

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

IN THE MATTER OF APPLICATION)
70055 FILED TO CHANGE THE PLACE)
OF USE AND MANNER OF USE OF A)
PORTION OF WATER PREVIOUSLY)
APPROPRIATED UNDER PROOF 00405)
OF THE HUMBOLDT RIVER DECREE,)
LOCATED WITHIN THE LAMOILLE)
VALLEY HYDROGRAPHIC BASIN)
(045), IN ELKO COUNTY, NEVADA.)

RULING

#5532

GENERAL

I.

Application 70055 was filed on May 27, 2003, by Lynn R. and Penny K. Forsberg to change the place of use and manner of use of a portion of water being 0.003 cubic feet per second previously appropriated under Proof 00405. The proposed manner of use and place of use are described as a pond for emergency fire protection located within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 19, T.33N., R.58E., M.D.B.&M. The point of diversion is to remain unchanged.¹

II.

Proof 00405 is an adjudicated claim of vested right under the Edwards Decree section of the Humboldt River Decree. According to the Edwards Decree, the original claimant is the Hankins-Bellinger Co., the source of water is Lamoille Creek and the delivery ditch is the Hankins Bellinger Ditches. The existing point of diversion, place of use and manner of use are as decreed.²

III.

Application 70055 was timely protested by Joseph Michael Presti, Leland W. Krugerud and Paula C. Krugerud on the following grounds:¹

Current practices by the Applicant Demonstrate Non-Compliance with Decreed Water Right Owners Priorities or Adjudicated Rights:

¹ File No. 70055, official records in the Office of the State Engineer.

² Findings of Fact, Conclusions of Law and Decree of Judge H.W. Edwards, Edwards Decree, In the Matter of the Determination of the Relative Rights of Claimants and Appropriators of the Waters of the Humboldt River Stream System and Its Tributaries, Case No. 2804, Sixth Judicial District Court of Nevada, In and for the County of Humboldt, 1935.

The proposed place of use under Application to Appropriate No. 70055 is described as Parcel No. 1 of the Parcel Map for Hog Tommy Hills, LLC under File No. 479676, Elko County, Nevada

The applicants are currently the subject of an active law suit filed by downstream decreed water right owners due to their destruction of decreed water supply ditches and headgates. The applicants have demonstrated by their current actions that they do not recognize prescriptive decreed ditch easements and have modified the historical ditch systems to direct surface water into their holding pond on Parcel No. 1. By directing surface water away from historical ditches and headgates downstream decreed water right acreage is not capable of receiving water.

The map filed to support Application Nos. 70032 and 70055 illustrates an "existing ditch" within Parcel No. 3 and along the west boundary. The applicants recently constructed this ditch system and diverted water to the holding pond on Parcel No. 1. This new ditch system has caused water to be removed from irrigated acreages and ditch systems historically utilized by downstream water right owners.

There is a store owned by the applicant located on Parcel No. 1. The County has required fire protection for this commercial facility.

Applicant is Actively Diverting Water to Parcel No. 1 Holding Pond Without an Approved Permit:

The applicant is currently diverting water into the holding pond on Parcel No. 1 without an approved permit from the State. This further demonstrates the applicants refusal to recognize State water law.

Request for Denial of Application to Appropriate No. 70055:

The applicant has not satisfactorily repaired the damage to historical decreed ditch and headgate systems. These repairs are necessary for the irrigation of decreed water righted acreage. The applicant has demonstrated a lack of compliance with State water law which is contrary to the public interest of the State of Nevada. Based on the reasons stated above, denial of the Application No. 70055 is the only action that can be taken.

FINDINGS OF FACT

I.

Nevada Revised Statute (NRS) § 533.365(3) provides that it is within the State Engineer's discretion to determine whether a public administrative hearing is necessary to address the merits of a protest to an application to appropriate the public waters of the State of

Nevada. In the case of protested Application 70055, there are a number of protest issues raised, including an allegation of diverting water without a permit, which could not be adequately addressed without additional information. On April 5, 2004, Humboldt River Water Commissioner, Kirk Owsley (Commissioner) conducted an informal field investigation in the matter of Application 70055, at the request of the Nevada Division of Water Resources. The Commissioner opined, in part, that Application 70055 could be approved; however, many of the protest issues raised were not addressed.¹ As such, the Office of the State Engineer planned a formal field investigation followed by an administrative hearing to gain a full understanding of the issues.

The State Engineer finds, on November 9, 2004, a formal field investigation and a subsequent administrative hearing were conducted with the applicants, the protestants, and the protestants' counsel (counsel) in attendance.

II.

