

IN THE SEVENTH JUDICIAL DISTRICT COURT
WITHIN AND FOR EMERY COUNTY, STATE OF UTAH

<p>HEAL UTAH, a Utah non-profit organization, et.al.,</p> <p style="text-align:center">Plaintiffs,</p> <p>vs.</p> <p>KANE COUNTY WATER CONSERVANCY DISTRICT, a Utah water conservancy district, et.al.,</p> <p style="text-align:center">Defendants.</p>	<p style="text-align:center">MEMORANDUM DECISION</p> <p>Case No. 120700009¹</p>
--	---

This matter came on for bench trial on September 23 through 27, 2013 before the court sitting, by stipulation of the parties, at Price, Utah. Plaintiffs were present and represented by John S. Flitton and Lara A. Swensen. Defendants Blue Castle Holdings, Kane County Water Conservancy District and San Juan County Conservancy District were present and represented by David C. Wright and John H. Mabey, Jr.. The Utah State Engineer, Kent Jones, was represented by Julie I. Valdes. The court, having heard testimony, received exhibits, reviewed the trial briefs of the parties, and considered the arguments of counsel, now rules as follows.

1. Factual Background.

Defendant Blue Castle Holdings (“Blue Castle”) proposes to build a twin reactor nuclear powered electrical generating plant near Green River, Emery County, Utah. In preparation for obtaining federal licensing of the plant, Blue Castle has secured real property and water for the operation of the proposed plant. Transitional Power Development, LLC, Blue Castle’s predecessor in interest, leased

¹ On May 16, 2012, the court signed an Order Consolidating Cases 120700010 (regarding the San Juan Water Conservancy District water rights) and 120700009 (regarding the Kane County Water Conservancy District water rights).

from the Kane County Water Conservancy District (hereinafter “Kane”) 29,600 acre feet of water, the original diversion point of which was from Lake Powell and Wahweap Creek in Southern Utah. The Kane County water right was filed on January 15, 1965 by another party for the development of a coal-powered power plant near Lake Powell with the water being diverted from Lake Powell/Colorado River. The water right was approved on September 3, 1965, but was subordinated to the Central Utah Project water rights and several other applications in the Uinta Basin and the Duchesne River. Over the years the water right was transferred several times and, on November 24, 2003, it was transferred to Kane County.

Transitional Power Development, LLC also leased from the San Juan Water Conservancy District (hereinafter “San Juan”) 24,000 acre feet of water, the diversion point of which is located on the San Juan River in San Juan County, Utah. The San Juan water right at issue is a segregated portion of a water right originally filed on October 14, 1965. The water right was segregated in 1967 and approved, in 1967, for a coal-fired power plant near Mexican Hat, Utah with the diversion at Lee’s Ferry, Arizona. The priority date for the San Juan water right is April 21, 2000, as a result of the reinstatement of an extension to submit proof of beneficial use or an extension of time.

The water represented by both of these leases has previously been approved for use in the operation of steam power generation at coal-fired power plants in Kane and San Juan counties, but because those projects are no longer viable, the two water conservancy districts have leased the water rights to Blue Castle. The Districts filed change applications² filed with the Utah State Engineer to change the points of diversion of the water to a point just south of Green River, Utah near the proposed site of the nuclear plant in Emery County.³ The change application for Kane was filed with the State Engineer on March 30, 2009 and for San Juan on August 27, 2009. Both change applications were supported by Blue Castle, who provided evidence in support of the applications. Blue Castle asserts that the nuclear power plant (hereinafter “the Project”) would consume and deplete the entire 53,600 acre feet of water represented by the two water rights, drawing a maximum of 74 cubic feet of water per second (“cfs”) continuously from the Green River, primarily for cooling the plant. The change

² Kane County filed change application 89-74 (a35402) and San Juan filed change application 09-462 (a35874).

³ The proposed site, according to exhibit 43, is directly to the west of Green River.

applications also seek approval to store 2,000 acre-feet of water in a reservoir located on the Project site. The state engineer, Kent Jones, (“State Engineer”) held an administrative hearing on the change applications on January 12, 2010, and thereafter conducted extensive investigation. In a decision dated January 20, 2012, the State Engineer approved both applications to change the points of diversion and allowed a depletion of up to 75 cfs. On February 28, 2012, the State Engineer denied a Request for Reconsideration which had been filed by opponents of the applications on February 9, 2012. The Plaintiffs filed this appeal on March 27, 2012.

The court notes that the Project, if constructed, would be Utah’s first nuclear power plant. It is a phased project, and if it proceeds, the Project will require an environmental impact assessment prior to the submission of an application for an Early Site Permit to the Nuclear Regulatory Commission, and then a full environmental impact statement prior to the approval of the Early Site Permit. Plaintiffs make the argument that the State Engineer has ceded a decision on Utah water rights to federal agencies by his recognition that these approvals are a reality. No matter what the State Engineer determines, if the environmental impacts cannot be satisfactorily resolved, the project will not be able to utilize the water rights.

2. Legal Standards.

In Utah, water belongs to the public and potential users must apply to the State Engineer for authority to withdraw water from the natural environment. Utah Code §73-1-1(1)-(2). In order to appropriate water, whether it be new a new application or a change to an approved applications’ point of diversion, place of use, or purpose of use, the the State Engineer must apply the criteria mandated by statute. § 73-3-8. All State Engineer administrative actions, unless designated otherwise, are informal proceedings. Utah Admin. Code R655-6-2.

