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

In the Matter of :
Application No. F77918 (Water Right No. 91-5140 91-5150) : **PROTEST**
June 4, 2008

[HEARING REQUESTED]

Living Rivers, the Moab Local Green Party (MLGP), and Red Rock Forests (RRF) (referred herein as Protestors), hereby object to and PROTEST, pursuant to Utah Code Ann. §73-3-7, the above noted Application to Appropriate Water (Application) filed by Mancos Resources, Inc., of Cortez, Colorado (MRI). 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 as they provide critical summer forage for wildlife, support a rich diversity of plant life and house critical watersheds for the health of the biotic and human desert communities. The Moab Local Green Party facilitates the planning and achievement of eco-justice action proposals adopted by the Green Party, supports and promotes the Green Party's candidates and eco-justice (ecological wisdom and environmental 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.

This Protest is filed on the following grounds:

1. Protestors are "persons interested" for the purposes of Utah Code Ann. §73-3-7. *See* Bonham v. Morgan, 788 P.2d 497, 502 (Utah 1989) ("[s]ection 73-3-7 permits 'any person,' not just a water user or an owner of vested rights, to protest the granting of an application under Title 73").
2. The Application - F77918 (Water Right No. 91-5150), - requests approval for the diversion of 800 acre feet from the Green River for purposes of processing related to a uranium mill proposed to be located near Green River, Utah. The diversion point will be located in N. 1950 ft. & W. 800 ft. from SE Cor. Section 17, T 20S, R16E, SLB&M.
3. The purpose of the point of diversion for the application, F77918 (Water Right No. 91-5150), is an industrial use for a, yet to be approved, uranium processing facility located at W2 Section 36, T20S, R14E, SLB&M and all other associated uses.
4. This Application does not satisfy the statutory criteria in Utah Code Ann. §73-3-8 that governs the approval of applications to appropriate water resources, as discussed below.

5. This Protest is based on the duties of the State Engineer as mandated by Utah Code Ann. §73-3-8(1). Specifically, "[i]f the state engineer, because of information in his possession obtained either by his own investigation or otherwise, has reason to believe that an application to appropriate water will interfere with its more beneficial use for irrigation, domestic or culinary, stockwatering . . . *or will unreasonably affect public recreation or the natural stream environment, or will prove detrimental to the public welfare, it is his duty to withhold his approval or rejection of the application until he has investigated the matter. If an application does not meet the requirement of this section, it shall be rejected***."** Utah Code Ann. §73-3-8(1) (emphasis added).

6. The applicant is seeking the right to totally consume the water sought to be appropriated. The point of diversion is on land administered by the Bureau of Land Management (BLM), and the existing diversion is operated by the Green River Canal Company. The place of use is administered by the applicant who requests an approval period of twenty years.

7. The location of the proposed point of diversion is in an area that has several senior water rights and is near the Green River. The Green River provides year-round water, except in times of extreme drought. This river is currently being used by senior water users and by a variety of native fish and wildlife. In particular, the area provides habitat for the following state-sensitive species: pronghorn, ferruginous hawk, big free-tailed bat, western red bat, ringtail cat, dwarf shrew, Townsend's big-eared bat, and the Virgin River montane vole. In addition, minimum streamflows ensure and increase public recreation in the area,

including commercial, and non-commercial rafting tours and trips on the Green and Colorado Rivers in Labyrinth, Stillwater, and Cataract Canyons. These activities generate a significant economic base in the communities of Green River, Moab, and elsewhere in the State of Utah.

8. The proposed point of diversion would potentially have an adverse impact on the existing instream flows for the Green River that belong to the American public. Impairment of these flows would impact not only the existing rights of current water permit holders, but would also unreasonably affect the natural environment, public recreation, and the habitat of the existing fish and wildlife in the area, which ultimately belongs to the American public. Such flows and habitat impairment would be detrimental to the public welfare.

