

PROTEST

PROTEST FEE PAID

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June 21, 2022

Protestant: Great Basin Water Network Et Al Great Basin Water Network Et Al
PO BOX 75
BAKER, NV 89311

RE: Protest of Water Right Application 71-5774

A hearing is requested.

Please see the attached document.

Great Basin Water Network Et Al Great Basin Water Network Et Al

Enclosure

RECEIVED

JUN 21 2022

WATER RIGHTS

ONLINE

SCANNED

June 14, 2022

Teresa Wilhelmsen, P.E.
Utah State Engineer
Utah Division of Water Rights

RE: Protest to Escalante Valley Partners LLC Application and Claim Number: A83279

INTRODUCTION

The Great Basin Water Network, the Center for Biological Diversity, Living Rivers, Utah Rivers Council, Iron County Water Conservatives, Conserve Southwest Utah, and the National Parks Conservation Association hereby submit a timely protest pursuant to Utah Code Ann. § 73-3-7 in regards to Application and Claim Number A83279 filed by Escalante Valley Partners, LLC on April 25, 2022, to appropriate 50,396 acre-feet of groundwater per year for irrigation purposes. The 115 points of diversion included in the Application are within Area 71 in the Beryl and Enterprise regions, both of which commenced adjudications in 1963 and 1964, respectively, and are now subject to a Groundwater Management Plan, which took effect in December of 2012.

STANDING OF PROTESTANTS

Under Utah Code Ann. § 73-3-7, any person is able to file a protest.

The Great Basin Water Network (GBWN) is a 501(c)(3) non-profit organization that has decades of experience working in the nation's second-driest state, representing a diverse cohort of water advocates concerned with protecting the public welfare — with board members and supporters who earn a living, reside, and recreate in Utah.

The Center for Biological Diversity (CBD) is a 501(c)(3) non-profit environmental organization dedicated to the protection of native species and their habitats in the Western Hemisphere through science, policy, and environmental law. The Center has over 1.7 million members and supporters throughout Utah and the United States, including supporters who live in Washington County, and who utilize public lands and waters for recreation and other uses. The Center's Great Basin program focuses on the protection of wildlife and endangered species, the preservation of public lands, and the sustainability of the Great Basin's groundwater resources.

Utah Rivers Council a 501(c)(3) non-profit, is working to protect Utah's rivers and the ecosystems and communities they support. Founded in 1994, we work to protect Utah's rivers and clean water sources for today's citizens, future generations and healthy, sustainable natural ecosystems. We implement our mission through grassroots organizing, direct advocacy, research, education, community leadership and litigation.

Iron County Water Conservatives represents concerned citizens in Cedar City who advocate for commonsense water pricing, smart water conservation practices and sensible government spending.

Living Rivers is a 501(c)(3) non-profit corporation headquartered in Moab, Utah, dedicated to the preservation, protection, and restoration of rivers and watersheds in the Colorado Plateau. Living Rivers works to insure the long-term health and viability of human, animal and plant species, as well as environmental quality, threatened by mining operations in the region.

The National Parks Conservation Association (NPCA) is a 501(c)(3) non-profit organization that has been protecting and enhancing our National Park System for more than 100 years. NPCA has more than 1.6 million members and supporters throughout Utah and the United States, and NPCA actively works to protect the national parks of southern Utah that are enjoyed by our members and the public.

Conserve Southwest Utah, founded in 2006, is a local 501(c)(3) non-profit coalition of citizens advocating for conservation of the region's natural resources (our public lands, our water, and our air) and cultural resources (the remnants of native and pioneer activity) and for the Smart Growth principles that enable conservation to preserve the 'livability' of the region for the benefit of present and future generations.

REQUEST FOR HEARING

Protestants request a hearing on Application A83279.

