

ClydeSnow

ATTORNEYS AT LAW

CLYDE SNOW & SESSIONS

A PROFESSIONAL CORPORATION

201 SOUTH MAIN STREET, SUITE 2200
SALT LAKE CITY, UT 84111-2216

PHONE/FAX 801.322.2516
CLYDESNOW.COM

May 21, 2024

Sent Via Email

Utah Division of Water Rights
Teresa Wilhelmsen, State Engineer
1594 West North Temple, Suite 220
P.O. Box 146300
Salt Lake City, UT 84114-6300
teresawilhelmsen@utah.gov

Re: Request for Reconsideration on Approval of Application to Appropriate Water Right No. 92-695 (A83862)

Dear State Engineer,

Pursuant to Utah Code Ann. §§ 63G-4-302 and Utah Admin Code R655-6-17, this Request for Reconsideration asks the State Engineer to reconsider the approval of Blackstone Minerals NV, LLC's ("Applicant") Application to Appropriate Water Right No. 92-695 ("Application"). This Application was approved by a State Engineer Order dated May 1, 2024. This request is submitted within the 20-day period for reconsideration as prescribed by the law.

Gayna Salinas owns Water Right No. 92-156. The recognized Place of Use of this Water Right is adjacent to the Application's Points of Diversion ("POD"), Places of Use ("POU"), and Points of Return ("POR"). Salina's Water Right may experience impairment resulting from the State Engineer's approval of the Application. Jeff and Trigg Gerber own Water Right No. 92-639, located downstream of the Application. The Gerber's Water Right may experience impairment resulting from the approval of the Application. Non-impairment of existing rights is a threshold condition required for the approval of an application to appropriate under Utah Code Ann. 73-3-8. Salinas and Gerbers are members of Living Rivers and Great Basin Water Network.

Living Rivers and Great Basin Water Network are interested parties pursuant to Utah Code Ann. § 73-3-7. "Section 73-3-7 permits 'any person of interest,' impacted by a proposed application, not just a water user or an owner of vested rights, to protest the granting of an application under title 73."¹ Living Rivers is a public-interest, non-profit organization dedicated to the restoration of Colorado River Basin ecosystems. Living Rivers members engage in recreational, conservation, and citizen science activities within the Colorado River Basin. Great Basin Water Network is a 501(c)3 organization with staff, board

¹ *Bonham v. Morgan*, 788 P.2d 497, 502 (1989).

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members, and members who rely on the Green and Colorado Rivers for their economic and recreational opportunities and interests.

The Protestants timely filed Protests to the Application pursuant to Utah Code Ann. § 73-3-7 on September 26, 2023 (Gayna Salinas), November 01, 2023 (Living Rivers and Great Basin Water Network), and November 28, 2023 (Jeff and Trigg Gerber).² On November 14, 2023, the Protestants participated in a telephonic hearing on the Application. At this hearing, the Protestants expressed concern that approving the Application would impair the Protestants' senior Water Rights. On May 1, 2024, the State Engineer issued a State Engineer's Order approving the Application.

Together, Gayna Salinas, Jeff and Trigg Gerber, Living Rivers, and Great Basin Water Network ("Protestants") submit this Request for Reconsideration regarding the Application's approval. This Request for Reconsideration incorporates the Protestants' prior protests. This Request asserts that the Applicant has not met its burden of showing there is a reason to believe the Application meets the criteria for approval under Utah law because:

1. The Applicant does not satisfy the reason to believe the standard as the Application fails to demonstrate that senior water rights will not be impaired as required by Utah Code Ann. § 73-3-8.
2. The Applicant has not filed with the State Engineer a copy of a contract for the payment of royalties to the state and a mineral lease as required by Utah Code Ann. § 73-3-8(3).
3. The State Engineer should reassess the Application to determine whether the proposed works constitute a non-consumptive use of water as required for approval by Area 92 Policy.
4. The State Engineer shall either reject or hold approval of the Application under Utah Code Ann. § 73-3-8(1)(b) to allow for additional investigation as the Application raises novel questions of public concern and is not ripe for the State Engineer to make an informed finding that the Application is not detrimental to the public welfare.