9. Utah Code Ann. §73-3-8(1) dictates that applications must be rejected if approval would result in the impairment of existing water rights, or interfere with more beneficial uses of water -- such as stockwatering, municipal and agricultural uses, and providing habitat for state-sensitive fish and wildlife species and other fish and wildlife. When combined with the fact that climate change is increasing the risk of U.S. crop failures, depleting the nation's water resources, and contributing to outbreaks of invasive species and insects, the water right permit requested (Permit) will directly and negatively affect agriculture and livestock in central Utah. According to a report compiled by 38 scientists with the U.S. Department of Agriculture, the effects of climate change and other problems for the agricultural and forestry industries will persist for at least the next 25 years. AP, Feds: Climate Change Will Threaten Livestock Water Supply for Years (May 28, 2008).

According to the report, drought-strained forests in the West and Southeast are easy prey for tree-killing insects like bark beetles. Snow in the Western mountains is melting earlier, making it more difficult for managers overseeing a long-established system of reservoirs and irrigation ditches that serves Western states. *Id.* Further, the Southeast doesn't have the same kind of storage system because rain historically has been more consistent. Current weather disruptions have the region struggling with drought. Rising carbon dioxide levels are changing the metabolism of grasses and shrubs on range land, decreasing the protein levels in plants eaten by cattle. Permits for industrial uses that consume large amounts of water like the one in question will exacerbate such impacts.

10. Further, Utah Code Ann. §73-3-8(1) requires that applications must be rejected if the State Engineer has information or has reason to believe that the appropriation of water will affect public recreation, the natural spring environment, or prove detrimental to the public welfare. The impairment of these River flows in the Green River and elsewhere would decrease the value of public recreation in the Southeastern Utah area, by limiting the sources and/or amounts of water flow for recreational users. The impairment of these natural stream environments, therefore, must not be allowed. In addition, these natural flows are critical to the continued existence of native fish and wildlife in this area.

Further, warmer, drier weather is altering the biodiversity of deserts in the Southwest and the high, colder deserts of Utah. Plants and animals already living in extreme conditions face threats from wildfires and nonnative species. The Permit would add to these impacts through the impairment of these flows.

Consequently, the loss of such fish and wildlife habitat would certainly be detrimental to the public welfare, since the point of diversion is on public lands, and these flows and the habitat they afford pass through public lands, which belongs to all of the citizens of the United States.

In addition, there is a high probability that water appropriated pursuant to the Application will become polluted by the proposed industrial use (uranium processing), will likely contaminate ground water resources in the area, and will present a clear threat to public health and welfare in the immediate area. Even the most recent technologies for uranium tailings disposal and containment have not been proven to be safe. Tailings, in fact, are the greatest long-term source of potential environmental contaminants associated with mills and other uranium development projects. The Application in this case, however, fails to provide information about whether the proposed mill will include the construction of reliable tailings management facilities, will insure that care will be taken when a site is selected for subaqueous tailings disposal, and whether the geology and hydrogeology of the surrounding formations have been thoroughly studied.

Further, uranium mill tailings can adversely affect public health and the environment: 1) through the diffusion of toxic radon gas directly into indoor air, if tailings are misused as a construction material or for backfill around buildings; 2) through the diffusion of radon gas from the piles into the atmosphere where they can be inhaled or ingested; and 3) through the production of gamma radiation from radioactive decay products in tailings and dispersal of tailings by wind, water, or leaching, which carries radioactive and other toxic materials to surface

or ground water that may be used for drinking. Regardless of these potential impacts, however, MRI has submitted no information regarding the impacts of the proposed uranium mill on the welfare of the community and its environment.

Such lack of information in the permit ignores the fact that uranium mill tailings are of particular environmental concern because they: 1) they retain the majority of the radioactivity of the ore from which they are derived; 2) their radioactivity is very long lived; 3) Contain a range of biotoxic heavy metals and other compounds; 4) they may contain sulfidic minerals and thus are prone to generate acid mine drainage; 5) their granular to slime constituency makes them readily leachable, erodable or collapsible under different conditions; 6) the common method of surface disposal exposes a large surface area to the natural elements and, thus, increases the risk of release of radiation flux, radioactive and geochemically toxic dusts, and interaction with surface water systems; and 7) the large surface area of these generally thin tailings deposits (or 'piles') adversely affects large areas of land and renders potentially valuable land and water unfit for other uses.

