

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

IN THE MATTER OF APPLICATIONS 63263, )  
63264, 63265, 63266 AND 63267 FILED )  
TO APPROPRIATE THE PUBLIC WATERS FROM )  
AN UNDERGROUND SOURCE WITHIN THE )  
FORTYMILE CANYON - JACKASS FLAT )  
GROUNDWATER BASIN (227A), NYE COUNTY, )  
NEVADA. )

INTERIM RULING

# 4662

GENERAL

I.

Application 63263 was filed on July 22, 1997, by the United States Department of Energy - Yucca Mountain Site Characterization Project Office to appropriate 1.0 cubic feet per second (cfs), not to exceed 430.0 acre-feet annually (afa), from the underground waters of the Fortymile Canyon - Jackass Flat Groundwater Basin, Nye County, Nevada, for industrial purposes for use within portions of Sections 31 through 36, inclusive, T.11S., R.49E., Sections 31 through 36, inclusive, T.11S., R.50E., all of T.12S., R.49E., all of T.12S., R.50E., Sections 10 through 15, inclusive, Sections 22 through 27, inclusive, Sections 34 through 36 inclusive, T.13S., R.48E., all of T.13S., R.49E., Sections 7 through 10, inclusive, Sections 15 through 22, inclusive, Sections 27 through 34 inclusive, T.13S., R.50E., Sections 1 through 3, inclusive, Sections 10 through 15, inclusive, Sections 22 through 27 inclusive, Section 35, and portions of Sections 34 and 36, T.14S., R.48E., all of T.14S., R.49E., Sections 3 through 10, inclusive, Sections 15 through 22, inclusive, Sections 27 through 34 inclusive, T.14S., R.50E., portions of Sections 1, 2 and 3, T.15S., R.48E., Sections 1 through 6, inclusive, portions of Sections 7 through 10, inclusive, Sections 11 and 12, T.15S., R.49E., and Sections 3 through 10, inclusive, T.15S., R.50E., M.D.B. & M.<sup>1</sup> The proposed point of diversion is described as being located within the NE¼ SW¼ of Section 19, T.13S., R.50E., M.D.B. & M.

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<sup>1</sup> File No. 63263, official records in the office of the State Engineer.

II.

Application 63264 was filed on July 22, 1997, by the United States Department of Energy - Yucca Mountain Site Characterization Project Office to appropriate 1.0 cfs, not to exceed 430.0 afa, from the underground waters of the Fortymile Canyon - Jackass Flat Groundwater Basin, Nye County, Nevada, for industrial purposes for use within the same places of use identified under Application 63263. The proposed point of diversion is described as being located within the SW¼ NE¼ of Section 6, T.14S., R.50E., M.D.B.&M.<sup>2</sup>

III.

Application 63265 was filed on July 22, 1997, by the United States Department of Energy - Yucca Mountain Site Characterization Project Office to appropriate 0.9 cfs, not to exceed 430.0 afa, from the underground waters of the Fortymile Canyon - Jackass Flat Groundwater Basin, Nye County, Nevada, for industrial purposes for use within the same places of use identified under Applications 63263 and 63264. The proposed point of diversion is described as being located within the NW¼ NE¼ of Section 14, T.13S., R.49E., M.D.B. & M.<sup>3</sup>

IV.

Application 63266 was filed on July 22, 1997, by the United States Department of Energy - Yucca Mountain Site Characterization Project Office to appropriate 0.9 cfs, not to exceed 430.0 afa, from the underground waters of the Fortymile Canyon - Jackass Flat Groundwater Basin, Nye County, Nevada, for industrial purposes for use within the same places of use identified under Applications 63263, 63264 and 63265. The proposed point of diversion is

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<sup>2</sup> File No. 63264, official records in the office of the State Engineer.

<sup>3</sup> File No. 63265, official records in the office of the State Engineer.

described as being located within the NW¼ NE¼ of Section 14, T.13S., R.49E., M.D.B. & M.<sup>4</sup>

V.

