

1 PETITION TO STATE ENGINEER FOR DETERMINATION
2 OF RELATIVE RIGHTS TO WATER OF SUNNYSIDE CREEK

3 COMES NOW, GARY G. SILVER, and makes this Petition to the
4 State Engineer, pursuant to Chapter 533 of the Nevada Revised
5 Statutes for a determination of the relative rights to the waters
6 of Sunnyside Creek.

7 I

8 STATEMENT OF FACTS

9 In 1969, Petitioner purchased real property in Nye County,
10 Nevada, in the

11 Southwest Quarter (SW $\frac{1}{4}$) of the Southwest
12 Quarter (SW $\frac{1}{4}$) of Section 36, Township 7 North
13 Range 61 East, M.D.B. & M.

14 At the time of its purchase by Petitioner, the real property
15 had a creek running diagonally through it known as Sunnyside
16 Creek. This creek was the original streambed for Sunnyside
17 Creek. The Department of Wildlife had attempted to divert the
18 creek by digging a ditch which went around a hill into the
19 present site of Old Place Reservoir. This ditch had grown in and
20 filled up to such an extent that no water flowed in the ditch
21 past a point fifty feet (50') beyond the fence that extends past
22 the west boundary of Petitioner's property. At best, this
23 diversion ditch carried only approximately one-seventh (1/7th) of
24 the flow of water from the original streambed for Sunnyside
25 Creek.

26 At the time of the purchase of the property in 1969, at
27 least seventy-five per cent (75%) of the water in Sunnyside Creek
28 was flowing across the property of Petitioner in its original
streambed, having broken through a dike constructed by the

1 Department of Wildlife across the original streambed to force the
2 water into the diversion ditch. The remaining twenty-five per
3 cent (25%) flowed to the fence line where more than half of it
4 spilled over the bank of the diversion ditch. Before the water
5 went fifty feet (50') past the fence line, it had all exited the
6 diversion ditch.

7 If the Department of Wildlife's measurement of the flow of
8 water in Sunnyside Creek at 7 cfs (cubic feet per second) is
9 accurate, that would mean that approximately 5.25 cfs was flowing
10 in the original streambed, across Petitioner's property.

11 Several years later, the Department of Wildlife deepened and
12 widened the diversion ditch from the point of diversion of
13 Sunnyside Creek to a point several feet past the fence line.
14 This reduced the amount of water flowing in the original stream-
15 bed through Petitioner's property to approximately 3.5 cfs.

16 When Old Place Reservoir was completed, the Petitioner was
17 told by a Mr. Bob Craig of the Department of Wildlife that all of
18 the water in Sunnyside Creek would be temporarily diverted to Old
19 Place Reservoir so they could fill it and test the dam, and that
20 as soon as the testing was over, the water would be turned back
21 through Petitioner's property. The Department of Wildlife then,
22 once again, rebuilt the dike across Sunnyside Creek and deepened
23 and widened the diversion ditch to Old Place Reservoir thereby
24 diverting all water from the original streambed of Sunnyside
25 Creek.

26 After the testing was completed, the Department of Wildlife
27 dug a second diversion ditch from the first diversion ditch at a
28 point below the Petitioner's property line, which diversion ditch

1 had the effect of completely preventing water from flowing
2 through the original streambed of Sunnyside Creek and across the
3 property of Petitioner.

4 At the time of the filing of this Petition, no water is
5 flowing in the original streambed of Sunnyside Creek across the
6 property of Petitioner.

7 II

8 THE NEVADA DEPARTMENT OF WILDLIFE HAS DIVERTED
9 SUNNYSIDE CREEK WITHOUT THE APPROVAL OF THE STATE ENGINEER

10 On September 7, 1971, the State of Nevada, Department of
11 Fish and Game (now the Department of Wildlife) filed in the State
12 Engineer's office an "Application for Permit to appropriate the
13 Public Waters of the State of Nevada", Application for Permit
14 No. 26295. The application was returned to the applicant for
15 correction on October 20, 1971, and a corrected application was
16 filed November 2, 1971. This application sought to appropriate
17 eighty (80) second-feet of water and to impound 2,000 acre-feet
18 of water.

