

IN THE OFFICE OF THE STATE ENGINEER

IN THE MATTER OF FORFEITURE OF WATER)
RIGHTS UNDER PERMIT 20478, CERTIFICATE)
6243 AND THE MATTER OF APPLICATION)
52892 TO CHANGE THE WATERS FROM AN)
UNDERGROUND SOURCE IN DIAMOND)
VALLEY, EUREKA COUNTY, NEVADA.)

RULING

GENERAL

I.

Application to change 52892 was filed on January 27, 1989, by the Town of Eureka. Application 52892 sought to change the point of diversion, manner of use and place of use of 2.51 c.f.s. and 640 acre-feet annually which is a portion of water from an underground source heretofore appropriated under Permit 20478, Certificate 6243. The proposed point of diversion is within Lot 9, Section 28, T.20N., R.53E., M.D.B.&M. The proposed place of use being within a portion of Sections 13, 14, 23 and 24 all in T.19N., R.53E., M.D.B.&M. The existing point of diversion is within the NE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 10, T.20N., R.53E., M.D.B.&M. and the existing place of use is within the SW $\frac{1}{4}$, Section 10, T.20N., R.53E., M.D.B.&M. The proposed manner of use is for municipal purposes and the existing manner of use is for irrigation and domestic purposes.¹

II.

Application 20478 was filed by Robert Wilson on May 23, 1962, to appropriate water from an underground source for irrigation and domestic purposes. The point of diversion was within the NE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 10, T.20N., R.53E., M.D.B.&M. and the proposed place of use was within the S $\frac{1}{2}$, Section 10, T.20N., R.53E. A permit was issued under Application 20478 on February 19, 1963, for 5.4 c.f.s. for irrigation and domestic purposes.² Certificate 6243 was issued under said permit on March 30, 1967 for 5.021

¹ Records in the office of the State Engineer. Also, see State of Nevada Exhibit Nos. 2 and 5 from the public administrative hearing, hereinafter referred to as "hearing", before the State Engineer on July 5, 1989, in Eureka, Nevada. The transcript of this hearing is a matter of public record in the office of the State Engineer.

² Records in the office of the State Engineer.

c.f.s., but not to exceed 1,280 acre-feet annually for the irrigation of 320 acres of land.³

III.

The ownership of the water rights for a portion of Permit 20478 has been transferred to the Town of Eureka. The portion of the right transferred to the Town of Eureka under Permit 20478, Certificate 6243 is described as 160 acres within the SW $\frac{1}{4}$ Section 10, T.20N., R.53E., M.D.B.&M. limited to an annual duty of 640 acre-feet.⁴

IV.

Application 52892 was timely protested by Edward B. Anderson on April 20, 1989, on the following grounds:⁵

This is Notice of Protest of Water Permit for the Town of Eureka, Eureka County, Nevada. Application #52892.
Reasons for Protest.

(1) Well was drilled before establishing point of diversion or acquiring a permit.

(2) Some of the funds used by the County were used illegally because they were taxes paid by all property owners in Diamond Valley and all of these people are to be denied use of this water because it will be for the Town of Eureka. Since the County is paying for this with County funds will the water belong to the County or the Town?

(3) The water acquired by the County or the Town of Eureka from Farm Home Administration is out of compliance for more than five years.

³ Records in the office of the State Engineer and State of Nevada Exhibit No. 6, July 5, 1989, hearing.

⁴ Records in the office of the State Engineer under 20478.

⁵ Records in the office of the State Engineer and State of Nevada Exhibit No. 3, July 5, 1989, hearing.

(4) I own a farm composed of the North $\frac{1}{2}$ of S. 29, T20N, R53E, M.D.B.M. Which joins sec 28, and at least one of my wells is being pumped to full capacity. It is almost a certainty that pumping from a new well in this area will reduce the water in that well and damage my prior rights.

(5) I own shares in a well belonging to Devils Gate Water users Coop which also can be damaged by pumping from a new well. The coop well is located Government Lot 16 of S-29 T20N R53E, M.D.B.M Which is also adjacent to S-28.

(4) and (5) This is a formal Protest of the transfer of point of diversion of the County of Eureka Water, to the Town of Eureka under Certificate 6243 to a point in Lot 9, S28, T20N, R53E, M.D.B.M.

V.

Application 52892 was timely protested by T.M. Thompson on May 5, 1989, on the following grounds:⁶

See attached photocopies. As you well know I filed a protest with your office in September 1981 when the flow of Diamond Springs dropped from 2057 gpm to 26 gpm. You also know Diamond Springs Ranch has the oldest water right in the valley. Since the hearing in 1982 not only have you continued to refuse to bring any control but in fact more wells have gone into use since that period. For the past three winters I have had to pack domestic water.

