

IN THE MATTER OF APPLICATION 34699 )  
FILED ON DECEMBER 7, 1977, BY )  
RUSSELL J. HARRISON TO APPROPRIATE )  
THE WATERS OF AN UNDERGROUND SOURCE )  
WITHIN FISH LAKE VALLEY, ESMERALDA )  
COUNTY, NEVADA )

R U L I N G

GENERAL

I

Application 34699 1/ was filed on December 7, 1977, by Russell J. Harrison to appropriate 2.4 cfs of water from an underground source for irrigation and domestic purposes. The point of diversion is described as being within the SE $\frac{1}{4}$  NE $\frac{1}{4}$  Section 5, T4S, R36E, MDB&M, and the place of use is 160 acres within the NE $\frac{1}{4}$  Section 5, T4S, R36E, MDB&M. The period of use is January 1st through December 31st of each year. This application completed the statutory processing and publication and became ready for action on January 28, 1979.

Application 34699 was denied by Ruling 2/ of the State Engineer on March 5, 1982, on the grounds that the appropriation of additional ground water for irrigation and use of the water applied for and requested from the area described in the application would tend to impair the value of existing rights and would be otherwise detrimental to the public interest and welfare. Prior to denial of Application 34699 on March 31, 1981, the State Engineer issued Order No. 757 to Russell J. Harrison to cease and refrain from diverting water for use on the NE $\frac{1}{4}$  Section 5, T4S, R36E, MDB&M. On March 20, 1982, timely appeal 3/ to the Ruling of the State Engineer was filed in the Fifth Judicial District Court of the State of Nevada in and for the County of Esmeralda. On February 9, 1983, the appeal titled, Russell J. Harrison, Appellant, vs. Peter G. Morros, State Engineer, Respondent, Case No. 4461, was dismissed 4/ and the matter, therefore, remanded to the State Engineer for additional consideration at a final hearing, based on the unique circumstances of the Appellant's Application 34699 and consideration set forth in the Memorandum of Decision and Order of Robert Hilburn, et al. vs. State of Nevada, et al. Civil Action Nos. 4382 and 4377, Fifth Judicial District Court of Nevada (1979). On April 5, 1983, an administrative hearing 5/ before the State Engineer was held for the purpose of receiving additional evidence and testimony to support Petitioner's position with regard to the State Engineer's denial of Application No. 34699.

II

Water Resources Bulletin No. 11 6/ titled, Preliminary Report on Ground Water in Fish Lake Valley, Nevada and California, with a statement on reconnaissance land classification of Fish Lake Valley, Esmeralda County, Nevada was prepared by T. E. Eakin and Howard G. Mason in 1950 as a cooperative study between the State of Nevada, office of the State Engineer, and the United States Department of Interior, Geological Survey.

III

Water Resources Reconnaissance Series Report No. 58 7/ titled, Water Resources Appraisal of Fish Lake Valley, Nevada and California, was prepared in 1973 by F. Eugene Rush and T. L. Katzer through the cooperative program of the State of Nevada, Department of Conservation and Natural Resources, Division of Water Resources, and the Geological Survey, U.S. Department of Interior.

IV

On February 10, 1978, the State Engineer under Order No. 704 8/ described and designated the Fish Lake Valley Artesian Basin under the provisions of Chapter 534 NRS. (Conservation and distribution of the underground waters)

V

The applicants, Russell J. Harrison and Helen Louise Harrison, became successors in interest to the NE $\frac{1}{4}$  Section 5, T4S, R36E, MDB&M, on July 31, 1972. 9/ On December 4, 1972, Russell J. Harrison filed Application 27156 10/ for underground water to irrigate 160 acres within the NE $\frac{1}{4}$  Section 5, T4S, R36E, MDB&M, and was subsequently granted a permit on May 14, 1973. The Proof of Commencement of Work was filed on October 23, 1973, indicating that a well had been drilled to a depth of 356 feet at a cost of approximately \$5,000.00.

The Proof of Completion of Work was due on December 14, 1974, and three extensions of time were granted extending the time for filing the Proof of Completion to April 14, 1976. This permit was cancelled 11/ on May 25, 1976, for failure of the applicants to comply with the provisions of the permit, namely, failure to file the Proof of Completion of Work.

It should also be noted for the record that the Harrisons' predecessor in interest, Angela M. Williams, held Permit 19405 12/ for irrigation use on this same land. That permit was cancelled on May 21, 1968, for failure of the applicant to file the Proof of Beneficial Use. The Proofs of Commencement and Completion 13/ indicate that a well was completed under this permit and a pump installed.

