

0029

ALT0071007
#2

EDWARD W. CLYDE, P.C.
ELLIOTT LEE PRATT
RODNEY C. SNOW
STEVEN E. CLYDE
THEODORE BOYER, JR.
EDWIN C. BARNES
GARY L. PAXTON
L. MARK FERRE
NEIL A. KAPLAN
D. BRENT ROSE
JOHN W. ANDERSON
JAMES L. WARLAUMONT
H. MIFFLIN WILLIAMS III
JEFFREY W. APPEL

CLYDE & PRATT

ATTORNEYS AT LAW
200 AMERICAN SAVINGS PLAZA
77 WEST SECOND SOUTH
SALT LAKE CITY, UTAH 84101

PHONE 322-2516
AREA CODE 801

TELECOPIER:
(801) 322-2516

OF COUNSEL
FRANK J. ALLEN

ADMITTED IN WASHINGTON, D.C.

November 6, 1985

FILE NO.

Jeffrey Collins, Esq.
Associated General Counsel
Kaiser Coal Corporation
102 South Tejon Street, Suite 800
Colorado Springs, Colorado 80901-2679

Re: Update on Sunnyside Area Water Rights

Dear Jeff:

The following is a summary of the water rights held by Kaiser Coal Company in the Sunnyside area, in the Grassy Trail Creek, Range Creek and Price River drainage areas.

According to the State Engineer's records, title to the water rights referenced below have all been transferred into the name of Kaiser Coal Company with the exception of the following:

91-326. Based upon an underground water claim No. 7552, established prior to 1935. This water right is for 137 gallons per minute for mining use on a year round basis in the Price River drainage. This is a mine tunnel diversion with a priority of 1899 or 1900 in what, I assume, is the Sunnyside Mine. This is a diligence claim to developed ground water. Assuming it was properly filed, it will constitute prima facie evidence of a water right and no further efforts are required to perfect this right. Title is currently held in Kaiser Steel Corporation, in care of Edward W. Clyde, as attorney-in-fact.

47-15. This is a small stock water diligence claim established prior to 1903, which as I will explain in more detail below, forms a part of the aggregate stock watering rights held by Kaiser. Title is currently in Kaiser Steel Corporation, in care of Edward W. Clyde, as attorney-in-fact.

91-332. This is a small mining right acquired from U.S. Steel Corporation in conjunction with the Horse Canyon Mine. It is based on

CLYDE & PRATT

Jeffrey Collins, Esq.
November 6, 1985
Page two

an underground water claim, No. 17744. The claim has a priority of 1923 to 85 gallons per minute. The water is used for mining and industrial purposes on a year round basis. Title is in Kaiser Steel Corporation.

Title to these rights should be brought forward into Kaiser Coal Corporation's name by a simple deed of conveyance by Kaiser Steel Corporation. I would be happy to prepare that deed for you if you would like me to do so.

Grassy Trail Creek

The following water rights are owned by Kaiser Coal Corporation in Grassy Trail Creek and its tributaries.

91-28, A5260, a-393, Cert. 808, a-2840, a-4233, Cert. A-519.

The priority is June 10, 1913. The flow is 2.2 cfs for irrigation purposes during April 1 through October 31 of each year. This particular right is limited to the needs of 149.90 acres. This would yield approximately 599.6 acre feet annually for use during the irrigation season, based upon an assumed duty of water of 4 acre feet per acre.

The right also provides for domestic use on a year round basis for 105 families in the Colombia area, which would yield approximately 76.44 acre feet and for 770 families in the Sunnyside area, which would yield an additional 560.56 acre feet annually.

The right also entitles Kaiser to use water for industrial and municipal uses within Sunnyside and at the Sunnyside Coal Mine on a year round basis. The municipal and industrial use is not further quantified and the flow is part of the 2.2 cfs irrigation flow. The right also entitles you to store water March 15 through December 15 in the Grassy Trail Creek Reservoir.

