

Document Information Form

Mine Number: C/041/0002 *gt*

File Name: Sureco Mine

To: Incoming

From:

Person Mare Stillson

Company Water Rights

Date Sent: 10/23/07

Explanation:

Water Rights Decision

cc:



JON M. HUNTSMAN, JR.
Governor
GARY R. HERBERT
Lieutenant Governor

State of Utah
DEPARTMENT OF NATURAL RESOURCES
Division of Water Rights

MICHAEL R. STYLER JERRY D. OLDS
Executive Director State Engineer/Division Director

RECEIVED

OCT 23 2007

DIV. OF OIL, GAS & MINING

OCT 12 2007

Jacoby
2/041/0002

ORDER OF THE STATE ENGINEER
For Fixed-Time Application Number 94-1883 (F76937)

Fixed-Time Application Number 94-1883 (F76937) in the names of Josiah K. & Etta Marie Eardley, was filed on February 26, 2007, to appropriate 1.00 cubic feet per second (cfs) or 240.56 acre-feet (af) of water from a surface source located South 208 feet and East 1099 feet from the NW Corner of Section 30, T22S, R6E, SLB&M. The water is to be used for the irrigation of 72.3 acres (sole supply of 60.00 acres) from April 1 to October 31, and the stockwatering requirements of 20 head of livestock (in cattle or horses or equivalent species) from January 1 to December 31. The water is to be used in all or portion(s) of Section 30, T22S, R6E, SLB&M; and Section 31, T22S, R6E, SLB&M.

Notice of the application was published in the Emery County Progress on March 13 and March 20, 2007 and protests were received from Quitchumpah Ranch, Canyon Fuel Company, and Bret Carter. None of the protestants requested a hearing and a hearing was not held.

Mr. Morgan Robertson, owner of Quitchumpah Ranch and owner of several existing water rights on Quitchumpah Creek, stated in a letter of concern he would be opposed to any new water right filings on Quitchumpah Creek. He also stated that if there is additional water available, the existing water right owners on the creek should have first rights to it.

Mr. Bret Carter, a water right holder on Quitchumpah Creek, stated in a letter of protest the water on Quitchumpah Creek has already been filed on and settled in a previous hearing.

Canyon Fuel, owner of SUFCO mine, sent a letter of protest via their legal counsel, Mr. Steven E. Clyde of CLYDE SNOW SESSIONS & SWENSON, P.C. The protestant states the applicants filed this application in order to appropriate water being discharged from the SUFCO mine. The first reason for protest, set forth in its letter, is it believes its prior vested water rights will be adversely impacted by the approval of this application. The second point of protest is that the only reliable supply of water is the base flow of Quitchumpah Creek, and the base flow is fully appropriated.

To support this point Canyon Fuel states that studies performed as part of the protestant's mining permitting process indicates the water intercepted and developed in the SUFCO mine is ancient water approximately 15,000 to 20,000 years old that has been trapped in perched aquifers. The company indicates these aquifers do not appear to outcrop in the Quitchumpah Creek or Muddy Creek drainages and the ground water surface appears to dip to the northwest away from the Quitchumpah Creek drainage following major geologic structural features consisting of normal faults of large displacements trending north-south located to the west and northwest of the mine. As such, Canyon Fuel contends this water is developed or foreign water in the Quitchumpah Creek drainage and not part of the naturally available water supply in this drainage. Canyon

Temporary Right

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Fuel states the belief that most of the water encountered in the mine is in perched aquifers and the water ceases to discharge once the intercepted perched aquifer has drained.

* Canyon Fuel further contends the water the applicants seek to appropriate is developed water owned by the company and as the source of developed water is foreign to this drainage, the company has the right to recapture and reuse this water at anytime.

A review of the application by the State Engineer revealed the applicants' point of diversion is located downstream from all other points of diversion for agricultural irrigation. It does not appear by diverting water from this point that the applicants would interfere with any other water user using water for irrigation purposes from Quitchumpah Creek.

Surface waters in Area 94 / Muddy Creek Drainage are considered fully appropriated, however, the area is still open to fixed-time and temporary applications which are considered on their individual merits, with emphasis on their potential to interfere with existing rights.

Over the past number of years, SUFCO Mine has been mining an area known as the Pines Tract. The mine discharges water from its workings into the North Fork of Quitchumpah Creek. A review of the watershed boundaries between Quitchumpah Creek and Muddy Creek shows, based on a vertical projection of the hydrologic boundary line, approximately 90% of the Pines Tract mining area is located beneath the Muddy Creek Watershed. Only 10% of the mining area is located beneath the Quitchumpah Creek Watershed. It is the opinion of the State Engineer the majority of water discharged by the mine from the Pines Tract mining area was in fact tributary to the Muddy Creek Watershed Drainage. While the mine purports that all of the water being discharged from the mine is "developed" water from isolated perched aquifers, it is the opinion of the State Engineer there is likely a substantial surface water recharge connection. Seepage from surface water is likely recharging aquifers intercepted or disturbed by coal extraction or the subsequent ground subsidence.

Information submitted by the mine to the Division of Oil, Gas and Mining show typical flow rates during this period of between 4 and 6 million gallons per day (~6-9 cfs). This volume of flow added to the base flow of Quitchumpah Creek has been sufficient to fill the ditches of the downstream water users with excess flows being sent down the creek. Recently, the mine has completed mining operations in the Pines Tract and moved its active workings further to the west beneath Big Ridge. This new mining tract is also located partially beneath the Muddy Creek Watershed Drainage. It is the State Engineer's understanding that discharge flows from the mine have reduced significantly.

