

Midway City Council  
5 March 2019  
Regular Meeting

Silver Rim Water Holdings /  
Change Application



---

345 West 600 South, Suite 108 • Heber City, Utah 84032  
P 435-657-0984 • F 888-822-8796  
WWW.GORDONLAWGROUPUTAH.COM

**TO:** Midway City  
**FROM:** Corbin Gordon, attorney for Midway City  
**DATE:** February 28, 2019  
**RE:** Silver Rim Change Application Request

---

## **INTRODUCTION**

Silver Rim Water Holdings, LLC is requesting that the City consider approving a proposed change application that would allow 100 acre feet of culinary water (53.58 consumptive) to be diverted from the City's well.

The change application was originally approved for the Mountain Spa resort, which went into foreclosure. The water was sold off of the project and is not currently tied to any land within the City. I was asked by the Mayor to analyze the approved change application which is attached as Exhibit A.

After analyzing the change application this is what I have determined:

1. The Change application is solely approved for "municipal use" which is culinary water (see paragraph 7)
2. The water can be taken out of any point of diversion within the Midway Irrigation Company system, but because it is solely approved for culinary use, the only places it could currently be diverted are the two existing culinary springs.
3. Before diverting it from either of the springs, Paragraph 9 of the application requires that proof be provided to ". . . 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 these sources."
4. There is currently no available capacity in either of the system's springs. Midway Irrigation Company shares consume all capacity in both sources. As such, in order to

use this water somewhere within the Midway Irrigation Company service area, the applicant would be required to either drill a well or to install a treatment plant.

5. The applicant does not appear to own any land within Midway City, meaning there is little chance of drilling a well.
6. If a treatment plant were in place the water could be diverted from any non-culinary surface source and then treated to culinary grade. Treatment plants are very expensive, and there are no current plans to install one.
7. The City well is not an approved point of diversion for the Silver Rim water under the change application. The City has no duty to accept the water into its source.

#### RECOMMENDATION

The City is not obligated to accept the water into its well. Should it decide that it wants to accept the water into its well, I would recommend requiring the water to be tied to a specific project, that a condition of the acceptance be that Silver Rim give up all other points of diversion within the Midway City area. Two additional conditions the City could consider is possibly limiting the water to commercial use, and requiring that the impact fees normally recovered at the time building permits are pulled to be paid at the time the change application is approved.



GARY R. HERBERT  
Governor  
GREG BELL  
Lieutenant Governor

**State of Utah**  
**DEPARTMENT OF NATURAL RESOURCES**  
**Division of Water Rights**

JUL 14 2010

MICHAEL R. STYLER      KENT L. JONES  
*Executive Director*      *State Engineer/Division Director*

**AMENDED ORDER OF THE STATE ENGINEER**  
**Reconsideration of Permanent Change Application Number 55-12250 (a33063)**

Permanent Change Application Number 55-12250 (a33063) in the names of Midway City Corporation, Midway Irrigation Company, Silver Rim Water Holdings, LLC, and Washington Irrigation Company, was filed on June 6, 2007, to change the point of diversion, place of use, and nature of use of 100.0 acre-feet of water as evidenced by Water Right Number 55-12250. Heretofore, the water has been diverted from a surface source located North 910 feet and East 675 feet from the SW Corner of Section 7, T3S, R7E, SLB&M, and was rediverted: (1) Surface - North 1800 feet and West 80 feet from the SW Corner of Section 12, T3S, R6E, SLB&M. The water has been used for the irrigation of 33.333 acres from April 1 to October 31. The water was used in all or portion(s) of Section 18, T2S, R6E, SLB&M; Section 19, T2S, R6E, SLB&M; Section 20, T2S, R6E, SLB&M; Section 27, T2S, R6E, SLB&M; Section 28, T2S, R6E, SLB&M; Section 29, T2S, R6E, SLB&M; Section 30, T2S, R6E, SLB&M; Section 33, T2S, R6E, SLB&M; Section 34, T2S, R6E, SLB&M; Section 2, T3S, R6E, SLB&M; and Section 3, T3S, R6E, SLB&M.