THERE IS INSUFFICIENT WATER AVAILABLE FOR APPROPRIATION

The State Engineer should deny the subject Application pursuant to Utah Code Ann. § 73-3-8(1)(a)(i) because there is insufficient water available for appropriation. The Division of Water Rights is explicit in its assessment of the hydrographic area: Area 71 is severely over-appropriated, and as a consequence the Area's Groundwater Management Plan prohibits new appropriations and imposes significant phased in pumping reductions beginning in 2030.¹ Withdrawal of the groundwater proposed in Application A83279 would result in severe additional overdraft and water table decline far in excess of the Area's sustained yield, and as such is prohibited under Utah law.

The stated purpose and intent of the Application is to offset the reductions in pumping imposed by the Beryl Enterprise Groundwater Management Plan, which are designed to rectify severe overdraft in the area. This planned offset would be accomplished simply by drilling deeper wells. However, such a scientifically unsound, short-sighted approach would only exacerbate the Area's already severe overdraft by further drawing down hydrologically-connected deeper groundwater in violation of the Groundwater Management Plan and Utah law.

¹ Utah Division of Water Rights, Area 71-Escalante Valley, <https://www.waterrights.utah.gov/wrinfo/policy/wrareas/area71.asp>.

Despite this obvious problem with its application, the applicant makes no effort at all to justify its claims that more than 50,000 afy of water exists in a heretofore “untapped” aquifer. The applicant’s claims that deeper wells would access an “untapped” source that exists below the fully-appropriated basin is unsupported by evidence. At best, there is too much uncertainty, too little sound data, and too great a risk of unsustainable over-appropriation in the Beryl-Enterprise area and the interbasin flow systems of which it is a part, for further appropriations to be permitted until substantial additional data are gathered and evaluated. Until this additional study has been completed, it would be premature and scientifically and legally unsound to permit any additional appropriation from hydrologically interconnected basins within the carbonate rock province, including the water targeted by this Application.

The applicant must demonstrate that withdrawal of groundwater proposed by its application will not, in fact, result in drawdown from the fully-appropriated Beryl Enterprise area. Absent such a demonstration, the Application likely will result in a double appropriation, impairment of existing rights, and severe additional overdraft causing devastating environmental impacts.

This dearth of information provided by the applicant leaves the State Engineer without sufficient basis to support a finding that would contradict its current assessment that the area is over-appropriated or that pumping deeper water would not further exacerbate such overdraft, and leaves the public wondering about the chemical makeup of the water, the hydraulic nature of flow, and the geologic separation among the subsurface sources. However, the applicant offers no evidence that it proposes to pump from a new source unconnected to that which already is over-appropriated. We would expect a legitimate applicant to demonstrate a number of factors prior to submitting such a request to the Division of Water Rights with data from a sufficient number of test wells to substantiate the claims made with regard to water availability within A83279.

Similarly, a legitimate applicant would provide test well data from wells at a sufficient depth below the surface at locations throughout the basin. There would be test well data to offer water samples highlighting the source’s general chemistry, quality and isotopic nature. We would expect test pumping for an extended period to demonstrate regional responses in groundwater and surface water sources. Lastly, there would need to be sufficient wells drilled for gradient analysis that would determine the difference between the “known” sources and geologic character of the “untapped” aquifer.

In summary, applicants and existing water rights holders expect sound science to guide decision making — especially when considering such large applications for appropriation. There is no such substantiation submitted in support of the Application.

This Application is a harbinger of a developing and disturbing trend in the region. As patterns of aridification take hold, more applicants seem to be seeking water in places where no one else in more than a century’s worth of appropriation have ever found an economic, reliable supply.

THE APPLICATION WOULD IMPAIR EXISTING RIGHTS

The State Engineer should deny the subject Application pursuant to Utah Code Ann. § 73-3-8(1)(a)(ii), because the proposed appropriation and use would impermissibly impair existing senior water rights and interfere with the more beneficial use of water in the subject basin. Specifically, the State Engineer has largely closed the area to new appropriations, because current pumping already greatly exceeds the basin's safe yield. The Applicant's outdated and brazen proposal to simply drill deeper, in an attempt to maintain the status quo, delay inevitable impacts, and likely to make a hefty profit, undermines the State Engineer's scientifically-sound approach and the State Engineer's attempt to limit the basin's pumping to its safe yield with the GMP curtailment schedule.

