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

IN THE MATTER OF APPLICATIONS 69775 AND 69776 FILED TO APPROPRIATE THE PUBLIC WATERS OF AN UNDERGROUND SOURCE WITHIN THE IMLAY AREA HYDROGRAPHIC BASIN (72), PERSHING COUNTY, NEVADA.	**RULING** **#5785**

GENERAL

I.

Application 69775 was filed on March 25, 2003, by the Nevada Cement Company to appropriate 2.25 cubic feet per second (cfs), not to exceed 1,000 acre-feet annually (afa), of underground water for mining, milling and domestic purposes. The proposed place of use is described as being located within Section 4, E½ Section 8, Section 10 and Section 14, T.30N., R.33E., M.D.B.&M. The proposed point of diversion is described as being located within the NW¼ NE¼ of Section 8, T.30N., R.33E., M.D.B.&M.[1]

II.

Application 69776 was filed on March 25, 2003, by the Nevada Cement Company to appropriate 2.25 cubic feet per second (cfs), not to exceed 1,000 acre-feet annually (afa), of underground water for mining, milling and domestic purposes. The proposed place of use is described as being located within Section 4, E½ Section 8, Section 10 and Section 14, T.30N., R.33E., M.D.B.&M. The proposed point of diversion is described as being located within the NW¼ NE¼ of Section 8, T.30N., R.33E., M.D.B.&M.[2]

III.

Application 69775 was protested by Nevada Pershing, LLC, and Application 69776 was protested by Devco Properties, Inc., alleging: (1) the applications are incomplete in that they do not address mine dewatering; (2) the proposed use will conflict with existing rights; (3) the proposed use threatens to prove detrimental to the public interest in that it may affect the purity of Rye Patch Reservoir, potentially affect the water available to replenish Rye Patch Reservoir, impact the aesthetics of the area and impact the natural environment; and will unduly impact future growth and development.[1,2]

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[1] File No. 69775, official records in the Office of the State Engineer.
[2] File No. 69776, official records in the Office of the State Engineer.

IV.

After all parties were duly noticed by certified mail, a public administrative hearing was held on November 29, 2006, regarding Applications 69775 and 69776 in Carson City, Nevada, before representatives of the Office of the State Engineer.[3]

FINDINGS OF FACT

I.

State Engineer's Order No. 702, issued January 31, 1978, described and designated the Imlay Area Hydrographic Basin as a groundwater basin in need of additional administration under the provisions of NRS § 534.030.[4] The State Engineer finds that Applications 69775 and 69776 have proposed points of diversion and places of use that are located within the hydrologic boundaries of the designated Imlay Area Hydrographic Basin.

II.

Perennial yield of a groundwater reservoir may be defined as the maximum amount of ground water that can be salvaged each year over the long term without depleting the groundwater reservoir. Perennial yield is ultimately limited to the maximum amount of natural discharge that can be salvaged for beneficial use. If the perennial yield is continually exceeded groundwater levels will decline.

Withdrawals of ground water in excess of the perennial yield contribute to adverse conditions such as water quality degradation, storage depletion, diminishing yield of wells, increase in cost due to increased pumping lifts, land subsidence and possible reversal of groundwater gradients which could result in significant changes in the recharge-discharge relationship.[5]

The United States Geological Survey estimates the perennial yield of the Imlay Area Hydrographic Basin is approximately 3,000 afa.[6] The committed groundwater resource in the form of permits and certificates issued by the State Engineer to appropriate underground water from the Imlay Area Hydrographic Basin currently exceeds 12,500 afa. However, a

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[3] Exhibits and Transcripts, public administrative hearing before the State Engineer, November 29, 2006, official records in the Office of the State Engineer (Hereafter, "Transcript" and "Exhibits").
[4] State Engineer's Order No. 702, issued January 31, 1978, official records in the Office of the State Engineer.
[5] State Engineer's office, *Water for Nevada, State of Nevada Water Planning Report No. 3*, p. 13, Oct. 1971.
[6] Jon O. Nowlin, *Ground-Water Quality in Nevada – a proposed Monitoring System*, USGS Open-file Report 78-768, United States Department of the Interior Geological Survey, (1986).