“The legislature created the office of the State Engineer ‘to keep records of all established water rights and those to be acquired in the future, to supervise the distribution of the water, and to keep records of and regulate future appropriations and changes in the place of diversion, use and nature of the use.’ *United States v. District Court, Utah*, 121 Utah 1, 238 P.2d 1132, 1134 (1951); *see also* Utah Code Ann. § 73-2-1 (1989 & Supp.2002) (identifying responsibilities of the State

Engineer). Due to the scarcity of water resources in our state, appropriation of water is tightly controlled and the State Engineer oversees each step in the application and appropriation process.” Green River Canal Co. v. Thayn, 2003 UT 50, 84 P.3d 1134, 1144-45

“A person aggrieved by an order of the state engineer” has the ability to obtain judicial review under the water statutes and the Utah Administrative Procedures Act. §73-3-14. The petitioner requesting judicial review is required to name the state engineer as a respondent. §73-3-14(3). Pursuant to Utah Code § 63G-4-402 (1)(a), this court has jurisdiction “to review by trial de novo all final agency actions resulting from informal adjudicative proceedings.” The court, “without a jury, shall determine all questions of fact and law.” §63G-4-402(3)(a). The court’s review by trial de novo “means a new trial with no deference to the administrative proceedings below.” Archer v. Bd. of State Lands & Forestry, 907 P.2d 1142, 1145 (Utah 1995). The issues before the court in its plenary review are, “however, strictly limited to those which were, or could have been, raised before the State Engineer.” Crafts v. Hansen, 667 P.2d 1068, 1070 (Utah 1983) and Searle v. Milburn Irr. Co., 2006 UT 16, 133 P.3d 382, 391.⁴ The Supreme Court of Utah stated, in Badger v. Brooklyn Canal Co., 922 P.2d 745, 751 (Utah 1996), that:

Although it may be inappropriate to impose the same level of strict waiver analysis that we have applied to issues or objections not raised before a trial court, the failure to make known the nature of one's rights in the course of an administrative proceeding clearly disentitles a party from raising its claim for the first time before a district court on de novo review. S & G Inc., 797 P.2d at 1085.

“[T]he decision of the court on review, except for the formalities of the trial and judgment is of the same nature and for the same purpose [as that of the State Engineer.]” Searle. Accordingly, under §73-3-8 (1)(a), it is the duty of the court to approve applications for permanent changes in the point of diversion,

⁴ Unlike the State Engineer, the court does not have the duty or right to conduct any independent investigation. Rather the court must rely solely on the evidence presented at trial. Contrary to Plaintiffs’ suggestion, the court is not tasked with determining whether the State Engineer conducted an appropriate investigation under §73-3-8 (1)(b) or even whether his actions and orders were correct. The court does not give deference to the State Engineer’s actions or orders. Under a de novo review, the court cannot consider the administrative hearings whatsoever. Neither may the court consider any protests filed before the administrative agency, or any other extrinsic evidence, except to the extent it was raised anew before the court in this trial and raises cognizable issues.

the place of use, or the purpose of use for which the water was originally appropriated, if the court has reason to believe that:

- (i) there is unappropriated 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 ... 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.

The court is required, under §73-3-8 (1)(b), to reject the application if it:

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...

In Searle, quoting Salt Lake City v. Boundary Springs Water Users Ass'n, 2 Utah 2d 141, 270 P. 2d 453, 455 (1954), the court described the procedure as “placing a fairly low burden on a party seeking approval of a change application,” but that it “must provide some meaningful barrier so that the floodgates remain closed to all applications except those with a sufficient probability of successful perfection.” Accordingly, the Court stated that it “must be clear that the decisionmaker's determination that there is reason to believe is grounded in evidence sufficient to make that belief reasonable.” Id. “[P]roducing evidence sufficient to block approval of a change application is no doubt a difficult task for a protestant, illustrating impairment by means not reliant on conjecture or probability would, in many cases, be an impossible task.” Id. at 395.

Although under the Utah Administrative Procedures Act the court may grant certain relief, see §63G-4-404(b)⁵, in cases involving the de novo review of an order of the State Engineer, the court is

⁵ §63G-4-404(b) states:

In granting relief, the court may: (i) order agency action required by law; (ii) order the

limited to “authorizing or denying the applicant the right to proceed with his plan to appropriate the water the same as though it were made by the Engineer without an appeal.” Bullock v. Tracy, 4 Utah 2d 370, 373, 294 P.2d 707, 709 (1956). The court simply “determines whether the application should be approved or rejected and does not fix the rights of the parties beyond the determination of that matter.” Eardley v. Terry, 77 p. 2d 362, 365 (Utah 1938.) The court may also, if it approves the change applications, impose conditions on the use of the water.

When an application is approved, the applicant is permitted a certain period of time within which to develop the proposed diversion and use of water. §73-3-12. If the water is not applied to beneficial use within the statutory timelines, the applicant’s water right lapses. Id. A change of an approved application does not affect the priority of the original application or extend the time period within which the construction of work is to begin or be completed. §73-3-3 (8). In times of water shortage, water rights in Utah are regulated according to the prior appropriation doctrine and “the one first in time shall be first in right.” §73-3-1.

The State Engineer has no authority to finally adjudicate water rights, but “only finds that there is reason to believe that the application may be granted and some water beneficially used thereunder without interfering with the rights of others.” United States v. Dist. Court of Fourth Judicial Dist. in & for Utah Cnty., 238 P.2d 1132, 1137 (1951). An applicant can only proceed absent “injury to [prior] rights if he hopes to perfect a right...Legally, no one can be hurt by the procedure established by the Legislature. At the same time, however, it permits the development of our water resources to the utmost.” Eardley, 77 P.2d at 366-67.

As stipulated by the parties and noted in the Scheduling Order and Trial Setting signed by the court on August 15, 2013, the Districts “have the burden of proof throughout the proceeding on the applications.”

3. Analysis.

The court finds that Blue Castle presented evidence sufficient to establish that there is reason to

agency to exercise its discretion as required by law; (iii) set aside or modify agency action; (iv) enjoin or stay the effective date of agency action; or (v) remand the matter to the agency for further proceedings.

believe that each of the statutory criteria have been met regarding the applications. The court has looked to the plain language of the statute and given effect to that language. See Salt Lake Cnty. v. Holliday Water Co., 2010 UT 45, 234 P.3d 1105, 1111. The court’s “primary goal is to evince the true intent and purpose of the Legislature.” State v. Martinez, 2002 UT 80, ¶ 8, 52 P.3d 1276 (internal quotation marks omitted).

3(a). Is There Unappropriated Water in the Proposed Source?

The proposed source of the water is the main stem of the Green River, which is tributary to the Colorado River. The Green River drainage is a major part of the Colorado River Basin.

3(a)(i). There Exists Unappropriated Water in the Colorado River Basin.

The court first looks at the appropriations on a system-wide basis. Like the State Engineer, the court considers all waters tributary to the Colorado River Basin to be hydrologically connected.

Plaintiffs argue that the State Engineer’s statement that the Upper Colorado River Basin, which includes the Green River, is “over-appropriated on paper”, establishes that there cannot be unappropriated water in the proposed source.

