

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

IN THE MATTER OF APPLICATION 65480, )  
FILED TO APPROPRIATE THE PUBLIC )  
WATERS OF AN UNDERGROUND SOURCE )  
WITHIN THE DIXIE CREEK TENMILE CREEK )  
AREA HYDROGRAPHIC BASIN (48), ELKO )  
COUNTY, NEVADA. )

**RULING**

**#5340**

**GENERAL**

**I.**

Application 65480 was filed on September 7, 1999, by Earl M. Carter to appropriate 0.05 cubic feet per second (cfs) of underground water from the Dixie Creek Tenmile Creek Area Hydrographic Basin, Elko County, Nevada. The proposed manner of use is for commercial purposes within the SE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 15, T.32N., R.55E., M.D.B.&M. The proposed point of diversion is described as being located within the SE $\frac{1}{4}$  NE $\frac{1}{4}$  of said Section 15.<sup>1</sup>

**II.**

Separate but identical protests to the issuance of Application 65480 were timely filed by Mitchell and Lawrence Moiola. The protestants contended that the land comprising the proposed place of use was not zoned for commercial use or purposes and that the Dixie Creek Tenmile Creek Area was a closed basin.<sup>1</sup>

**FINDINGS OF FACT**

**I.**

If sufficient information is contained within the records of the State Engineer's office, the State Engineer may proceed in an evaluation of the application and its associated protest without the benefit of a public hearing.<sup>2</sup> The State Engineer finds that, in the instance of the subject application, the merits of the protest can be addressed without additional information garnered from a public hearing.

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<sup>1</sup> File No. 65480, official records in the Office of the State Engineer.

<sup>2</sup> NRS § 533.365(3).

## II.

If the protest to Application 65480 is examined, it can be divided into two separate issues. The first of which contends that the proposed place of use described by the application is not zoned for commercial purposes. The applicant, by letter dated January 27, 2000, was asked by the Office of the State Engineer to provide a more detailed accounting of the ownership and zoning of the area in question. A timely response to this letter recited the applicant's attempt to transform the existing agricultural zoning to commercial through the county planning commission. The applicant's efforts were eventually rewarded, with the issuance of a zone change resolution by the Elko County Planning Commission on August 16, 2001. A copy of this resolution, which changed the applicant's place of use to the required commercial zoning, was placed into the State Engineer's records on January 23, 2003.<sup>1</sup> The State Engineer finds that the protest issue relating to applicant's conformance with county zoning has been resolved and that this portion of the protest can be overruled.

## III.

The remaining issue set forth within the protest rests upon the applicant's interpretation of the State Engineer's guideline governing new appropriation of ground water from the Dixie Creek Tenmile Creek Area. The text of the protest, describes this groundwater basin as a "closed basin", which is assumed to mean that no additional requests for new appropriation of underground water will be allowed.<sup>1</sup> The degree to which this is true is easily found in an analysis of State Engineer's Order No. 1120. This administrative action limited new appropriations of underground water to a specific set of water right applications, which can be identified as:

1. Those applications for any purpose except irrigation, which seek to appropriate 4,000 gallons per day or less.
2. Those applications for environmental permits filed pursuant to NRS § 533.437.
3. Those applications filed for water from the geothermal aquifer.

This order covered only a portion of the Dixie Creek Tenmile Creek Area Hydrographic Basin, with the subject point of diversion and place of use falling within its jurisdiction.<sup>3</sup>

If the requested diversion rate of 0.05 cfs is expanded over a 24-hour period, a daily appropriation of water equal to 1,800 gallons is calculated. This level of appropriation is in

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<sup>3</sup> State Engineer's Order No. 1120, issued April 2, 1996, official records in the Office of the State Engineer.

compliance with the 4,000 gallons per day ceiling created under Order No. 1120, as is the non-irrigation manner of use. The State Engineer finds that the Dixie Creek Tenmile Creek Area Hydrographic Basin is not "closed" to the manner of use proposed by Application 65480, and that this portion of the protest can be overruled.

#### IV.

While it has been determined that Application 65480 complies with State Engineer's Order No. 1120, it must also follow the guidelines set under the Nevada Revised Statutes. These statutes state that a water right application that requests a new appropriation of underground water must be denied if it is determined that:<sup>4</sup>

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

When applying these criteria to Application 65480, it is necessary to review the history and ultimate fate of commercial water right applications, which have been filed for underground water within the Dixie Creek Tenmile Creek Area. This information is readily available from the State Engineer's water right information database, which can be queried to identify past denials of these applications. A search of the database, specific to the subject groundwater basin, produced no instances where a water right application filed for small scale commercial purposes had been denied for issues relating to unappropriated water or existing rights.<sup>5</sup> The State Engineer finds that there are no past denials of commercial water right applications, which would prevent the approval of Application 65480.

### CONCLUSIONS

#### I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>6</sup>

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<sup>4</sup> NRS § 533.370(4).

<sup>5</sup> Nevada Division of Water Resources Water Rights Database, January 5, 2004, Rulings Abstract Hydrographic Basin No. 48, official records in the Office of the State Engineer.

<sup>6</sup> NRS chapters 533 and 534.

**II.**

As has been previously stated, the State Engineer is prohibited by law from granting an application to appropriate the public waters where:<sup>4</sup>

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

**III.**

The State Engineer concludes that the approval of a small scale commercial manner of use, which complies with the provisions of State Engineer's Order No. 1120, will not violate the provisions found under NRS § 533.370.

**RULING**

The common protests to Application 65480 are hereby overruled and Application 65480 is approved subject to existing rights and the payment of the statutory filing fees.

Respectfully submitted,



HUGH RICCI, P.E.  
State Engineer

HR/MDB/jm

Dated this 14th day of  
April, 2004.