

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

IN THE MATTER OF APPLICATIONS)
66073, 66074, 66075 AND 66076 FILED TO)
APPROPRIATE THE PUBLIC WATERS)
OF AN UNDERGROUND SOURCE)
WITHIN THE FRENCHMAN FLAT)
HYDROGRAPHIC BASIN (160), NYE)
COUNTY, NEVADA.)

RULING

#5859

GENERAL

I.

Application 66073 was filed on February 16, 2000, by the Nye County Board of Commissioners to appropriate 4.83 cubic feet per second (cfs) of underground water from the Frenchman Flat Hydrographic Basin for municipal purposes within the Amargosa Desert Hydrographic Basin as described in State Engineer's Order No. 724. The proposed point of diversion is described as being located within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 25, T.14S., R.53E., M.D.B.&M.¹

II.

Application 66074 was filed on February 16, 2000, by the Nye County Board of Commissioners to appropriate 4.83 cfs of underground water from the Frenchman Flat Hydrographic Basin for municipal purposes within the Amargosa Desert Hydrographic Basin as described in State Engineer's Order No. 724. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 25, T.14S., R.53E., M.D.B.&M.²

III.

Application 66075 was filed on February 16, 2000, by the Nye County Board of Commissioners to appropriate 4.83 cfs of underground water from the Frenchman Flat Hydrographic Basin for municipal purposes within the Amargosa Desert Hydrographic Basin as

¹ File No. 66073, official records in the Office of the State Engineer.

² File No. 66074, official records in the Office of the State Engineer.

described in State Engineer's Order No. 724. The proposed point of diversion is described as being located within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 25, T.14S., R.53E., M.D.B.&M.³

IV.

Application 66076 was filed on February 16, 2000, by the Nye County Board of Commissioners to appropriate 4.83 cfs of underground water from the Frenchman Flat Hydrographic Basin for municipal purposes within the Amargosa Desert Hydrographic Basin as described in State Engineer's Order No. 724. The proposed point of diversion is described as being located within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 25, T.14S., R.53E., M.D.B.&M.⁴

V.

The United States Department of Energy, Office of National Nuclear Security Administration – Nevada Test Site (DOE), the United States Department of Interior, National Park Service – Death Valley National Monument (NPS), the United State Department of Interior, Fish and Wildlife Service⁵ and the United States Department of Energy/YMSCO all timely protested the applications.

The NPS's protests focus on its concern with any additional appropriations of water from the Death Valley Flow System and the effect those additional appropriations might have on the water sources within the Death Valley National Park. The NPS alleges there is no water available for appropriation and that the use of water as proposed under the applications will impair the NPS's water rights and water-related resources within the Park, which would threaten to prove detrimental to the public interest.¹

The DOE's protests allege that there is no unappropriated water at the source and would threaten to prove detrimental to the public interest by impacting DOE's alleged reserved water rights, that the applications are speculative because the points of diversion are on property controlled by the DOE and the Applicant will not be able to prove upon the works of diversion. The DOE also alleges that the applications are inappropriate in that they seek to control water,

³ File No. 66075, official records in the Office of the State Engineer.

⁴ File No. 66076, official records in the Office of the State Engineer.

⁵ All four protests filed by the U.S. Fish and Wildlife Service indicate the grounds of the protest were identified in Attachment A to the protest, but none of the protests have any attachment in the records of the Office of the State Engineer.

rather than put the requested amounts to an actual beneficial use and the Applicant has not demonstrated a financial ability to place the water to beneficial use.¹

The United States Department of Energy/YMSCO protested the applications on the grounds that they should not be considered until the litigation regarding the Yucca Mountain water right permit applications are resolved and the proposed use of the water threatens to prove detrimental to the public interest in protecting the threatened and endangered species and critical habitats in Ash Meadows, Devil's Hole and/or Death Valley.¹

FINDINGS OF FACT

I.

Nevada Revised Statute § 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. The State Engineer finds that in the case of protested Applications 66073, 66074, 66075 and 66076 there is sufficient information contained within the records of the Office of the State Engineer to gain a full understanding of the issues and a hearing on this matter is not required.

II.

A water right application is filed to request an appropriation of water to be appropriated from a specific point of diversion to be used for a specific purpose within a well defined place of use. Prior to the approval of a water right application, it must be determined that there is a reasonable expectation that the water requested for appropriation will be placed to its proposed beneficial use. An examination of the land ownership records in the Office of the State Engineer shows that all of the subject applications request appropriations of underground water from points of diversion and places of use that are located upon land that has been withdrawn from public use as the Nevada Test and Training Range. The State Engineer finds the points of diversion are on property controlled by the United States Government, which is land the Applicant does not own, control or have access to and therefore will not be able to prove upon the works of diversion. The State Engineer finds that since the Applicant does not have control of the respective points of diversion and is highly unlikely to ever obtain permission to access the proposed points of diversion that the ability to divert and use water as proposed under the subject applications does not exist;

therefore, there is no reasonable expectation that beneficial use will occur under any permits granted under the subject applications.

CONCLUSIONS

I.

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

II.

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:⁷

- 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 to approve water right applications for which the Applicant cannot obtain access to the proposed point of diversion would threaten to prove detrimental to the public interest.

IV.

Applications 66073, 66074, 66075, and 66076 request appropriations of underground water from points of diversion that are located upon land that has been withdrawn from public use. Protests submitted by the lawfully recognized stewards of the lands in question pointedly indicate they will not authorize access or the development of any water infrastructure. The absence of the land steward's consent to the Applicant's access and development of the water sought under these applications eliminates the expectation that the water will be put to beneficial use. The State Engineer concludes that under these circumstances, the approval of the subject applications would threaten to prove detrimental to the public interest.

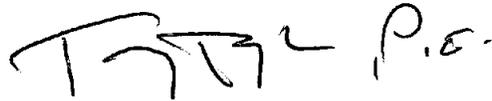
⁶ NRS chapters 533 and 534.

⁷ NRS § 533.370(5).

RULING

Applications 66073, 66074, 66075, and 66076 are hereby denied on the grounds that their approval would threaten to prove detrimental to the public interest. No ruling is made on the remaining protest issues.

Respectfully submitted,

Handwritten signature of Tracy Taylor, P.E. in black ink.

TRACY TAYLOR, P.E.
State Engineer

TT/SJT/jm

Dated this 10th day of

June, 2008.