The use of the Green River’s water is regulated by the Colorado River Compact of 1922 and the Upper Colorado River Basin Compact of 1948. Utah Code § 73-12a-1 et seq and §73-13-1 et seq. Under the Upper Colorado River Basin Compact of 1948 (“Upper Compact”), the upper basin states (i.e., Utah, Colorado, Wyoming, New Mexico, and Arizona) are required to provide 75 million acre feet of water in any continuous ten year period, as measured at Lees Ferry, Arizona, to the lower basin states; which equates to 7.5 million acre feet of water per year, plus an additional 750 thousand acre feet per year must be delivered to Mexico. Since 1896, the Upper Basin states have always delivered to the Lower Basin and Mexico the required water.

Under the Upper Compact, the State of Utah is apportioned 23 percent of the remaining water of the Basin, which is calculated at approximately 1.4 million acre feet per year. To date, it is estimated by the State Engineer and Jerry Olds, former State Engineer, that Utah has developed and uses approximately 1 million acre feet per year, leaving approximately 400,000 acre feet per year currently

unappropriated. When the State Engineer approves an application for the appropriation of water, the applicant acquires only the right to develop the use of the water; the approved application is not an actual use or appropriation of water. Accordingly, under Utah law, the *application to appropriate* water, such as the two applications here, is not actual appropriation of water.

The three principal elements to constitute a valid appropriation of water, and, as stated by the court in the case of *Low v. Risor*, 25 Or. 557, 37 Pac. 82, and approved by the same court in the case of the *Nevada Ditch Co. v. Bennett*, 30 Or. 59, 45 Pac. 472, 60 Am. St. Rep. 777, are: “(1) An intent to apply it to some beneficial use; (2) a diversion from the natural channel by means of a ditch, canal, or other structure; and (3) an application of it within a reasonable time to some useful industry.”

...

But we think the filing of a written application with the state engineer, as required by the statute, is but declaring, or the giving of a notice of, an intention to appropriate unappropriated public water. The final step, and the most essential element, to constitute a completed valid appropriation of water, is the application of it to a beneficial purpose. Whatever else is required to be or is done, until the actual application of the water is made for a beneficial purpose, no valid appropriation has been effected. Sowards v. Meagher, 37 Utah 212, 108 P. 1112, 1116 (1910).⁶

At the present time, there is 574,600 acre feet of water in the Upper Colorado River Basin for which the State Engineer has previously approved applications for appropriation, including the Kane and San Juan applications. Because none of this water has been applied to beneficial use, it is unappropriated water under Utah law. If all the water represented by these applications for appropriation were finalized, that is, the water actually put to beneficial use, then Utah’s allocation would, in fact be over appropriated. At this point, however, the water has not been put to, or applied to, some useful industry or to a beneficial purpose. Under Utah law, the Upper Basin is not, in fact, over appropriated.

The court also notes that the United States Bureau of Reclamation estimates that even under a rapid growth scenario, by the year 2060, Utah will only have developed 1.38 million acre feet of the 1.4 million acre feet allotted to it under the Upper Compact. In addition, the underlying water rights

⁶ Although an old case, Sowards is still the law in Utah and is controlling on this issue.

associated with the Kane and San Juan change applications are approved for appropriation and have been accounted for in the approved, but unappropriated water of the Upper Basin.

3(a)(ii). There Exists Unappropriated Water in the Green River.

The Green River has an average volume of 3.9 million acre feet per year, as measured from 1977 to 2007. This is an average base flow of between 1,800 and 3,000 cfs. The flows fluctuate according to the time of year, being higher during spring runoff and times of precipitation, and lower during dry summer months and colder months when the river ices up in areas. The average mean flow at United States Geological Survey Station Number 09315000, near the town of Green River, Utah is 6,048 cfs. Based on historic flows at the Green River station, there has always been sufficient water at the station to accommodate the amount of the diversion requested in the applications.

There are approximately 139 approved water rights on the Green River with points of diversion located between its confluence with the Price River and confluence with the Colorado River, which are approved to divert 125,000 acre-feet of water and deplete 56,500 acre-feet. If all of the existing approved rights were in use, the total depletion from the Green River would be approximately 1.29% of the volume measured at the Green River Station. Most of these depletions occur above the Green River Station. At this time there remains 369,000 acre feet of water on the Green River available for development and to be applied to beneficial use. It has never been necessary to regulate the Green River by priority because there has always existed adequate flows in the Green River to accommodate the existing appropriations. The additional depletion of water from the Green River to support the Project would be 1.22% of the annual mean volume of the River, based on data from the Green River Station gauge. This would result in a maximum expected decrease in the depth of the Green River of less than one and one half inches, and an average decrease in width of the Green River of approximately one foot. The average width of the Green is approximately three hundred and fifty feet.

The court finds reason to believe that there exists adequate unappropriated water in the Upper Colorado River Basin and the Green River to support the Applications.

3(b). Will the Proposed Use Impair Existing Rights or Interfere with the More Beneficial Use of the Water?

3(b)(i). The Proposed Use Will not Impair Existing Rights.

In Searle, quoting Salt Lake City v. Boundary Springs Water Users Ass'n, 2 Utah 2d 141, 270 P.2d 453, 455 (1954) (footnotes omitted), the Utah Supreme Court stated:

A change application cannot be rejected without a showing that *vested rights will thereby be substantially impaired*. While the applicant has the general burden of showing that no impairment of vested rights will result from the change, the person opposing such application must fail if the evidence does not disclose that his rights will be impaired. [Emphasis added.]

See also Utah Code § 73-3-3(7)(a):

Except as provided by Section 73-3-30, the state engineer may not reject a permanent or temporary change application for the sole reason that the change would impair a vested water right.

The majority of the points of diversion of existing water rights users with higher priority rights on the Green River are above Blue Castle's proposed point of diversion. Only 16 water rights divert downstream from the Project to the confluence with the Colorado River. Those downstream water rights require 37.2 cfs. There was no testimony by persons opposing the applications or any water rights owners that any of their vested rights would be substantially impaired as a result of the proposed change. The court did not receive any evidence that the Project would interfere with or impair the rights of any vested water right holders on the Green River or the Colorado River. As a result, the change applications cannot be rejected on this basis.

As the State Engineer did, the court may also approve an application with conditions designed to mitigate potential impairment. Accordingly, the Project shall be subordinated to all prior rights and to the Central Utah Project.

3(b)(ii). The Project will Not Interfere With a More Beneficial Use of the Water.