19 According to paragraph 12 of the application:

20 "This application covers water which, according
21 to our stream measurement records, have proven
22 to be surplus in particularly wet years. . .
23 This application is made with the knowledge that
24 there is an existing downstream right to be
25 satisfied and that in some years there will not
26 be a surplus of water. . ."

27 The application was approved by the State Engineer on August 23,
28 1972, subject to the following limitations and conditions:

29 "This permit to store 2,000 acre-feet of water
30 per annum for propagation and recreation purposes
31 is issued subject to all existing rights on the
32 source. The proof of beneficial use, when filed,
33 must show the maximum amount of water stored and
34 released during any one year. The State retains

1 the right to regulate the use of the water herein
2 granted at any and all times. (Emphasis added).

3 The permit was issued under the following further
4 conditions:

5 1. Actual construction work shall begin on or before
6 February 23, 1973.

7 2. Proof of commencement of work shall be filed before
8 March 23, 1973.

9 3. Work must be prosecuted with reasonable diligence and
10 be completed on or before February 23, 1974.

11 4. Proof of completion of work shall be filed before March
12 23, 1974.

13 5. Application of water to beneficial use shall be made on
14 or before February 23, 1977.

15 6. Proof of the application of water to beneficial use
16 shall be filed on or before March 23, 1977.

17 On August 24, 1972, the State Engineer sent a notice to the
18 Department of Fish and Game concerning, among others, the above-
19 referenced permit.

20 That notice contained the following language:

21 "You are advised that if the various proofs
22 thereunder, together with any maps which may
23 be required, are not filed in this office prior
24 to the dates set for such filings, the permits
 will be subject to cancellation. For your
 assistance a sheet is enclosed which will
 advise you of the requirements to fulfill the
 terms of your permits."

25 On March 23, 1973, the date the proof of commencement was
26 due, the State Engineer sent a notice to the Department of Fish
27 and Game informing them that the permit was in poor standing and
28 subject to cancellation because the Proof of Commencement had not

1 been filed on or before March 23, 1973 as required. The notice
2 further demanded that the Proof or an affidavit requesting an
3 extension of time within which to file the Proof be received and
4 filed in the State Engineer's office within thirty (30) days. On
5 April 16, 1973, the Proof of Commencement of work was filed in
6 the office of the State Engineer.

7 On March 25, 1974, two days after the Proof of Completion of
8 Work was due, the State Engineer sent a notice to the Department
9 of Fish and Game informing them that the permit was in poor
10 standing and subject to cancellation because the Proof of
11 Completion had not been filed on or before March 23, 1974 as
12 required. This certified final notice further demanded that the
13 Proof or an affidavit requesting an extension of time within
14 which to file the Proof be received and filed in the State
15 Engineer's Office within thirty (30) days or the permit would be
16 cancelled.

17 On March 28, 1974, the Department of Fish and Game filed in
18 the office of the State Engineer an Application for Extension of
19 Time, requesting one (1) year within which to file the Proof of
20 Completion. "No Further Extension" was stamped on the bottom
21 right corner of the application.

22 On April 1, 1974, the application for extension of time was
23 granted, extending to March 23, 1975, the time for filing the
24 Proof of Completion of Work, with the provision that "no further
25 extensions will be granted for filing the Proof of Completion of
26 Work."

27 On March 24, 1975, one day after the Proof of Completion was
28 due, the State Engineer sent a notice to the Department of Fish

1 and Game informing them that the permit was in poor standing and
2 subject to cancellation unless the required Proof of Completion
3 or an affidavit requesting an extension of time was received in
4 the office of the State Engineer within thirty (30) days. This
5 final certified notice contained the typewritten addition, "NO
6 FURTHER EXTENSIONS WILL BE GRANTED FOR FILING THE . . . PROOF OF
7 COMPLETION (26295).

8 On April 9, 1975, the Department of Fish and Game again
9 applied for an extension of time of one (1) year for the filing
10 of the Proof of Completion of work. Again, "No Further
11 Extension" was stamped on the bottom right corner of the
12 application.

