basin has been closed to new appropriations for now more than 55 years. The Applicant has provided no information to demonstrate the availability of 600 AF of water at the proposed points of diversion. In the absence of such proof, the Change Application must be rejected, as the State Engineer does not have a reason to believe there is unappropriated water available to support this change of use. Additional information is needed from the Applicant to confirm the availability of unappropriated physical water at the proposed new points-of-diversion.

2. The Change Application Will Impair Protestant's Water Rights and Impairment Cannot be Mitigated.

Utah Code Ann. 73-3-8(1)(a)(ii) provides that a change application cannot be approved if it impairs existing rights. The Change Application seeks to move the point of diversion to the west and to a higher elevation. The groundwater supply in this very dry region of the State is very limited and often hydrologically connected to surface water. The proposed wells will intercept local ground water and prevent water from contributing to Kanab Creek by impacting flows and recharge to Kanab Creek. The Applicant has other ground water rights in the Kanab Creek drainage that develop water from the same aquifer targeted by the SRS well, and interference with the City's own water rights is likely to occur.

Approving this Change Application and allowing the diversion of up to 600 AF of water, assuming this volume of water can be developed at this location, will inevitably impact and impair existing wells and surface water rights down gradient. The likelihood of quantity impairment is very high. The ability of the Applicant to mitigate this interference by replacing water seems impossible based upon the Applicant's projected water shortage and statements of the need to buy more water to meet projected demand.

3. The Change Application Interferes with More Beneficial Municipal Uses.

Utah Code Ann. § 73-3-8(1)(a)(ii) provides that change application cannot be approved if it interferes with a more beneficial use. Presently, the Applicant's 40-year plan includes Water Right 85-39 as a necessary part of its municipal supply for future domestic and related purposes.

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The Change Application requests removing 600 AF of water from municipal use and apply it to a fully consumptive industrial use. The SRS Agreement is a 50-year term with no right conferred to the Applicant to terminate the Agreement to meet its future water demands.

The Applicant's 40-year plan shows a future shortfall. This calculation predates and does not contemplate removing 600 AF to support SRS. Accordingly, the Applicant will most likely experience a shortage before this Change Application and the term of the Agreement expire. Accordingly, approving the Change Application will be taking away water critically needed to meet the needs of the Applicant's inhabitants. To meet this unfilled demand, Applicant will have to acquire additional water from other sources at a great expense to taxpayers.

Moreover, based on changing economic and growth patterns, the Applicant will receive the most benefit from its water by using it in City limits and for City purposes. Water can be used for a number of economic drivers, such as new small business, domestic growth and a service and tourism economy. In contrast, the Applicant receives very little relative benefit from using its water to fulfill the Agreement and mine frac sand. For example, SRS is projected to generate only 10-15 jobs.[1] The proposed mine site is well outside the City's boundaries and the City receives no tax revenues from this mining activity. In short, the benefits to the Applicant are small and the approval of this Change Application has the potential to harm the Applicant's ability to serve its own growing population. Accordingly, the Change Application should be denied, as it will provide limited benefit to the City and will interfere with the City's more beneficial use of water in meeting wide and numerous future municipal needs.

4. Applicant Has Not Shown Its Plan is Economically and Financially Feasible or that SRS has the Financial Ability to Complete the Proposed Works and Place this Water to Beneficial Use.

Utah Code Ann. § 73-3-8(1)(a)(iii) requires that the State Engineer must have "reason to believe" that the proposed plan is both economically and financially feasible and that the Applicant has the financial ability to complete the proposed works and place the water to the intended beneficial use.

To date, Applicant has provided no information regarding the finances of SRS, the intended end user of this water, the existence of any contract(s) to purchase the extracted sand for fracing purposes, or the economic capability of SRS to do as it proposes. These critical factors are missing from the Change Application. In the absence of further evidence from the Applicant and/or SRS, the State Engineer cannot have a reason to believe the project is economically and financially feasible and that the Applicant has the financial ability to complete the project and put the 600 AF to use. Accordingly, the State Engineer must reject the Change Application.

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1 SRS has made differing statements regarding the number of jobs created by its operation. Original estimates told to the City were upwards of 50 jobs. The most recent articulation of job numbers from a recent KUER interview with the operation place job numbers much lower at 10-15.

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5. The Change Application is Contrary to the Public Welfare.

As discussed above, there is a more beneficial municipal use of this water. Taking water away from the Applicant's inhabitants for a term of 50 years when the Applicant, by its own 40-year plan, anticipates a water shortage, is clearly detrimental to the public welfare. The cost to taxpayers to fund replacement water to meet growth is contrary to the public welfare, as it makes water more expensive and future availability less secure.