The court received no evidence of a more beneficial use of the water. Power generation, under

§73-3-8 (1)(b) is equally beneficial as irrigation or domestic use. The court received no evidence that there exists a proposed use for domestic or culinary purposes which the Project will impair. Further, power generation is an important segment of Utah's economy, supporting thousands of jobs and providing electricity at reasonable cost to the public and industry. From 1985 to 2005, power generation provided more tax revenue to the state than any other segment of the economy. The Governor and Legislature have stated that providing for Utah's growing energy needs is a priority. The Governor has challenged power producers in Utah to develop generation resources that will allow Utah to meet its projected power need and also export 25% of its power production. According to the Utah Legislature "[i]t is the policy of this state to encourage the development of independent and qualifying power production and cogeneration facilities, to promote a diverse array of economical and permanently sustainable energy resources in an environmentally acceptable manner, and to conserve our finite and expensive energy resources and provide for their most efficient and economic utilization." Utah Code § 54-12-1. The "State Energy Policy" is that: "Utah will promote the study of nuclear power generation." Utah Code § 63M-4-301 (c). The state has also codified the Western Interstate Nuclear Compact, which provides that its "board shall have power to: (a) Encourage and promote co-operation among the party states in the development and utilization of nuclear and related technologies and their application to industry and other fields." Utah Code § 19-11-201. The Utah Legislature, Emery County, and Green River City have specifically expressed support for the Project to be built.

The court finds reason to believe that the Project will not impair any existing water rights, nor will it interfere with a more beneficial use of the water.

3(c). Is the Proposed Plan Physically and Economically Feasible?

3(c)(i). The Proposed Plan is Physically Feasible.

Blue Castle has secured sufficient property in Emery County, Utah on which to locate the Project, through a combination of purchase and options to purchase such property.

Utah appellate courts have not directly addressed the issue of physical feasibility as it is applied to applications to change the point of diversion or to appropriate water. In Bullock v Hanks, 452 P. 2d 866 (Utah 1969), the Utah Supreme Court upheld a trial court's approval of an application to

appropriate water, where the district court had found that “. . . it would appear that an enlargement [of an irrigation ditch] would not be physically impossible. . .” In City of Hilldale v. Cooke, 2001 UT 56, the Supreme Court discussed the determination of “highest and best use” of property in the context of valuing land for condemnation. The Court held that “. . . highest and best use must reflect only ‘potential development [that] *could with reasonable certainty be expected* with respect to the property.’” The Court further held that “. . . a property's highest and best use includes only those uses that are feasible, not those that are merely possible.” One of the three elements of feasibility is “. . . that the use is physically feasible—that the land is physically suited or adaptable to the potential use.”

Using these two criteria, the court finds from the evidence presented that the proposed plan is physically feasible because there exists reason to believe the physical site proposed for the project meets all the criteria necessary for the construction of the proposed works. Blue Castle has investigated many sites in many states, and this particular site meets the Project’s needs for rail transportation, proximity to an interstate highway and major electrical transmission lines, and, of course, proximity to water. Under the supervision of the Nuclear Regulatory Commission, the Project has conducted geologic testing, archaeological studies, installed seismic monitoring equipment, and has completed approximately 50% of the NRC Early Site Permit process, at a cost of \$17.5 million to date. No physical impediments have been identified that would prohibit construction of the Project.

An early site permit (ESP) resolves site safety, environmental protection, and emergency preparedness issues independent of a specific nuclear plant design. The ESP application must address the safety and environmental characteristics of the site and evaluate potential physical impediments to developing an acceptable emergency plan. The NRC documents its findings on site safety characteristics and emergency planning in a Safety Evaluation Report and on environmental protection issues in Draft and Final Environmental Impact Statements. The ESP process does not require a reactor design to be chosen at this point, and Blue Castle has not done so. The Utah statute at issue does not require that Blue Castle produce a final plant design at this point, only that the plan be physically feasible. The basic elements of the Project are known and are feasible.

The court therefore concludes that there is reason to believe that the Project is physically feasible.

3(c)(ii). The Proposed Plan is Economically Feasible.

As with the issue of physical feasibility, the Utah appellate courts have not specifically ruled on what “economic feasibility” means in the context of appropriation of water, particularly on such a large scale as contemplated in the Project. However, the statute’s plain language only requires reason to believe the proposed plan to use or divert the water is economically feasible, regardless of the size of the project contemplated. In Bullock, the Utah Supreme Court held:

“Defendants argue that no applicant should be required at the approval stage to expend the money to design completely a dam, spillway, and other works and to dig test holes and expend other substantial amounts of money to assure he has a reservoir site. Such an expenditure is unmerited, since the application may be disapproved on some other ground, such as, nonavailability of water. With this contention, we agree; the standard applied by this court in *United States v. District Court of Fourth Judicial District* is equally appropriate in the instant action.” Bullock v Hanks, 452 P. 2d 866 (Utah 1969).

Utah law does not require the proponents of an application to prove that their entire project will be economically feasible by expending all of the required monies at this stage of the process. In Bullock the Utah Supreme Court upheld the district court’s ruling relative to the economic feasibility of a plan to appropriate water by stating: “The State Engineer testified that he merely determines if there be a reasonable probability that a dam can be built, that water can be impounded, and that water will be available to be impounded, diverted and placed on the lands; if these requirements be met, the project is considered feasible. The State Engineer stated that on this project he determined whether it could, not would, be feasible.” Id. The Court went on to explain:

. . . the law provides a period of experimentation during which ways and means may be sought to make beneficial use of more water under the application before the rights of the parties are finally adjudicated. If we were to finally adjudicate applicant's right to change or to appropriate water at the time that such application was rejected or approved, he would get only such rights as he could establish by a preponderance of the evidence that he could use beneficially without interfering with the rights of others and in such hearing he would not have the benefit of any opportunity to experiment and demonstrate what he could do. Such a system would cut off the possibility of

establishing many valuable rights without a chance to demonstrate what could be done. Bullock op. cit.

3(c)(ii) A. Blue Castle has Established Demand for Power in Utah and in the Region

In the context of valuing the use of property in connection with an eminent domain action, the Utah Supreme Court has defined “economic feasibility” as evidence that there is “sufficient demand for potential use.” City of Hilldale, 2001 UT at ¶24.

