

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

IN THE MATTER OF APPLICATIONS)
49038, 49039, 49053, 49141, AND 49142)
FILED TO APPROPRIATE THE PUBLIC)
WATERS OF AN UNDERGROUND)
SOURCE WITHIN THE LOWER REESE)
RIVER VALLEY HYDROGRAPHIC)
BASIN (59), LANDER COUNTY,)
NEVADA.)

RULING

#5288

GENERAL

I.

Application 49038 was filed on May 9, 1985, by Hart Resources, Incorporated, to appropriate 2.0 cubic feet per second (cfs) of underground water for mining, milling and domestic purposes within the W $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 19, T.31N., R.44E., M.D.B.&M., and Sections 9, 10, 13, 14, 15, 16, and 24, T.31N., R.43E., M.D.B.&M. The proposed point of diversion is described as being located within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 19, T.31N., R.44E., M.D.B.&M.¹

II.

Application 49039 was filed on May 9, 1985, by Hart Resources, Incorporated, to appropriate 2.0 cfs of underground water for mining, milling and domestic purposes within the W $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 19, T.31N., R.44E., M.D.B.&M., and Sections 9, 10, 13, 14, 15, 16, and 24, T.31N., R.43E., M.D.B.&M. The proposed point of diversion is described as being located within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 19, T.31N., R.44E., M.D.B.&M.²

III.

Application 49053 was filed on May 17, 1985, by Hart Resources, Incorporated, to appropriate 2.0 cfs of underground water for mining, milling and domestic purposes within the W $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 19, T.31N., R.44E., M.D.B.&M., and Sections 9, 10, 13, 14, 15, 16, and 24, T.31N., R.43E., M.D.B.&M. The proposed point of diversion is described as being within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 24, T.31N., R.43E., M.D.B.&M.³

¹ File No. 49038, official records in the Office of the State Engineer.

² File No. 49039, official records in the Office of the State Engineer.

³ File No. 49053, official records in the Office of the State Engineer.

IV.

Applications 49038, 49039, and 49053 were assigned on February 10, 1999, in the records of the Office of the State Engineer to F.W. Lewis, Inc.

V.

Application 49141 was filed on June 17, 1985, by Frank W. Lewis to appropriate 3.0 cfs of underground water for mining, milling and domestic purposes within the Sections 9, 10, 11, 14, 15, and 16, T.31N., R.43E., M.D.B.&M. The proposed point of diversion is described as being located within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 9, T.31N., R.43E., M.D.B.&M.⁴

VI.

Application 49142 was filed on June 17, 1985, by Frank W. Lewis to appropriate 3.0 cfs of underground water for mining, milling and domestic purposes within the Sections 9, 10, 11, 14, 15, and 16, T.31N., R.43E., M.D.B.&M. The proposed point of diversion is described as being located within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 16, T.31N., R.43E., M.D.B.&M.⁵

VII.

Applications 49038, 49039, 49053, 49141 and 49142 were timely protested by Louie Venturacci on the grounds that a mining corporation's well dried up the upper spring in Galena Canyon creating a shortage of water, and that more wells could dry up other springs and jeopardize the creek and its tributaries upon which he has vested stockwater rights.¹

VIII.

After all parties were duly noticed by certified mail, a public administrative hearing was held on November 13, 2002, regarding protested Applications 49038, 49039, 49053, 49141, and 49142 in Carson City, Nevada, before representatives of the Office of the State Engineer.⁶

⁴ File No. 49141, official records in the Office of the State Engineer.

⁵ File No. 49142, official records in the Office of the State Engineer.

⁶ Exhibit No. 1 and Transcript, public administrative hearing before the State Engineer, November 13, 2002, (hereafter "Transcript" and "Exhibit").

FINDINGS OF FACT

I.

Frank Lewis appeared on behalf of the applicant and there were no appearances on behalf of the protestant.⁷ The State Engineer finds that the protestant was properly notified of the hearing by certified letter dated September 17, 2002, and failed to appear to present evidence and testimony in support of the protests.

II.