This water right is supplemental to all other water rights in Grassy Trail Creek, and like the other Grassy Trail rights, is subject to the joint agreement with U.S. Steel Corporation regarding the Grassy Trail Creek Reservoir.

CLYDE & PRATT

Jeffrey Collins, Esq.
November 6, 1985
Page three

91-84, A 9462, Cert. 2047, a-2839, a-4239, Cert. a-525.

The flow is 2.2 cfs with a priority of January 31, 1924. This right is limited to the irrigation requirements of 38.94 acres and would yield approximately 155.76 acre feet annually for use during the irrigation season. This is, again, supplemental to 91-28 and all other rights on Grassy Trail Creek.

91-114, A 11774, Cert. 2426, a-3409, a-4235, Cert. a-521.

This right has a priority of July 5, 1935 and a flow of 1.8 cfs. The use is irrigation and is limited to the needs of 30.80 acres and would yield approximately 123.20 acre feet annually for use during the irrigation season. This right is supplemental to all of the rights on Grassy Trail Creek.

91-125, A 13333, a-3408, a-4234, Cert. 7765.

The priority of this right is February 13, 1940 and has a flow of 5.0 cfs. The use is irrigation and is limited to the needs of 150 acres and would yield approximately 600 acre feet of water annually for use during the irrigation season. This right is supplemental to all other rights on Grassy Trail Creek.

91-144, A-1562 a, a-3048, Cert. 7959.

The priority is December 18, 1943 with a total diversion right of 33.33 acre feet. The use is municipal from January 1 through December 31, inclusive, within the town of Sunnyside. This is a storage right for Grassy Trail Reservoir. You are entitled under this right to store water January 1 through December 31. It is supplemental to all other Grassy Trail Creek rights.

91-178, A-20409, a-3770, Cert. 5901.

The priority is December 19, 1951 with a total diversion right of 916.00 acre feet. This is again, a storage right for Grassy Trail Creek Reservoir and is limited to the 916 acre feet.

91-146, A-15621 a, a-3049, Cert. 7958.

The priority is December 18, 1943. The diversion right is 33.33 acre feet. This is a high water storage right for Grassy Trail Creek

CLYDE & PRATT

Jeffrey Collins, Esq.
November 6, 1985
Page four

Reservoir and limited to 33.33 acre feet. The authorized uses are irrigation, domestic, municipal and industrial, and this right is supplemental to all of the rights on Grassy Trail Creek.

91-362, Decree of November 7, 1917, a-1687a, a-3047, a-4238, Cert. a-523.

This is one of the earliest rights on Grassy Trail Creek. It has a priority of 1878. The flow is 1.0 cfs. The right is for irrigation from April 1 through October 31 and is limited to the needs of 50 acres. This right would yield approximately 200 acre feet of water annually for use during the irrigation season. The right also entitles Kaiser to municipal, industrial and domestic use from January through December, and storage March 15 through December 15 in Grassy Trail Creek Reservoir. The municipal and industrial use is not further quantified. Again, this right is supplemental to all other rights on Grassy Trail Creek.

91-367, Decree of November 7, 1917, a-3172, a-4237, Cert. a-524.

The priority is 1888 with a flow of 0.875 cfs. The right was certificated for irrigation, domestic, municipal and industrial use. This is supplemental to all other rights on the Grassy Trail Creek and is a storage right limited to 200 acre feet of water annually.

91-368, Decree of November 7, 1917, a-3173, a-4236, Cert. a-522.

The priority is 1888 with a flow of 0.625 cfs. The authorized uses are irrigation, municipal, industrial, domestic and storage. This is again, a supplemental storage right and is limited to a total of 100 acre feet of water in storage annually.

91-369, Decree of November 7, 1917, a-3174, a-4232, Cert. a-520.

The priority is 1888. The authorized uses are irrigation, municipal, industrial, domestic and storage. This is again, a high storage right limited to 99.40 acre feet and is supplemental to all other Grassy Trail Creek rights.