13 On April 11, 1975, the Department of Fish and Game was
14 granted an extension to March 23, 1976, for the filing of the
15 proof of completion, once again with the provision that "no
16 further extensions will be granted for filing the Proof of
17 Completion.

18 On March 23, 1976, the date the Proof of Completion was due,
19 the State Engineer sent a notice to the Department of Fish and
20 Game informing them that the permit was in poor standing and
21 subject to cancellation and requiring them to file the required
22 Proof of Completion or affidavit requesting an extension of time
23 within which to file the Proof of Completion, within thirty (30)
24 days or the permit would be cancelled. This certified final
25 notice also stated "NO FURTHER EXTENSIONS OF TIME WILL BE GRANTED
26 FOR FILING PROOFS OF COMPLETION OF WORK."

27 On April 15, 1976, the Department of Fish and Game filed an
28 Application for Extension of Time in the State Engineer's office

1 requesting an additional one (1) year within which to file the
2 Proof of Completion of Work. Once again, "No Further Extension"
3 was stamped on the bottom right corner of the application.

4 On April 22, 1976, the time for filing the Proof of
5 Completion of Work was extended to March 23, 1977, at which time
6 the Proof of Beneficial Use would also be due.

7 On March 23, 1977, the date the Proof of Completion and
8 Proof of Beneficial Use were due, the State Engineer sent a
9 notice to the Department of Fish and Game informing them that
10 their permit was in poor standing and subject to cancellation
11 unless the Proof of Completion of Work and Proof of Beneficial
12 Use or an affidavit requesting an extension of time were filed
13 within thirty (30) days. This certified final notice further
14 stated, "NO FURTHER EXTENSION OF TIME WILL BE GRANTED FOR FILING
15 PROOFS OF COMPLETION OF WORK UNDER PERMITS 26295 AND 26332 ONLY."

16 On April 25, 1977, the Proof of Completion of Work for
17 permit 26295 was filed in the office of the State Engineer.

18 On April 25, 1977, an Application for Extension of Time was
19 filed in the office of the State Engineer requesting an extension
20 of time for one (1) year within which to file the Proof of
21 Beneficial Use.

22 On April 28, 1977, the Application for Extension of Time to
23 file proof of Beneficial Use was granted to March 23, 1978.

24 On March 23, 1978, the date the Proof of Beneficial Use was
25 due, the State Engineer sent a notice to the Department of Fish
26 and Game informing them that the permit was in poor standing and
27 subject to cancellation because the Proof of Beneficial Use had
28 not been filed. This certified final notice required the Proof

1 of Beneficial Use or an affidavit requesting an extension of time
2 to be filed with the State Engineer within thirty (30) days.

3 On April 10, 1978, the Department of Fish and Game filed in
4 the office of the State Engineer an Application for Extension of
5 Time for one additional year within which to file the Proof of
6 Beneficial Use. "No Further Extension" was stamped on the bottom
7 right corner.

8 On April 17, 1978, the Application for Extension of Time was
9 granted to March 23, 1979, with the provision that no further
10 extensions will be granted for the filing of the Proof of
11 Beneficial Use.

12 On March 23, 1979, the date the Proof of Beneficial Use was
13 due, the State Engineer sent a notice to the Department of Fish
14 and Game informing them that the permit was in poor standing and
15 subject to cancellation due to the fact that the Proof of
16 Beneficial Use had not yet been filed. The letter further stated
17 that unless the legally required Proof of Beneficial Use is filed
18 with the State Engineer within thirty (30) days of the date of
19 this final certified notice, the permit will be cancelled. It
20 also indicated "NO FURTHER EXTENSION OF TIME WILL BE GRANTED FOR
21 FILING PROOF OF BENEFICIAL USE."

22 On March 26, 1979, permit number 26295 was cancelled for
23 failure to comply with permit terms. A copy of the Amended
24 Application for Permit to appropriate the Public Waters of the
25 State of Nevada No. 26295, is attached hereto as Exhibit "A" and
26 incorporated herein by this reference.

27 . . .

28 . . .