Application 63267 was filed on July 22, 1997, by the United States Department of Energy - Yucca Mountain Site Characterization Project Office to appropriate 0.9 cfs, not to exceed 430.0 afa, from the underground waters of the Fortymile Canyon - Jackass Flat Groundwater Basin, Nye County, Nevada, for industrial purposes for use within the same places of use identified under Applications 63263, 63264, 63265 and 63266. The proposed point of diversion is described as being located within the NW¼ NE¼ of Section 14, T.13S., R.49E., M.D.B. & M.<sup>5</sup>

VI.

The remarks under Item 12 of the applications indicate the following.

This application to appropriate the waters of the State of Nevada is being filed by the Department of Energy in order to provide water for meeting the Department of Energy's responsibilities under the Nuclear Waste Policy Act. Said uses will include, but are not limited to, road construction, facility construction, drilling, dust suppression, tunnel and pad construction, testing, culinary, domestic and other related site uses.

Existing Permits 57373, 57374, 57375, 57376, 58827, 58828 and 58829 were issued for site characterization and aquifer characteristic studies as part of the overall site characterization for the Yucca Mountain Project. These permits (with the exception of Permit 57375) had a limited life and are scheduled to expire within a few years. Although no final determination has been made on whether or not the Repository will be located at Yucca Mountain, these applications are being filed in order to ensure priority of filing and establishment of a claim for the use of the water. Accordingly, under the

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<sup>4</sup> File No. 63266, official records in the office of the State Engineer.

<sup>5</sup> File No. 63267, official records in the office of the State Engineer.

provisions of NRS 533.370(2)(a), it is requested that, after this application becomes ready for action, that the State Engineer withhold final approval until the Department of Energy provides notification to proceed.

The total combined duty of this application to appropriate and its four companion applications to appropriate, along with Permit 57375, is not to exceed 430.00 acre-feet annually from any and all sources.<sup>1-5</sup>

#### VII.

Applications 63263, 63264, 63265, 63266 and 63267 were protested by Robert Loux, Executive Director, Nevada Agency for Nuclear Projects, Ralph McCracken, farmer and President of the Southern Nye County Conservation District, Richard Nielsen, Executive Director, Citizen Alert, and Michael DeLee, farmer and Chairman, Amargosa Water Committee.

#### VIII.

On April 2, 1998, protestant Nevada Agency for Nuclear Projects filed a Motion to Dismiss the applications on the grounds summarized below.

1. The applicant does not now have the legal capability and authority under the law of the United States to apply the water to the intended use. 42 U.S.C. § 10101, et seq.

a) Since the applicant has not completed the site characterization activities at Yucca Mountain as required by 42 U.S.C. § 10133(a), and does not expect to complete such activities until 2001, the applications violate the Nuclear Waste Policy Act.

b) Since the applicant has not determined that the Yucca Mountain site is suitable for the development of a high-level nuclear waste repository as required by 42 U.S.C. § 10132(b), considering, among other things, the effect of such a repository on the rights of users of water as required by 42 U.S.C. § 10132(a), the applications violate the Nuclear Waste Policy Act.

c) Since the applicant has not prepared an environmental impact statement on the development of a high-level nuclear waste repository at the Yucca Mountain site as required by 42 U.S.C. § 10134(f) and 42 U.S.C. § 4321, et seq., the applications violate the Nuclear Waste Policy Act and the National Environmental Policy Act.

d) Since the applicant has not given full consideration to whether the development, construction and operation of a high-level nuclear waste repository at the Yucca Mountain site may require the purchase or other acquisition of water rights that will have a significant adverse effect on the present or future development of the area in which the repository is located, nor proposed to mitigate any such adverse effects as required by 42 U.S.C. § 10144, the applications violate the Nuclear Waste Policy Act.

e) Since the applicant has not recommended to the President of the United States that the Yucca Mountain site be developed as a repository as required by 42 U.S.C. § 10134(a)(1), and the applicant is not yet permitted to make such a recommendation because it can only be made upon completion of site characterization activities at the site and after notice to the Governor and Legislature of the State of Nevada, the applications violate the Nuclear Waste Policy Act.

f) Since the President of the United States has not reviewed the applicant's recommendation that the Yucca Mountain site be developed as a high-level nuclear waste repository as required by 42 U.S.C. § 10134(a), the applications violate the Nuclear Waste Policy Act.

g) Since the President of the United States has not recommended to Congress that the Yucca Mountain site be developed as a high-level nuclear waste repository as

required by 42 U.S.C. § 10134(a)(2)(A), the applications violate the Nuclear Waste Policy Act.