review of the basin abstract shows that over 10,000 afa is committed to mining and geothermal permits.[7]

Applications that request a permanent appropriation of underground water within the Imlay Area Hydrographic Basin have been denied by the State Engineer as far back as 1976. These denials were based on the grounds that the appropriation of underground water would conflict with and tend to impair the value of existing rights and be detrimental to the public interest and welfare.[8] In addition, many of the rulings note that existing appropriations exceed the estimated perennial yield.[9] However, a review of the basin abstract shows that new appropriations have been granted later in time for small commercial and stockwater uses, mining and milling, and geothermal purposes.[10] Mining is often considered a temporary manner of use by the nature of the activity and geothermal is only partially consumptive and from a source generally not suitable for any other purpose.

The State Engineer finds the amount being permitted is a minimal quantity of water for mining and milling and is a temporary use.

III.

The amount of water requested under each application is 1,000 afa, for a total of 2,000 afa. However, additional information within the remarks section of the applications indicates that the Applicant is requesting a total combined duty of just 1,000 afa. This request was further reduced at the administrative hearing to a total combined duty of 500 afa. The estimated water use was reduced from 1,000 afa to 500 afa based on a change in equipment vendors, which provided for a more water efficient design of the equipment.[11] In addition to the water requested in Section 8 under Applications 69775 and 69776, an additional application was filed in Section 10 for 30 afa under Application

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[7] Nevada Division of Water Resources' Water Rights Database, Hydrographic Basin Summary, Imlay Area Hydrographic Basin (72), June 25, 2007, official records in the Office of the State Engineer.
[8] State Engineer's Ruling Nos. 2097, 2118, 2133, 2232, 2344, 2489, 2821, 3163 and 4213, official records in the Office of the State Engineer.
[9] State Engineer's Ruling Nos. 2232, 2344, 2489, 2821, 3163 and 4213, official records in the Office of the State Engineer.
[10] Nevada Division of Water Resources' Water Rights Database, Special Hydrographic Abstract, Imlay Area Hydrographic Basin (72), June 25, 2007, official records in the Office of the State Engineer.
[11] Transcript, p. 67 and p. 77.

73807. The Applicant indicated that the total combined duty requested for all three applications would be 500 afa.[12] The two wells in Section 8 would primarily serve the cement plant, while the well in Section 10 would be used for the limestone mine facilities and associated mining activities, such as dust control and fire suppression.

The original plan of operation consisted of the construction of a new cement processing facility in Section 8 to coincide with the development of a nearby limestone deposit (hereinafter, Project 1). The Applicant indicated that the revised Plan of Operations is to expand the existing cement plant in Fernley and forego the construction of a new cement plant in Section 8 (hereinafter, Project 2). A description of the current project, Project 2, is as follows:

> The Nevada Cement Company (NCC) plans to construct a 1-million-ton-per-year mine on public lands administered by the Bureau of Land Management (BLM) and on private lands owned by NCC. The planned mine site is known as Project Echo and is located on the western flank of the Humboldt Range in central Pershing County, Nevada, just to the east and west of the Rye Patch exit off of Interstate-80 (I-80, Figure 1-1). Project Echo will mine limestone for use in cement manufacturing. In addition to the mine, NCC will transfer the mined minerals to a shipping facility that will be used to load trucks or rail cars for transport to a NCC cement facility in Fernley, Nevada.[13]

The planned expansion of the Fernley cement plant was described in the same document as follows:

> NCC has recently made the decision to modernize the Fernley facility. The plans will expand the annual production capacity of Nevada Cement to 1.1 million tons of cement production while at the same time dramatically reducing their fuel and electricity consumption. The Nevada Cement project is expected to be operational in fall 2008. NCC has begun collecting data to support the permit process with the Nevada Department of Environmental Protection (NDEP), Bureau of Air Pollution Control (BAPC). Due to market and economic reasons, the modernization of the Fernley facility will occur before Project Echo is operational.[14]

