

**IN THE OFFICE OF THE STATE ENGINEER**

IN THE MATTER OF APPLICATIONS 29417,) 29468, 29469 and 29740 FILED TO CHANGE OR) APPROPRIATE DRAIN WATER AND SURPLUS) FLOW IN LOWER LOVELOCK VALLEY,) PERSHING AND CHURCHILL COUNTIES,) NEVADA. )

**RULING**

**GENERAL**

I.

Change Application 29417 was filed on June 5, 1975, to change the point of diversion of 2,000 c.f.s. of water as evidenced by Permit 26907, Certificate 9741 which evidences the right to use 2,000 c.f.s. (21,573 acre-feet) from the Humboldt River for fish, wildlife and recreation purposes. The application seeks the right to change the point of diversion to be within the SE1/4 SE1/4 Section 25, T.25 N., R.30E., M.D.B.&M.<sup>1</sup>

Application 29468 was filed on June 26, 1975, by Nevada Department of Fish and Game to appropriate 250 c.f.s. of water from Toulon or Graveyard Drain for fish, wildlife and recreation purposes within portions of T.24N., R.29E.; T.24N., R.30E.; T.25 N., R.29E. and T.25 N., R.30E., M.D.B.&M. The point of diversion is described as being within the SW1/4 SE1/4 Section 19, T.26N., R.31E., M.D.B.&M.<sup>1</sup>

Application 29469 was filed on June 26, 1975, by Nevada Department of Fish and Game to appropriate 500 c.f.s. of water from the Army Drain for fish, wildlife and recreation purposes within portions of T.24N., R.29E.; T.24N., R.30E.; T.25 N., R.29E. and T.25 N., R.30E., M.D.B.&M. The point of diversion is described as being within the SW1/4 SW1/4 Section 7, T.25 N., R.31E., M.D.B.&M.<sup>1</sup>

Application 29470 was filed on June 26, 1975, by Nevada Department of Fish and Game to appropriate 5,000 c.f.s. of water from Humboldt River for fish, wildlife and recreation purposes within portions of T.24N., R.29E.; T.24N., R.30E.; T.25 N., R.29E. and T.25 N., R.30E., M.D.B.&M. The point of diversion is described as beingin within the SE1/4 SE1/4 Section 25, T.25 N., R.30E., M.D.B.&M.<sup>1</sup> (Same point of diversion as Application 29417).

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<sup>1</sup> Public record in the office of the State Engineer.

II.

Change Application 29417 and Application 29470 were noticed for the statutory time period and were timely protested by Leon Anderson and John Froelich on the following grounds:

"1. The waters of the Humboldt River are fully appropriated:

- (a) The said waters are subject to vested rights.
- (b) Said waters are also the subject of existing certificate and permit rights obtained on application to appropriate waters made to the State Engineer of Nevada. The total amount of water subject to vested rights and to pending adjudicated and permit rights exceed the reasonably anticipated maximum flow of the stream.
- (c) The waters of the Humboldt River are subject to the Humboldt Decree.

2. The granting of the subject applications would permit the diversion of water for which valid prior and senior rights exist.

3. Protestants are the owners and holders of both vested and application and decreed water rights which divert from the same source and said water rights will be impaired and lost if the subject applications are granted.

4. There are no waters available for appropriation from said source.

5. Upon information and belief, Application Nos. 29470 and 29417 relate all or in part to waste water and under Nevada law waste water is not subject to appropriation. In the alternative, said applications relate to return flow, said waters having become a part of the respective streams and, as set forth above, are already fully appropriated. In the event it is held that waste water can be appropriated, said waste water is also subject to existing certificates and permit rights.

6. Upon information and belief, Application Nos. 29470 and 29417 should be denied by reason of the fact that the applications set forth no known natural and physical point of diversion for the waters of the Humboldt River. The proposed point of diversion set forth in the said applications is, in fact, located on land owned by the protestants. In any event, a point of diversion could have been applied for by the applicant State of Nevada, Department of Fish and Game at a point downstream sufficiently far to be removed from the private property of protestants.

7. Application No. 29470 should be denied for the reason that it does not set forth and specify a place of use. The reason set forth in the said application refers to "fish, wildlife and recreational purposes", and if the said applications were to be granted, the aforesaid uses would or could result in various types of recreation by the general public taking place on and around the private property of protestants.

8. Upon information and belief, the maintenance of storage water in the Humboldt River, will interfere and jeopardize the proper drain of waters from lands of protestants and will interfere with the continued maintenance and upkeep of the said drains and will increase costs thereof.