⁶ Records in the office of the State Engineer and State of Nevada Exhibit No. 4, July 5, 1989, hearing. Protestant Thompson attached to his protest copies of certain pages of a transcript of litigation before Washoe County District Court in another matter.

VI.

Evidentiary presentations were made by the applicants and protestants at a public administrative hearing before the State Engineer on July 5, 1989, in Eureka, Nevada.⁷ The State Engineer took administrative notice of other matters more fully set forth in the record.⁸

VII.

The State Engineer verbally ruled at the conclusion of the administrative hearing that 440 acre-feet representing a portion of the water under Permit 20478, Certificate 6243 acquired by Eureka County had been forfeited because of non-use for a period of 5 consecutive years. The following findings of fact and conclusions are entered in the matter of the determined forfeiture and the limited approval of Application to Change 52892.⁹

FINDINGS OF FACT

I.

Application 20478 was filed on May 23, 1962, by Robert Wilson to appropriate 5.4 cubic feet per second (c.f.s.) of water from an underground source for irrigation and domestic purposes. On February 19, 1963, a permit was granted under Application 20478 for 5.4 c.f.s. to irrigate 320 acres of land within the S $\frac{1}{2}$ Section 10, T.20N., R.53E., M.D.B.&M. On August 27, 1963, and October 7, 1963, the Proofs of Commencement and Completion of Work respectively were filed attesting that the well had been drilled and completed. On November 26, 1965, the Proof of Beneficial Use was filed along with supporting documents and Certificate 6243 was subsequently issued on March 30, 1967, for 5.021 c.f.s. not to exceed 1280.0 acre-feet annually to irrigate 320 acres of land in the S $\frac{1}{2}$ Section 10, T.20N., R.53E., M.D.B.&M.¹⁰

⁷ See footnote 1.

⁸ See transcript of hearing page 12.

⁹ See transcript of hearing, pages 216 through 220, inclusive.

¹⁰ Public record in the office of the State Engineer under Permit 20478.

II.

On July 5, 1989, the ownership of Permit 20478, Certificate 6243 was reflected in the records of the State Engineer's office to be in the name of Eureka County for the SW $\frac{1}{4}$ Section 10 and Jerry, Cheri, LeRoy and Sandra Sestanovich for the SE $\frac{1}{4}$ Section 10, T.20N., R.53E., M.D.B.&M. Several ownership changes have occurred under this right and are reflected in records of the State Engineer's office.¹¹

III.

The State Engineer's office has maintained pumpage, water level and water use inventories on an annual basis in Diamond Valley Groundwater Basin since 1967. The points of diversion under Permit 20478, Certificate 6243, and Application to Change 52892 lie within the Diamond Valley Groundwater Basin. Records in the State Engineer's office reflect that no groundwater was withdrawn or pumped under Permit 20478, Certificate 6243 from 1981 to 1986, a period of six (6) consecutive years.¹²

IV.

Evidence and testimony received into the record provides substantial evidence that a portion of the land in the SW $\frac{1}{4}$ of Section 10, T.20N., R.53E., M.D.B.&M. was irrigated during 1984. The record establishes with reasonable certainty that approximately 200 acre-feet of water was withdrawn from the well under Permit 20478, Certificate 6243 and used for irrigation purposes on approximately 60 acres of land. The record establishes that this groundwater withdrawal occurred in July and August of 1984

¹¹ See footnote 10.

¹² Public record in the office of the State Engineer and State of Nevada Exhibits 8-A through 8-H and testimony of Andrew Erickson pages 61 through 90, inclusive, July 5, 1989, hearing.

after the Spring measurements and before the Fall measurements by the State Engineer's office.¹³

V.

The record of evidence and testimony clearly establishes that 440 acre-feet were not placed to beneficial use under Permit 20478, Certificate 6243 for a period of six (6) consecutive years.¹⁴

VI.

Application to Change 52892 does not constitute a request for a new appropriation of water but rather seeks to change the point of diversion, manner and place of use of an existing right. There was no evidence in the record that the granting of Application to Change 52892 in the amount of 200 acre-feet annually would adversely affect or impair existing rights.¹⁵

VII.

