

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

IN THE MATTER OF APPLICATIONS 45416 )  
AND 46749 FILED TO APPROPRIATE THE )  
PUBLIC WATERS OF THE STATE OF )  
NEVADA FROM LAMOILLE CREEK WITHIN )  
THE LAMOILLE VALLEY HYDROGRAPHIC )  
BASIN (045), ELKO COUNTY, NEVADA. )

RULING

# 4735

GENERAL

I.

Application 45416 was filed on March 3, 1982, by Kent L. Brown to appropriate 44.0 cubic feet per second (cfs) of water from April 15th to August 15th and 4 cfs of water from August 15th to April 15th from Lamoille Creek for hydroelectric power generation on Lot 1 of Section 6, T.32N., R.58E., M.D.B.&M. The proposed point of diversion is described as being located within NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 16, T.32N., R.58E., M.D.B.&M. The point of return back to Lamoille Creek is described as being located in Lot 1, Section 6, T.32N., R.58E., M.D.B.&M.<sup>1</sup>

II.

Application 46749 was filed on March 21, 1983, by Kent L. Brown to appropriate 44.0 cfs of water from January 1st to December 31st from Lamoille Creek for hydroelectric power generation in the S $\frac{1}{2}$  SE $\frac{1}{4}$  of Section 31, T.32N., R.58E., M.D.B.&M. The applicant states that he would keep a minimum flow of 3.0 cfs in Lamoille Creek at all times. The proposed point of diversion is described as being located within NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 16, T.32N., R.58E., M.D.B.&M. The point of return back to Lamoille Creek is described as being located in the SW $\frac{1}{4}$  SE $\frac{1}{4}$ , of Section 31,

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<sup>1</sup> File No. 45416, official records in the office of the State Engineer.

T.33N., R.58E., M.D.B.&M. The applicant indicated that he would withdraw Application 45416 if Application 46749 were approved.<sup>2</sup>

III.

Application 45416 was timely protested on September 16, 1982, by William A. Molini, Director of the Nevada Department of Wildlife ("NDOW") and on September 17, 1982, by William L. Johnson, Deputy Regional Forester, United States Forest Service ("USFS").<sup>1</sup>

Application 46749 was timely protested on May 20, 1983, by William A. Molini, Director of the Nevada Department of Wildlife and on August 22, 1983, by T. A. Roederer, Deputy Regional Forester, United States Forest Service.<sup>2</sup>

Applications 45416 and 46749 were protested by NDOW which requested that "a minimum flow of 7.12 cfs be left in the stream channel at all times to sustain spawning and other biological functions of the resident and planted trout, to maintain the public values of the Lamoille Creek fishery." Applications 45416 and 46749 were protested by the USFS on the grounds that (1) the proposed point of diversion is on National Forest land which the applicant does not control by lease, rent, or ownership; (2) the applicant will not be able to develop or put the water to beneficial use without Forest Service approval; (3) the United States has non-consumptive federal reserved rights on the stream under the authority of the Organic Administrative Act of 1897 (with a claimed priority date of March 29, 1904) and under the

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<sup>2</sup> File No. 46749, official records in the office of the State Engineer.

Multiple Use-Sustained Yield Act of 1960 (with a claimed priority date of June 12, 1960); and (4) the amount of water applied for will interfere with these claimed reserved rights.

IV.

On October 12, 1984, the State Engineer provided notice of a November 9, 1984, public administrative hearing on Applications 45416 and 46749 in Elko, Nevada. The hearing was held as scheduled at the Elko County Library. Both the protestants and the applicant were present or represented and entered testimony and evidence into the record of the hearing to support their respective positions.<sup>3</sup>

FINDINGS OF FACT

I.

Mr. Brown was issued a preliminary permit by the Federal Energy Regulatory Commission (FERC) on March 12, 1984, for the South Fork Hydro Project, FERC No. 7507, 26 FERC #62, 218. The State Engineer finds that an Order cancelling Preliminary Permit FERC No. 7507 was issued on November 23, 1984.<sup>1</sup>

II.

A letter dated May 3, 1999, from Dave P. Aicher, District Ranger of the USFS reaffirmed the USFS's position and also that of NDOW that they are interested in maintaining a minimum flow of 7.0 cfs for the aquatic and riparian health of Lamoille Creek, and that in addition, the designation of the Lamoille Canyon Road as a

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<sup>3</sup> Transcript, pp. 10, 74, 112, public administrative hearing before the State Engineer, November 9, 1984. (Hereinafter referred to as "Transcript")

scenic byway and the entire Lamoille Canyon as a scenic area precludes the USFS from permitting any activity such as a penstock or ditch which would detract from the scenic quality of the canyon.<sup>1,2</sup> The State Engineer finds that the proposed point of diversion and the route of the penstock are on USFS land and the applicant does not have control of said land by lease, rent or ownership. Therefore, the applicant is unable to place the water to beneficial use as contemplated under the applications.<sup>4</sup>

### III.

Applications 45416 and 46749 seek to divert 44 cfs of water from Lamoille Creek through a penstock approximately 2½ miles to a power plant, and then will return said water back to Lamoille Creek. Application 46749 requests diverting 44 cfs in excess of 4 cfs<sup>5</sup> which would continue to flow down the creek to maintain the fishery. Both the USFS and NDOW state that a reduction in flow of Lamoille Creek to 4 cfs would effectively dewater the creek through this 2½ mile reach and that a minimum flow of approximately 7 cfs is needed to maintain the fishery.<sup>6</sup>

The applicant stated that any minimum flow requirement greater than 4 cfs would make the proposed project economically unfeasible.<sup>7</sup>

Testimony was presented as to the importance of Lamoille Creek to recreational fishing in northeastern Nevada<sup>8</sup> and that

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<sup>4</sup> NRS § 533.370(1).

<sup>5</sup> Transcript, p. 108.

<sup>6</sup> NDOW Exhibit No. 1.

<sup>7</sup> Transcript, pp. 107-108.

<sup>8</sup> Transcript, pp. 76-79.

dewatering the creek would threaten the fishery thereby threatening to prove detrimental to the public interest.

The State Engineer finds that to approve these applications would threaten to prove detrimental to the public interest in maintaining the fishery in Lamoille Creek.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>9</sup>

II.

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:<sup>10</sup>

- A. there is no unappropriated water at the proposed source;
- B. the proposed use conflicts with existing rights; or
- C. the proposed use threatens to prove detrimental to the public interest.

III.

The State Engineer concludes that to grant permits under Applications 45416 and 46749 would threaten to prove detrimental to the public interest. No decision is made on the USFS alleged reserved rights claimed or on any minimum flow quantification for maintaining a viable fishery.

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<sup>9</sup> NRS Chapter 533.

<sup>10</sup> NRS § 533.370(3).

RULING

Applications 45416 and 46749 are hereby denied on the grounds that the granting of either application would threaten to prove detrimental to the public interest. No ruling is made on the merits of the other protest claims.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.  
State Engineer

RMT/SJB/cl

Dated this 27th day of

May, 1999.