The amount of water required for Project 2 was difficult to determine from the record. The May 25, 2006, Plan of Operations *Revision 3* indicates that only 30 afa of water is necessary, but the well locations will depend upon which shipping facility option

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[12] Transcript, p. 20.
[13] Exhibit No. 12, p. 1-1.
[14] Exhibit No. 12, p. 1-1.

is ultimately selected.[15] There are four shipping facility options discussed in the Plan of Operations. For Option A, the shipping facility is located in Section 14 and will consist of a loading operation that transfers crushed limestone into haul trucks for transport to the Fernley facility. For Options B, C, and D, the shipping facilities will be located in Section 8; Options B and C will use rail cars and Option D will use trucks.[16] The Applicant clarified in testimony that the 30 afa was exclusive of the shipping facility and implied additional water above the 30 afa would be necessary.[17] In later testimony, the Applicant indicated an amount of water above 30 afa would be necessary if the shipping facility were constructed in Section 8 but did not specify an amount, only that it would be less than 30 afa.[18] Later, it was indicated that for the Section 8 options, less than 20 afa was necessary for the shipping facility.[19] An exhibit was later introduced with a water estimate of a total of 69 afa.[20] For a shipping facility and rail car option, the total water use was also estimated at less than 60 afa.[21]

The State Engineer finds that the amount of water requested for Project 1 is 500 afa. The State Engineer finds that the amount of water requested for Project 2 is between 20 afa and 39 afa, exclusive of water applied for under Application 73807.

IV.

As indicated, the Applicant is pursuing two different tracks regarding its future plans. Basically, Project 1 was to build a new cement plant in the Imlay area and Project 2 is to expand the Applicant's existing cement plant in Fernley and both projects intend to exploit a nearby limestone deposit in the Imlay Area. However, the Applicant explained that Project 2 is dependent upon obtaining the necessary permits from the Nevada Division of Environmental Protection (NDEP). If the permits cannot be obtained, then the Applicant may return to Project 1 and build a new cement plant in Section 8, where the proposed points of diversion of Applications 69775 and 69776 are located.[22]

The Nevada Revised Statutes (NRS) chapters 533 and 534 and the policies developed by the Office of the State Engineer control the appropriation of water within

[15] Exhibit No. 12, p. 5-7.
[16] Exhibit No. 12, p. 5-1.
[17] Transcript, p. 44.
[18] Transcript, pp. 46-47.
[19] Transcript, p. 49.
[20] Exhibit No. 38.
[21] Transcript, p. 109.
[22] Transcript, p. 35.

the State of Nevada. Under the provisions found under NRS § 533.370(1)(c), before an application that requests a new appropriation of underground water can be considered for approval, the applicant must provide proof satisfactory to the State Engineer of his intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence and his financial ability and reasonable expectation actually to construct the work and apply the water to the intended beneficial use with reasonable diligence. The answer to these questions can often be determined from the information provided on the submitted application form and associated map. However, it is not uncommon for the State Engineer to request additional information regarding the proposed project and the necessary water requirements, to ensure that the statutory criteria regarding beneficial use are satisfied. In this case, the State Engineer has been asked to approve the applications for a duty of 500 afa, based on water use estimates for Project 1. The Protestant has alleged that the Applicant is no longer actively pursuing Project 1 and has chosen instead to pursue the expansion of its existing cement plant in the Fernley Area, thereby greatly reducing its water requirement for the remainder of the project.