2. The applicant's legal authority under the law of the United States to apply the water to its intended use is dependent upon the approval or disapproval of the Governor or Legislature of the State of Nevada (42 U.S.C. § 10136(b), 10135), and the date upon which the Governor or Legislature may approve or disapprove has not occurred.

3. Because NRS § 459.910 prohibits the intended use of the water, there is no clear certainty that the Governor or Legislature will approve the development of a high-level nuclear waste repository at Yucca Mountain; thereby creating the applicant's legal authority to apply the waters to their intended use.

4. The applicant's applications call upon the State Engineer to usurp the statutory powers of the Governor and Legislature under the Nuclear Waste Policy Act; therefore, the applications violate the Nuclear Waste Policy Act, and the applicant's applications call upon the State Engineer to assist the applicant in the violation of NRS § 459.910.

5. The applicant has not withdrawn, and therefore does not control, as required by the law of the United States, the land upon which the water would be applied to its intended beneficial use (Federal Land Policy Management Act, 43 U.S.C. § 1714).

6. The applicant already has sufficient water rights to meet its needs for beneficial use within the foreseeable future.

7. The applications are premature and not ripe for adjudication, beneficial use of the water is not now required; therefore, the necessity for the use of the water does not presently exist violating NRS § 533.045, and the applicant may not file a premature application for the appropriation of the public waters of Nevada for the sole purpose of establishing

a priority of filing and claim for the water.

8. The applicant cannot presently demonstrate the amount of water which is reasonably required for the use it wishes to serve violating NRS § 533.070.

9. The applicant cannot at this time provide satisfactory proof of its intention in good faith to construct the works necessary to apply the water to its intended beneficial use with reasonable diligence violating NRS § 533.370(1)(c)(1).

10. The applicant cannot at this time provide satisfactory proof of its financial ability and reasonable expectation to actually apply the water to the intended beneficial use with reasonable diligence violating NRS § 533.370(1)(c)(2).

#### FINDINGS OF FACT

##### I.

The protestant cited to a series of cases in support of its proposition that the applicant does not have the legal capability and authority under the law of the United States to apply the water to the intended use. Therefore, the applicant lacks standing to make application for the use of the waters, and the State Engineer should dismiss the applications prior to considering them on their merits. For the reasons stated below, the State Engineer finds those cases not to be dispositive on Nevada law, and finds that Nevada law does not provide for the summary dismissal of water right applications on the issue of lack of standing to file.

The protestant cited to the case of California v. U.S.<sup>6</sup> for the proposition that rights to additional water should be withheld and water should be reserved for other beneficial uses to support its contention that the Department of Energy has sufficient water under its current permits for its foreseeable beneficial uses; therefore, the applications at issue here should be dismissed. In California v. U.S., the U.S. Bureau of Reclamation had applied to

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<sup>6</sup> 438 U.S. 645, 652, 57 L.Ed.2d 1018, 98 S.Ct. 2985 (1978).

the California Water Resources Control Board for a permit to appropriate water that would be impounded by the New Melones Dam. The Board approved the Bureau's applications, but attached 25 conditions to the permit (the most important of which prohibited full impoundment until the Bureau was able to show a specific plan for the use of the water) which the Board concluded was necessary to meet California's statutory water appropriation requirements. The California water code provides that in determining whether to issue a permit the Board is to consider not only the planned use of the water, but also alternative uses, including enhancement of water quality, recreation and the preservation of fish and wildlife.<sup>7</sup>

The U.S. then brought suit seeking a declaratory judgment that the U.S. could impound whatever unappropriated water is necessary for a federal reclamation project without complying with state law. The proposition that the protestant states the case stands for is actually a recitation of the conditions imposed by the Board on the permit, and the Supreme Court held that California may impose conditions on or control the appropriation, use, or distribution of water in a federal reclamation project which are not inconsistent with clear congressional directives respecting the project. The State Engineer finds that Nevada law does not generally provide for reserving water for other beneficial uses, and does not have provisions similar to California law for examining alternative uses of water; therefore, the case is not persuasive as to Nevada law.