Hereafter, it is proposed to divert 100.0 acre-feet of water to points of diversion changed to: (1) Surface - North 3167 feet and West 3170 feet from the SE Corner of Section 21, T3S, R4E, SLB&M (Snake Creek); (2) Surface - North 1000 feet and East 150 feet from the SW Corner of Section 18, T3S, R5E, SLB&M (Provo River); (3) Surface - North 441 feet and West 1620 feet from the SE Corner of Section 21, T3S, R4E, SLB&M (Gerber Spring); (4) Surface - North 2550 feet and East 50 feet from the S $\frac{1}{4}$  Corner of Section 3, T4S, R4E, SLB&M (Snake Creek); (5) Surface - North 683 feet and West 336 feet from the E $\frac{1}{4}$  Corner of Section 18, T3S, R4E, SLB&M (Snake Creek); (6) Surface - North 728 feet and East 195 feet from the W $\frac{1}{4}$  Corner of Section 17, T3S, R4E, SLB&M (Lavina Creek); (7) Surface - North 1000 feet and East 150 feet from the SW Corner of Section 18, T3S, R4E, SLB&M (Provo River); (8) Surface - South 299 feet and East 403 feet from the NW Corner of Section 21, T3S, R4E, SLB&M (Epperson Spring); (9) Surface - North 899 feet and East 1298 feet from the SW Corner of Section 22, T3S, R4E, SLB&M (Pine Creek); (10) Surface - North 2539 feet and East 138 feet from the SW Corner of Section 22, T3S, R4E, SLB&M (Mahogany Spring); (11) Surface - North 2384 feet and West 3137 feet from the SE Corner of Section 27, T3S, R4E, SLB&M (Snake Creek); (12) Surface - South 1669 feet and West 3085 feet from the NE Corner of Section 34, T3S, R4E, SLB&M (Snake Creek); (13) Surface - North 2482 feet and West 3329 feet from the SE Corner of Section 34, T3S, R4E, SLB&M (Snake Creek). The nature of use of the water is being changed to municipal purposes within the service area of Midway.

Notice of the application was published in The Wasatch Wave on August 29, and September 5, 2007, and a protest was received from United States Bureau of Reclamation. A hearing was not held.

The protestant expressed its concern that changing a 5<sup>th</sup> Class Provo River right to more reliable sources, as well as changing the right from one that is used primarily during the irrigation season to one that is utilized for year-round municipal use, would constitute an enlargement of the right and reduce the storage flows into Deer Creek Reservoir. The Bureau submitted calculations suggesting that Deer Creek storage would be reduced by 10 to 35 acre-feet annually, depending on hereafter depletion estimates. The State Engineer notes that the Bureau has erroneously stated that the applicants intend to change water from surface sources to more reliable underground sources. The application indicates that the proposed points of diversion will also be surface sources.

In response to the protestant's concerns, the applicants state that the underlying right is available for use all year, and that Washington Irrigation Company has storage rights under the Provo River Decree that are available to mitigate any potential impacts to downstream users. The applicants also state that the Bureau incorrectly assumes that the water will be diverted year-round at a constant rate. The applicants contend that demand is much less during non-irrigation season.

The applicants have amended the application with the resubmission of stock certificates showing the ownership of 100 shares. Recently approved memorandums<sup>1</sup> show that a share of stock in the Washington Irrigation Company is worth 1.0 acre-foot. The volume of water available to change is therefore 100.00 acre-feet.

Change Application Number 55-12250 (a33063) was approved on February 24, 2009. The applicants requested reconsideration, which was granted by the State Engineer on March 23, 2009. The applicants contend the assumption that water is only available through July 24<sup>th</sup> of each year for irrigation is an erroneous assumption. The applicants state Washington Irrigation Company also owns storage rights in the upper lakes of the Provo River in addition to this 5<sup>th</sup> class right, which allows the Company to utilize water for irrigation purposes through August of each year. In support of this request for reconsideration, the applicants submitted supporting documents to show the availability of water to users when the Company reevaluated the value of shares of stock in 2007.

The depletion for irrigation of 33.333 acres within the Provo River drainage near Francis would be about 53.58 acre-feet (33.333 acres x 19.29<sup>2</sup> inches / 12 inches per foot). Therefore, if a diversion of 100.0 acre-feet and a depletion of 53.58 acre-feet are not exceeded in the use of water for municipal purposes, this application can be approved without enlarging the underlying right, subject to certain conditions.

The amount of water available on the Provo River to distribute to water right holders is determined by the commissioner of the Provo River and diversions are regulated to ensure that

---

<sup>1</sup> Order of the State Engineer in the Matter of Change Application Numbers 55-12361 (a34520) and 55-12362 (a34521), dated October 14, 2008 and September 24, 2008.

<sup>2</sup> "Consumptive Use of Irrigated Crops in Utah," Research Report 145, Utah Agricultural Experiment Station, Utah State University, Logan, Utah, October 1994, Table 25" Kamas Station.

senior rights are protected. The river commissioner will regulate the proposed diversion of water under this application from the spring based on its relative priority date to other water rights on the system.

In evaluating the various elements of the underlying rights, it is not the intention of the State Engineer to adjudicate the extent of these rights, but rather to provide sufficient definition of the rights to assure that other vested rights are not impaired by the change and/or no enlargement occurs. If, in a subsequent action, the court adjudicates that this right is entitled to either more or less water, the State Engineer will adjust the figures accordingly.

