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**OFFICE OF THE STATE ENGINEER
DIVISION OF WATER RIGHTS
STATE OF UTAH**

In the Matter of :
Application No. A8569 :
(Water Right Nos. 89-74, 89-1285, and 89-1315) :
: **PROTEST**
: November 4, 2008

[HEARING REQUESTED]

Living Rivers, the Moab Local Green Party (MLGP), Red Rock Forests (RRF), and Uranium Watch (referred herein as Protestors), hereby object to and PROTEST, pursuant to Utah Code Ann. §73-3-12, the above noted Kane County Water Conservancy District. Request for Extension of Time to File Proof of Beneficial Use 89-74 (A35818); 89-1285 (A35818a); and 89-1513 (A35818ab), September 25, 2008. (Extension Request) filed by Kane County Water Conservation District, Utah (KCWCD or the Applicant). Red Rock Forests, located in Moab, Utah, focuses on the health of the La Sal Mountains, Abajo Mountains, and the Canyonlands Basin of southeast Utah. Red Rock Forests' mission is to protect the long-term health and viability of these high elevation forests. They provide critical summer forage for wildlife and support a rich diversity of plant life. The Moab Local Green Party facilitates the planning and achievement of ecological wisdom and environmental justice proposals adopted by the Green Party, supports and promotes the Green Party's candidates and eco-justice platform and agenda, and promotes

and lobbies for responsible government stewardship of the Earth and its inhabitants. Living Rivers promotes river restoration through mobilization, by articulating conservation and alternative management strategies to the public. It seeks to revive the natural habitat and spirit of rivers by undoing the extensive damage done by dams, diversions, and pollution on the Colorado Plateau. Members of these organizations make use of the Green River for personal recreation, commercial recreation, educational activities, and scientific research. Uranium Watch works to educate and advocate for protection of public health and the environment from past, current, and future impacts of uranium mining, uranium recovery operations, and other nuclear fuel cycle facilities.

This Protest is filed on the following grounds:

1. Protestors are “persons interested” for the purposes of Title 73 Chapter 3 of the Utah Code which deals with appropriation of water.
2. The date for KCWCD to show proof of beneficial use for the three water rights that Transition Power has leased was September 30, 2008. On September 25, 2008, KCWCD submitted three Requests for Extension of Time to File Proof of Beneficial Use. The termination date of the Extension Requests is August 2015.
3. The purpose of the Extension Requests for the applications, A8569 (Water Right Nos; 89-74, 89-1285, and 89-1315), is an industrial use for a, yet to be approved, 2-unit Nuclear Power Plant in the vicinity of Green River, Utah and all other associated uses. Transition Power Development LLC (TPD) has leased 29,600 acre-feet of water from KCWDC and 24,000 acre-feet from the San Juan County Water Conservancy the power station. The primary source of the KCWCD water is Lake Powell. At present, the water may be diverted from Lake Powell on the Colorado River drainage. The Extension

Requests do not satisfy the statutory criteria in Utah Code Ann. §73-3-12 that governs the approval of extension requests for an application to appropriate water resources, as discussed below.

4. This Protest is based on the duties of the State Engineer as mandated by Utah Code Ann. §73-3-12. Specifically, “in considering an application to extend the time in which to place water to beneficial use under an approved application, the state engineer *shall deny the extension of time* and declare the application lapsed, unless the applicant *affirmatively shows* that the applicant has exercised or is exercising reasonable and due diligence in working toward completion of the appropriation.” Utah Code Ann. §73-3-12(2)(B)(h) (emphasis added).

In the Extension Requests, however, KCWDC entirely fails to mention the construction completed to date or of any work completed since the termination of its last extension request for the same water right in question here.¹ KCWDC, clearly has failed to satisfy the standard under Utah Code Ann. §73-3-12.

¹ The application was approved in 1965 and proof of beneficial use was last due in 2003. The water right was donated to KCWDC in 2003 by AMCA, shortly before the AMCA would need to show proof of use of the right. After KCWDC acquired the water right, they submitted a request for an extension to show beneficial use on November 25, 2003. Kane County Water Conservancy District. Requests for Reinstatement and Extension of Time. Water Rights 89-74 (A35818); 89-1285 (A35818a); and 89-1513 (A35818ab), November 25, 2003. The 2003 Extension Request was based on a proposed use of the water for mining and for the Big Water development on Utah School and Institutional Trust Lands Administration land.