For these reasons, as more specifically described below, the Application does not meet the requirements for the appropriation of a water right and the State Engineer should deny the Application.

ARGUMENT

1. The Application failed to demonstrate that senior water rights will not be impaired as required by Utah Code Ann. § 73-3-8.

The reason to believe standard functions as the determinative question in reviewing whether a new appropriation will impair or interfere with existing senior water rights. Under this standard, the Applicant bears the burden of persuasion to show that the Applicant can satisfy the statutory requirements of Utah Code Ann. § 73-3-8. The State Engineer shall reject an application where evidence produced by a protestant undermines the reasonableness of the Applicant's assertion that the Appropriation will not

² The Application was originally noticed on September 6, 2023, in a newspaper of general circulation for Emery County, Utah. However, the Application impacts both Emery and Grand Counties. Because notice was not provided to Grand County, the protest period was held open through January 3, 2024. For this reason, Protestants' filings were timely and not "late," as originally identified in the Water Right's file.

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MAY 21 2024
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impair vested rights or where the Applicant is otherwise unable to meet their burden of persuasion.³ Protestants may defeat this standard by providing direct or circumstantial evidence.⁴

On March 8, 2024, a temporary well owned by the Applicant at their site located at 1600 South 1015 East, Green River, UT, encountered high pressures while breaching an aquifer at 1500'.⁵ Due to the high pressures, the temporary well spilled 10,000 barrels of produced water. This well is in close proximity to the current Application under review and is intended to tap the same source, be of the same depth, and for the same beneficial use as the current Application. Save for the much greater quantity of water requested and the permanence of the request, this temporary well under Water Right 92-698 is, in essence, an exact and adjacent predecessor of this Application.

The spill of produced water from the Applicant's temporary well is circumstantial evidence that nearby rights may experience impairment due to this Application. Statute identifies impairments as impacts to quantity and changes in the timing and availability of water.⁶ The Applicant's unplanned spill of produced water provides significant circumstantial evidence that nearby existing water rights may be impaired should this Application be approved. Further, the spill threatens to contaminate neighboring freshwater sources relied on for domestic and irrigation purposes.

Together, this evidence substantially undermines the Applicant's ability to satisfy the reason-to-believe standard and suggests that the State Engineer should either modify the Appropriation to protect existing water uses, delay acting on the Application until other state permitting bodies with jurisdiction have had the opportunity to impose contamination and safety requirements or deny the Application.

2. The Applicant has not filed with the State Engineer a copy of a contract for the payment of royalties to the state and a mineral lease as required by Utah Code Ann. § 73-3-8(3).

a. A hydrological connection between the Appropriation source and the Green River requires that a royalty contract and mineral lease exist before the State Engineer can approve the Application.

State Code requires that "Before the approval of any application to divert water from navigable lakes or streams of the state that contemplates the recovery of salts and other minerals or elements. . . the applicant shall file with the state engineer a copy of (i) a contract for the payment of royalties to the state; and (ii) any mineral lease."⁷

The Green River is a navigable stream of the state, and its banks and beds constitute sovereign lands.⁸ The stated beneficial use of the Application is Lithium Extraction. The Bureau of Land Management and Bureau of Reclamation argued that the brine water that will act as the source of this Appropriation is hydrologically connected to the Green River. A hydrological connection between the Green River, a navigable stream of the state, and the lithium brine to be mined by the Applicant would trigger statutory requirements that a contract for payment of royalties and a mineral lease must exist

³ *Searle v. Milburn Irrigation Company*, 2006 UT 16, ¶¶ 49, 57 (emphasis added).

⁴ *Searle v. Milburn Irrigation Company*, 2006 UT 16, ¶ 56.

⁵ The Times-Independent, "[Lithium Well "Blowout" Didn't Breach the Green River, State Says.](#)" March 13, 2024.

⁶ Utah Code Ann. § 73-3-3.

⁷ Utah Code Ann. § 73-3-8(3).

⁸ See [Final Green and Colorado Rivers Mineral Leasing Plan and Record of Decision](#). SWCA Environmental Consultants prepared for Utah Department of Natural Resources, Division of Forestry, Fire, & State Lands (January 2020).