The protestant then cited to the case of Nebraska v. Wyoming<sup>8</sup> for the proposition that an applicant must show a current need for the water. The State Engineer finds the protestant provided no specific cite to that proposition in the case, and as the case addressed the equitable apportionment of water rights between

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<sup>7</sup> 98 S.Ct. 2985, 2989-2990, n. 7.

<sup>8</sup> 325 U.S. 589, 89 L.Ed. 1815 (1945).

states it is not applicable to the issue at hand.

The protestant cites to the case of U.S. v. Gerlach Livestock<sup>9</sup> for the proposition that one cannot hold water rights against other potential users when no beneficial use can be made of those waters. U.S. v. Gerlach is a case which dealt with a riparian land owner trying to enforce an injunction to a mere technical right to the natural flow of a stream even when that claimant was getting no actual benefit from the use of the stream. The State Engineer finds that Nevada is not a riparian right state and that the holding in this case is not applicable to the filing for a water right application in an appropriative right state.

Finally, the protestant citing to City and County of Denver v. Colorado Water Conservation District<sup>10</sup> argues for the proposition that legal capacity is a prerequisite to demonstrate an intent to appropriate, an element which is required to support the priority date claimed under the doctrine of relation back. Colorado has no administrative procedure for control over the acquisition of appropriative water rights exclusive in operation by which a State agency may choose among various applicants for permits and reject those which fail to meet statutory requirements. Colorado has not elected to join the majority of her Western sister States in imposing public control upon the acquisition of appropriative rights in water. Colorado's method consists of special judicial proceedings for the determination and adjudication of water rights.<sup>11</sup>

Under Colorado law, upon the filing of claim for a conditional water right in a judicial proceeding, the court looks to the elements for the appropriation of water found in the common law,

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<sup>9</sup> 339 U.S. 725, 94 L.Ed. 1231 (1950).

<sup>10</sup> 969 P.2d 730, 737-742 (Col. 1985).

<sup>11</sup> Hutchins, W.A., Water Rights Laws in the Nineteen Western States, U.S. Dept. of Agriculture 299, 1971.

that is (1) whether there was a specific intent to appropriate as of the date claimed to support that date under the doctrine of relation back (this requires a fixed purpose to pursue diligently a certain course of action to take and beneficially use water from a particular source), and (2) whether there are any overt acts of such a character as to manifest the necessary intent (a demonstration that a substantial step toward the application of water to beneficial use has been taken).<sup>12</sup> In the City and County of Denver case, the Colorado Supreme Court held that because Denver had the legal capacity to do what it proposed to do with the water claimed it had the legal capacity to form the necessary intent to support the priority date claimed. The State Engineer finds that citation to Colorado law when that state does not have a similar system for the application with an administrative agency for the right to use the public waters of the state is not dispositive on Nevada law.

## II.

In those states which have enacted statutory administrative procedures for the filing of water right applications, the intent to appropriate is expressed in the application for a permit which complies with the State agency requirements.<sup>13</sup> The State Engineer finds that in Nevada intent to appropriate is expressed upon the filing of a water right application that complies with the statutory requirements for said application, and Nevada water law has no provision requiring legal capacity to complete the proposed project at the time of filing an application for a water right. For example, a person is not denied a permit on an application filed to apply water to a quasi-municipal beneficial use to support four homes when that person has not yet obtained a building permit

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<sup>12</sup> City and County of Denver v. Colorado Water Conservation District, 969 P.2d 730, 745 (Col. 1985).

<sup>13</sup> Hutchins, W.A., Water Rights Laws in the Nineteen Western States, U.S. Dept. of Agriculture 371, 1971.

from the appropriate government agency to build those homes. If the State Engineer accepted the protestant's position, any such water right application would have to be denied when the person had not yet obtained the legal capability or authority under the local law to build those homes.