The Grassy Trail Creek rights, having been made supplemental to each other, will entitle Kaiser to irrigate 1,511.43 acres of land. This should yield approximately 5,156.52 acre feet of water annually for use during the irrigation season.

CLYDE & PRATT

Jeffrey Collins, Esq.
November 6, 1985
Page five

The total domestic entitlement under all of the above mentioned rights is for 875 families in the Colombia and Sunnyside areas and will yield 637 acre feet annually for use on a year round basis. This is in addition to the irrigation portion of the right. The rights also entitle Kaiser to municipal, industrial and storage purposes. The storage rights are limited to the capacity of the reservoir, which is 916 acre feet. The industrial use is not quantified, it is simply a part of the total authorized flows under all of the above mentioned water rights.

There are numerous stock watering rights in Grassy Trail Creek. I will, however, address those in a later section of this report.

Range Creek

The following water rights are owned by Kaiser Coal Corporation in Range Creek and its tributaries.

91-11, A 2864, Cert. 499, a-5458.

The priority of this right is December 8, 1909 with a flow of 1.10 cfs. The authorized uses are irrigation from April 1 to October 15 and is limited to 77.10 acres. This will yield approximately 308.40 acre feet annually for use during the irrigation season. Change applicaton a-5458 was withdrawn by Kaiser Coal Corporation by letter of June 4, 1984, as confirmed by the State Engineer's Memorandum Decision of July 13, 1984. The underlying water right is vested, perfected and in good standing.

91-33, A 5471, Cert. 793, a-5459.

The priority is October 2, 1913, with a flow of 2.0 cfs. The authorized use is for irrigation during a May 1 through October 1 irrigation season and is limited to the needs of 56 acres. This will yield approximately 224 acre feet annually for use during the irrigation season. Change application a-5459 was withdrawn by Kaiser in June of 1984, as confirmed by Memorandum Decision of the State Engineer dated July 13, 1984. The underlying water right is vested, perfected and in good standing.

CLYDE & PRATT

Jeffrey Collins, Esq.
November 6, 1985
Page six

91-192, A 23053, a-7814, a-5467, Cert. 9798 issued August 7, 1975.

The priority of this right is July 3, 1951. The flow is 1.5 cfs. The approved use is irrigation from March 1 through November 1 and is limited to 50 acres. This will yield approximately 200 acre feet of water annually for use during the irrigation season. In addition, stock watering rights were approved during the grazing season of March 1 through November 1 and limited to the needs of 50 cattle and 10 horses.

91-55, A 7212, a-842, a-998, Cert. 1621, a-2386, a-3801, a-5460.

The priority is April 15, 1917, with a flow of 1.239 cfs. The authorized use is irrigation April 1 through October 31 and is limited to the needs of 87.02 acres. This should yield approximately 348.08 acre feet of water annually for use during the irrigation season.

Change applications a-3801 and a-5460 were withdrawn by letter of May 10, 1985, as confirmed by Memorandum Decision of May 29, 1985. The underlying water right is vested, perfected and in good standing.

91-81, A 9269, Cert. 1435, a-3800, a-5461.

The priority is October 25, 1924. The flow is 0.56 cfs. The authorized use is irrigation May 1 through September 30 and is limited to the needs of 33.45 acres. This should yield approximately 133.80 acre feet annually for use during the irrigation season. Change applications a-3800 and a-5461 were withdrawn by letter of May 10, 1985 and confirmed by Memorandum Decision of May 29, 1985. The underlying water rights are vested, perfected and in good standing.

91-89, A 9618, Cert. 1686, a-2557, Cert. a-346, a-3802, a-5462.

The priority of this right is October 24, 1924. The flow is 0.472 cfs. The authorized use is irrigation April 1 through October 1 and limited to the needs of 33.41 acres. This right was certificated at a 3 acre foot duty and would limit this to 100.23 acre feet annually for use during the irrigation season. The proposed determination, however, indicates that the right will produce 133.64 acre feet annually, which is a 4 acre foot duty. There is thus a conflict between the proposed determination and the certificate. The certificate of appropriation should control in this instance. We simply note this discrepancy for future reference.

