IN THE OFFICE OF THE STATE ENGINEER OF THE STATE OF NEVADA

IN THE MATTER OF APPLICATION NUMBER 80209T
FILED BY Ruby Pipeline LLC
ON October 15, 20 10, TO APPROPRIATE THE
WATERS OF Underground well- MP 425

PROTEST

FILED
NOV 0 2 2010
STATE ENGINEER'S OFFICE

Comes now Amy Atwood
Printed or typed name of protestant

whose post office address is Center for Biological Diversity, PO Box 11374, Portland OR 97211-0374
Street No. or PO Box, City, State and ZIP Code

whose occupation is Attorney and protests the granting

of Application Number 80209T, filed on October 15, 20 10

by Ruby Pipeline LLC to appropriate the

waters of Underground well - MP 425 situated in Humboldt
Underground or name of stream, lake, spring or other source

County, State of Nevada, for the following reasons and on the following grounds, to wit:

According to NRS 533.345(2), "If an applicant is seeking a temporary change of place of diversion, manner of use or place of use of water already appropriated, the State Engineer shall approve the application if:.. (b) The temporary change is in the public interest." The appropriation requested under application 80209T is not in the public interest because the Ruby Pipeline project will harm the environment locally, regionally and globally. See attached statement of reasons.

THEREFORE the Protestant requests that the application be Denied
Denied, issued subject to prior rights, etc., as the case may be

and that an order be entered for such relief as the State Engineer deems just and proper.

Signed
Agent or protestant

Amy Atwood
Printed or typed name, if agent

Address Center for Biological Diversity PO Box 11374
Street No. or PO Box

Portland OR 97211-0374
City, State and ZIP Code

503-283-5474
Phone Number

Subscribed and sworn to before me this 28th day of October, 20 10

Notary Public

OFFICIAL SEAL
RENE E QUARANTO
NOTARY PUBLIC-OREGON
COMMISSION NO. 441867
MY COMMISSION EXPIRES AUGUST 12, 2013

State of Oregon
County of Multnomah

+ $25 FILING FEE MUST ACCOMPANY PROTEST. PROTEST MUST BE FILED IN DUPLICATE.

ALL COPIES MUST CONTAIN ORIGINAL SIGNATURE.

Via Overnight Delivery

October 29, 2010

Jason King, P.E., State Engineer
Division of Water Resources
Department of Conservation and Natural Resources
State of Nevada
901 South Stewart Street, Suite 2002
Carson City, NV 89701

Re: Statement of Reasons in Support of Protests by Center for Biological Diversity of Water Rights Applications for the Ruby Pipeline Project: 80127T, 80128T, 80129T, 80143T, 80144T, 80145T, 80146T, 80147T

Dear State Engineer King:

The Center for Biological Diversity ("Center") respectfully submits this Statement of Reasons in support of its protests of applications 80127T, 80128T, 80129T, 80143T, 80144T, 80145T, 80146T, and 80147T ("Applications"). These permits would appropriate scarce, high desert water resources for the Ruby Pipeline Project ("Pipeline"). For the reasons set forth below, the appropriation of water for the Ruby Pipeline is not in the "public interest" as required by NRS § 533.345(2)(b), because the Pipeline will harm the local and regional environment. Accordingly, the Applications should be denied under NRS § 533.370(6)(c).

The Center is a non-profit 501(c)(3) environmental organization headquartered in Tucson, Arizona and with field offices in Nevada and elsewhere in the United States. The Center works through science, law and policy to secure a future for all species hovering on the brink of extinction. The Center's members and staff are actively involved in species and habitat protection throughout the United States, including protection of species in Nevada. The Center has over 42,000 members throughout the United States and the world.

I. The Public Interest Requires Protection of Environmental Values.

A decision of whether to grant the Applications requires consideration of the "public interest" pursuant to NORS § 533.345(2)(b). The public interest requires protection of environmental values – in particular, the public's "common heritage of streams, lakes, marshlands and tidelands." *See Mineral County v. State*, 117 Nev. 235 (2001). As Supreme Court justices Rose and Shearing have observed:

> If the current law governing the water engineer does not clearly direct the engineer to continuously consider in the course of his work the public's interest in Nevada's natural water resources, then the law is deficient. It is then appropriate, if not our constitutional duty, to expressly reaffirm the engineer's continuing responsibility as a public trustee to allocate and supervise water rights so that the appropriations do not substantially impair the public interest in the lands and waters remaining. The public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust. Our dwindling natural resources deserve no less.

Id. at 248-49 (internal quotations removed).

The State Engineer has considered environmental values in determining water rights. For example, on April 16, 2007, the State Engineer issued Ruling No. 5726, which concerned Southern Nevada Water Authority Applications 54003 through 54021, in which the State Engineer required the collection of biological and hydrological baseline data, an environmental monitoring and mitigation plan, and staged development supported by associated studies in order to ensure the environmental safety of the basin of origin.

Likewise, here the State Engineer must consider environmental values as part of the public interest, in considering the Applications.

II. The Ruby Pipeline Will Significantly Harm the Local and Regional Environment, and Thus Is Not in the Public Interest.