9. Upon information and belief, the said proposed points of diversion are not natural points of diversion. Applicant does not propose to construct any ditches or other structures which would enable applicant to obtain dominion over said water and, therefore, no valid appropriation can be made.

10. Applicant does not own property in the area of the proposed points of diversion, nor does applicant have right of access to the point of diversion set forth in Application Nos. 29470 and 29417, but would be only a trespasser.

11. Applicant will pay no taxes and no water master fees which are being paid by protestants and/or other land owners and water users in the area.

12. Diversion of water from stated points of diversion would raise the water table with adverse affects on surrounding lands and would directly interfere with the value of lands of protestants and the value of existing water rights located thereon.

13. The ruling of the State Engineer, Division of Water Resources, dated January 17, 1975, pertaining to Applications 26906, 26907 and 26908 which were filed on August 24, 1972, contains certain restrictions pertinent to the two applications numbered 29470 and 29417 being protested herein. Presumably, that ruling still applies in full with all restrictions to Application 29417 which requests change in the point of diversion of waters heretofore appropriated under Permit 26907. In that ruling, on the fifth page, set forth, among a number of other things, is the following condition:

"4. The permittee shall not, through the use of structures of other means, intentionally raise the water levels of the Toulon or Humboldt Lakes without consent of the Pershing County Water Conservation District."

It also sets forth a restriction, among other things, as follows:

"1. Permittee shall file an application to move the point of diversion downstream to a point below the last existing diversion on the Humboldt River within 60 days of the date of issue of Permit 26907."

In this connection it was assumed by protestants, who originally protested Application 26907, that the point of diversion would not only be changed to a point below the last existing diversion on the Humboldt River, but would also be sufficiently far downstream so that it would not be on the private property of protestants. As set forth within the said previous protests and the within protest, there is no reason for a point of diversion to be on the private property of protestants, there is no access to that point and there is no means of physical diversion of water at that point. Apparently, the applicant proposes to leave the water in the main stream of the Humboldt River which was one point protested in previous Applications 26907 and 26908.

14. While Application 29417 requesting a change in the point of diversion is objected to, among other reasons, on the basis the point of diversion is not sufficiently downstream to not be on the protestants' private property, it is assumed that Application 29417 remains subject to all the terms and conditions of the basic ruling of the State Engineer, including, but not limited to, the quoted sections in Paragraph 13 above. However, there are no such limitations on Application 29470 for an additional 5,000 second feet of the public waters of the State of Nevada, which said application lists a proposed diversion point identical to that of Application 29417. If Application 29470 should be granted in the future, even if further downstream, it should be subject to every applicable restriction, requirement, exception and the like contained in the ruling of the State Engineer dated January 17, 1975, reference Applications 26906, 26907 and 26908. It is submitted that both of the current applications are strenuously protested, in addition to the other grounds set forth herein, on the basis that the point of diversion should not be on the private property of protestants."

### III.

Applications 29469 and 29470 were noticed for the statutory time period and were timely protested by the Pershing County Water Conservation District on the following grounds:

"1. The Army Drain, is a private drain owned, operated and maintained by your Protestant, and therefore is not a natural point of diversion for water.

2. The water in the drain ditch is waste water to which no permanent right can be acquired.

3. The appropriation of waters from a private drain will interfere with the maintenance and upkeep of said drain and increased costs thereof and interfere with the drainage of lands."

### FINDINGS OF FACT

#### I

With the exception of Article 13 and 14 of Mr. Anderson and Mr. Froelich's protest, all points raised are identical to those raised against Applications 26906, 26907 and 26908, which were overruled by the State Engineer in Ruling No. 2022 issued by the State Engineer on January 17, 1975.<sup>1</sup>

Article 13 and 14 of the protests now before the State Engineer deal with property rights of the Protestants which are beyond the scope of the jurisdiction of the State Engineer to adjudicate.<sup>2</sup>

#### II.

Protests to Applications 29469 and 29470 raise identical points as those raised against Applications 26906 and 26908 which have been resolved in total or in part by agreement between the Applicant and the Protestant dated November 1, 1978,<sup>3</sup> and furthermore those same points were ruled upon with certain conditions in Ruling No. 2022 issued by the State Engineer January 1, 1975.<sup>1</sup>

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<sup>2</sup> NRS Chapters 533 and 534 deal with the appropriation, adjudication and distribution of the waters of the State of Nevada, but nowhere is there authority for the State Engineer to resolve rights of trespass, ingress or egress between applicants and protestants.