The Change Application is lacking in key data to inform the State Engineer, and the public, of the Applicant's ability to complete the SRS project. Approaching a Change Application under these circumstances would be contrary to the public welfare and set a poor precedent for future Change applications.

Additionally, as discussed below, the Agreement is contrary to the Constitution of Utah and Utah Law and therefore cannot be the subject of a Change Application. Approving the Change Application under these circumstances would be contrary to the public welfare

6. The Change Application is filed for Speculative Purposes.

Utah Code Ann. § 73-3-8(1)(a)(v) requires that the State Engineer not approve a Change Application if it is filed for speculative purposes. The Change Application is filed to support a 50- year industrial operation to produce frac sand, a necessary part of the fracing process in oil and gas wells. The oil and gas industry is an inherently speculative enterprise that rests on a boom and bust cycle. Presently, there may be an uptick in oil and gas production, but future energy demands and energy portfolios may require a lesser reliance on fossil fuels obviating the need for frac sand production. Further, neither Applicant nor SRS has provided any proof that it has contracts in place to sell this sand product, and in the absence of such contracts, this application is purely speculative. *See Western Water v. Olds*, 2008 UT 18, 184 P.3d 578 (Utah 2008).

In contrast, Applicant today knows the nature and quantity of water it needs to meet projected municipal demands and has a stable and real use for the water. The Change Application is dependent on changing, volatile and unknown future conditions. Moreover, the absence of firm contracts to purchase this sand product, shows that the venture is purely speculative and should not be approved as it violates appropriation policy.

THE CHANGE APPLICATION VIOLATES THE UTAH CONSTITUTION AND UTAH LAW AND SHOULD BE DENIED

1. The Agreement is Unconstitutional.

Article XI, Section 6 of the Utah Constitution provides that "[n]o municipal corporations shall directly or indirectly, lease, sell, alien, or dispose of any waterworks, water rights, or

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sources of water supply now, or hereafter to be acquired by any municipal corporation." Instead, this Article and Section mandates that municipalities "shall preserve and maintain those water rights and source of water supply to supply water to its inhabitants and others within its designated water service area."

The Agreement by its terms indicates that the City will, for a term of up to 50 years, provide SRS with up to 600 AF of water. Despite its title, this is not a Water Service Agreement, but is rather a sale for a term of years of 600 AF of water to SRS.[2] The City will not be supplying SRS with any water. Rather, SRS will be drilling, operating and maintaining the well and the City will have no ownership interest in the same. Further, the Agreement provides no mechanism or ability for the City to terminate the Agreement and recall the water for the constitutionally mandated needs of its inhabitants.[3] This is a violation of the Constitution of Utah and therefore, the underlying change contemplated by the illegal agreement must be denied.

2. The Agreement Violates Utah Code Ann. § 10-8-14(2).

Municipalities have a general obligation to maintain and promote the orderly public welfare, including planning for and providing water to its inhabitants. Only under narrow fact dependent circumstances can Utah municipalities provide water to users outside its municipal boundaries. Utah Code Ann. § 10-8-14(2) limits municipalities to only providing water that is a "surplus product … not required by the municipality." The Agreement with SRS asserts that the water at issue is surplus to City needs. The Agreement provides for the annual use of up to 600 AF of water for a non-terminable period of up to 50 years.

However, and as noted above, the Agreement is in direct conflict with the City's 40-Year Plan which projects a future shortage of water. By its own admission, the City does not have "surplus" water or "surplus product" that is in excess of its needs. Consequently, this water is not surplus and cannot be made available to a third party.

The Change Application should be denied because it is in violation of the mandates of Utah Code Ann. § 10-8-14(2).

3. Applicants Must Show a Hydrologic Connection.

The State Engineer's policy for Area 85 requires that change applications proposing a change from surface to underground sources will be critically reviewed to assure hydrologic connection. *See* Policy for Area 85. The instant change is a groundwater to groundwater change. Notwithstanding, the Contract acknowledges that the well(s) to be drilled by SRS are in the same aquifer but up gradient from other City wells and the wells of many other water users. Therefore, in this case the hydrologic connection may meet the State Engineer's policy, but it all but ensures the wells will interfere with other water rights that draw water from the same aquifer, and if interference occurs that cannot be mitigated, the change of use cannot proceed.

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3 Although the agreement with SRS does in Section 1.b. acknowledge that the agreement is subject to §10-8-14.

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CONCLUSION

The Change Application fails to meet the statutory criteria for approval under Utah Code Ann. §73-3-3 and §73-3-8, and the State Engineer must reject the change application.

Protestant requests a hearing on its Protest and reserves the right to supplement its protest.

Very truly yours,

CLYDE SNOW & SESSION P.C.

Steven E. Clyde
Tim Pack
Jonathan Clyde
Emily Lewis

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