1 On May 15, 1979, the State of Nevada, Department of Fish and
2 Game (now the Department of Wildlife), filed in the State
3 Engineer's office an Application for Permit to Appropriate the
4 Public Waters of the State of Nevada, No. 38186. This
5 application sought to appropriate the same waters and did the
6 cancelled Permit No. 26295. In fact, no map was filed with
7 Application for Permit No. 38186 but a reference was made to the
8 map filed "Oct. 1, 1971 under 26295."

9 Once again, paragraph 12 of the Application provides:

10 "This application covers waters which, according
11 to our stream measurement records, have proven to
12 be surplus in particularly wet years. . . This
13 application is made with the knowledge that there
14 is an existing down stream right to be satisfied
15 and that in some years there will not be a surplus
16 of water."

17 This application was not approved by the State Engineer and
18 a schedule of compliance deadlines was never established.

19 Although this application (38186) was filed on May 15, 1979,
20 more than seven years ago, it has never been approved by the
21 State Engineer. Furthermore, the application is based upon the
22 following representations:

- 23 "1. That the estimated time required to construct
24 the works is three (3) years; and
25 2. That the estimated time required to complete
26 the application to beneficial use is five (5) years."

27 A copy of the Application for Permit to Appropriate the Public
28 Waters of the State of Nevada No. 38186 is attached hereto as
29 Exhibit "B" and incorporated herein by this reference.

30 It is Petitioner's position that since the conditional
31 approval of the State Engineer was revoked on March 26, 1979 when
32 Permit No. 26295 was cancelled, the actions of the Department of

1 Wildlife in appropriating the waters of Sunnyside Creek were done
2 without the approval of the State Engineer and in violation of
3 NRS 533.030(1) which provides as follows:

4 "533.030. Appropriation for beneficial use;
5 use for recreational purpose declared
6 beneficial use.

7 1. Subject to existing rights, all water may
8 be appropriated for beneficial use as provided
9 in this chapter and not otherwise."

10 III
11 THE APPLICATION FOR PERMIT TO APPROPRIATE THE
12 PUBLIC WATERS OF THE STATE OF NEVADA NO. 38186
13 IS STALE, HAS NOT BEEN DILIGENTLY PURSUED AND
14 SHOULD BE CANCELLED

15 Application No. 38186 attached hereto as Exhibit "B", was
16 filed in the State Engineer's Office May 15, 1979, using the Map
17 filed October 1, 1971 under the Application for Permit No. 26295.
18 Notice of this Application was published in November and December
19 of 1979, and the final date to file a protest with the State
20 Engineer under this Application was January 19, 1980.

21 NRS 533.370(2) provides as follows:

22 "2. The state engineer shall either approve
23 or reject each application within 1 year after
24 the final date for filing protest; but:

25 (a) Action can be postponed by the state
26 engineer upon written authorization to do so
27 by the applicant or, in case of a protested
28 application, by both the protestant and the
applicant; and

(b) In areas where water supply studies are
being made or where court actions are pending,
the state engineer may withhold action until it
is determined there is unappropriated water or
the court action becomes final."

According to NRS 533.370(2), the State Engineer was required
to either approve or reject the application by January 19, 1981,

• • •

1 unless any of the following had occurred prior to January 19,
2 1981:

3 1. The State Engineer had received written authorization
4 to postpone action by the applicant;

5 2. A water supply study was being made; or

6 3. Court action was pending.

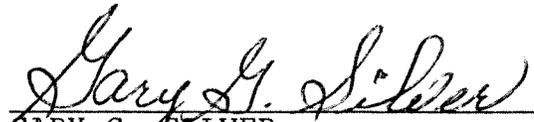
7 A review of all documentation concerning Application for
8 Permit No. 38186 indicates that none of these three contingencies
9 had occurred prior to January 19, 1981.

10 It is Petitioner's position that the appropriation of waters
11 from Sunnyside Creek cannot be justified under Permit No. 38186
12 because the application was not approved within one (1) year as
13 provided in NRS 533.370(2).