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MAY 21 2024
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WATER RIGHTS
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before the State Engineer can approve the diversion. As no such contract and lease exist, approval of the Application is premature.

b. The Applicant's requested beneficial use of "Lithium Extraction" requires the Applicant to satisfy the requirements of Utah Code Ann. § 73-3-8(3).

In the alternative and in addition to a finding that there is a hydrological connection between the brine water/source water and the Green River and therefore requiring the application to meet the requirements of Utah Code Ann. § 73-3-8(3), the inherent features of "Lithium Extraction" as a requested beneficial use necessitate the Applicant satisfy the requirements of Utah Code Ann. § 73-3-8(3).

Under state law, water can only be appropriated where it will be placed to beneficial use, as "beneficial use shall be the basis the measure and the limit of all rights to the use of water in this state."⁹

- i. The Applicant has not demonstrated it has the right to extract and control lithium and, therefore, cannot establish a beneficial use of "Lithium Extraction."

In reviewing applications to appropriate for mineral mining, the Utah Supreme Court has held no beneficial use is available until the applicant has acquired the rights to extract the mineral, "the appellant is in no position, until it acquires rights to the salt therein, to place the water to a beneficial use as its sole purpose for its attempted appropriation is to extract salt from the water. If it cannot place the water to a beneficial use it cannot appropriate the water because beneficial use is the only basis upon which water can be appropriated in this state."¹⁰ In essence, if the beneficial use cannot be achieved, the Application must be denied because beneficial use is the basis, measure, and limit of a water right.

Here, the Applicant's stated beneficial use is Lithium Extraction. The Applicant has shown no lease or authority to extract the lithium from the deep brine water it seeks to appropriate. If the Applicant cannot achieve its desired use because it does not have the rights or contracts in place to extract and own/control the lithium, then no beneficial use is available, and the Application cannot be approved.

- ii. The Applicant's stated use of freshwater as part of its "Lithium Extraction" process necessitates satisfying the Utah Code Ann. § 73-3-8(3) criteria.

The Applicant's materials suggest that their lithium extraction process will require freshwater to complete the process. The Applicant's materials state that the Wayne County Water Conservancy District will provide this freshwater. An initial review finds that the only water rights of any substantial size in the area owned by Wayne County Water Conservancy District are Water Right Nos. 95-434, 95-5330, 95-5440, and 95-5441. All have the Green River as their source. The Applicant has recently purchased Water Right Nos. 92-169, 92-40, 92-35, which have their source as the Green River. The beneficial use of 92-169 is irrigation, and the beneficial use of 92-40 and 92-35 is mining.

Given these rights' proximity to the Application's PODs and the lithium operation, the Green River appears to be a likely source for the Applicant's freshwater. The Green River, in the general vicinity of the Applicant's operation, is a navigable body of water governed by Utah Forestry Fire and State Lands under Utah Code Title 17. It appears this water will be co-mingled with the deep brine waters to make the Applicant's lithium extraction process possible.

⁹ Utah Code Ann. § 73-1-3.

¹⁰ *Deseret Livestock Co. v. State*, 110 Utah 239, 244 (1946).

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MAY 21 2024

WATER RIGHTS
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As directed by the Supreme Court's holding in *Deseret Livestock Co.*, the State Engineer cannot separate the mineral component from the water component for an appropriation seeking a water right for mineral extraction. As the Applicant's intended fresh water sources will likely be co-mingled with the lithium-laden brine water, the Application is seeking to "divert water from navigable lakes or streams of the state that contemplates the recovery of salts and other minerals" and needs to have both a royalty contract and mineral lease under Utah Code Ann § 73-3-8(3). As stated above, the Applicant has no contract or lease. Accordingly, the Applicant cannot put the water requested under the Application to beneficial use.

Where the Application's stated beneficial use cannot be achieved today, the Application must fail on its face, or the State Engineer must hold the Application until the Applicant can secure the royalty contract or mineral lease required under Utah Code Ann § 73-3-8(3).

3. The State Engineer should reassess the Application to determine whether it is non-consumptive as required for approval by Area 92 Policy.