### III.

The protestant claims that the applicant does not now have the legal capability and authority under the law of the United States to apply the water to the intended beneficial use; therefore, the applications should be summarily dismissed without further consideration by the State Engineer. First, NRS § 533.365(3) mandates that the State Engineer shall consider the protest, and may, in his discretion, hold hearings and require the filing of such evidence as he may deem necessary to a full understanding of the rights involved. The directive of "shall consider" means that the State Engineer must consider the protest on its merits, which means the State Engineer must also review the application.

Nevada water law provides there shall be no denial of a right to appropriate except where certain factors are found. NRS § 533.370 contemplates only the approval, rejection, or approval with conditions of a properly filed application to appropriate the public waters. NRS § 533.370 provides that the State Engineer shall approve an application submitted in the proper form which contemplates the application of water to beneficial use if:

- (a) The application is accompanied by the prescribed fees, and
- (c) The applicant provides proof satisfactory to the state engineer of:
  - (1) His intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence; and
  - (2) His financial ability and reasonable expectation actually to construct the work and apply the water to the intended beneficial use with reasonable diligence.

The issues the protestant agency asks the State Engineer to

consider in its Motion to Dismiss go to the very merits of these questions. The applicant filed for the right to use water to fulfill its responsibilities under the Nuclear Waste Policy Act; therefore, the State Engineer must determine whether there is an intention in good faith to construct the works of diversion necessary to apply the water to its intended beneficial use with reasonable diligence; whether the applicant has the financial ability and reasonable expectation to construct the works and apply the water to the intended beneficial use with reasonable diligence; whether it is a reasonable expectation that the site may be suitable for the project envisioned; whether it is a reasonable expectation that an environmental impact statement will be completed; and whether it is a reasonable expectation that the other steps necessary will be accomplished toward having the legal capacity to apply the water to the beneficial uses requested under these applications. The standard under Nevada water law is not that of beyond a reasonable doubt, but rather, is there a reasonable expectation that the applicant will apply the water to the intended beneficial use under the facts and circumstances of each particular case.

NRS § 533.370(3) provides that where there is no unappropriated water in the proposed source of supply, or where it proposed use or change conflicts with existing rights, or threatens to prove detrimental to the public interest the State Engineer shall reject the application and refuse to issue the requested permit. The State Engineer finds that Nevada water law does not provide that the State Engineer shall summarily reject an application on the grounds that the applicant does not have the legal authority at the time of the filing of the application to pursue the project envisioned. The question under Nevada law is whether there a reasonable expectation to go to beneficial use with reasonable diligence under the facts and circumstances of each particular case. The State Engineer finds that the completion of

the steps set forth in the Nuclear Waste Policy Act are not a prerequisite to the filing of an application to appropriate water and compliance with that act is entrusted to other agencies of government.

#### IV.

Permits 52338, 57373, 57374, 57375, 57376, 58827, 58828 and 58829 were issued by the State Engineer for site characterization and aquifer characteristic studies for the Yucca Mountain Project.

The State Engineer finds that proof of completion of works of diversion was filed in the office of the State Engineer under Permit 52338 on August 12, 1992, and said permit expires on April 9, 2002.

The State Engineer finds that Permit 57373 identifies the same point of diversion as Application 63264 and proof of completion of works of diversion was filed in the office of the State Engineer under Permit 57373 on December 7, 1992, and said permit expires on April 9, 2002.

The State Engineer finds that Permits 57374 and 57376 identify the same point of diversion as Application 63263 and proof of completion of works of diversion were filed in the office of the State Engineer under Permits 57374 and 57376 on December 7, 1992, and said permits expire on April 9, 2002.

The State Engineer finds that Permit 58827 identifies the same point of diversion as Application 63265 and proof of completion of works of diversion was first due to be filed in the office of the State Engineer on February 14, 1995. Several extensions of time have been granted for the filing of proof of completion of works of diversion under Permit 58827 which is now due before December 31, 1998, when the permit is set to expire.

The State Engineer finds that Permit 58828 identifies the same point of diversion as Application 63267 and proof of completion of works of diversion was filed in the office of the State Engineer under Permit 58828 on March 8, 1996, and said permit expires on

December 31, 1998.