The proposed appropriation and use will further exceed the safe yield of the subject and hydrologically connected aquifers, resulting in declining groundwater levels and unreasonable degradation of the level and quality of the water in existing wells, or in other words will impermissibly impair existing rights.

Additionally, the aquifer from which this Application proposes to appropriate water likely is the source of water for hydrologically connected aquifers where it already has been appropriated by senior water rights holders, and so the Application likely also would result in impairment to those senior rights.

USGS data showcase considerable transmissivity between Area 71 and Snake/Hamlin Valley, Pine Valley, Milford Valley, Cedar Valley and others.² Indeed, steady-state flow paths showcase what is a delicate balance underground. Beaver County uploaded the Great Basin Carbonate and Alluvial Aquifer System 3.0 model to find insights in regards to the federal environmental review for the Pine Valley Water Supply Project.

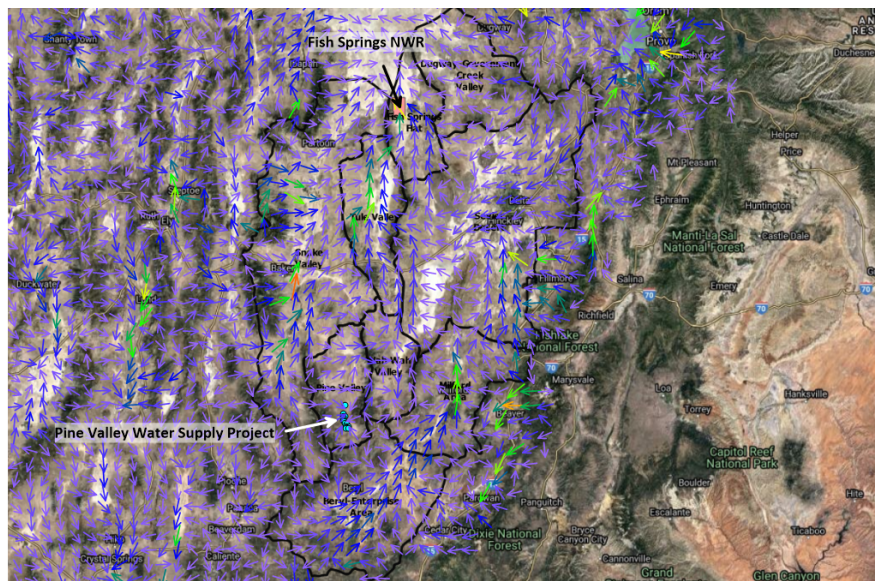


Figure 1: Flow Path Data from GBCAAS 3.0

² Brooks, L.E., 2017, Groundwater model of the Great Basin carbonate and alluvial aquifer system version 3.0: Incorporating revisions in southwestern Utah and east central Nevada: U.S. Geological Survey Scientific Investigations Report 2017-5072, <https://pubs.usgs.gov/sir/2017/5072/sir20175072.pdf> (page 52).

Moreover, the State Engineer must consider the cumulative impacts to senior water rights holders that would result from pumping both the subject applications and the proposed Pine Valley Water Supply Project (PVWSP). Modeling from the USGS on that project, which currently is undergoing a federal environmental review, demonstrates that pumping in Pine and Wah Wah Valleys will impact existing water rights holders in Beryl Enterprise region. Pumping from Pine Valley impacts water rights holders in Beryl Enterprise — an effort that will undermine the GMP as well — while pumping in the Beryl Enterprise Area will impact hydrologically connected Pine and Wah Wah Valleys and basins like Snake Valley and Tule Valley.

THE APPLICATION WOULD CONFLICT WITH EXISTING DECREES

The subject Application would conflict with the determinations in at least three of the five books in the Escalante Valley Division of the Beaver River/Escalante Valley Adjudication filed with the Fifth Judicial District Court. Looking at existing USGS data,³ there is considerable reason to believe that this Application would harm existing rights as determined by the district court, and therefore the Application should be denied by the State Engineer.