It is, therefore, **ORDERED** and Permanent Change Application Number 55-12250 (a33063) is hereby **APPROVED** subject to prior rights and the following conditions:

- 1) The diversion of water under this application is limited such that depletion may not exceed 53.58 acre-feet. Under no circumstances is diversion to exceed 100.0 acre-feet. The applicants must maintain records of use sufficient to reasonably estimate the depletion of water associated with its use.
- 2) All diversions of water under this application are subject to direct regulation of the Provo River by the commissioner of the Provo River. Washington Irrigation Company has a small amount of reservoir storage that could enable the use of water under this application to continue through times in which the Washington Irrigation Company water rights are out of priority.
- 3) To accommodate the approval of this permanent change application, the use of 100.0 acre-feet of water for the irrigation of 33.333 acres at the historic point of diversion and place of use must cease.
- 4) The water being changed, which has historically been supplied by Washington Irrigation Company for use under these shares, is to remain in the Provo River without any diminution. Diversions of water into the Washington Irrigation Company system are to be reduced by this amount. Alternatively, the water based on these shares of stock can continue to be diverted and an equivalent amount of water returned to the Provo River from Washington's distribution system directly to the Provo River. A permanent measuring device must be installed to measure any water claimed to be returned to the river. Adequate records must be kept by Washington Irrigation Company to document at least the number of shares of stock for which water is being returned to the river, the rate and volume of water measured as returned, when the water was returned, and how much total water was diverted into its distribution system. This information shall be made available to the State Engineer or his representatives at any reasonable time.

- 5) The commissioner of the Provo River may assess Washington Irrigation Company such additional reasonable amounts of money for expenses incurred in regulating this change application.
- 6) The basis for this change right is ownership of 100 shares of stock in the Washington Irrigation Company. This ownership must be maintained in good standing by the co-applicant shareholders and/or the successor(s) in interest for this application to remain valid. No water may be withdrawn for the surface sources if valid ownership of this stock is not in effect.
- 7) Approval of this application assumes municipal use by a qualifying municipal entity. This right must be solely in the name of Midway City on records of the State Engineer prior to the date proof is due as stated in this approval. Proof must be filed in the name of Midway City.
- 8) 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 Permanent Change Application.
- 9) Inasmuch as this application seeks to divert water from numerous points of diversion, it is necessary that detailed information be provided to the State Engineer to show which sources of supply are actually developed and used and the extent of their usage under this application. Upon the submission of proof as required by Section 73-3-16, Utah Code, for this application, the applicant 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.
- 10) The applicant is required to maintain accurate diversion records for each source and to report these records on an annual basis to the Water Use Program of the Division of Water Rights.

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.

The applicants are strongly cautioned that other permits 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 **February 28, 2014**, 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.

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 the lapsing of this permanent change application.

The State Engineer has statutory responsibility to create and maintain water right records based on an administrative process outlined in statute. The State Engineer is not authorized by statute to adjudicate water right title or the validity of established water rights. It is noted that failure to exercise a water right within the statutory period could render all or a portion of a water right invalid through forfeiture. Parties who wish to challenge the validity of a water right are advised that a declaration of forfeiture is a judicial action and the courts are available to pursue such suits. (UCA 73-1-4).

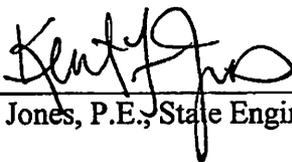
**It is the applicants' responsibility to maintain a current address with this office and to update ownership of their water right. Please notify this office immediately of any change of address or for assistance in updating ownership.**

Your contact with this office, should you need it, is with the Utah Lake/Jordan River Regional Office. The telephone number is 801-538-7240.

This Order is subject to the provisions of Administrative Rule R655-6-17 of the Division of Water Rights and to Sections 63G-4-302, 63G-4-402, 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.

ORDER OF THE STATE ENGINEER  
Permanent Change Application Number  
55-12250 (a33063)  
Page 6

Dated this 14<sup>th</sup> day of July, 2010.

  
Kent L. Jones, P.E., State Engineer

Mailed a copy of the foregoing Order this 14<sup>th</sup> day of July, 2010 to:

Midway City Corporation  
PO Box 277  
Midway, UT 84049

Washington Irrigation Company  
c/o Andrea McNeil  
3000 South 1000 East  
Kamas, UT 84036

Midway Irrigation Company  
c/o Steve Farrell  
325 West 500 South  
Midway, UT 84049-1268

United States Bureau of Reclamation  
c/o Jonathan B. Jones  
302 East 1860 South  
Provo, UT 84606-7317

Silver Rim Water Holdings, LLC  
941 West 600 North  
Alpine, UT 84004

Stream Alteration Section  
Division of Water Rights

Water Use Program  
Division of Water Rights

BY: 

Sonia Nava, Applications/Records Secretary