Utah is the third fastest growing state in the United States and its growth rate increased 23.8% between 2000 and 2010. PacifiCorp, the parent company of Rocky Mountain Power, who produces the majority of electricity for the state of Utah, forecasts the growth in Utah will increase the load demand for electricity 2.4% per year, between 2011 and 2020. This demand forecast takes into consideration increased efficiency and demand-side management, including steps to encourage the efficient use of electricity resources. Even with increased efficiency, the Governor forecasts a growth load between 2% and 2.4% per year. At that growth rate, by 2025 Utah will require 1,440 megawatts of *new* power beyond that currently produced in the state. By 2025, existing need and new growth load would require between 5,200 and 5,900 megawatts of electricity. PacifiCorp’s 2013 Integrated Resources Plan (IRP) forecasts a shortage of 2,308 megawatts of electricity by 2022, which will have to be imported to the state. In 2012 the Governor adopted an energy policy for the state of Utah, and one part of that policy identifies an energy initiative challenging Utah power producers to construct 25% more generating capacity than the state requires for current power needs, for purposes of export. Problematically, in the 2011 IRP, PacifiCorp has not identified any new resources to meet the needs it projects, and shortfalls of the electric power supply, and consequent importation of electricity to the state is projected as early as 2015.

Natural gas, although currently at an all time low cost, suffers from similar environmental problems as coal, emitting carbon and contributing to visual pollution. Further, natural gas producers are now beginning to export natural gas to foreign markets in the form of liquefied natural gas (LNG) which will likely cause the price of natural gas to rise in the near future.

Solar and wind resources in Utah are de minimis at this time, primarily because of cost. Even

assuming the cost of these renewable resources becomes more palatable because of the unavailability of coal generation or natural gas cost increases, neither resource is suitable to produce baseline power, that is, electricity available on demand. Solar power is available normally only about 4 to 5 hours in an average day. The technology to store wind or solar generated electricity is not available; there exists only one pilot project for such storage on a commercial basis in the United States at this time. Nuclear power is ideal for baseline power, produces no carbon or particulate emissions and does not result in visual pollution. Blue Castle testified that it has had discussions with eighteen utilities, expressing an interest in 4,500 megawatts of power. Based upon Blue Castle's water rights, the Project could supply approximately 2,500 megawatts of power.

3(c)(ii) B. Blue Castle has Established the Cost-Effectiveness of Supplying Nuclear Power.

98% of Utah's electricity is currently generated by fossil fuel power plants. It is highly unlikely that any new coal plants will be constructed in Utah, or in the western region that the Project would serve. Should carbon capture regulations be enacted, it is further highly likely that the cost of generation of electricity by the remaining coal power plants and natural gas plants in the region will rise significantly. Historically, the cost per megawatt hour of power has been higher for nuclear power than for coal or natural gas, primarily due to the high capital costs of nuclear power, but the introduction of carbon capture legislation or regulation would make nuclear power competitive with these sources. Nuclear power is comparable to or less expensive per megawatt hour than solar or wind generation. Because there exists no method of storage for wind and solar, it is not feasible as base load power. The price of natural gas, a multi-use fuel, is subject to price fluctuation, and is uncertain. Nuclear generation is a consistent and stable base load power source, but has extremely high construction costs. Future cost projections show that the cost of nuclear power generation is equivalent to or cheaper than other alternatives. It is far from certain that Blue Castle will find partners to construct the nuclear plant itself, but Blue Castle's business plan shows the Project, if built, will eventually be profitable. Blue Castle is not required to have a business plan that is certain to succeed, but rather it is only required to establish that its plan is economically feasible. Blue Castle's goal at this point is to remove as much risk as possible during the licensing phase of the plant, to make the ultimate construction of a nuclear plant as

attractive to utilities or other investors as possible. This approach is feasible and is consistent with current practices in the planning, construction and financing of nuclear plants. Even though there are high construction costs associated with a nuclear plant, at this point the court concludes that there is reason to believe the Project is economically feasible once operational.

3(d) Does the Applicant Have the Financial Ability to Complete the Proposed Works?

As with the requirements of physical and economic feasibility, the requirement that the applicant have the financial ability to complete the proposed works has had little appellate attention in Utah jurisprudence. In Searle, op. cit. the Utah Supreme Court, in applying the “reason to believe” standard to all the statutory criteria of §73-3-8 held that this standard was designed to “provide some meaningful barrier so that the floodgates remain closed to all applications except those with a sufficient probability of successful perfection.” This standard is applicable to the issue of financial ability.

The total cost of the Project is estimated to be between \$15-20 billion, and Blue Castle does not contend that they have the ability to accumulate that amount presently or on its own. However, Blue Castle has a staged plan to build the Project. The cost of obtaining approval for an Early Site Permit (ESP) from the NRC is estimated to be approximately \$50 million and Blue Castle has raised (and spent) \$17.5 million so far, or approximately 34% of the necessary capital to obtain the ESP. They have been working on the Project for over 4 years, and are on target in their development plan. Blue Castle has not borrowed any money at this point, and has met all of its financial obligations. They have conducted preparation, studies, and drafted strategic business plans. The Project is a phased process and Blue Castle is not required, at this stage, to have the entire project financed to completion. The approach Blue Castle has adopted for the project (i.e., removing as much risk as possible in the early permitting process) makes it more likely that they will eventually find strategic partners to construct the power plant itself. It is clear that financing for nuclear power is inherently risky and that funding is difficult and highly selective. However, this does not mean that the Project is impossible. Blue Castle has provided sufficient evidence that it is possible, and that there is reason to believe that the Project will be completed.

As the court in Seale recognized, the change applicant, Blue Castle in this case, “assumes a risk

by investing time and money in an effort to perfect a proposed change in use that may later be effectively disallowed or modified by a court in an adjudicatory proceeding.” Id. at 392-93. This is a risk that Blue Castle has assumed, and apart from the water at issue here, no public funds have been used on this project.

Blue Castle has demonstrated an ability to secure funding and capital as needed, on a step-by-step basis to capitalize the Project and has a plan to continue capitalizing the Project. Accordingly, the court finds that there exists reason to believe the applicants have the financial ability to complete the project.

3(e). Was the Application Filed in Good Faith and Not for Purposes of Speculation or Monopoly?