Area 92 Policy states that new appropriations for consumptive uses are limited to small amounts not greater than that required to serve one domestic unit, irrigation of one acre, and ten head of livestock. The policy allows non-consumptive uses to be considered based on the individual merits of each application.¹¹ The State Engineer's glossary identifies non-consumptive uses as "water withdrawn for use that is not consumed, e.g., hydropower generation, recreation, instream flow."¹² Non-consumptive use, then, is water that is used without diminishing the available supply.

It is unclear whether the use of the water contemplated under this Application is a "non-consumptive use" fitting within the definition provided by the State Engineer. If the Application is for consumptive uses (outside the limited domestic exception noted above), it does not fit within the requirement of the Area Policy and should be denied for this reason.

The Applicant proposes that the source is deep water brine located at approximately 10,000 feet below the surface. The Applicant intends to extract this water, engage in the scrubbing process, remove the lithium from the brine, and reinject this water at a depth of 6,000 feet. According to the State Engineer's Order and materials provided by the Applicant, there is no danger of contamination in part because the source aquifer located at 10,000 feet and the reinjection aquifer situated at 6,000 feet are wholly independent aquifers with significant distances between them, rendering the two impermeable from one another. This description, and the State Engineer's acceptance of it, demands the question of whether the Application is indeed non-consumptive.

The result of the Appropriation is that the available supply in the source aquifer is clearly depleted, and the available water supply in this aquifer is undoubtedly diminished. The full depletion of water from one closed hydrological system to another fully closed hydrological system (nearly a mile away) constitutes a consumptive use of water similar to how the State Engineer treats trans-basin diversions. The two examples of non-consumptive water rights relied on by the State Engineer's glossary, power generation and instream flows, are both instances where the basis of the non-consumption is the return of the water into the same source of supply. This does not occur under the Application. While the same amount of water taken from the original aquifer may be returned to a different aquifer, the water is depleted from the source. An appropriation that fully depletes the source is not "non-consumptive."

¹¹ Area 92 – Lower Green River Policy Page. <https://waterrights.utah.gov/wrinfo/policy/wrareas/area92.asp>. (visited 5/21/24).

¹² <https://waterrights.utah.gov/water-rights/glossary>.

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MAY 21 2024

WATER RIGHTS
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The current Application does not qualify as “non-consumptive” as the State Engineer defines that term. Similarly, the Application represents a situation similar to a trans-basin diversion. For these reasons, the Application should be considered an application for consumptive uses that contradicts the Area Policy and State Engineer precedent. Accordingly, the Application should be denied.

4. The State Engineer shall either reject or hold approval of the Application under Utah Code Ann. § 73-3-8(1)(b) to allow for additional investigation as the Application raises novel questions of public concern and is not ripe for the State Engineer to make an informed finding that the Application is not detrimental to the public welfare.

Utah Code Ann. § 73-3-8 states that after an investigation, the State Engineer “shall withhold approval or rejection of [an] application” if it finds the application “.... will prove detrimental to the public welfare,... until the state engineer has investigated the matter. [.]” The Utah Supreme Court has confirmed that this statute “expressly provides that the State Engineer shall reject applications under specified conditions[] in the interest of public welfare....”¹³

a. Public Welfare Standards and Precedent.

Utah has little case law or rules further defining the public welfare standard for an Application to Appropriate. Utah’s sister state of Idaho defines “local public interest” as “the interest that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.” Idaho Courts have determined that Idaho public interest intended to include the elements listed in statute: “fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, water quality.” Alaska’s statutes do not define public welfare but require consideration of eight factors, including (1) benefit to the applicant, (2) effect of economic activity stemming from the proposed appropriation, (3) effect on fish and game, as well as recreation, (4) effect on public health, (5) effect of the loss of alternative uses, (6) harm to others, (7) intent and ability to complete the appropriation, finally (8) the effect on access to navigable or public water.

These authorities are helpful when determining how to address the application’s novel nature and potential impact on local policy and Utah’s broader water and mineral policies.

b. The State Engineer is required to hold the approval of the Application so that it can make further investigation to determine it will not prove detrimental to the public welfare: The State Engineer is currently without adequate information or authority to make this determination.