As demonstrated below, the Applications are not in the public interest and should be denied because the Ruby Pipeline will harm the local and regional environment.

A. Local Impacts

Within Nevada, the Ruby Pipeline will have significant impacts to wildlife, including endangered and threatened species and their habitats. A portion of these impacts will occur on previously undisturbed lands, due to the route chosen by Ruby Pipeline LLC. The withdrawal, use and disposal of water will cause environmental impacts, as will the transportation of pipeline workers, equipment and material. And the potential for serious damage to the Pipeline and its surroundings due to earthquakes has not been adequately considered.

1. Species and Habitats

Along its 675 mile length, the Ruby Pipeline will cut through forests, rip a 195-foot wide corridor through rare sage-brush habitat, and blast bedrock to cross hundreds of streams, including streams that provide habitat for threatened and endangered fish species.

The Pipeline will have significant impacts on sage-grouse, pygmy rabbits, and other sage-brush obligate species. Many of these species are endangered, threatened, or under consideration for listing under the Endangered Species Act. The sagebrush habitat that makes up a significant fraction of the Pipeline route is disappearing at an accelerating rate, leaving the species that live there with less habitat and fewer available sources for food, water and other needs. Given the additional loss of sagebrush habitat and species due to the Pipeline, the Ruby project violates the Nevada Sage Grouse Conservation Strategy developed by Governor Guinn's Sage Grouse Conservation Planning Team, which can be found on the website of the Nevada Department of Wildlife, http://www.ndow.org/wild/conservation/sg/plan/.

The Pipeline will also harm and kill aquatic species, including threatened and endangered fish like the Lahontan cutthroat trout and Warner sucker. The removal of riparian vegetation for Pipeline construction across streams will result in any significant in-stream temperature increases. Recent localized removal of riparian vegetation in the Truckee River, where native Lahontan cutthroat trout still occur, has altered habits enough to allow non-native bass and several native fishes typically residing in warmer waters to move up river into the construction site.

2. Undisturbed Lands

In Nevada, Humboldt, and Washoe counties, only 28 percent of the Pipeline occurs in an existing utility or road corridor, with 72 percent through prime, essentially undisturbed habitat, impacting vast areas of wilderness-quality lands in Nevada. The level impacts to sage-grouse habitat and other species indicates that impacts on other pristine wildlife habitats, including forests and streams in northern Nevada, are also likely to be severe.

3. Impacts to the Sheldon National Wildlife Refuge

Because so much of the Ruby Pipeline runs through undisturbed lands, building a transportation system and using it to transport material, workers, and equipment will cause severe environmental impacts.

For example, the Ruby Pipeline will have impacts on the Sheldon National Wildlife Refuge. While the Pipeline does not run through the Refuge, large-scale construction efforts will use Sheldon's roads, many of which are in primitive or poor condition. Running large tractor trailers with Pipeline sections, construction equipment, and water for dust control over these poorly-maintained roads will damage them even further and cause increased conflicts with the general public, endangering Refuge visitors and further harming native species.

Ruby's vehicular use of Sheldon NWR's roads and routes would generate air pollution (dust and internal-combustion-engine emissions) and noise, and add unnatural elements to the Refuge's landscape. Roadside litter and other human impacts would increase with the increase in traffic. These same effects are now seen from existing traffic on Refuge roads, but to a much lesser extent.

Finally, one of the major uses of water will be for dust control on unimproved roads, and transporting the water to the place of use is a large undertaking. There must be an analysis of the impacts along routes used for transportation of water to the roads where dust control is necessary, as well as to the construction sites where it will be used for hydrostatic testing.

4. Water Use

The Pipeline route runs through extremely dry areas, where water is already scarce and over-appropriated, resulting in significant deleterious impacts to the environment and, thus, the public interest.

Environmental review documents do not disclose where large volumes of water required for the Pipeline will come from in Nevada. Water withdrawals for the Pipeline are, therefore, being determined by the State Engineer of Nevada. But because the locations and amounts of water withdrawals and uses in Nevada are still under consideration (as made evident by change in diversion applications), the State Engineer must evaluate and consider the impacts of water withdrawal and use along the Pipeline route in Nevada. Ad-hoc consideration of individual permits is not sufficient for a project of this scale, and if this is the approach, basic facts will not be known before applications are finalized. The State Engineer must gather all the information about Nevada water withdrawals and uses, and must analyze, consider, and disclose this information to ensure an informed decision and that the public interest will be served by the project.

Disposing of huge amounts of wastewater would also cause impacts. Large quantities of water dumped on high desert land will cause erosion and pollution of ground and surface water. Biocides could be used in hydrostatic test water, which will have harmful impacts and could be toxic to wildlife.

B. Regional Impacts of the Ruby Pipeline

The Pipeline will have significant harmful impacts along its entire length in the western United States, from Wyoming to Oregon, undermining the public interest, from transportation, water use, cultural resources impacts, and impacts to fish.

