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Appellate court upholds water rights diversion for planned nuclear power plant

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SALT LAKE CITY — The Utah Court of Appeals said a district court judge did not err in upholding the state engineer's decision to grant a diversion of 53,600 acre-feet of water from the Green River for a planned nuclear power plant.

In the ruling issued Thursday, the appellate court said HEAL Utah had failed to prove its case that the diversion of water rights was unlawful by being contrary to the public good, unsustainable or that the project wasn't feasible.

"We have believed in this project since the beginning and yet another court has agreed with us," said attorney David Wright, who defended the state engineer's decision. "We are pleased with the outcome."

The ruling comes three years after 7th District Judge George Harmond said State Engineer Kent Jones rightfully applied Utah law when he approved a pair of change applications for diverting water involving San Juan County and Kane County water conservancy districts.

The appropriated but unused water belongs to the districts but will be leased to Blue Castle Holdings for use at a twin-reactor nuclear power plant planned near Green River in Emery County.

Harmond concluded Jones followed the law in a 26-page decision that came as a result of a five-day trial in Price where HEAL Utah, Living Rivers and other groups challenged Jones' decision. The groups argued Jones did not follow the law because the diversion would have negative impacts on the river and interfere with flows that come out of Flaming Gorge that must be maintained for endangered fish.

The appellate court disagreed.

"HEAL Utah's argument ignores the fact that the Green River and its tributaries form an interconnected system of which the Flaming Gorge Reservoir is only a part," the ruling noted. "HEAL Utah's evidence and experts were unable to demonstrate the extent of impact the diversions would have on the fish or the stream."

The court pointed out that claims the Green River is part of a system that is already over-appropriated are not true in the sense that Utah has only developed about a million acre-feet of a 1.4 million acre-feet per year allocation under the Colorado River Compact.

Additionally, the court said there are 574,000 acre-feet of approved but undeveloped water rights in the system, including the water owned by the conservancy districts but destined for use at the nuclear power plant.

The Green River has an average volume of 3.9 million acre-feet per year and 139 approved water rights in the contested, relevant area, the court said, noting that even if all those rights were developed, it would still only amount to 1.29 percent of the total volume.

The court also rejected the reasoning that the project is speculative or not feasible, noting that Utah is the third fastest growing state in the United States and will require an additional 1,440 megawatts of power by the year 2025. Blue Castle's project would produce 3,000 megawatts of power.

Matt Pacenza, executive director of HEAL Utah, said his group and other challengers to Jones' decision are disappointed in the ruling and have not yet decided if they will appeal.

"We will take some time and read the decision carefully and figure out what is next," he said.

Pacenza said despite the ruling, there's nothing that convinces him the project will ever get off the ground.

"This remains a project which has failed to attract investment or interest from any utility. If no one wants to fund your project, or buy the product you're selling, then you're going nowhere," he said.

Blue Castle's Aaron Tilton, a former Utah lawmaker, said the company is sifting through contractors and plans to begin site preparation work at Green River in about two years.

He praised the ruling.

"Our project has been scrutinized at many levels, including the state engineer, the district court and now the appeals court," he said. "We have fully complied and satisfied all the requirements of the law and we can assure the public the level of scrutiny that has been applied to the process is welcomed."

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