GLYDE & PRATT

Jeffrey Collins, Esq.
November 6, 1985
Page seven

Change applications a-3802 and a-5462 were withdrawn by Kaiser by letter of May 10, 1985 and confirmed by Memorandum Decision of May 29, 1985. This right also included domestic use by one family during the irrigation season and is limited to .73 acre feet annually.

91-298, Decree in Civil No. 1933, based upon a Diligence Claim No. 234, Change Application No, 3799, a-5457.

The priority of this right is 1890 with a flow of 2.0 cfs. The authorized use is irrigation from April 1 to October 31 and is limited to the needs of 130 acres. This should yield approximately 520 acre feet annually for use during the irrigation season.

Additionally, this right includes stock watering rights from January 1 through December 31 and is limited to the needs of 500 cattle and 2,000 sheep. The stock watering right is quantified at 25.20 acre feet annually. The stock water directly from the stream and the stock watering right is part of the above stated irrigation flows.

The right also includes municipal, industrial and domestic use on a year round basis in the town of Sunnyside. The total quantity of water approved for all uses is 554.33 acre feet annually. The stock watering portion of this right is supplemental to all other stock watering rights held in both Range Creek and Grassy Trail Creek, which I will discuss in more detail below.

Change applications a-3799 and a-5457 were withdrawn by Kaiser by letter of May 20, 1985 as confirmed by Memorandum Decision of July 2, 1985. The underlying water right is vested, perfected and in good standing.

There are a variety of stock watering rights on Range Creek which I will discuss below.

It is essential that the Range Creek rights remain in active use in order to protect them from forfeiture or abandonment. It is only necessary to use this water once every five years in order to protect it from statutory forfeiture under Section 73-1-4 U.C.A., 1953. Abandonment does not require any set time limit. Instead, it simply requires a manifest intent to abandon and cease using the water rights. So long as Kaiser maintains its ditches and diversion works

CLYDE & PRATT

Jeffrey Collins, Esq.
November 6, 1985
Page eight

so that it has the capability of using this water it will be difficult, if not impossible, to demonstrate an intent on Kaiser's part to abandon the water rights.

Kaiser does have a variety of options. It can use the water itself on its land. It could file a non-use permit under Section 73-1-4, which would authorize a period of non-use for up to five years. It may be renewed for additional five year periods upon satisfying the statutory criteria for continued non-use. Alternatively, the water could be used by a lessee, either on Kaiser's land in Range Creek, or on other land downstream. This would necessitate the filing of a change application and receipt of State Engineer approval to change the place of use and point of diversion. The use by a lessee, however, is use and use is all that is required to prevent the water right from being forfeited.

If Kaiser elects to use the water itself or to have it used by a lessee, it would be desirable to prepare affidavits upon the conclusion of each irrigation season documenting the nature and extent of the use made during that particular year or season. This documented history of water use will be helpful in the event anyone should raise a forfeiture challenge in the future.

Miscellaneous Water Rights

Kaiser has a variety of other water rights in springs, drains, mine tunnels and in the Price River drainage as follows:

Springs

91-98, A 10265, Cert. 1971.

The priority is January 16, 1928. The flow is .005 cfs. This is a stock watering right from April 1 through November 1. It is supplemental to all other stock watering rights, which in the aggregate are limited to 500 cows and 2,000 sheep. This particular right is limited to a withdrawal of 16.80 acre feet out of the over-all 25.20 acre feet of stock watering rights held by Kaiser. The Spring is located South 63° 45' East, 3,449 feet from the Northwest corner of Section 9, Township 14 South, Range 14 East, SLB&M. Although the appropriated flow is very small, this constitutes the majority of Kaiser's stock watering rights and is therefore quite valuable.