Application 52892 proposes to change an existing irrigation right to municipal use to serve the needs of the Town of Eureka, Eureka County, Nevada. The record reflects a decline in quantities of water available to the Town of Eureka from their existing and

¹³ See testimony of Linda L. Brown pages 22 through 61, inclusive; Edward B. Anderson, pages 91 through 105, inclusive; Paul Lumos, pages 105 through 138, inclusive; Jerry Sestanovich, pages 138 through 154, inclusive; Robert Lee Smith, pages 154 through 172, inclusive; Jim Baumann, pages 172 through 181, inclusive; Pam Buffham, pages 181 through 190, inclusive; July 5, 1989, hearing. Also see Protestant Anderson Exhibit No. 1; Applicant Exhibit No. 11; Applicant Exhibit No. 3; Applicant Exhibit No. 5; and Applicant Exhibit No. 4.

The annual water use inventory is normally conducted by the State Engineer's office at the same time that the annual water level measurements are made in the field. This is normally during October or November. The record reflects that water use under Permit 20478 in 1984 occurred during July and August and that subsequent to that cattle were turned into the place of use that was alleged as subject to the forfeiture. It can reasonably be assumed that cattle grazing on this land contributed substantially to destroying evidence that water had been placed to beneficial use on the land during July and August of 1984. When staff of the State Engineer's office viewed the land in the field on November 7, 1984, there was no evidence of beneficial use. See testimony of Robert Lee Smith and Applicant's Exhibit No. 3; and testimony of Jerry Sestanovich.

¹⁴ See footnote 13.

¹⁵ NRS 533.370 Subsection 3.

historical sources. Concerns are documented in the record reflecting inadequate culinary and fire protection quantities of water from these sources. After careful review of the entire record the State Engineer finds that the granting of Application 52892 in the amount of 200 acre-feet annually is in the public interest and welfare.¹⁶

VIII.

In the State Engineer's verbal ruling at the conclusion of the administrative hearing he limited the diversion rate under the approval of Change Application 52892 to 1.0 c.f.s. Upon further reflection and a request for reconsideration by the applicant, County of Eureka, and additionally, consideration of the protestants opposition to reconsideration of the diversion rate, the State Engineer finds that it is in the public interest to amend his verbal ruling of July 5, 1989, and approve a maximum diversion rate of 1.78 c.f.s. not to exceed an annual duty of 200.0 acre-feet. The permittee, County of Eureka, or successor in interest will be required to install a totalizing meter before any diversion of water and maintain records on the total amount of water diverted annually.¹⁷

CONCLUSIONS

I.

The State Engineer has jurisdiction of the subject matter contained herein.¹⁸

II.

The State is prohibited from granting an application to change an existing right if that change:¹⁹

¹⁶ NRS 533.370 Subsection 3.

¹⁷ See public record in the office of the State Engineer, letter dated August 3, 1989, under signature of Frank Yeamans, Attorney at Law and letter dated July 17, 1989, under signature of Protestant Edward B. Anderson and letter dated July 11, 1989, under signature of Applicant's agent, Paul Lumos.

¹⁸ NRS Chapters 533 and 534.

¹⁹ NRS 533.370 Subsection 3.

- a) conflicts with other existing rights, or
- b) is not in the public interest.

III.

A portion of Permit 20478, Certificate 6243 is forfeited in the amount of 440 acre-feet because of non-use for a period in excess of five (5) consecutive years.

IV.

The granting of Application to Change 52892 will not interfere with or impair existing rights.

V.

The granting of Application to Change 52892 is in the public interest.

VI.

The issuance of a permit under Application to Change 52892 will be limited to a diversion rate of 1.78 c.f.s. not to exceed an annual duty of 200.0 acre-feet.

VII.

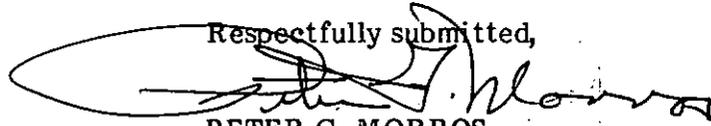
It is in the public interest to require that a totalizing meter be installed under Permit 52892 and annual pumpage records be maintained and submitted to the State Engineer's office.

RULING

The protests to the granting of Application to Change 52892 are upheld in part and overruled in part. Four hundred and forty (440) acre-feet of water under Permit 20478, Certificate 6243 is declared forfeited. The protests to the granting of Application to Change 52892 are overruled to the extent that Application 52892 is approved in the

amount of a diversion rate of 1.78 c.f.s. not to exceed an annual duty of 200.0 acre-feet and on the further grounds that the approval will not impair existing rights or be detrimental to the public interest.

Respectfully submitted,



PETER G. MORROS
State Engineer

PGM/HR/bk

Dated this 10th day of
August, 1989.