When considering the terms “speculation” and “monopoly” the court looks to the plain meaning of the statute, in the context of what the statute intends to regulate. In this case, the Plaintiffs claim the Project’s ultimate completion is speculative, in that the scope of the Project and the money need to complete the project make it unlikely to succeed, and Blue Castle will therefore prevent other uses of the water. However, within the context of §73-3-8, “speculation” means holding the water itself for purposes of speculation. See W. Water, LLC v. Olds, 2008 UT 18, 184 P.3d 578, 583: “Fifth, the State Engineer concluded that the Original Application was filed for speculation or monopoly because the only proposed beneficial use for the water was a plan to sell it to others. Indeed, the applicants had ‘no lands, facilities, customers, or contracts.’” In this case, Blue Castle has a specific plan to utilize the water for a purpose specifically identified in the statute as a beneficial use, not to develop the water only to sell it to others. While the Project is certainly ambitious, Blue Castle has mapped out a clear pathway to achieve its plan. There is no reason to believe that Blue Castle intends only to monopolize the water. The fact that Blue Castle does not intend to build the actual power plant itself without the assistance of other entities, but rather to intends to market the NRC lease to others, does not amount to speculation within the meaning of the statute. Ultimately the water will be put to beneficial use for a statutory purpose.

Moreover, Paragraph 13 of the Water Right Lease Agreement between San Juan and Blue Castle, dated September 15, 2010, states: “During the pre-operation payment period, Lessor shall be

entitled to use of lease all or a portion of the Lease Water not required by Lessee on a short-term basis, at no cost to Lessor, for so long as the Lease Water is not actually required for diversion and use by Lessee.” The Water Right Lease Agreement between Blue Castle⁷ and Kane County contains similar language in Paragraph 15 “Requirements Contract and Use of Water Right,” stating: “Lessor shall be entitled to use, rent, or lease all or a portion of the Lease Water not required by Lessee on a short-term basis, at no cost to Lessor, for so long as the Lease Water is not actually required for diversion and use by Lessee.” Meaning, the water is not tied up and the Districts are not deprived the use of the water without the ability to use the water during the development of the Project.

Finally, to date, Blue Castle has spent \$17.5 million working on this project. None of that money has come from external financing, but instead it has all been provided by the investors who are, in turn, part of the project. Because the private investors are willing to risk enormous amounts of their own money and time in the Project, the risk of speculation or monopoly is minimal. The court concludes that there is reason to believe the application was filed in good faith and not for purposes of speculation or monopoly.

3(f). Will the Application Unreasonably Affect Public Recreation or The Natural Stream Environment?

3(f)(i). There is Reason to Believe that The Application Will Not Unreasonably Affect Public Recreation.

The evidence presented at trial establishes that as an average, 95% of the time the impact of diverting 70 cfs from the Green River will have less than a 5% reduction on the flow rate of the river; that as an average, 99% of the time even with the 70 cfs withdrawal, the discharge of the river will be above 700 cfs; 99% of the time the width of the river will be reduced less than 1.5 feet, out of an average width of approximately 350 feet; and 99% of the time the depth of the river would be reduced less than 1.5 inches. The applicants presented evidence that public recreation (e.g., rafting, river running,

⁷ An Assignment and Assumption of Water Rights Lease Assignment between Blue Castle, Transition Power Development, LLC, and Kane was signed on July 14, 2010, which assigned Transition Power’s rights and obligations to Blue Castle. The underlying Water Right Lease Agreement between Transition Power and Kane was signed on September 20, 2007.

or fishing) would not be affected by the proposed withdrawal. There was no evidence presented by the Plaintiffs that public recreation would be affected if the applications were approved.

3(f)ii. There is Reason To Believe that the Application Will Not Unreasonably Affect the Natural Stream Environment.

The issues raised at trial relative to the natural stream environment primarily focused on the effect on endangered species and fallout from the cooling towers. There exists four species of endangered fish that are unique to the Colorado River system. The stretch of the Green and Colorado Rivers from Flaming Gorge Reservoir to Lake Powell is sensitive in nature and Plaintiffs argue that heightened scrutiny of the project is warranted. Plaintiffs did not provide the court with any legal basis supporting a heightened level of scrutiny by the State Engineer or this court, and the court applies the “reason to believe” standard, as required by Utah law.

The Green River is designated as critical habitat for the four endangered fish, and Blue Castle’s expert testimony was that the water withdrawn from the Green River would have a de minimus effect on the protected species. Defendants’ expert, Dr. Harold Tyus, testified that there would be an effect, but was unable to opine as to what that effect would be without further research. Dr. Tyus testified that the surface area of the average backwater on the river may be reduced by as much as 50%, at times when the river depth would be decreased by over 1.5 inches. However, Tyus was unsure of the impact of the potential loss of this surface area on the fish population. Testimony from Dr. Hardy, Defendants’ expert, indicated that the depth necessary for the fish larvae and fry to survive and thrive was between 29 to 38 centimeters (i.e., approximately 11 to 14 inches.) The evidence disclosed that with the 70 cfs withdrawal for the Project, 99% of the time the flow rate of the river would exceed 700 cfs, and the change in depth would be less than 1.5 inches. 95% of the time, the flow rate would be above 1,300 cfs and the corresponding drop in river depth would be below 1 inch. There is no evidence that the proposed withdrawal would have an unreasonable impact the natural stream environment.

The State Engineer acknowledged that the National Environmental Policy Act (NEPA) processes would ultimately reach the conclusion of whether the Project would unduly impact the natural stream environment and the protected fishes. In fact, the purpose of NEPA is to address the questions

raised by Dr. Tyus. Based on the NEPA requirement, the State Engineer determined that he had reason to believe that the NEPA process would identify measures necessary to mitigate negative impact to the natural stream environment. Regardless of any further investigation by the State Engineer, the Project will be subject to NEPA and the State Engineer conditioned the Application on a biological consultation with the U.S. Fish and Wildlife Service, pursuant to Section 7 of the Endangered Species Act. The Upper Colorado River Endangered Fishes Recovery Implementation Program Recovery Action Plan (RIPRAP) was a partnership created in 1988 to address the recovery of the four endangered fishes in the Upper Basin. RIPRAP provided participants with a “reasonable and prudent alternative” to avoid a jeopardy finding. Existing diversions are allowed under RIPRAP, as are new diversions. Utah is a partner in RIPRAP, and the program is supported by the State Engineer. The goal of RIPRAP is to achieve naturally self-sustaining populations and protect the habitat and water flows on which they depend such that the fishes can eventually be de-listed. Requiring a Section 7 consultation will ensure that the Project must cooperate with the United States Fish and Wildlife Service (“USFWS”) and the Bureau of Reclamation to coordinate releases and take other steps to reach the goals of RIPRAP.⁸