The United States Geological Survey estimates the perennial yield of the Lower Reese River Valley Hydrographic Basin to be approximately 17,000 acre-feet annually (afa).⁸ The committed groundwater resources in the form of permits and certificates issued by the State Engineer to appropriate underground water from the Lower Reese River Valley Hydrographic Basin exceeds 17,880 afa excluding resources committed to mining and milling and non-adjudicated vested rights.⁹ There are approximately 20,478 acre-feet of water resources already committed to mining and milling in the Lower Reese River Valley Hydrographic Basin. The State Engineer finds that Applications 49038, 49039, 49053, 49141, and 49142 were filed for a total of 12 cfs or 8,687.64 afa for mining, milling and domestic purposes.

III.

The applicant presented evidence and testimony in an effort to prove a viable mining project exists at the proposed place of use, the project is progressing over time, and additional water is necessary to support the project.

In this regard, the applicant presented a copy of a land patent 27-2001-0045 issued to F.W. Lewis, Inc., dated May 17, 2001. The patent conveys title to a land patent pursuant to general mining laws for the land embraced within the New Silver Dream #6 lode mining claim as designated in the patent. A mineral survey of New Silver Dream #6 shows an expenditure of \$104,454.35. The money was spent on a drilling program of 19 exploratory holes varying in depth from 345 feet to 800 feet.¹⁰ A valuable mineral deposit at New Silver Dream #6 was documented with an estimated 56,366.72 ounces of

⁷ Transcript, p. 4.

⁸ Nowlin, Jon O., Ground-Water Quality in Nevada, a Proposed Monitoring Program, USGS Open File Report 78-768, p. 193, 1986.

⁹ Hydrographic Basin Summary, Basin 59, Nevada Division of Water Resources database, February 18, 2003.

¹⁰ Exhibit No. 13.

gold and 308,443 ounces of silver. The average ore grade was estimated to be 0.274 Oz/ton gold and 1.50 Oz/ton silver.¹¹

The applicant provided the following information during testimony summarized as follows. The New Silver Dream #6 is a part of seven patented claims and 360 unpatented claims on the project property. Frank W. Lewis, Inc. pays \$36,000 a year in fees to the BLM, plus taxes on the patented claims. Additional work on the property includes at least 17 exploration holes drilled during 1997 and 1998. In 2000 and 2001, there was \$350,000 expended in drilling and other work upon the property. This year nine holes, of a total depth of almost 6,000 feet, have been completed along with mapping and data interpretation. Assays from this year's drilling exploration program are in progress; however, the amount of mineralization has not yet been determined.¹²

The applicant testified that, "We have . . . continued to work on this property for many years and as a small company we've had some success with the work we have done. We plan on continuing work in the future. It would hurt us to lose our water right applications because . . . if you're not going to be able to have water for a mill, you may be out of business on the property."¹³

The testimony indicated that the additional water applied for under Applications 49038, 49039, 49053, 49141, and 49142 is to be used primarily for an onsite mill for processing the ore. The applicant testified that, "Someday some of this ore will be mined, but it's very difficult for me to represent to you that I know that date, because I don't."¹⁴

The State Engineer finds that the project property may contain valuable mineral resources and some exploration activity has occurred on the property. The State Engineer further finds that the applicant has had over seventeen years since the applications were filed to proceed past the preliminary exploration phase of this project and has failed to do so. The State Engineer also finds that the applicant has no firm date for when this project will move forward.

IV.

The applicant indicated the amount of time required to move from the exploration phase of the project to the mining and milling stage is unknown. The speed of the

¹¹ Exhibit No. 14, pp. 12-13.

¹² Transcript, pp. 9-12.

¹³ Transcript, pp. 11-12.

¹⁴ Transcript, p. 18.

project's progression will depend upon the value of the mineral resources (i.e. the price of gold and silver) to provide the economic opportunity for moving from the exploratory phase to the mining and milling phase of the project. The applicant explained that his company is an exploration company that finances the mining phase of the project through bringing in lessees as defacto partners. Lessees have worked on the property in the past and will continue to do so in the future. When economic conditions are ripe for proceeding with a mining and milling operation, the project will require the water requested under the applications.¹⁵ Applications 49038, 49039, 49053, 49141, and 49142 were filed in 1985. Over seventeen years have past since the applications were filed and the applicant has given no time frame for moving forward from exploration to actual mining and milling. The State Engineer finds there is no reasonable expectation of putting the water under Applications 49038, 49039, 49053, 49141, and 49142 to beneficial use in the foreseeable future.