<sup>3</sup> The points of protest raised by the Pershing County Water Conservation District dealt with obstructions in the drain interfering with normal maintenance and operation and also the availability of water on demand. The Applicant agreed not to place any structures in the drain without supplying plans and specifications to the District for their approval. The State Engineer ruled on the matter of water availability and placed no demand or responsibility on the District to supply the water.

III.

Application 29417 was filed to change the point of diversion of Permit 26907, Certificate 9741 to a point downstream downstream as mandated in the State Engineer's Ruling No. 2022 which approved the application.<sup>4</sup>

IV.

Application 29470 was filed by the same Applicant, from the same source, for the same use and at the same point of diversion as Permit 26907 as amended by Change Application 29417.<sup>4</sup>

V.

Application 29468 was filed by the same applicant, from the same source, for the same use, from the same point of diversion as Permit 26906 which was the subject of the State Engineer's Ruling No. 2022.<sup>1</sup>

VI.

Application 29469 was filed by the same applicant, from the same source, for the same use, from the same point of diversion as Permit 26908 which was the subject of the State Engineer's Ruling No. 2022.<sup>1</sup>

VII.

The State Engineer's office took measurements of the drain waters and has records of the Humboldt River flows that demonstrate there are waters in excess of those appropriated under Applicants' Permits 26906, 26907 and 26908 during times of high runoff.<sup>5</sup>

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<sup>4</sup> See State Engineer's Ruling No. 2022 dated January 17, 1975. Public record in the office of the State Engineer.

<sup>5</sup> See memo in file 26908 dated October 2, 1978, as well as all flow records. Public record in the office of the State Engineer.

VIII.

Studies performed by or for the Division of Water Resources demonstrate that the water requirements for the use under the subject applications exceed the amount appropriated under Permits 26906, 26907 and 26908.<sup>6</sup>

CONCLUSIONS

I.

The State Engineer has jurisdiction of the parties and the subject matter of this action and determination.<sup>7</sup>

II.

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

- A) There is no unappropriated water in the proposed source, or
- B) The proposed use conflicts with existing rights, or
- C) The proposed use threatens to prove detrimental to the public interest.<sup>8</sup>

III.

Recreation and wildlife propagation are beneficial uses of water and in the public interest.<sup>9</sup>

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<sup>6</sup> Report of Environmental and Wildlife Investigations Humboldt River Upstream Storage Project and Rock Creek Dam, Vol. II. December, 1974, Table 31 show: a requirement of 71,129 acre-feet per year to sustain the two marshes.

<sup>7</sup> NRS 533.325.

<sup>8</sup> NRS 533.370(3).

<sup>9</sup> 533.030(2) also see Nevada v. Morros \_\_\_\_\_ Nev. \_\_\_\_, \_\_\_\_ P.2d \_\_\_\_, (Adv. Opn. 117, Dec. 21, 1988). NRS 533.030.

IV.

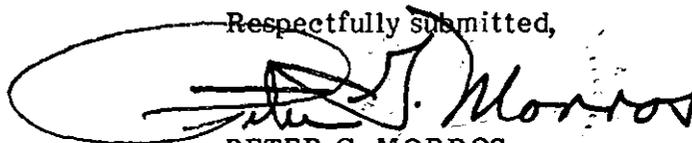
The State Engineer's records provide evidence that there is unappropriated water in the sources and studies indicate the Applicant has the ability to put the water to beneficial use.

RULING

The protests to Applications 29417, 29468, 29469 and 29470 are hereby overruled subject to the conditions of the agreement dated November 1, 1978, and further subject to the conditions of the State Engineer's Ruling No. 2022 dated January 17, 1975. Applications 29417, 29468, 29469 and 29470 are hereby approved subject to the following conditions:

1. Upon payment of statutory fees where applicable.
2. Conditions imposed in the agreement between the parties dated November 1, 1978.
3. Conditions imposed in the State Engineer's Ruling No. 2022 dated January 17, 1975.
4. Approval is for excess waters in the subject drains and infrequent surplus flows in the Humboldt River. This approval shall not be construed to guarantee availability of water or continuity of flow nor shall it interfere with or place any call on existing upstream rights.
5. Issued subject to existing rights.

Respectfully submitted,



PETER G. MORROS  
State Engineer

PGM/RMT/bk

Dated this 13th day of  
February, 1989.