The president of the Nevada Cement Company testified extensively on the proposed projects. It was indicated that the location of the proposed cement plant was within Section 8, T.30N., R.33E., M.D.B.&M., along with the proposed wells under Applications 69775 and 69776. Further, Section 8 is public land managed by the BLM and a permit to use the land must be acquired by the Applicant. As part of the BLM permitting process, a Plan of Operations was submitted for Project 1. It was made clear that the Applicant made the decision to revise its plan and take out the proposed cement plant and proceed instead with Project 2.[23] A revised Plan of Operations, dated May 25, 2006, was submitted and the cement plant was in fact removed from the revised plan. As a result, the Applicant is currently pursuing Project 2 with the BLM. If the Applicant chooses to pursue Project 1, its original plan for Section 8, a new or revised Plan of Operations would have to be submitted to the BLM.[24]

Concerns were expressed by the Office of the State Engineer regarding which project has a reasonable expectation of placing the requested water to beneficial use as the estimated water requirements differ dramatically depending on whether the Applicant

[23] Transcript, p. 36.
[24] Transcript, pp. 38-39.

pursues Project 1 or Project 2. The Applicant is waiting on a decision from the NDEP and only if the NDEP permits are denied will the Applicant return to its original plan. The Applicant and Protestant were asked to come to an agreement to delay a decision in this matter until such time as the NDEP makes a determination on the air quality permits, which will determine the project to be pursued. It appeared that an agreement had been reached by the Applicant and Protestant in regard to delaying the decision on Applications 69775 and 69776. However, the representatives for the Applicant and Protestant later requested additional time to consult with their clients and the record was left open until the last business day before Christmas 2006.[25] A review of the record shows that no such agreement was submitted to the Office of the State Engineer prior to the Christmas deadline. To date, no additional information regarding the disposition of the NDEP permits or in regard to a delay on the decision in the matter of Applications 69775 and 69776 has been received.[26]

The State Engineer finds that the Applicant and Protestant were given the opportunity to request a delay in action on this matter in order to determine if the necessary NDEP permits could be obtained for Project 2, but no such request was made. The State Engineer finds that the Applicant is actively pursuing Project 2 and, for the time being, Project 1 has been set aside. The State Engineer further finds that the Applicant failed to provide proof satisfactory to the State Engineer of his intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence and reasonable expectation actually to construct the work and apply the water to the intended beneficial use with reasonable diligence for Project 1, but such proof was provided for Project 2.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.[27]

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[25] Transcript, pp. 256-257.
[26] File Nos. 69775 and 69776, official records in the Office of the State Engineer.
[27] NRS chapters 533 and 534.

II.

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:[28]

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.

The State Engineer concludes that the Applicant's request for water for Project 1, a project that is no longer being actively pursued, is unreasonable and would threaten to prove detrimental to the public interest.

IV.

The State Engineer concludes that Applications 69775 and 69776 are for mining and milling purposes and due to the temporary nature of the activity can be considered for approval.

V.

The State Engineer concludes that the project currently being pursued by the Applicant is Project 2, and therefore, the maximum amount of water requested under Applications 69775 and 69776 is 39 afa.

VI.

The State Engineer concludes that the Protestant's concerns that the pumping of 1,000 afa or 500 afa would conflict with its existing rights may have had some merit,[29] but any such concerns have been resolved by the Applicant choosing to pursue Project 2, which requires a greatly reduced duty of water.

VII.

The State Engineer concludes the protest claim that the applications are incomplete in that they do not address mine dewatering was not supported by substantial evidence and therefore, this protest claim is dismissed. The State Engineer concludes the protest claims that the applications would affect the purity of Rye Patch Reservoir and potentially affect the water available to replenish Rye Patch Reservoir were not supported by substantial evidence and therefore, these protest claims are dismissed. The State

[28] NRS § 533.370(5).
[29] Exhibit, No. 33.

Engineer concludes that impact to the aesthetics of the area and impact to the natural environment are not water related issues and are beyond the scope of the public interest criteria that must be considered under NRS § 533.370.

RULING

The protest to Applications 69775 and 69776 is overruled and the applications are hereby approved subject to:

1. Existing rights; and
2. Total combined duty of 39 afa; and
3. Payment of the statutory permit fees.

Respectfully submitted,

TRACY TAYLOR, P.E.
State Engineer

TT/TW/jm

Dated this 2nd day of October, 2007.