In addition, studies illustrate that no uranium mining or milling company has ever been able to clean up water affected by the mining process to "restoration standard" levels. *See,* Uranium Isl Ground-Water Data From Written Testimony Of William P. Staub, Ph.D., January 9, 1999 (Attachment 1). The Stuab and other studies illustrate that, so far, restoration efforts have only been able to meet what are called "alternative concentration limits" which are nothing more than reduced amounts of radiation and heavy metals in water samples through expensive and

complicated water purification processes. Once water requested in the application is used for processing at mill site, therefore, it will be permanently contaminated and may not be used for any other beneficial use in the future. Based on the fact that the appropriator will consume the entire 800 acre feet of water diverted, the Permit would impact water rights held by the senior and other water right holders. Any proposed use of water that has a clear potential to be detrimental to the public welfare should not be approved without supporting evidence to the contrary. The State Engineer, therefore, is required to reject the MRI application under § 73-3-8(1).

The Application states that the water would be used for an industrial use for a uranium processing facility and all associated uses. However, no such facility exists yet and the applicant has invested less then 3% of the total anticipated cost of construction in the proposed mill. There is no evidence that MRI intends to build a uranium mill, operate a uranium facility or any other industrial complex, or that it will put the water to beneficial use. The Applications appear to be for the sole purpose of increasing the value of MRI's property, so that the agency can subsequently sell the property to another mining or other company. Indeed, the speculative nature of this application is illustrated by the fact that on April 10, 2008, Bluerock Resources Ltd. (BRL) announced that it purchased a 100% interest in the Mancos Uranium Mill Project that is the subject of the application in question via the acquisition of MRI. *See* Attachment 2.

The State Engineer should not condone this type of speculation in water and must thoroughly prevent such offensive precedent. In fact, now that MRI is

wholly owned by BRL, MRI is no longer even the applicant and cannot be issued the Permit. At the very least, BRL must put in a new application for the water right in question. Without such re-application, the State Engineer cannot possibly make a determination as to whether he has information or has reason to believe that such appropriation of water will affect public recreation, the natural spring environment, or prove detrimental to the public welfare under § 73-3-8(1).

Utah Code Ann. § 73-3-8(1)(a)(i) requires sufficient unappropriated water for the proposed appropriation. That such water is not available for the Application is illustrated by the fact that water needs in Utah are increasingly clashing with reality. The State has already doled out 180,000 rights to tap rivers and dig wells, but there is not enough water to honor them all. In fact, after the State Engineer Jerry Olds, seeing Wayne County perilously close to the deadline, last year approved a farmer's request for transfer of 50,000 acre-feet per year of Fremont River water to the Green River — one of the largest water-right transfers in recent State history. The farmer now can draw on the Green River — about 60 miles upstream from where the right exists — for Wayne County's Fremont River allocation and may irrigate more than 16,000 acres across three counties.

According to the BLM, this project would threaten to dry up about 54 acre-feet of water (an acre-foot can supply one Utah household with water for a year) that it draws from downstream springs and underground wells near Hanksville. In addition, new wells the farmer proposes near Hanksville could intercept water before it reaches the Fremont and Dirty Devil Rivers, tributaries that flow to the Colorado. This could cause the Fremont to dry up before it reaches

Capitol Reef National Park and pose unacceptable risks to federally listed threatened and endangered species.

Further, in this case, in violation of the beneficial use doctrine and § 73-3-8(1)(a)(i), the 800 acre feet of water requested by the appropriator is far in excess of that generally required for a uranium mill that would process 1,200 tons of ore per day and is almost 5-times the amount of water that other Uranium Mills in Utah apply to processing of uranium ore in their operations. *See e.g.*, Uranium One's Shootaring Canyon Mill water right application number 97-1555. In addition, a uranium mill requires approximately the same volume of water as ore for the mill processing circuit. MRI has stated that they intend to process 1,200 tons of ore per day, or 438,000 tons per year. That works out to approximately 2034 cubic feet per day (http://www.wise-uranium.org/cunit.html?ug=4&ut=2&iu=4), or 742,410 cubic feet per year. MRI has requested 800 acre feet per year, or 34,848,000 cubic feet per year. In other words, they have requested approximately 47 times the amount of water needed to process 1,200 tons of ore per day. Data and information regarding the water requirements for existing uranium mills and the contemplated mill is needed before the State Engineer can approve the Application.