As a point of clarification, Section 73-1-1, Utah Code Annotated, 1953, as revised, states that "All waters in this state, whether above or under the ground are hereby declared to be the property of the public, subject to all existing rights to the use thereof." Rights to use water for a beneficial purpose are obtained by application to the State Engineer. While the State Engineer has not heretofore required mine operators to obtain a water right for non-consumptive "in mine" water use, it is required that all consumptive uses of water within the mine and all water

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discharged from the mine for use by the mine for some other beneficial purpose be permitted by acquisition of a water right regardless of its source.

While the State Engineer recognizes that water right holders on Muddy Creek may have claim on some portion of the water discharged by the mine into the Quitchumpah drainage, until such time as the water is returned to the Muddy Creek drainage or until the water right holders on Muddy Creek establish a formal claim through some other means such as a temporary or permanent change application, it is the opinion of the State Engineer that this fixed-time application can be approved to allow the applicants to divert and put to beneficial use water from Quitchumpah Creek when it is available. However, this right will not be granted in perpetuity. The fixed-time nature of this application has been discussed with the applicants and the applicants are willing to accept the conditions of such an approval.

It is, therefore, **ORDERED** and Fixed-Time Application Number 94-1883 (F76937) is hereby **APPROVED** subject to all prior rights. This application is also approved subject to Section 73-3-8, Utah Code Annotated, 1953, as revised, for a Fixed-Time, not to exceed ten years, at which time this application will permanently lapse, except as noted in Section 73-3-8, paragraph #2, Utah Code Annotated.

The applicants still have the responsibility of utilizing the water and for showing diligence to develop this right and for preparing and submitting proof of beneficial use of the water as required under Sections 73-3-12 and 73-3-16 of the Utah Code Annotated.

Inasmuch as this application proposes to divert water from a surface source, the applicants are required to contact the Stream Alteration Section of the Division of Water Rights at 801-538-7240 to obtain a Stream Alteration permit in addition to this Fixed-Time Application.

This application is also approved according to the conditions of the current appropriation policy guidelines for the Colorado River Drainage, adopted March 7, 1990.

The applicants are strongly cautioned that other permits issued by entities other than the Division of Water Rights may be required before any development of this application can begin and it is the responsibility of the applicants to determine the applicability of and acquisition of such permits. Once all other permits have been acquired, this is your authority to develop the water under the above referenced application which under Sections 73-3-10 and 73-3-12, Utah Code Annotated, 1953, as amended, must be diligently prosecuted to completion. The water must be put to beneficial use and proof must be filed on or before October 31, 2012, or a request for extension of time must be acceptably filed; otherwise the application will be lapsed. This approval is limited to the rights to divert and beneficially use water and does not grant any rights of access to, or use of land, or facilities not owned by the applicants.

As noted, this approval is granted subject to prior rights. The applicants shall be liable to mitigate or provide compensation for any impairment of or interference with prior rights as such may be stipulated among parties or decreed by a court of competent jurisdiction.

Proof of beneficial use is evidence to the State Engineer that the water has been placed to its full-intended beneficial use. By law, it must be prepared by a registered engineer or land surveyor, who will certify to the location and uses of the extent of your water right.

Upon the submission of proof as required by Section 73-3-16, Utah Code, for this application, the applicants must identify every source of water used under this application and the amount of water used from that source. The proof must also show the capacity of the sources of supply and demonstrate that each source can provide the water claimed to be diverted under this right as well as all other water rights which may be approved to be diverted from those sources.

Failure on your part to comply with the requirements of the applicable statutes may result in forfeiture of this Fixed-Time Application.

It is the applicants' responsibility to maintain a current address with this office and to update ownership of their water right. Please notify this office immediately of any change of address or for assistance in updating ownership.

Your contact with this office, should you need it, is with the Southeastern Regional Office. The telephone number is 435-637-1303.

This Order is subject to the provisions of Administrative Rule R655-6-17 of the Division of Water Rights and to Sections 63-46b-13 and 73-3-14 of the Utah Code which provide for filing either a Request for Reconsideration with the State Engineer or an appeal with the appropriate District Court. A Request for Reconsideration must be filed with the State Engineer within 20 days of the date of this Order. However, a Request for Reconsideration is not a prerequisite to filing a court appeal. A court appeal must be filed within 30 days after the date of this Order, or if a Request for Reconsideration has been filed, within 30 days after the date the Request for Reconsideration is denied. A Request for Reconsideration is considered denied when no action is taken 20 days after the Request is filed.

Dated this 12 day of October, 2007.



Jerry D. Olds, P.E., State Engineer

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Mailed a copy of the foregoing Order this 12 day of October, 2007 to:

Josiah K. & Etta Marie Eardley
P.O Box 554
Emery, UT 84522

Quitcumpaw Ranch
c/o Morgan Robertson
PO Box 65
Emery, UT 84522

Canyon Fuel Company
c/o Steven E. Clyde
201 South Main Street, Suite 1300
Salt Lake City, UT 84111

Bret Carter
PO Box 24
Emery, UT 84522

Stream Alteration Section
Division of Water Rights

BY: Kelly K. Horn
Kelly K. Horn, Appropriation Secretary