1. Transportation

The roads network required for the Pipeline is longer in total length than the Pipeline itself, and crisscrosses through a wide variety of habitats, resulting in a wide variety of significant impacts to the environment. In addition, there are also reports that Ruby is not adhering to its agreements with local governments concerning local road use. According to the Modoc County Daily News of October 15, 2010:

> Over a month ago [Modoc County] issued a permit for Ruby Pipeline (and its contractors and subcontractors) to use several roads in the Newell area for purposes of their project. That permit was issued prior to any hauling and was relatively straightforward because it only affected about six miles of roadway, most of which is gravel. Our conditions of the permit allowed them to perform maintenance on the roads and required them to leave the roads in a condition equal to or better than their current condition, as provided for in their Environmental Impact Statement (EIS)...
>
> Ruby's recent use of County Road 1, on the other hand, came as a complete surprise to us when they began hauling pipe on County Road 1 on Sept. 13. We had been told on several occasions that pipeline materials and equipment would not be hauled on County Road 1, but would be moved north on Nevada Route 34. We are disappointed that they made such a severe change in their plan without contacting us.

See http://modocindependentnews.blogspot.com/2010/10/rubys-use-of-county-road-1-comes-as.html (last visited October 28, 2010).

The abuse of local roads raises the question of further illegal use of local roads, and the damage and costs to repair faced by local governments all along the Ruby Pipeline route.

2. Issues with Water Withdrawal, Use, and Disposal

There is a major, unresolved discrepancy regarding the amount of water needed for dust control and hydrostatic testing. According to the FWS Biological Opinion, "[a]n estimated 64,268,784 gallons of water will be required from surface water sources for hydrostatic testing and dust abatement." In stark contrast, BLM's FEIS states that 402 million gallons of water will be used for the Pipeline. This includes 141,985,656 gallons (436 acft) of groundwater for hydrostatic testing in Nevada, and 65,520,000 gallons (201 acft) of groundwater for dust control and alternate hydrostatic testing in Nevada.

Thus, the volume of water necessary for Nevada alone is far greater than the total estimate of water necessary for the entire project as stated in the Biological Opinion. These figures reflect a fivefold difference in two federal agencies' assessment of the Pipeline's water needs, and if this is not resolved, there is no way that the State Engineer can possibly know whether the appropriation will be for beneficial use in the public interest.

There are also considerable potential impacts associated with water withdrawals on aquatic habitats. The Biological Opinion notes (at page 91) that "[t]he Project is proposed in habitats that are already flow-limited, due to the high desert environment" and that "[a]ny additional reduction of flows caused by waterbody crossings in or connected to listed fishes habitats will have significant, adverse effects to listed fishes." Given the limited flows associated with many of the stream systems along the Pipeline, a few cubic feet per second may make a significant difference to native fish populations. Surface water withdrawals should not be taken from stream systems that support native fishes, particularly during the low flow periods.

This discrepancy, when considered in light of the known impacts to endangered fish and the possibility of pollution and water depletion in streams, it is obvious that the Pipeline is not in the public interest.

3. Impacts to Fish

The Pipeline will cross hundreds of perennial and intermittent streams, requiring retention and rerouting of the streams in order to facilitate blasting of bedrock streambeds. According to FWS' Biological Opinion, where listed fish are present during construction of the Project's waterbody crossings, there are likely to be direct effects to listed fish during work site isolation, fish salvage, and blasting activities.

Adverse, direct effects from fish salvage activities, including capture, handling, and relocation, encompass physical injury, death, and physiological stress during capture, holding, or release; predation and cannibalism when relocated fish are released; and potential horizontal transmission of disease and pathogens and stress-related phenomena. Floodplain and channel disturbance will increase sedimentation and turbidity and reduce flow along 12 miles of streams. Construction in streams could release sediments contaminated by arsenic and iron in Modoc and Warner sucker habitat, and herbicide or insecticide spray in the pipeline right of way could enter and poison waterways.

In total, 230 Lahontan cutthroat trout, 25 Warner, 4 Modoc, 19 Lost River and 19 shortnose suckers are anticipated to be killed by the Ruby Pipeline project, all of which are listed under the Endangered Species Act as threatened or endangered. The death of hundreds of endangered species is not in the public interest.

III. Conclusion

The Ruby Pipeline in proposed to stretch 675 miles from Wyoming to Oregon, and will require a 195 foot wide construction Right-of-Way and a network of supply roads that will cross streams, wetlands, and pristine sage-brush habitats and forests. Impacts from construction will include damage to local roads, the death of hundreds of endangered fish and other wildlife species, pollution in streams and airsheds, and harm to sensitive Native American Cultural Resources. Any of these impacts alone would indicate that the public interest is not served by the Pipeline. Taken together they are more than enough evidence to reject the approval of these water applications.

Additional References

The U.S. FWS. Biological Opinion for the Ruby Pipeline Project, dated June 8, 2010, is available at
http://www.blm.gov/pgdata/etc/medialib/blm/nv/nepa/ruby_pipeline_project/rod/attachment_f.Par.36850.File.dat/Ruby%20Pipeline%20Final%20BO.pdf.

The Ruby Pipeline FEIS, released in January 2010, can be found at http://elibrary.ferc.gov/idmws/File_list.asp?document_id=13783509.

All websites and online documents mentioned in this Statement of Reasons are incorporated in their entirety herein by reference.