CLYDE & PRATT

Jeffrey Collins, Esq.
November 6, 1985
Page nine

91-100, A 10402, Cert. 2024.

The priority is November 7, 1928. The flow is 0.5 cfs, again from a spring source located North 870 feet and West 1,310 feet from the Southeast corner, Section 3, Township 15 South, Range 13 East, SLB&M. This right is for irrigation from June 15 through September 15 and is limited to the needs of 6.54 acres. This is supplemental to all of the rights in the Grassy Trail Creek drainage, where this spring apparently originates.

91-3914, A 20205, a-7275, Cert. 11411.

The priority is October 1, 1948. The water source is a spring. The authorized uses are irrigation on 29.20 acres from April 1 through October 31, domestic for 15 persons January through December and stock watering rights. The stock rights are supplemental to all other stock watering rights, which in the aggregate are limited to 500 head of cattle and 2,000 sheep.

Drain - Sewage Effluent

91-138, A 15092, a-4299, Cert. 7764.

The priority is February 24, 1943. The flow is 1.07 cfs. The source of water is recaptured sewage effluent from the Sunnyside/East Carbon Sewage Treatment Plant. The authorized use is irrigation April 1 through October 31 and is limited to the needs of 77.20 acres. This right is supplemental to all other Kaiser rights in Grassy Trail Creek and is limited to a total diversion of 288.80 acre feet annually for use during the irrigation season.

This is a very unique right in that, as a general rule, the appropriator of water is entitled to recapture and re-use his waste water. If he chooses to let it run to waste, downstream water users may use it themselves, so long as it is available to them, but they generally acquire no vested rights as against the upstream appropriator in this waste water source. The original appropriator may capture this waste water and take it away from the downstream user without liability exposure. In this particular instance, however, the State Engineer approved an application filed by Mr. McMahan, and perfected the same in this sewage effluent source. Kaiser later

CLYDE & PRATT

Jeffrey Collins, Esq.
November 6, 1985
Page ten

acquired it. We are aware of only one other water right of this nature that has been approved in this state. The State Engineer has subsequently taken the position that the waste water from sewage treatment plants belongs to the original appropriator and that downstream users cannot acquire any vested or perfected rights therein.

Price River Drainage

The following rights, 91-808, 809, 810 and 399 are all pending applications to appropriate water from small springs located in the Price River drainage. The quantity of water under each of these applications is .05 cfs. Kaiser seeks to appropriate this water for mining and industrial use. The State Engineer has adopted a policy in the entirety of the Colorado River drainage basin regarding approval of pending applications. Under this policy, he will not approve any new applications to appropriate until such time as the applicant has a specific project in mind and is prepared to actually commence the diversion and use of water. Consequently, these applications are still in a pending and unapproved status. No action will be taken on these applications until such time as Kaiser comes forward with a specific project and use for this water. At that time, the State Engineer will re-advertise the applications and subject them to protest and review once again.

91-241, A 29412.

The priority of this right is August 29, 1957. The source is Price River and the appropriated flow is 5 cfs. This application is approved for storage of 5,000 acre feet annually for municipal and industrial use.

The State Engineer lapsed this right for lack of diligent development of the water right. The right was reinstated upon Kaiser's voluntary agreement to reduce the application to 1,000 acre feet from 5,000 acre feet. Proof of appropriation is now due January 31, 1986, as per Memorandum Decision of September 8, 1980. Although it may be possible to obtain an additional extension of time within which to submit proof of appropriation, the State Engineer has indicated that no further extensions will be granted. Consequently, unless this right is perfected by January 31, 1986, this right will in all probability be lapsed for lack of diligence by the State Engineer.

CLYDE & PRATT

Jeffrey Collins, Esq.
November 6, 1985
Page eleven

This is a fairly early priority right in the Colorado River drainage and thus, it does have some value. However, the time to submit proof is very short. The winter weather is now upon us, and it may simply be too late to do anything towards salvaging this right. Nevertheless, the January 31, 1986 proof date should be kept in mind if Kaiser has any interest in protecting this right.