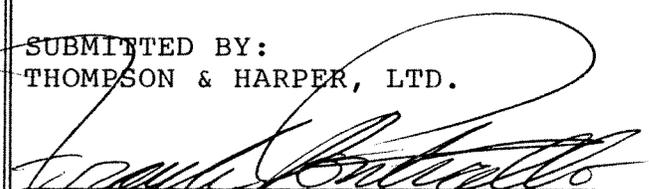
14 Petitioner asserts that the appropriation of the waters of
15 Sunnyside Creek was done without the approval of the State
16 Engineer and in violation of NRS Chapter 533. Accordingly,
17 Sunnyside Creek should be returned to its natural streambed, a
18 portion of which runs across the property of Petitioner.

19 DATED this 6th day of October, 1986.

20 Respectfully submitted,

21
22 
23 GARY G. SILVER
24 Petitioner

25 SUBMITTED BY:
26 THOMPSON & HARPER, LTD.

27 
28 FRANK M. PONTICELLO, ESQ.
703 South Eighth Street
Las Vegas, Nevada 89101
Attorneys for Petitioner

APPLICATION FOR PERMIT TO APPROPRIATE THE PUBLIC WATERS OF THE STATE OF NEVADA

Date of filing in State Engineer's Office MAY 15 1979

Returned to applicant for correction

Corrected application filed

Map filed Oct. 1, 1971 under 26295

The applicant State of Nevada, Department of Fish and Game

P.O. Box 10678, of Reno

Nevada 89510, hereby make application for permission to appropriate the public waters of the State of Nevada, as hereinafter stated.

(If applicant is a corporation, give date and place of incorporation; if a copartnership or association, give names of members.)

1. The source of the proposed appropriation is from the Sunnyside Creek and White River Channel

2. The amount of water applied for is 80 second-feet

(a) If stored in reservoir give number of acre-feet 2,000 acre-feet

3. The water to be used for fish, wildlife and recreation

4. If use is for:

(a) Irrigation (state number of acres to be irrigated)

(b) Stockwater (state number and kinds of animals to be watered)

(c) Other use (describe fully under "No. 12. Remarks")

(d) Power:

(1) Horsepower developed

(2) Point of return of water to stream

5. The water is to be diverted from its source at the following point: in the SW 1/4 Sec. 35, T. 7N., R. 61E., MDB&M, from which point the south quarter corner of said sec. 35 lies S 21° 19' 48" W 1,001.18 ft. See map filed under Permit #26295; filed October 1, 1971.

6. Place of use SE 1/4, SE 1/4 SW 1/4 Sec. 35, T. 7N., R. 61E.; W 1/2 NE 1/4, NE 1/4 NE 1/4, NW 1/4 SE 1/4, SW 1/4, E 1/2 NW 1/4 Sec. 2; N 1/2 NW 1/4 sec. 11, T. 6N., R. 61E., MDB&M. See map filed under Permit #26295; filed October 1, 1971.

7. Use will begin about January 1 and end about December 31, of each year.

8. Description of proposed works. (Under the provisions of NRS 535.010 you may be required to submit plans and specifications of your diversion or storage works.) BY a series of new low spreader dikes and existing ditches and spreader dikes.

AMENDED
APPLICATION FOR PERMIT

No 26295

TO APPROPRIATE THE PUBLIC WATERS OF THE STATE OF NEVADA

Date of filing in State Engineer's Office SEP 7 1971
Returned to applicant for correction OCT 20 1971
Corrected application filed NOV 2 1971
Map filed OCT 1 1971

The applicant State of Nevada, Department of Fish and Game, Box 10678
of Reno, County of ,
State of Nevada, hereby makes application for permission to appropriate the public
waters of the State of Nevada, as hereinafter stated. (If applicant is a corporation, give date and place of incorpora-
tion; if a copartnership or association, give names of members.)

1. The source of the proposed appropriation is from the Sunnyside Creek and White
Name of stream, lake or other source.
River Channel

2. The amount of water applied for is 80 second-feet
One second-foot equals 448.83 gals. per min.
(a) If stored in reservoir give number of acre-feet 2,000 acre-feet

3. The water to be used for fish, wildlife and recreation
Irrigation, power, mining, manufacturing, domestic, or other use.