The 2003 Extension Requests were accompanied by an outline of the development projects that would make use of the subject water right: agriculture, residential and recreational growth, and coal resource development. The affidavit accompanying the requests as Attachment A referred to an agreement between KCWDC and SITLA for water service for state lands currently being developed. In closing, the affidavit claimed that water availability had, heretofore, been a key limiting factor in development and that granting this extension would facilitate the development prospects in KCWDC. The State Engineer granted the 2003 Extension Requests on April 22, 2004. State Engineer of the State of Utah, Memorandum Decision for Water Rights 89-74 (A35818); 89-1285 (A35818a); and 89-1513 (A35818ab), April 22, 2004.

5. Utah Code Ann. §73-3-12 does not authorize KCWCD to refer to the due diligence of another entity which does not hold the water right in question as its own “affirmative showing” of due diligence. As proof of its required showing of due diligence in this case, KCWCD provides that it has entered into a "Water Right Lease Agreement" with TPD who has been using "due diligence" by meeting certain milestones and conducting certain activities "associated with its plan to develop the water and successfully deploy new nuclear power plants in Utah." Extension Request, p. 1.

Specifically, KCWCD provides that:

It is reported by TPD to KCWDC that during the last 18 months, TPA has completed the following milestones and activities associated with its plan to develop the water and successfully deploy new nuclear power plants in Utah:

A. TPD has leased a total of 53,000 acre-feet of water rights from the water conservancy districts of KCWDC and San Juan County to be used primarily for evaporative cooling of the condenser and for other uses typical of the process water needs for nuclear power plants.

B. A preliminary site evaluation report, including geotechnical analysis, was conducted by an industry-leading nuclear-site-evaluation consultant. Results support the TPD project plan.

C. A Notice of Intent was provided to the US Nuclear Regulatory Commission for Early Site Permit Application and/or combined License application submittal by April of 2010....

It is clear, however, that any work towards securing the water right or development of its own plans by TPD is irrelevant in this case. Utah Code Ann. specifically provides that the Extension Request in this case must be denied “unless *the applicant affirmatively shows that the applicant* has exercised or is exercising reasonable and due diligence in working toward completion of the appropriation.” Utah Code Ann. §73-3-12(2)(B)(h) (emphasis added). Based on the fact, therefore, that KCWDC has

failed to illustrate that it has engaged in any due diligence between 2003, when it applied for the extensions and 2007, when KCWDC leased the water right to TPD.

Indeed, KCWCD, has not even complied with the Chief Engineers specific instructions regarding due diligence for Water Right No. 89-74 when he granted the Applicant's last extension request. In that context, the State Engineer noted that "the approved point of diversion [Lake Powell] and the beneficial use of water under the [KCWDC's] application is not consistent with the beneficial uses detailed in the affidavit regarding future public needs. " Before the State Engineer of the State of Utah, In the Matter of Application to Appropriate Number 89-74 (A35818), Memorandum Decision, p. 1 (April 22, 2004). (Memorandum Decision).

KCWDC was, therefore, "advised that KCWDC must file a change application to modify the current application to coincide with the developments being planned." *Id.* At 1-2. There is no indication on the record, however, of Water Right 89-74, 89-1285, or 89-1513 that KCWDC at any time requested a change in the point of diversion or beneficial use, as directed by the State Engineer.

Finally, the fact that KCWCD has failed to meet the standard in 17-3-12(h) is illustrated by the fact that when the County previously requested an extension of time for the same permit, the State Engineer emphasized the fact that:

The applicant is advised that extension requests must comply with the provisions of §73-3-12, Utah Code Ann. as detailed herein and as such may be amended in the future: Any future extension requests must satisfy the requirements of this or other pertinent statutes by providing the mandated documentation of due diligence or reasonable cause for delay.

Memorandum Decision, p. 2.