The State Engineer finds that Permit 58829 identifies the same point of diversion as Application 63266 and proof of completion of works of diversion was filed in the office of the State Engineer under Permit 58829 on March 13, 1998, and said permit expires on December 31, 1998.

V.

In 1987 Congress directed the U.S. Department of Energy to study only Yucca Mountain as a potential repository for the disposal of radioactive waste.<sup>14</sup> By law, the Secretary of Energy shall provide to the President of the United States and the Congress no later than September 30, 1998, a viability assessment of the Yucca Mountain site with said assessment to include a preliminary design concept for the critical elements for the repository and an estimate of the costs to construct and operate the repository in accordance with the design concept.<sup>15</sup> The environmental impact statement for the Yucca Mountain Repository is due around the year 2000 and public information indicates that the Department of Energy's recommendation to the President of the United States, and plans to apply to the Nuclear Regulatory Commission to build the repository would take place around the years 2001-2002.<sup>16</sup>

Multiple lawsuits have surrounded this project and the potential repository for years. For example, *Southern Nye County Conservation District v. Turnipseed*, and *Amargosa Water Committee v. Turnipseed*, Case Nos. 14621 and 14646 (5th Judicial District) were filed over the State Engineer merely issuing a pre-hearing conference notice regarding the water right applications at issue

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<sup>14</sup> 42 U.S.C.S. § 10133 (1997).

<sup>15</sup> 42 U.S.C.S. § 10134 (1997).

<sup>16</sup> Nevada Appeal, July 13, 1998, at C1.

here. If litigation can take place over the mere notice of a hearing, which will take time to resolve, it is highly likely that more litigation will pursue these water right applications and other phases envisioned under the Nuclear Waste Policy Act. The State Engineer finds that in light of the fact that Permits 58827, 58828 and 58829 expire at the end of this calendar year, and the rest of the permits, excepting 57375, expire in less than four years, the fact that the viability assessment is due by September 30, 1998, and the fact that repeated litigation has surrounded this project, it is reasonable for the United States Department of Energy to have filed these water right applications for consideration at this time. However, the State Engineer further finds that nothing in this Interim Ruling shall be taken as indicative of an ultimate ruling on these applications.

V.

Because NRS § 459.910 prohibits the intended use of the water, the protestant requests the State Engineer to dismiss the applications upon the grounds that there is no clear certainty that the Governor or the Legislature of Nevada will approve the development of a high-level nuclear waste repository at Yucca Mountain; thereby creating the applicant's legal authority to apply the waters to their intended beneficial use. The protestant further argues that the applicant's applications call upon the State Engineer to assist the applicant in the violation of NRS § 459.910.

The State Engineer recognizes there is no clear certainty that either the Governor or Legislature of Nevada will approve development of the site, and the State Engineer also recognizes that the Nuclear Waste Policy Act provides for Congressional override of any State disapproval.<sup>17</sup> While the issue of legal capability to complete the project has not been finalized, the

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<sup>17</sup> 42 U.S.C.S. § 10135 (1997).

State Engineer finds that is not a prerequisite under Nevada water law for the filing of a water right application. As to the protestants argument regarding NRS § 459.910, in State of Nevada v. Watkins,<sup>18</sup> the Ninth Circuit Court of Appeals held that Nevada's attempted legislative veto of the Secretary's site characterization activities was preempted by the Nuclear Waste Policy Act.

VI.

The protestant alleges that the applicant has not withdrawn, and therefore does not control, the land upon which the water would be applied to its intended beneficial use as required by the law of the United States. The State Engineer finds that part of the place of use contemplated is on land already withdrawn from the public domain, recognizing that withdrawal was not for the nuclear repository, and further, that control of the land is not always required under Nevada law, but falls under the consideration of whether the applicant has a reasonable expectation of beneficially using the waters for which it applied. Evidence as to that reasonable expectation needs to be explored at a public administrative hearing.

VII.