The pond on the applicants' property is described as being within Parcel No. 1 on the Elko County Parcel Map for Hogg Tommy Hills, LLC., File No. 479676. The formal water right application map filed in support of Application 70055 shows three parcels, Parcel No. 1, Parcel No. 2 and Parcel No. 3, located north of Lamoille Highway and east of North Canyon Road. Parcel No. 2 sits in the corner formed by the intersection of the North Canyon Road and Lamoille Highway with its south boundary abutting the Lamoille Highway and its west boundary abutting the North Canyon Road. Immediately to the north is Parcel No. 1. Parcel No. 3 is to the immediate east of Parcels No. 1 and 2.³ The protestants' properties are located downstream of the applicants.

Application 70055 proposes to change the manner and place of use of a portion of water decreed under Proof 00405. The purpose of the application is to hold water in a pond on the property for the purpose of fire protection for a recently constructed commercial development. Further, the applicants indicated that they are irrigating their remaining acreage under Proof 00405 from the pond via sprinklers.⁴ It should be noted that the applicants' commercial development is served by a well under Permit 68953.

³ Transcript of Proceedings, Public Hearing November 9, 2004, Exhibit No. 4. Hereinafter, the transcript will be referred to by page number and exhibits from the hearing by exhibit number, as appropriate.

⁴ Transcript, p. 30.

An issue brought up in the protest and reiterated by counsel at the hearing is the construction and use of the pond prior to Application 70055 being approved. Counsel stated, "One other point that my clients wanted to make that's in the protest is they were very concerned and quite upset with the fact that the fire suppression pond was and has been used prior to an application being approved."⁵ The protestants request that Application 70055 be denied in part because, "The applicant has demonstrated a lack of compliance with State water law..."⁶ There was no evidence presented that water from the pond was used for actual fire suppression. Still, the pond was constructed for that primary purpose and water was diverted and stored in the pond. In this case; however, the applicants are entitled to their remaining irrigation water under Proof 00405 in accordance with the Edwards Decree so the construction of the pond does not appear to be in violation of State water law. Storage of water in the pond for fire protection does require a permit and the applicants have filed Application 70055 for the purpose of obtaining the requisite permit.

In regards to the construction of the pond, the State Engineer finds substantial evidence was not provided that construction of the pond has violated State water law.

III.

At the hearing, counsel expressed a concern over the amount of water applied for and ensuring the duty of water available to the pond is an accurate measurement of the water.⁷ An examination of Exhibit No. 2 shows that these issues were not included in the protest; however, these issues are permissible and have been taken into consideration.⁸

Application 70055 does not request a new appropriation of water. Rather, the application requests change of water previously appropriated under Proof 00405. The amount of water requested for change equates to an annual duty of about 195,511 gallons or just over three times the estimated capacity of the pond. The applicants indicated that the requirement for fire protection was a 30,000-gallon minimum storage in the pond.⁹ The applicants estimated the size of the pond at 57,000 gallons but rounded the number upward to 60,000 gallons due to the irregular shape of the pond.¹⁰ The pond was sized to accommodate the minimum requirement of

⁵ Transcript, pp. 13,14.

⁶ Exhibit No. 2.

⁷ Transcript, p. 9.

⁸ NRS § 533.220.

⁹ Transcript, p. 35.

¹⁰ Transcript, pp. 34, 35.

30,000 gallons when up to two feet of ice forms on the surface. The application indicates that the pond is to be drained for cleaning once per year and then filled to capacity, with the remaining duty compensating for evaporation.

No evidence was presented disputing the applicants' estimated capacity of the pond. The duty of water available to the pond would be limited to the quantity of water requested for change or approximately 0.60 acre-feet per irrigation season as designated by the decree. The pond, which is lined with a claymax liner,¹¹ is designed for water to flow into the pond from the ditch, overflow a small spillway and return to the same ditch a short distance away. There was no evidence presented by the protestants to indicate the duty of water requested would be insufficient to satisfy the proposed use and operation of the pond as described by the applicants in Application 70055.

The State Engineer finds that the protestants failed to provide any evidence to support their concerns about the amount of water applied for and ensuring the duty of water available to the pond is an accurate measurement of the water.

IV.

The protestants also expressed a concern over the applicants' construction of a ditch along the east side of the applicants' parcel, which feeds the newly constructed pond. The protestants' counsel indicated that the parties are currently involved in litigation regarding all the ditches on the applicants' parcels and later requested that action be postponed on Application 70055 until the ditch issues are settled.¹²

During the field investigation, the ditches and pond were examined. According to the applicants, the ditch feeding the pond was reconstructed based on the Jan. 1912 cultural map filed in support of Proof 00405.¹³ The applicants further indicated that they felt they had reached an agreement with the protestants regarding the location of the ditch.¹⁴ The protestants obviously disagree as evidenced by their ongoing litigation over the ditches.