V.

Frank W. Lewis has existing water rights for mining and milling purposes at the project site under Permit 22759, Certificate 7592, and Permit 22990, Certificate 7593. The quantity of water allowed under the two certificates totals about 627.4 afa.¹⁶ A small portion of water under these existing rights has been used for drilling and other exploration activities.¹⁷ J.W. Patterson & Associates, Incorporated, provided estimates of water requirements for the project in response to a request from the State Engineer's office.¹⁸ These estimates are based on processing 7,000 tons of ore every 24 hours. On this basis, the estimated gross average annual water requirement is expected to be 4,520 acre-feet of which an estimated 3,100 acre-feet would be recycled. The estimated average annual water consumption is expected to be 1,420 acre-feet. The applicant was asked to justify the 8,687.64 acre-feet under Applications 49038, 49039, 49053, 49141, and 49142. The applicant testified that, ". . .at this time I don't know what size of mill this property might actually in the end warrant."¹⁹

The applicant was unable to provide any additional information regarding the actual quantity of water required for this project. The applicant also stated, "At this

¹⁵ Transcript, pp. 18, 22, 23, and 25.

¹⁶ Hydrographic Basin Summary, Basin 59, Nevada Division of Water Resources database, November 27, 2002.

¹⁷ Transcript, p. 22.

¹⁸ Exhibit Nos. 16 and 17.

¹⁹ Transcript, p. 17.

moment in time I can't represent to you that I know exactly where a mill might be built because I don't know."²⁰ The State Engineer finds that the applicant has sufficient water to continue with current exploration activities. The State Engineer further finds that the applicant has not justified the approval of additional water rights for a mill to be built at some undefined time in the future, of unknown size and location.

VI.

Certificate 8130 was issued under Permit 23927 to Clara E. Post for mining, milling and domestic purposes. Water is obtained from a sump cut in the bed of Duck Creek and is considered an underground source. The point of diversion is described as being within the SE¼ NE¼ of Section 24, T.31N., R.43E., M.D.B.&M.²¹ Application 49053 indicates that its source of water is from the same location from an existing cut in the alluvium. The application provides, "The applicant contends the water originally developed under Certificate No. 8130 (Permit No. 23927) has been forfeited and is available for appropriation."²² Records in the office of the State Engineer indicate that no forfeiture proceedings have ever been initiated in regards to Certificate 8130. The State Engineer finds that Application 49053 has the same point of diversion as Certificate 8130. The State Engineer further finds that Certificate 8130 has not to date been declared forfeited.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.²³

II.

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:²⁴

- A. there is no unappropriated water at the proposed source;
- B. the proposed use or change conflicts with existing rights;
- C. the proposed use or change conflicts with protectible interests in existing domestic wells as set forth in NRS § 533.024; or

²⁰ Transcript, p. 15.

²¹ File No. 23927, official records in the Office of the State Engineer.

²² File No. 49053, official records in the Office of the State Engineer.

²³ NRS chapters 533 and 534.

²⁴ NRS § 533.370(3).

D. the proposed use or change threatens to prove detrimental to the public interest.

III.

The applicant has had over seventeen years since the applications were filed to proceed with a mining project. The State Engineer concludes the applicant did not demonstrate an intention to place the water to beneficial use with reasonable diligence; therefore, it would threaten to prove detrimental to the public interest to consider granting the applications.

IV.

Considering the applicant's existing water rights, the State Engineer concludes no additional water is necessary for the applicant to continue the exploration phase of the project and the approval of Applications 49038, 49039, 49053, 49141, and 49142 are not justified at this time.

V.

The point of diversion under Application 49053 is the same as existing Certificate 8130. The State Engineer concludes that to approve an application on top of an existing water right would conflict with existing rights.

RULING

Application 49053 is hereby denied on the grounds that its approval would conflict with existing rights. Applications 49038, 49039, 49053, 49141, and 49142 are hereby denied on the grounds that their approval would threaten to prove detrimental to the public interest. No ruling is made on the merits of the protests.

Respectfully submitted,



HUGH RICCI, P.E.
State Engineer

HR/TW/jm

Dated this 6th day of

October, 2003.