The protestant alleges that the applicant has sufficient water rights to meet its needs for beneficial use for the foreseeable future, and that the applications are premature; therefore, the necessity for the use of the water does not presently exist violating NRS § 533.045. Three of the Department of Energy's present permits expire at the end of 1998, and four others expire in the year 2002 which is less than four years away. The Department's present permits are only for site characterization and aquifer characteristic studies and not to construct any potential repository, and the applications do not indicate they are strictly for repository purposes. The applications indicate they were filed

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<sup>18</sup> 914 F.2d 1545 (9th Cir. 1990), cert. denied, 111 S.Ct. 1105 (1991).

to provide water to meet the Department of Energy's responsibilities under the Nuclear Waste Policy Act. NRS § 533.045 cited by the protestant is not concerned with the granting of water right applications, but rather the loss of a right to divert water once granted; therefore, the protestant's citation to that authority is misapplied.

As provided in 10 C.F.R. § 60.121(c), the Department of Energy shall have obtained such water rights as may be needed to accomplish the purpose of the geologic repository operations area as a condition for licensing any potential repository. In 1991 the protestant, as an Intervenor in the Department of Energy's filing of water right Application 52338, in its Pre-hearing Statement indicated that the approval of Application 52338 threatened to prove detrimental to the public interest. One of the reasons it asserted was that approval of the use of water for site characterization, without an adequate source of water first being identified to satisfy the long term needs of any potential repository program, would be a waste of water; and therefore, not in the public interest.

The State Engineer finds it is true that one cannot file a water right application merely to preserve a priority, and that the filing of a water right application does not begin the implementation of a repository. However, the State Engineer also finds that one cannot look at the statement that these applications were filed in order to ensure priority of filing and establishment of a claim for the use of the water in a vacuum. The permits for site characterization and aquifer characteristic studies will expire in the near future. The potential for a high-level nuclear waste repository has already had multiple facets litigated by Nevada and others several times. The State Engineer believes the potential exists for these water right applications, whether granted or denied, to be tied up in litigation for several years; therefore, it is not unreasonable for the applicant to have filed

these applications at the present time for consideration by the State Engineer.

The protestant is clearly demonstrating the problem of which comes first, the chicken or the egg. The protestant earlier argued that the site characterization applications were wasteful and threatened to prove detrimental to the public interest since no long term source of water for the project had been identified. However, when the Department of Energy now files for a long term source for any potential site the protestant now argues the applicant cannot demonstrate the need for the water; therefore, the applications should be denied. Nevada water law provides upon the demonstration of certain preliminary matters that there is time for an applicant to work out issues that go to the heart of whether it can ever beneficially use the waters for which it applied, and all the issues raised by the protestant are matters upon which evidence needs to be introduced at a public administrative hearing.

#### VIII.

The protestant alleges that the applicant cannot presently demonstrate what amount of water is reasonably required for the use it wishes to serve thereby violating NRS § 533.070. NRS § 533.070 provides that the quantity of water which may be appropriated is limited to such water as shall reasonably be required for the beneficial use to be served. The State Engineer finds this is a perfect example of why a public administrative hearing is necessary. The only way he can determine if the amount of water applied for under the applications is an amount that shall be reasonably required is to obtain evidence on that very issue. The law does not state that the exact amount which will finally be needed must be determined upon the filing of the application. That quantity is determined upon the filing of proof of beneficial use. At the application stage, what is required of an applicant is a reasonable estimation for the specific project to be served.

IX.

The protestant alleges that the applicant cannot at this time provide satisfactory proof of its intention in good faith to construct the works necessary to apply the water to its intended beneficial use with reasonable diligence thereby violating NRS § 533.370(1)(c)(1). The State Engineer finds that the construction of works of diversion has already taken place under nearly all the permits now held by the Department of Energy, and evidence needs to be obtained as to whether there is a reasonable expectation that the water will be applied to the intended beneficial use with reasonable diligence. The State Engineer finds that Nevada water law contemplates potential hurdles to be overcome when it provides for a number of years before a permittee must file proof of completion of the works of diversion and proof of beneficial use of the waters, and evidence of whether there is a reasonable expectation to overcome those hurdles needs to be explored at a public administrative hearing.

X.