THE APPLICATION DOES NOT COMPLY WITH THE BERYL ENTERPRISE GROUNDWATER MANAGEMENT PLAN

In December 2012, the State of Utah used its authority to enact the Beryl Enterprise Groundwater Management Plan (GMP) in Area 71. The GMP prohibits new appropriations and outlines strict management criteria, including a phased-in reduction in pumping designed to limit pumping to the area's safe yield.⁴ The applicant's intended pumping will undermine the purpose of the GMP by shifting current pumping to deeper wells, or in other words, by delaying the impacts caused by pumping in excess of the area's safe yield. Without sound hydrologic data demonstrating that the deeper wells would pump from a hydrologically isolated aquifer, the State Engineer is without evidence to support a finding that the new appropriations will not undermine the intent of recovering to pumping within the area's safe yield. In other words, the State Engineer is without evidence to support a finding that the applicant's proposed pumping will comply with the GMP as required by Utah Code Ann. § 73-3-8(1)(a)(vi).

THE APPLICATION IS SPECULATIVE

The nebulous nature of the Application is a major flaw and does not give the public any certainty about how the waters of the State of Utah will be used if approved. However, the Application essentially implies that the applicant would be the new water lord in Beryl-Enterprise, doling out water to entities that have been curtailed by the GMP. However, the application fails to identify end users and contracts that have been signed in preparation of the application's filing. This Application, therefore, poses considerable questions about how the applicant would manage the beneficial uses. Rather, there is a promise that this application will help make up for what was

³ *Id.*

⁴ *Supra*, Note 1.

lost to the GMP — without any evidence of an actual agreement with those end users for the purchase of that water. Such speculation is prohibited by Utah Code Ann. § 73-3-8, and the Application should be denied as speculative.

THE APPLICANT DOES NOT HAVE THE FINANCIAL ABILITY TO COMPLETE THE PROPOSED WORKS NOR IS THE PROJECT PHYSICALLY OR ECONOMICALLY FEASIBLE

The State Engineer should deny the subject application pursuant to Utah Code Ann. § 73-3-8(1)(a)(iv), because the applicant does not have the financial ability to complete the proposed works. Similarly, the State Engineer should deny the subject Application pursuant to Utah Code Ann. § 73-3-8(1)(a)(iii)(A), because the proposal is not physically or economically feasible.

The applicant must demonstrate that it can construct, maintain, and operate the proposed project in a sustainable way that does not cause severe impacts from groundwater pumping, including impacts on existing water rights and waters in hydrologically connected basins. Importantly, such a demonstration must include a showing that the applicant has the financial ability to carry out a comprehensive monitoring and mitigation plan designed to offset impacts of its pumping, which program likely would be astronomically expensive.

THE APPLICATION WOULD BE DETRIMENTAL TO THE PUBLIC WELFARE

The State Engineer should deny the subject application pursuant to Utah Code Ann. § 73-3-8(1)(a)(iii)(B), because the Application would prove detrimental to the public welfare, because it would threaten to cause serious environmental harms in the subject basin and in hydrologically connected downgradient basins within the same interbasin flow system.

The proposed appropriation and use would result in severely lowered groundwater levels in the subject aquifer and in hydrologically connected downgradient basins within the same interbasin flow system. Those declining groundwater levels will result in drying out springs, seeps, wetlands, wet meadows, and moist playas, and in killing off vegetation that is groundwater-dependent. This loss of water will cause significant direct harm to many wildlife species and to wildlife habitat.

Additionally, public welfare considerations must consider what would happen to the human communities that depend on water that feeds into Beryl-Enterprise. The effects of groundwater mining on vegetation, air quality and businesses must be considered by the State Engineer. Furthermore, this application poses serious questions about the Indian Peaks Band of the Paiute Tribe of Utah's water rights that are held in trust by the federal government in Pine Valley. Considering Pine Valley's connectivity with Beryl-Enterprise, this application poses a threat of significant drawdown and warrants the State Engineer's denial in order to ensure that the federal government does not flout its tribal trust obligations any more than it already has in Pine Valley. Next, the state engineer must consider water rights holders in Milford, Hamlin, Snake, Pine and numerous other valleys in the region. This application has the potential to cause significant drawdown in those basins and others.