The field investigation report noted that Application 70055 does not request a change in point of diversion. Further, the Commissioner's authority only extends to the diversion of water from Lamoille Creek into the Hankins-Bellinger ditches as specified in the Edwards Decree and

¹¹ Transcript, p. 33.

¹² Transcript, pp. 7, 8.

¹³ Transcript, pp. 14, 15.

¹⁴ Transcript, p. 15.

does not extend to the regulation of the many laterals and drain ditches that exist on the water-righted properties.¹⁵

The protest states, "The applicants ... have modified the historical ditch systems to direct surface water into their holding pond on Parcel No. 1." The applicants responded,

We reviewed the 1912 cultural map and where the water had historically been taken to Mr. Presti's land so that he would have sufficient water. That ditch was restored according to that meeting, that that [*sic*] is for Mr. Presti's use. That ditch doesn't necessarily have to – that ditch was not put there to supply the fire pond. We can put an upper ditch and come across and totally close in that ditch if Mr. Presti and their clients would choose that ditch. We were told it needed to be restored because of the historical value on the 1912 and when we developed this land, but as far as the water coming across for this permit, we can take it from a totally different area. We do not have to use that ditch if they're concerned.¹⁶

As noted by the applicants, it does not matter how the water is conveyed from the point of diversion to the place of use of Application 70055; if the water is conveyed through the ditch as reconstructed based on the 1912 cultural map for Proof 00405 or via the ditches in existence prior to the applicants construction activities or via ditches located as a result of negotiation or litigation, the applicants will still be able to divert water to their property in accordance with the Edwards Decree.

The State Engineer finds that Application 70055 does not request a change in the point of diversion of Proof 00405. The State Engineer further finds the ultimate location of the ditches, which will be decided through the ongoing litigation or settlement thereof, is irrelevant to Application 70055; therefore, the motion to postpone action on Application 70055 is denied.

V.

The protestants expressed concern over construction activities on the applicants property that they feel have altered the historic ditch systems. In their request for denial of Application 70055, the protestants cited the following grounds.

The applicant has not satisfactorily repaired the damage to historical decreed ditch and headgate systems. These repairs are necessary for the irrigation of decreed water righted acreage. The applicant has demonstrated a lack of compliance with State water law which is contrary to the public interest of the State of Nevada. Based on the reasons stated above, denial of the Application No. 70055 is the only action that can be taken.⁶

¹⁵ Report of Field Investigation No.1064, Feb. 25, 2005, official records in the Office of the State Engineer.

¹⁶ Transcript, p. 15.

The applicants parcels, including the pond, are on land that can be irrigated under Proof 00405 as specified in the Edwards Decree. Under Application 70055, the applicants have proposed to strip water from 0.20 acres of their irrigated land and change the manner and place of use of a portion of that water to a fire protection pond for their commercial development. The protestants have attempted to relate their dispute with the applicants over ditches to grounds for denial of a change application that does not change the point of diversion of Proof 00405.

The State Engineer finds that the dispute over the location of ditches on the applicants' property does not constitute a valid basis for denial of Application 70055.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and of the subject matter of this action and determination.¹⁷

II.

The State Engineer is prohibited by law from granting a permit under a change application that requests to appropriate the public waters where:¹⁸

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

III.

Based on the record of evidence available, the State Engineer concludes that approval of Application 70055 will not threaten to prove detrimental to the public interest.

IV.

The State Engineer concludes that the amount of water requested for change is sufficient to satisfy the proposed use under Application 70055.

¹⁷ NRS chapter 533.

¹⁸ NRS § 533.370(4).

V.

The State Engineer concludes there is not substantial evidence to support the protest claim that the applicant has demonstrated a lack of compliance with State water law.

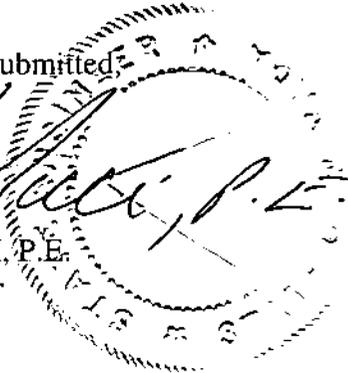
RULING

The protest is overruled and Application 70055 is hereby approved subject to payment of the statutory permit fees and existing rights.

Respectfully submitted,



HUGH RICCI, P.E.
State Engineer



HR/TW/jm

Dated this 19th day of
September, 2005.