The state must provide and consider information regarding the amount of unappropriated water available and the long-term availability of water in the Green River to satisfy all water appropriations.

11. Utah Code Ann. § 73-3-8(1)(a)(iii) requires that the proposed plan for use of the water must be physically and economically feasible." MRI's Application states that the water would be used for an industrial use for a uranium processing facility

and all associated uses. The uranium mill would be located at a proposed industrial development site near Green River, Utah. In its Application, however, MRI did not provide any information regarding the physical or economic feasibility of the proposed mill. There is no information available to the public and the State Engineer at this time regarding the physical and economic feasibility of a large and complex uranium mill operation near Green River. Until the proposed site is fully characterized, information about the physical feasibility of the millsite will not be known. Current and proposed uranium recovered operations are primarily owned by large, international companies with a history of uranium mining and/or milling in the United States and internationally. The companies are publicly traded in the US and/or Canada. MRI is not a publicly traded company and has no history in the uranium mining and milling industry. MRI does not have its own uranium mines. It is not currently known where the uranium ore would come from and to whom the processed uranium would be sold.

The State Engineer, therefore, cannot know if the project is physically and economically feasible until MRI submits information regarding the feasibility of the proposed uranium mill project. Therefore, the State cannot make this finding at this time.

12. Utah Code Ann. § 73-3-8(1)(a)(iv) requires a finding that "the applicant has the financial ability to complete the proposed work." The Applicant has not provided any information to demonstrate that they are financially able to permit, construct, operate, and decommission the proposed uranium mill, including funds for the

required surety to cover the costs of reclamation and long-term care. According to statements made by MRI, they currently have less than 3% of the funds necessary to put the mill into operation. The State Engineer, therefore, cannot approve the requested water appropriation until MRI provides the State Engineer with documentation demonstrating that they financially able to permit, construct, operate, and decommission the proposed mill. In fact, MRI cannot provide any such information at all since it will no longer the owner of the mill, which, as of April 10, 2008, will be owned BRL. See Attachment 2.

13. 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 Agrariaranism: 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 Envtl. 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 Plaints A & M. LLC v. Southeastern Colorado Water Conservancy Dist.*, 120 P.3d 710, 719 n.3 (Colo. 2005).

In this case, in violation of the beneficial use doctrine and § 73-1-1 and § 73-1-17, the amount of water requested is far in excess of that generally required for a uranium mill that would process 1,200 tons of ore per day and is almost 5-times the amount of water that similar uranium processing facilities says is sufficient for such needs. *See* Uranium One's Shootaring Canyon Mill water right application number 97-1555. Data and information regarding the water requirements for existing uranium mills and the contemplated mill is needed before the State Engineer can approve the Application.

14. Utah Code Ann. § 73-3-8(1)(a)(v) requires a finding that "the application was filed in good faith and not for purposes of speculation." MRI is not an established uranium industry company, and they have not shown that they retained personnel who have the expertise to fully carry out the proposed project. As is often the case in the mining industry, junior companies obtain claims, leases, rights, permits, and similar resources necessary for a project, then attempt to sell those resources or join with other, more well-funded companies to carry out a proposed mining or milling project. This type of activity is speculative, because the original company cannot carry out the proposed project on their own. That MRI will use the water rights to encourage speculative investment in the project, is illustrated by the fact that on April 10, 2008, MRI was bought out by BRL. See Attachment 2.

The State Engineer, therefore, cannot make a finding that the application was not filed for the purposes of speculation, until more information is available about MRI and its financial and other resources to carry out the proposed project.

Further, MRI has not provided any information regarding the amount of water necessary to construct, operate, decommission, and reclaim a uranium mill. The amount of water requested is far in excess of the amount of water that is generally required for a uranium mill that would process 1,200 tons of ore per day and is almost 5-times the amount of water that Uranium One says if sufficient for the Shootaring Canyon Mill. Data and information regarding the water requirements for existing uranium mills and the contemplated mill is needed before the State Engineer can approve the Application.