The protestant alleges that the applicant cannot at this time provide satisfactory proof of its financial ability and reasonable expectation to actually apply the water to the intended beneficial use with reasonable diligence violating NRS § 533.370(1)(c)(2). The State Engineer finds evidence of whether there is satisfactory proof of the Department of Energy's financial ability and reasonable expectation to apply the water to the intended beneficial use needs to be explored at a public administrative hearing.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>19</sup>

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<sup>19</sup> NRS Chapters 533 & 534.

II.

The applicant argues that Nevada Administrative Code Chapter 533 only provides for two "pleadings", a protest and an answer; therefore, the motion to dismiss is a fugitive document which should be stricken and not considered for decision. The State Engineer concludes that the Nevada Administrative Code does not preclude the filing of other relevant motions. The Code provides for potential pre-hearing discovery, and the way an applicant or a protestant would request that discovery is by the filing of a motion to request the same.

III.

The State Engineer concludes that Nevada water law mandates he review the applications and consider protests as filed.<sup>20</sup>

IV.

Under Nevada law, any person who wishes to appropriate any of the public waters must apply to the State Engineer for a permit to do so.<sup>21</sup> Person is defined in two places in the Nevada Revised Statutes specific to the appropriation of water. NRS § 533.010 defines a person to include the United States and this state. NRS § 534.014 defines a person to include any municipal corporation, power district, political subdivision of this or any state, or any agency of the United States Government. The State Engineer concludes the United States Department of Energy is a "person" under law authorized to file an application to appropriate the public waters of Nevada, and its intent to appropriate is demonstrated upon the filing of said application.

V.

There is no question that the State of Nevada has the constitutional power to control and regulate the public waters of the state, and to provide how and in what manner the use of such

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<sup>20</sup> NRS § 533.365.

<sup>21</sup> NRS § 533.325.

water can be obtained.<sup>22</sup> It is also settled in this state the water law and all proceedings thereunder are special in character, and the provisions of such law not only lay down the method and procedure, but strictly limit it to that provided.<sup>23</sup> The State Engineer concludes that Nevada water law does not provide for the summary dismissal of a water right application based on a protestant's allegation that the applicant does not have standing to file the application. The State Engineer further concludes that NRS § 533.365 and 533.375 provide him with the discretion to hold a public administrative hearing and require the filing of evidence as he may deem necessary for a full understanding of the rights involved. The State Engineer concludes that such a hearing is necessary for a full understanding of the rights involved in these applications, and to address the very issues raised by the protestant.

#### VI.

The protestant alleges that the applicant's legal authority to apply the water to its intended beneficial use is dependent upon the approval or disapproval of the Governor or Legislature of the State of Nevada, and as there is no clear certainty that the Governor or the Legislature will approve the development creating the legal authority to apply the waters to their intended beneficial use. Therefore, the protestant alleges that the applicant's applications call upon the State Engineer to usurp the statutory powers of the Governor or the Legislature in violation of the Nuclear Waste Policy Act and NRS § 459.910. The State Engineer concludes that his statutory authority to consider the denial or

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<sup>22</sup> In Re Application of Filippini, 66 Nev. 17, 27, 27, 202 P.2d 535 (1949).

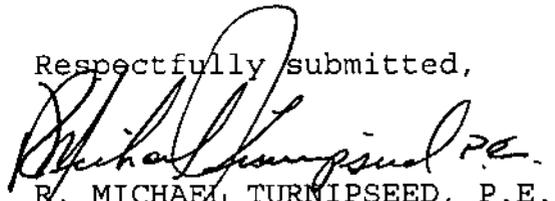
<sup>23</sup> In Re Application of Filippini, 66 Nev. at 27; G & M Properties v. District Court, 95 Nev. 301, 305, 594 P.2d 714 (1979); Ruddell v. District Court, 54 Nev. 363, 367, 17 P.2d 693 (1933).

approval of a water right application has no bearing on the Governor's or Legislature's responsibilities under the Nuclear Waste Policy Act as those responsibilities have been entrusted to others and not delegated to him.

RULING

The State Engineer hereby denies protestant Nevada Agency for Nuclear Projects' Motion to Dismiss.

Respectfully submitted,

  
R. MICHAEL TURNIPSEED, P.E.  
State Engineer

RMT/SJT/cl

Dated this 28th day of  
August, 1998.