This is a premature application filed on a lark by entities looking to get water any way they can without regard for the law.

Degradation of Air Quality:

The proposed appropriation and use would result in severely lowered groundwater levels in the subject aquifer and in hydrologically connected downgradient basins within the same interbasin flow system. Those declining groundwater levels will result in drying out springs, seeps, wetlands, wet meadows, and moist playas, and in killing off vegetation that is groundwater-dependent. This pervasive desiccation, in turn, will make these previously moist and/or vegetated areas dramatically more susceptible to greatly increased mobilization of sediment, or dust. In other words, just as in Owens Valley, the desiccation of these areas will result in much more frequent and severe dust storms. These dust storms likely will have serious harmful impacts on human and animal health in those basins and in additional downwind communities. In addition to causing severe respiratory problems, the particulate matter that will be mobilized in dust storms in these areas is likely to contain radioactive fallout that heretofore has been held in place by the groundwater-fed moisture in the soil and vegetation. These dust storms also will dramatically degrade the aesthetic and recreational value of the basins in which they occur and additional downwind areas.

Degradation of Water Quality:

The groundwater drawdown that would be caused by the appropriation proposed in this application would lower the static water table in both the basin fill and carbonate rock aquifers within the affected basins to such an extent that brackish groundwater and/or other pollutants could infiltrate those aquifers. The consequence of this infiltration of poor quality groundwater and other pollutants would be significant degradation of groundwater quality. This degradation of groundwater quality would prevent humans, livestock, and wildlife from relying on the groundwater from these aquifers, as they have throughout history.

Degradation of Cultural Resources:

The environmental harms described above also will lead to the pronounced degradation, and in some instances destruction, of cultural resources in the subject basin and in hydrologically connected basins within the same interbasin flow system. Cultural resources likely to be harmed by the appropriation and export of water proposed under this application include but are not limited to Native American ritual worship and other sacred sites, prehistoric Native American village or dwelling sites, Native American graves or burial sites, Native American petroglyph sites, and scenes of historic massacres of Native Americans. These and other cultural resources that would be damaged if this Application is approved constitute an important part of Utah's, and the Nation's, historical and cultural legacy.

Degradation to Great Basin National Park:

The known, scientifically accepted groundwater in Area 71 flows from Hamlin/Snake Valley. A 2017 report from USGS⁵ highlights the transmissivity of the region. Pumping in an already over-appropriated basin will likely exacerbate a cone of depression and impact basins outside of Area 71, especially when considered in conjunction with proposed pumping by the PVWSP. The transmissivity between Hamlin/Snake and Beryl-Enterprise signal likely impacts.

Degradation to Fish Springs National Wildlife Refuge:

By its very hydraulic nature, the scientifically accepted flow paths of the regional groundwater systems indicate that a cone of depression from groundwater mining in Area 71 will inevitably impact flows all the way to Fish Springs National Wildlife Refuge, especially when considered in conjunction with proposed pumping by the PVWSP.

PROTESTANTS RESERVE THE RIGHT TO AMEND THIS PROTEST AS MAY BE WARRANTED BY FUTURE DEVELOPMENTS

The pumping anticipated by the applicant's proposed groundwater development project would withdraw groundwater from an aquifer which has not been the subject of sufficient scientific study. Thus, it is not possible to anticipate all potential adverse impacts without further study. New scientific or other data and changed circumstances may uncover different bases for this protest. Accordingly, Protestants reserve the right to amend the subject protest to include such issues as they develop.

INCORPORATION OF OTHER PROTESTS TO SUBJECT APPLICATION BY REFERENCE

Protestants additionally incorporate by reference, as though fully set forth herein, and adopt as their own, each and every reason or ground for other protests to this application filed pursuant to Utah Code Ann. § 73-3-7.

CONCLUSION

We appreciate the opportunity to protest Application A83279 and urge the State Engineer to deny the same.

Please ensure that the below representatives of the signatories to this protest are included on all communications moving forward which relate to this application.

Sincerely,

Kyle Roerink
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⁵ *Supra*, Note 2.

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