4. If use is for:
- (a) Irrigation (state number of acres to be irrigated)
 - (b) Stockwater (state number and kinds of animals to be watered)
 - (c) Other use (describes fully under "No. 11. Remarks")
 - (d) Power:
 - (1) Horsepower developed
 - (2) Point of return of water to stream

5. The water is to be diverted from its source at the following point: in the SW 1/4 SE 1/4 Sect. 35, T. 7N.,
R. 61E., M. D. R. & M. from which point the south quarter corner of said Sect. 35
Describe as being within a 40-acre subdivision of public survey, and by course and distance to a section corner. If on unsurveyed land,
lies S. 21° 19' 48" W. 1,001.18 ft.
It should be stated.

6. Place of use SE 1/4, SE 1/4 SW 1/4, Sect. 35, T. 7 N., R. 61 E., N 1/2 NE 1/4, NE 1/4 NE 1/4,
Describe by legal subdivision, if on unsurveyed land it should be so stated.
NW 1/4 SE 1/4, SW 1/4 E 1/4 NW 1/4 Sect. 2; N 1/4 NW 1/4 Sect. 11, T. 6 N., R. 61 E.,
M., D., R. & M.

7. Use will begin about January 1 and end about December 31, of each year.
Month Month

8. Description of proposed works. (Under the provisions of NRS 535.010 you may be required to submit plans
and specifications of your diversion or storage works.) By a series of new low spreader dikes
and existing ditches and spreader dikes.
State manner in which water is to be diverted, whether by dam or other works, whether through pipes, ditches, flumes, or other conduits.

- 9. Estimated cost of works.....\$5.....
- 10. Estimated time required to construct works.....3 years.....
- 11. Estimated time required to complete the application to beneficial use.....5 years.....

12. Remarks This application covers waters which, according to our stream measurement records, have proven to be surplus in particularly wet years. The use will be for flooding wildlife food plots primarily after the growing season and continuing on through the waterfowl nesting season. Lands will be shallow flooded as is typical for waterfowl habitat. Irrigation water for the crops on these lands is under our existing rights. No change is intended in the irrigation use of the existing rights. Only the manner of crop harvest will change. This application is made with the knowledge that there is an existing downstream right to be satisfied and that in some years there will not be a surplus of water. This application is not intended to waive any existing water rights or permits.

Applicant.....State of Nevada.....
 Department of Fish and Game

By: s/ Fred E. Wright
 Fred E. Wright, Acting Director
 Box 10678
 Reno, Nevada 89510

Compared.....bk/ga.....ga/jw.....

APPROVAL.....OF STATE ENGINEER

This is to certify that I have examined the foregoing application, and do hereby grant the same, subject to the following limitations and conditions: This permit to store 2000 acre-feet of water per annum for propagation and recreation purposes is issued subject to all existing rights on the source. The proof of beneficial use, when filed, must show the maximum amount of water stored and released during any one year. The State retains the right to regulate the use of the water herein granted at any and all times.

The amount of water to be appropriated shall be limited to the amount which can be applied to beneficial use, and not to exceed.....80.0.....cubic feet per second and not to exceed 2000 acre-feet per annum.

Actual construction work shall begin on or before.....February 23, 1973.....

Proof of commencement of work shall be filed before.....March 23, 1973.....

Work must be prosecuted with reasonable diligence and be completed on or before.....February 23, 1974.....

Proof of completion of work shall be filed before.....March 23, 1974.....

Application of water to beneficial use shall be made on or before.....February 23, 1977.....

Proof of the application of water to beneficial use shall be filed on or before.....March 23, 1977.....

Map in support of proof of beneficial use shall be filed on or before.....

Commencement of work filed.....APR 16 1973.....
 Completion of work filed.....
 Proof of beneficial use filed.....
 Cultural map filed.....
 Certificate No. Issued.....
 Recorded..... Bk..... Page.....

IN TESTIMONY WHEREOF, I.....ROLAND D. WESTERGARD.....
 State Engineer of Nevada, have hereunto set my hand and the seal of
 my office, this.....23rd.....day of.....August.....

A.D. 19.....77.....
[Signature]
 State Engineer

218 (Rev. 1-70) CANCELLED.....BECAUSE OF FAILURE
 OF APPLICANT TO COMPLY WITH THE PROVISIONS OF PERMIT
 W...man