Mine Tunnel Rights

91-231, A 288112, a-13237 (Amendatory Change), Cert. 12576 issued August 27, 1985.

This is the primary right in the Sunnyside Mine. The certificated flow is 2.22 cfs. The priority is January 10, 1957. The authorized uses are irrigation for 160 acres, industrial uses related to coal mining and is supplemental to all other rights in the Grassy Trail Creek drainage. I have enclosed a copy of the Certificate of Appropriation for your files. It was recently issued and you may not have a copy in your possession.

Rights Acquired From U.S. Steel Corporation With The Horse Canyon Mine

91-150, A 17147, a-2319.

The priority is December 29, 1945 with a flow of 0.10 cfs. The authorized uses are domestic and municipal from January 1 through December 31 in the Geneva Townsite. The application was approved April 29, 1949. Proof of appropriation was submitted in 1952. A Certificate of Appropriation No. 4154 was subsequently issued by the State Engineer for 0.10 cfs, limited to industrial use only.

91-148, A 17145, Cert. 4152, a-2320.

The priority is December 29, 1945 and the flow is 0.03 cfs. The authorized use is industrial and mining on a year round basis.

91-149, A 17146, a-2321, Cert. 4153.

The priority is December 29, 1945. The flow is 0.10 cfs for mining use January 1 through December 31 for mining and industrial use.

CLYDE & PRATT

Jeffrey Collins, Esq.
November 6, 1985
Page twelve

91-326, Based on an Underground Water Claim No. 7552.

The authorized flow is 137 gallons per minute for mining use from January 1 through December 31. This is a mine tunnel diversion with a priority of 1899 to 1900. This is a diligence claim and if properly filed constitutes prima facie evidence of a water right. Thus, no further activity is required by Kaiser in order to perfect this right.

91-332.

This is based on an underground water claim No. 17744. The appropriated flow is 85 gallons per minute with a priority of 1923. The authorized use is industrial January 1 through December 31. This is again, a diligence right. If properly filed it constitutes prima facie evidence of the water right and thus, no further effort is required to perfect this right.

Stock Watering Rights

The following water user claim numbers represent stock watering rights owned by Kaiser Steel in both Grassy Trail and Range Creek drainages.

| | | |
|---------|---------|---------|
| 91-1640 | 91-3006 | 91-3530 |
| 91-3519 | 91-3520 | 91-2655 |
| 91-4270 | 91-3521 | |
| 91-3523 | 91-3526 | |
| 91-3532 | 91-3533 | |

All of the stock watering rights are supplemental to each other. In the aggregate they provide water for 500 head of cattle and 2,000 head of sheep and will yield annually 25.20 acre feet of water. The stock watering rights have various dates of priority with the earliest apparently 1869 and the latest 1902. The rights all provide for direct stock watering on the stream rather than artificial diversions to stock watering ponds. Although the law generally requires the actual diversion of water from the stream in order to appropriate water, one Utah case has held that a right to water livestock from the natural water course may be acquired without a diversion from the stream. Adams v. Portage Reservoir, 95 Ut.1, 72 P.2d 648 (1938). There was a strong dissent in this case and there is authority that holds to the contrary.

CLYDE & PRATT

Jeffrey Collins, Esq.
November 6, 1985
Page thirteen

The rights do not involve a significant amount of water. Some of the rights are limited to very short grazing seasons. Others are authorized for year round use. They are, however, valuable rights in this area if you intend to continue using this property for stock grazing purposes. I would therefore take whatever steps are necessary to keep this water in use and avoid any claim of statutory forfeiture.

The foregoing constitutes a complete inventory of Kaiser's water rights on record with the State Engineer. Should you have any questions regarding the foregoing, please do not hesitate to contact me.

Very truly yours,

CLYDE & PRATT



Steven E. Clyde

SEC/jl
Enclosure
cc: Scott Johnson