The State Engineer often conditions its approvals on receiving other permits from sister agencies. However, no sister agency is tasked with regulating this discreet issue. This Application is novel and asks the State Engineer to fill a vacuum and endorse/approve a mining activity that it does not have the authority or expertise to allow. Without additional guidance on this topic, the State Engineer cannot make a finding that the Application will not be detrimental to the public welfare because it does not know that and no other rules apply to protect the public welfare.

Lithium mining from deep brines is a new process that is raising new questions. The State has rules regarding mining elements and salts from surface sources under Utah Code Title 65A Chapter 6. However, though the argument presented above applies because of the introduction of fresh water, this

¹³ *Tanner v. Bacon*, 136 P.2d 957, 962 (Utah 1943).

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MAY 21 2024

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chapter does not squarely address mining or mineral leases from deep brines. Utah Admin. Code R647 – Minerals Regulatory program covers non-coal mining resources or mineral extraction, but those rules typically govern surface activity where even small mining operations are not a good fit for governing the extraction of minerals from deep brines.

Utah Admin Code R649 Oil and Gas – governs the extraction of oil and gas and subsurface disruptions like drilling and reinjection of produced projects. While very much applicable to the activities proposed by the Application, those rules only cover activities related to hydrocarbon production. Arguably, lithium extraction from deep brines, while seemingly a very similar process, is unrelated to hydrocarbon production, and these rules would not apply.

Moreover, the Application is traipsing into very murky territory related to the intersection of water rights and mineral production. Just this year, the Utah Legislature passed HB 295, which set out very specific rules for how produced water in the oil and gas industry was to interact with the State's water rights appropriation process. These rules clarified the scope of beneficial use for produced water and the consumptive versus non-consumptive components, reinjection and public safety concerns, and a host of other issues addressing questions that have arisen over decades of oil and gas development.

The purpose of Utah Code Title 65A Chapter 6, Utah Admin. Code R647, Utah Admin Code R649, HB 295, and similar regulatory regimes are to balance public benefit from our resources with public health and welfare. The State should benefit from its resources but do so in a way that protects our environment and people. Currently, there is a vacuum for rules governing lithium extraction from deep brines. None of the discreet protections and regulations attached to other mineral extraction processes apply here. For example, who regulates this? Who receives the royalties? Who is responsible when something goes wrong? Currently, the State Engineer, if approving this Application, is becoming the de facto body approving lithium mining from deep brines in the State of Utah. This is outside and unrelated to the State Engineer's stated mission.

Accordingly, this Application is not ripe for decision because, without more information and guidance under a distinct regulatory scheme addressing the novelties of the proposed process, the State Engineer cannot make a good faith determination that the Application will not be detrimental to the public welfare. Until more laws are built to address this issue, the State Engineer, by approving a water right, should not be the sole body allowing this process to move forward. The State Engineer is neither qualified nor authorized to make this determination independently.

For these reasons, the Application should be denied or held till a future date.

Sincerely,

CLYDE SNOW & SESSIONS



Robert DeBirk



Emily E. Lewis

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Waterrights DNR <waterrights@utah.gov>

Request for Reconsideration on Approval of Application to Appropriate Water Right No. 92-695 (A83862)

1 message

Robert W. DeBirk <RDeBirk@clydesnow.com>

Tue, May 21, 2024 at 8:50 PM

To: "waterrights@utah.gov" <waterrights@utah.gov>

Cc: "kyleroerink@greatbasinwater.org" <kyleroerink@greatbasinwater.org>, John <john@livingrivers.org>, "Emily E. Lewis" <EEL@clydesnow.com>, Gayna Salinas <grredeemed@gmail.com>, "jgerberdesigns@gmail.com" <jgerberdesigns@gmail.com>

Dear State Engineer,

Please find attached the Request for Reconsideration on Approval of Application to Appropriate Water Right No. 92-695 (A83862) on behalf of Protestants Gayna Salinas, Jeff Gerber, Great Basin Water Network, and Living Rivers.

Sincerely,

Robert DeBirk

Emily E. Lewis

201 South Main Street, Suite 2200

Robert W. DeBirk

Salt Lake City, Utah 84111

Associate

801.433.2434

ClydeSnow

rdebirk@clydesnow.com

www.clydesnow.com

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