In fact, the State Engineer granted the 2003 extension request by the County

only on the condition that “additional requests for extension of time *will be reviewed critically* and will not be granted *unless they are accompanied by the documentation* required by statutes extant at the time of such filings...” and that “the State Engineer shall deny such extension and declare the application lapsed, unless the applicant *affirmatively shows* that he has exercised or is exercising reasonable and due diligence in working toward completion of the appropriation.” *Id.* (emphasis added).

Although, the Extension Requests state that there is a "preliminary site evaluation report" that supports the project plan, KCWDC failed to include that site evaluation report in their requests. In addition, the Request states that TPD provided the NRC with a "Notice of Intent" that they intend to submit an Early Site Permit Application and/or combined License application submittal by April 2010. Letter from Aaron Tilton, CEO, and Tom Retson, President, Transition Power Development, to David B. Mathews, Division of New Reactor Licensing, Office of New Reactors, U.S. Nuclear Regulatory Commission, January 30, 2008. *See*, Attachment A. Further, the January 30, 2008, letter states: "TPD will provide shortly additional information on the site and associated planning to begin the process of providing timely and pertinent information to the NRC staff." Since January 10, however, TPD has not submitted any additional information to the NRC, has not set up any meetings with NRC staff to discuss their license application, and has failed to contact the NRC.²

Finally, although the Extension Requests state "an option contract to purchase approximately 1,700 acres with Emery County is in place." EnergyPath Corporation, not

². The NRC encourages all prospective licensees to set up pre-licensing meetings to discuss the content of the application and assure that the applications will be accurate and complete. Given the size and complexity of a nuclear power station license application and length of time and costs associated with the submittal of such an application, it is extremely doubtful that TPD could meet the April 2010 submittal date.

TPD, has the option to purchase land a few miles west and upwind of the City of Green River, the State Engineer should wait until EnergyPath exercises (or fails to exercise) their option to purchase before ruling on KCWDC's Request. This will likely occur within the next few months. There will be a date certain to exercise the option once Emery County and SITLA sign the development lease agreement.

The information provided by KCWDC regarding TPD's proposed plans is minimal, and in no manner demonstrates a commitment of the resources necessary to put the water right to beneficial use for a nuclear power station. Based on the fact that the record does not show that the Applicant has filed any such "documentation," the Extension Request must be denied.

6. The Applicant Does not Qualify as a "Public Agency" under §73-3-12(1) Utah Code Ann. Utah Code Ann. 73-3-12(2)(j)(i) provides that "[t]he state engineer shall consider the holding of an approved application by a public agency or a wholesale electrical cooperative to meet the reasonable future water or electricity requirements of the public to be reasonable and due diligence within the meaning of this section for the first 50 years." KCWDC, appears to claim that §73-3-12(1) is applicable in this case by maintains that it "is a public water supply agency of the State and holds the water right to meet the future reasonable requirements of the public, and as such meets the requirement of exercising reasonable and due diligence." Extension Request, p. 1.

§73-3-12(1), however, is not applicable in this case because a public agency will not be the one to provide the water to the "public." The water is to be used by a private entity, not the public agency, therefore the standard of due diligence for a public agency is really not applicable to this situation where a private entity will be making use of

water. Kane County Water District will not actually be providing (except in a lease agreement). In fact, no water will be applied to the public at all since Kane County will sell the water to TPD for processing of fissionable materials in the nuclear power generation process.

7. Utah Code Ann. § 73-1-1 requires that any “appropriation must be for some useful and beneficial purpose.” Similarly, Utah Code Ann. § 73-1-17 requires that the State Engineer may not certify a water right until, among other things, that the water appropriated has been put to a beneficial use...” This requires the applicant to establish that it “can and will put the conditionally appropriated water to beneficial use within a reasonable period of time.” See e.g. *Pagoas Area Water and Sanitation District v. Trout Unlimited (In re Application for Water Rights)*, 170 P.3d 307 (Colo. 200&). Similarly, the appropriator may not merely possess or waste the water. Water right holders who fail to show continuous beneficial use of the water may lose the water right through abandonment or forfeiture. Utah Rev. State § 73-1-4.