On June 13, 1977, Russell J. Harrison filed Application 32046 14/ for underground water to irrigate 160 acres within the NE $\frac{1}{4}$  Section 5, T4S, R36E, MDB&M. This application was denied by ruling 15/ of the State Engineer on March 31, 1978.

VI

On February 8, 1983, the Appellant, Russell J. Harrison, and Respondent, State Engineer, entered into a stipulation 16/ agreeing to remand to the State Engineer and dismissal of the appeal in the matter of Application 34699.

On February 9, 1983, by order of the Fifth Judicial District Court, Case No. 4461 was dismissed and remanded to the State Engineer for additional consideration and final hearing as set forth above.

FINDINGS OF FACT

I

In Hilburn vs. State of Nevada 17/ the court concluded that there was a triable issue "i.e., whether the granting of petitioner's prayer for equitable relief will be detrimental to existing rights or detrimental to the public interest and welfare." This action centered on the statutory mandated cancellation of a permit for irrigation use within Fish Lake Valley and was not brought as a judicial review of a denial of an application by ruling of the State Engineer. This distinction must be clear in considering equity in light of the Nevada Supreme Court's findings in Griffin et al. vs. Westergard. 18/

The court concluded that the appellants did not seek equitable relief but asserted that the permits that were sought under applications to appropriate should be granted on the basis of equitable estoppel, the court declined. The circumstances contained in Griffin are similar to those contained herein even to the extent that cease and desist orders were issued to preclude illegal pumping. The record should then establish that any equity developed by the Harrisons was a result of lawful acts. The court in Griffin held:

"Appellants contend that respondent, by his alleged statements had induced them into believing that their pending permits would be granted if there was no protest. They had expended \$16,000 in drilling the well and purchasing a pump. However, the deepening of the well was an unlawful act. (Underlining added) The cost of drilling the well to a depth of 500 feet was incurred under permits that had been cancelled."

II

One other point that must be discussed is the Applicants', Harrisons', reliance on advice of his Water Right Surveyor and the letter of January 12, 1976, from John Lane of the staff of the Division of Water Resources to Harrison. In Hilburn the applicant raised a similar point concerning reliance upon a State Water Right Surveyor which resulted in the filing of certain applications for the wrong purpose. The court concluded that:

"Upon these facts, the court finds that the surveyor was the agent of the petitioners and that therefore, not chargeable to respondents in any way."

Mr. Lane's letter of January 12, 1976, returned an Application for Extension of Time under Permit 27156 because it was not accompanied by the filing fee required by statute. 19/ The letter further informed the applicant, Harrison, that notice requiring the filing of the Proof of Completion of Work provided for no further extensions and that should the applicant desire to file a new application in the event of cancellation of Permit 27156, the map on file under 19405 could be used to support the new application. There was no indication of either approval or denial of a new application, therefore, no advice that the applicant could rely on.

### III

Ground water recharge in the Fish Lake Valley Basin is derived primarily from precipitation on and runoff from the mountains. The perennial yield (the maximum amount of natural discharge that can be salvaged each year over the long term by pumping without bringing about some undesired result) is estimated to be 30,000 acre-feet. 20/

### IV

The estimated consumption of ground water in Fish Lake Valley for 1970 was 14,000 acre-feet. 21/ Of this, around 2,400 acre-feet were consumed in California. 22/ Since 1970, the Nevada State Engineer has issued permits to appropriate an additional 20,000 acre-feet per year. Total existing rights to appropriate underground water in the Nevada portion of Fish Lake Valley amount to in excess of 45,000 acre-feet per year. 23/ There is potential for additional ground water development in the California portion of Fish Lake Valley.

### V

Should additional water be allowed for appropriation under new applications and subsequent development of ground water pursuant thereto detrimentally affect prior ground water rights, the State Engineer is required by law to order withdrawals be restricted to conform to priority rights. 24/

### VI

Evidence and testimony 25/ disclose that a diligent, although marginal at times, effort has been made to perfect water rights for the subject land by the Harrisons and their predecessors. Close examination of the record establishes that an irrigation well was drilled and completed and at least 23 acres of the land were placed to beneficial use with an irrigation system constructed to the remaining portion of the 160 acres. The record also supports the fact that the major portion of these improvements were accomplished prior to the time of designation (NOTE: see NRS 534.050) and during the time when previous permits were in effect. In the Hilburn matter, resolution of the equitable relief claim was accomplished through issuance of permits junior in priority to those existing rights in the valley. The record was deficient in Hilburn in that no administrative

hearing was held by the State Engineer to establish a record as the basis for resolution of the equitable relief claim by Hilburn through issuance of permits junior in priority. The court had determined that there was cause for considering equitable relief but only as related to the cancellation of an existing permit.