15. Utah Code Ann. § 73-3-8(2)(a) requires that use of the requested water cannot be "for a period of time less than that ordinarily needed to satisfy the essential and primary purpose of the application." In this instance, MRI has requested water for a period of 20 years. However, they have provided no information regarding the time required for the life of proposed project. MRI would need water for the permitting, construction, operation, and reclamation phases of the mill. Normally, the operating life of a mill is much longer than 20 years. Water for the mill cannot just be cut off at the end of the season. Water would need to be available through the decommissioning and reclamation of the mill, which might take years.

It is reasonable to assume that the time period for all phases of the uranium mill project would greatly exceed 20 years. Therefore, the State Engineer must deny the application because the time for the use of the requested water is far less that that needed to satisfy the purposes of the appropriation.

16. Under Utah Code Ann. §73-3-8(1), the State Engineer is obligated to investigate the potential adverse impacts that the proposed point of diversion would have on the holders of current water rights and current stockwatering, municipal, and agricultural uses, the impacts to the natural spring environments and instream flows, the adverse impacts to public recreation in this area, and the adverse impacts to the public welfare if these instream flows were impaired by the proposed point of diversion.

As the point of diversion is located on public lands and the Green River flows through such lands that belong to all American citizens and, thus, contribute

to the public welfare, the River's instream flows must be protected. The State Engineer is compelled to insure that the current rate of water flowing instream remains unchanged as a result of new groundwater diversions. Safeguards to protect the current flow rate must be included in the conditions of approval for any diversion of water from the Green River.

It is further noted that the State of Utah is facing potential cutbacks in water available from the Green River, in response to decade-long drought conditions, documented regional changes in hydrological conditions and future snowpacks due to climate change, and administrative management modifications pursuant to the Colorado River Compact and State water adjudication processes. Protestors therefore submit that the State Engineer's office has a responsibility to consider future water availability in light of these factors, prior to approving large, non-domestic appropriations of water.

17. Protestors also submit that as there is likely a high probability that water appropriated pursuant to the above Application will become polluted by the proposed industrial use (uranium processing), and that such polluted waters will present a clear threat to public health and welfare in the immediate area and for downstream users. Protestors thus submit that the Application should be rejected as the proposed use. Far from being the highest and best beneficial use of water, in reality it presents a hazard to public health and welfare.

18. Utah Code Ann. § 73-3-11 provides that:

> Before either approving or rejecting an application the state engineer may require such additional information as will enable him properly to guard the public interests, and may require a statement of the following facts: In case of an

> incorporated company, he may require the submission of the articles of incorporation, the names and places of residence of its directors and officers, and the amount of its authorized and its paid-up capital.

Based on the fact that BRL, which retains its main office British Colombia and BRL announced that it has purchased a 100% interest in the Mancos Uranium Mill Project near Green River, Utah, via the acquisition of MRI, the State Engineer must exercise his/her authority to investigate the information required by § 73-3-11. This investigation must include MRI's claim that the "acquisition furthers the Company's goal of becoming a standalone uranium producer in the US Southwest" and that the "status of Utah as an "Agreement State" as well as the location selected for the mill site is expected to *streamline the permitting processes*, with a forecasted three to four year development timeline for a new standalone 1,200 ton per day milling complex." Attachment 2. In addition, the provisions of the a Best Effort Agreement between MRI and Emery County, Utah do not contain any mention of Mancos Resources obtaining water rights for the proposed mill. *Id.* That is a glaring omission in list of steps that MRI must complete.

WHEREFORE, Protestors request that the State Engineer reject application - F77918 (Water Right No. 91-5150), as it will impair existing rights, interfere with more beneficial uses of the water, negatively impacts the public health and welfare, was submitted merely for speculative purposes, and the Applicant no longer owns the facility for which the water is requested. Protestors, further, request that the State Engineer initiate an investigation pursuant to Utah

Code Ann. §73-3-8(1) as to the impacts that the point of diversion will have on the existing (and prospective) instream flows in the area, senior water rights, livestock uses, and the public health and welfare. This investigation should include thorough scrutiny of the construction and safety features of the uranium mill for which the water is requested, the operation of the uranium mill and the corporate finances and structure of the company requesting the Permit.

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 June 4, 2008.

/s/ Harold Shepherd

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CERTIFICATE OF FAX AND MAILING

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

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Dated June 4 2008.

/s/ Harold Shepherd
Harold Shepherd
Issues Director, RRF

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