The US Bureau of Reclamation is working with the USFWS to develop an operation plan for Flaming Gorge Dam releases in order to meet the goals of RIPRAP. In September 2005, the USFWS released the Final Biological Opinion on the Operation of Flaming Gorge Dam. The Final Opinion stated that the operation of the dam would achieve the flow and temperature recommended for the survival of the fishes, while maintaining all authorized purposes, including the development of water resources. Several months later, in February 2006, the Bureau of Reclamation issues a Record of Decision (“ROD”) which stated similar goals. It stated:

The purpose of the proposed action is to operate Flaming Gorge Dam to protect and assist in recovery of the populations and designated critical habitat of the four endangered fishes, *while maintaining all authorized purposes of the Flaming Gorge Unit of the Colorado River Storage Project (CPSP) including those related to the development of water resources in accordance with the Colorado River Compact.* [Emphasis added.]

⁸ Whether or not the State Engineer conditioned the application approval on a Section 7 consultation, it appears that Blue Castle would be subject to NEPA and would have been required to meet all requirements imposed by federal law in any event.

...

This action is limited to the proposition that avoiding jeopardy and making progress toward recovery of listed fish facilitates the ability of the Upper Basin States to continue utilizing and further develop their Colorado River apportionments.

Plaintiffs contend that the ROD requires base flows to remain undiverted in the Green River to satisfy the requirements of the Endangered Species Act; however, if that were accurate, no one between Flaming Gorge and the confluence of the Green and Colorado rivers would be able to divert or use any water. To the contrary, the ROD clearly anticipates further development of the water of the Green River and notes a target flow of 1300 cfs. Utah has developed the “Utah Work Plan 2010” in conformity with the state’s commitment to RIPRAP. Of the 4 million acre-feet at the Green River station, only 1.4 million acre-feet is released from Flaming Gorge Dam. The majority of flows at the Green River station, then, come from tributaries to the Green River downstream from the dam. The Flaming Gorge releases have an impact, clearly, but make up much less than half of the available water at the Green River station.

The NRC has promulgated comprehensive regulations (Environmental Standard Review Plan, 5.2.1 Hydrologic Alterations and Plant Water Supply) with regard to the hydrologic alterations that a nuclear plant may cause, including minimizing any “adverse environmental impacts.” The NRC Regulatory Guide 4.7, General Site Suitability Criteria for Nuclear Power Stations, in conformance with NEPA, also outlines the comprehensive study to be undertaken by the NRC and the applicant. This process allows for public comment. See 10 CFR Part 51 et seq. “Numerous public meetings ...are held during the course of the reactor licensing process.” Backgrounder, pg2. The NEPA review includes analyses of impacts to air, water, animal life, vegetation, natural resources, and property of historic, archaeological, or architectural significance. Both of these regulatory guides call for close examination of the effect that the operation of the plant will have on the Green River, and specifically include the impact of the cooling system with regard to drift and its effect on the natural vegetation and crops in the vicinity of the Project site. The review also evaluates cumulative economic, social, cultural, and other impacts and environmental justice. Accordingly, even if the State Engineer were to have expended the

significant resources necessary to address the Plaintiffs' concerns by conducting further studies, the NRC and NEPA requirements are not optional, and cannot be circumvented by anything the State Engineer requires. Further, the State Engineer is not equipped to study cooling system design or drift. If Blue Castle is unable to comply with the requirements of the NRC, the ESP will not issue.

Given the compulsory federal regulations and burden of proof at this point in the proceedings under Utah law, it would be unnecessary and inappropriate for this court to attempt to make a final determination of whether the Project will have any unreasonable effect on the natural stream environment. Because of the comprehensive nature of the NRC review process, and the information presented at trial regarding the likely effect on the Green River and its biota, the court is convinced that there is reason to believe that there will not be any unreasonable effect on the natural stream environment.

3(g). Will the Application Prove Detrimental to the Public Welfare?²

“The existing Utah and federal pollution regulation schemes impose a dimension of control separate and apart from appropriation and allocation.” Michele Engel, Water Quality Control: The Reality of Priority in Utah Groundwater Management, 1992 Utah L. Rev. 491, 508 (1992)

As noted above, the nuclear power industry is heavily regulated by the NRC. Under the Atomic Energy Act of 1954 (the “Act”), the NRC is responsible for the development and regulation of nuclear energy, radiological health, and the safety of the public. 42 U.S.C § 2021 is the Federal-State amendment, which provides that the NRC retains sole authority and responsibility with respect to the construction and operation of nuclear production or utilization facilities. 42 U.S.C § 2021 allowed the State of Utah to enter into an agreement that gives Utah the authority to license and inspect byproduct, source, or special nuclear materials used or possessed within Utah. That authority is exercised by the Utah Department of Environmental Quality’s Radiation Control Board (“UDEQ RCB”), but their authority does not, and cannot, extend to the construction or operation of nuclear power plants. The UDEQ RCB has the authority to make rules to protect the public and environment within Utah from significant sources of radiation, mainly from radioactive waste or the source materials. Utah Code

⁹ This issue is raised under Utah Code §73-3-8 (1)(a)(iii) as well as under §73-3-8 (1)(b)(i).

§19-3-104 (4) states: “The board may make rules: (a) necessary for controlling exposure to sources of radiation that constitute a significant health hazard”; however, the scope of Utah’s authority is limited and does not include the construction or operation of nuclear power plants, which cannot be delegated by the NRC. See 42 U.S.C. § 2021 (c) “Commission regulation of certain activities:”

No agreement entered into pursuant to subsection (b) of this section shall provide for discontinuance of any authority and the Commission shall retain authority and responsibility with respect to regulation of-- (1) the construction and operation of any production or utilization facility or any uranium enrichment facility;

The federal statute, according to Barnson v. United States, 816 F.2d 549, 554 (10th Cir. 1987), references “production facility” for the manufacture of “special nuclear material,” not the extraction of “source material” such as uranium. The federal Act largely preempts the regulation of commercial nuclear power plants at the state and local level. However, the Act provides and allows for state and local involvement. The US Supreme Court, in Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm’n, 461 U.S. 190 (1983), said:

[F]rom the passage of the Atomic Energy Act in 1954, through several revisions, and to the present day, Congress has preserved the dual regulation of nuclear-powered electricity generation: the Federal Government maintains complete control of the safety and “nuclear” aspects of energy generation; the States exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like.