These requirements are intended to ensure that the public’s water resource is available to those who actually need water. David B. Schorr, *Appropriation as Agrarianism: Distributive Justice in the Creation of Property Rights*, 33 *Ecol. L.Q.* 3,9,22 (2005). In Utah, the restriction on speculation and waste is enforced by a recognition that the approval of an application is “only a preliminary step which gives the applicant the authority to proceed and perfect, if possible, the proposed appropriation by actual diversion and application of the water to a beneficial use. See *Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co.*, 104 Utah 202, 212--13, 135 P.2d 108, 113 (1943); *Little v. Greene & Weed Inv.*, 839 P.2d 791, 794 (Utah 1992).

The adoption of the Prior Appropriation Doctrine, by definition, required the appropriator to apply the water to beneficial use, thereby precluding speculative hoarding in hopes of future gain. Neuman, 28 Env'tl. L. 919, 963-64. "Because actual, beneficial use was required, no one could acquire all of the water and thereby monopolize a scarce and valuable resource. Nor could anyone speculate by holding water without using it, and then make a steep profit by selling to those who need it." *Id.* at 964. *See High Plains A & M, LLC v. Southeastern Colorado Water Conservancy Dist.*, 120 P.3d 710, 719 n.3 (Colo. 2005).

That the extension in this case would violate beneficial use standards is illustrated by the fact that the rights are junior to most rights in Utah and all of the rights downstream on the Colorado River. In addition, KCWDC failed to discuss why any of the projects contemplated in the November 25, 2003, request for extension of time to show proof have not been completed.

Further, KCWDC has failed to demonstrate, with supporting documentation, why the 5-year extension would be a sufficient and reasonable time within which to show beneficial use. The time needed to submit the applications for the license and permits necessary to construct and operate a nuclear power station and have them approved would probably be more than 5-years. If the license and permits were approved, then it would take from 5 to 10 years (and possibly longer) to construct the facility and bring it on-line. This is if there are no delays due to technical difficulties, a legal challenge to one or more of the permits, economic factors, or other unforeseen circumstances. The request should, therefore, be denied because the extension of time to put the water right

to beneficial use is unrealistic and KCWDC has not shown that the proposed use is in any manner feasible.

8. The State Engineer may not grant the Extension Requests because the Applicant has not illustrated reasonable cause for delay for its lack of due diligence. Utah Code Ann. § 73-3-12(2)(h). As justification for the Extension Request the KCWCD provides that:

More time is needed to place the water to beneficial use. The water right is part of Utah's allocation under the Colorado River Compact. It is in the best interest of the State of Utah to utilize and place to beneficial use Utah's allocation from the Upper Colorado River drainage.

...More time is needed to complete the project.

Extension Request p. 1.

Simply stating that “more time is needed,” however, does not meet the required standard of providing “reasonable cause for delay.” In addition, KCWDC has failed to show that it has exercised due diligence in working towards the completion of the appropriations, and it has failed to demonstrate any causes for the delay of any of the proposed uses outlined in 2003 affidavit. Rather, it refers in the Extension Requests to a previous proposed use of the water by AMCA and previous holders of the water right and explains why those projects did not reach fruition.³ That information is irrelevant to the current extension requests.

WHEREFORE, Protestors request that the State Engineer reject application – the

³ KCWDC filed for the original water right in 1964 under subsequent to the segregation of two portions. It proposed to divert 13,670 acre feet of water from Lake Powell for the purpose of steam generation for the proposed Kaipaiowitz coal fired power plant. Later the coal power project was abandoned after the lands were included as part of the 1996 Grand Staircase-Escalante National Monument. Extension Request, p. 1.

Extension Request for Water Right Nos. 89-74; 89-1825 and 89-1315, as the applicant has failed to illustrate due diligence and the water diversion would interfere with more beneficial uses of the water.

Protestors further request a hearing in this matter. Protestors reserve the right to submit additional information and evidence at the hearing in support of this Protest.

Protestors respectfully request to supplement this Protest with additional information in support of the Protest.

Dated November 4, 2008.

Harold Shepherd, Issues Director
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Moab, UT 84532

On behalf of:
Living Rivers
Moab Local Green Party
Red Rock Forests
Uranium Watch

CERTIFICATE OF FAX AND MAILING

I hereby certify that I faxed and mailed, First Class, Return Receipt Requested, a copy of this Protest to:

Jerry Olds, State Engineer
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Dated October 4, 2008.

Harold Shepherd
Issues Director, RRF