VII

NRS 533.357 establishes the order of priority the State Engineer must consider in acting on applications for irrigation use within the same basin.

VIII

NRS 534.120 provides that the State Engineer in the interest of the public welfare is authorized to designate preferred uses of water within the respective areas so designated by him and from which the ground water is being depleted and in acting on applications to appropriate ground water, he may designate such preferred uses with respect to the particular areas involved.

IX

The State Engineer has maintained periodic static water 26/ level measurements in the Fish Lake Valley ground water basin since 1968. The measurements show a declining trend in the water table in areas of concentrated development.

CONCLUSIONS

I

The State Engineer has jurisdiction under the provisions of NRS Chapters 533 and 534.

II

The State Engineer has the authority under NRS 534.120 to declare preferred uses of water within a designated ground water basin.

III

The State Engineer is prohibited by law 27/ from granting a permit where:

- A. there is no unappropriated water at the proposed source,
- B. the proposed use conflicts with existing rights,
- C. the proposed use threatens to prove detrimental to the public welfare.

IV

The record 28/ establishes that the applicants and their predecessors have made a marginal but adequate good faith and diligent effort to place water to a beneficial use under previous permits.

V

The approval of Application 34699 would establish a priority junior 29/ to existing rights within the basin.

VI

The State Engineer does not have the authority 30/ to declare the use under Application 34699 a preferred use based on supporting cause for equitable relief.

RULING

The denial of Application 34699 by ruling of the State Engineer dated March 5, 1982, is herewith affirmed. No ruling is made on the matter of equitable relief.

Respectfully submitted,



Peter G. Morros  
State Engineer

PGM/ja

Dated this 14th day

of SEPTEMBER, 1983.

### FOOTNOTES

1. Public record in the office of the State Engineer.
2. Public record under Application 34699 in the office of the State Engineer.
3. Public record in the office of the State Engineer. NRS 533.450
4. Public record in the office of the State Engineer. See State of Nevada Exhibit No. 8, Administrative Hearing April 5, 1983.
5. See transcript of Administrative Hearing April 5, 1983. Public record in the office of the State Engineer.
6. See transcript of Administrative Hearing April 5, 1983, Pages 11 and 12.
7. Same as Footnote 6.
8. State of Nevada Exhibit No. 3, Administrative Hearing April 5, 1983.
9. Public record in the office of the State Engineer certified copy of deed of transfer filed on July 31, 1972, under Permit 16632.
10. Public record in the office of the State Engineer under cancelled Permit 27156.
11. Same as Footnote 10.
12. Public record in the office of the State Engineer under cancelled Permit 19405.
13. Same as Footnote 12.
14. Public record in the office of the State Engineer.
15. State of Nevada Exhibit No. 4, Administrative Hearing April 5, 1983.
16. State of Nevada Exhibit No. 7, Administrative Hearing April 5, 1983.
17. Memorandum of Decision and Order of Robert Hilburn et al., vs. State of Nevada, Civil Action 4382 and 4377, Fifth Judicial District Court of Nevada (1979).
18. Griffin vs. Westergard, 96 Nev. 627, 615 P.2d 235.
19. Public record in the office of the State Engineer under cancelled Permit 27156. NRS 533.435
20. Water Resources Bulletin No. 11, Water Resources Reconnaissance Series Report No. 58. See transcript of Administrative Hearing April 5, 1983, Pages 11 and 12.

21. Water Resources Reconnaissance Series Report No. 58, Table 12.
22. Same as Footnote 21.
23. Public record in the office of the State Engineer. State of Nevada Exhibit No. 2, Administrative Hearing April 5, 1983.
24. NRS 534.110, subsections 3 and 6.
25. Transcript of Administrative Hearing April 5, 1983, Harrison Exhibit Nos. 1, 2, 3, and 4.
26. See State of Nevada Exhibit No. 6, Administrative Hearing April 5, 1983.
27. NRS 533.370, Section 4.
28. See Footnote 25.
29. State of Nevada Exhibit No. 2, Administrative Hearing April 5, 1983.
30. NRS 534.120.