“All nuclear power plant applications must undergo a safety review, an environmental review and antitrust review by the NRC. In order to construct or operate a nuclear power plant, an applicant must submit a Safety Analysis Report. This document contains the design information and criteria for the proposed reactor and comprehensive data on the proposed site. It also discusses various hypothetical accident situations and the safety features of the plant that prevent accidents or, if accidents should occur, lessen their effects. In addition, the application must contain a comprehensive assessment of the environmental impact of the proposed plant.” (From the US NRC Backgrounder). The NRC, in July 2011, issued a report which concluded that “a sequence of events like the Fukushima accident is

unlikely to occur in the United States and some appropriate mitigations measures have been implemented, reducing the likelihood of core damage and radiological releases.”

According to the U.S. Supreme Court, NRC licenses “can only be issued consistently with the health and safety of the public. But the responsibility for safeguarding the health and safety belongs under the statute to the Commission.” Power Reactor Development Co. V. International Union, 367 U.S. 1529, 1533 (1961).¹⁰ The NRC will address the Project’s impact on surface and groundwater, physical and environmental aquatic impact, potential discharge (from the air or otherwise) into surface water and groundwater, and potential surface and groundwater contamination issues. There is reason to believe that a nuclear power plant constructed under the NRC licensing processes will not be detrimental to the public welfare.

In addition, the State Engineer will continue to retain jurisdiction to participate in the review and approval (or disapproval) of diversion structure plans and the construction of water storage facilities, when such plans are made known.

While concerns regarding radiological health are valid, based on NRC review and state oversight of the Radiation Control Board and the State Engineer, together with a lack of evidence indicating negative health or safety impacts from the construction or operation of the nuclear power facility, the court finds that there is reason to believe that neither the NRC nor the state Department of Environmental Quality’s Radiation Control Board, will allow the Project proceed in a manner which will be detrimental to the public welfare or safety. The court’s initial threshold determination that there is reason to believe that the Project will not prove detrimental to the public welfare is the first of many that must be made in the Project’s process. See Id. (stating: “We think the great weight of the argument

¹⁰ Power Reactor Dev. Co. v. Int’l Union of Elec., Radio & Mach. Workers, AFL-CIO, 367 U.S. 396, 411, 81 S. Ct. 1529, 1536-37, 6 L. Ed. 2d 924 (1961) Even a glance at s 185 suffices to show that issuance of a construction permit does not make automatic the later issuance of a license to operate. For that section sets forth three conditions, in addition to the completion of the construction, which must be met before an operating license is granted: (1) filing of any additional information necessary to bring the application up to date—information which will necessarily in this case include detailed safety data concerning the final design of petitioner’s reactor; (2) a finding that the reactor will operate in accordance with the act and regulations—i.e., that the safety and health of the public will be adequately protected—and with the construction permit itself, which is expressly conditioned upon a full investigation and finding of safety before operation is permitted; and (3) the absence of any good cause why the granting of a license to operate would not be in accordance with the Act—e.g., a showing by respondent unions, who will have full rights to appear and contest the issuance of an operating license, that the reactor may not be reasonably safe.

supports the position taken by PRDC and by the Commission, that Reg. 50.35 permits the Commission to defer a definitive safety finding until operation is actually licensed.”)

Based on the compulsory and stringent NRC review regarding health and safety issues, together with state oversight of the source materials and waste, the court has reason to believe that the proposed plan is not detrimental to the public welfare.

Finally, the court has considered that the Central Utah Project supplies water for municipal purposes to more than 600,000 people on the Wasatch Front, has expended significant taxpayer funds, puts water to beneficial use, and provides for the general health and welfare of the public. The Project’s potential impact on CUP would impact the general welfare of a large segment of Utah’s population center. The State Engineer determined, and the court agrees, that the Project should be subordinated for purposes of priority distribution of water rights held by entities for use in the CUP. With this condition in place, the court finds that there is reason to believe that the Project will not be detrimental to the public welfare.

The court finds that the additional conditions imposed by the State Engineer are reasonable and necessary and hereby adopts those conditions.

Summary and Conditions

The Applications are approved subject to the following conditions:

1. The diversion and depletion under Application 89-74 (a35402) is limited to 29,600 acre-feet annually and under Application 09-462 (a35874) to 24,000 af annually; the total rate of diversion may not exceed 75 cfs.
2. Blue Castle shall install and maintain measuring and totalizing recording devised to meter all water diverted from the Green River and shall annually report the data to the Diversion of Water Rights Water Use Program.
3. Blue Castle shall successfully complete a Section 7 consultation with the USFWS and comply with all required conservation measures.
4. Prior to altering the natural channel or construction of any diversion structure, Blue Castle must

file and receive approval of a Stream Alteration Permit with the Division of Water Rights. See Utah Code 73-3-29 and Rule R655-13 of the Utah Administrative Code.

5. If a dam or any water impounding structure is constructed, Blue Castle must provide the Dam Safety Section of the Division of Water Rights with the plans and specifications. See Utah Code 73-5a-101 et seq. and Rule 655-11 of the Utah Administrative Code. Construction of the dam or other structure may only commence once the necessary authorizations are obtained.
6. Acquisition of all easements, rights of way, and title to property must be obtained prior to construction.
7. Blue Castle must comply with all local, state and federal statutes, ordinances, and rules in connection with the construction of the project.
8. The Project is subject to prior rights and expressly subordinated to the water rights held by various entities of use in the CUP, for purposes of priority distribution of water.

After an application is approved, an applicant is empowered to construct all necessary works and use the water in the manner contemplated by the change application. However, no water will be diverted or used until such time as all other regulatory requirements are met.

The water must be put to beneficial use and proof filed on or before September 30, 2015 for Application No. 89-74 (a35402) and on or before November 30, 2017 for Application No. 09-462 (a35874). Requests for extension may also be filed. Otherwise the applications will lapse, pursuant to Utah law.

Counsel for the Defendants is directed to prepare findings of fact, conclusions of law and a judgment conforming to this memorandum decision.

By the Court:



George M. Harmond

Digitally signed by
Judge George M.
Harmond

Date: 2013.11.27
12:44:40 -07'00'