

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

IN THE MATTER OF APPLICATIONS)
31542, 31544, AND 31545 FILED TO)
APPROPRIATE THE PUBLIC WATERS)
FROM AN UNDERGROUND SOURCE AND)
APPLICATIONS 65019, 65020,)
65021, AND 65022 FILED TO CHANGE)
THE POINT OF DIVERSION AND)
PLACE OF USE OF THE PUBLIC)
WATERS FROM AN UNDERGROUND)
SOURCE WITHIN THE STONE CABIN)
VALLEY HYDROGRAPHIC BASIN (149),)
NYE COUNTY, NEVADA)

RULING

5020

GENERAL

I.

Application 31542 was filed on May 9, 1977, by Green Ridge Water Co.¹ to appropriate 5.4 cubic feet per second (cfs) of water for irrigation and domestic purposes on 320 acres of land within the S $\frac{1}{2}$ of Section 27, T.1N., R.46E., M.D.B.&M.² The proposed point of diversion is described as being located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 27. Under the remarks portion of the application, it is indicated that the application is filed in support of a Carey Act application.

II.

Application 31544 was filed on May 9, 1977, by Green Ridge Water Co.³ to appropriate 5.4 cfs of water for irrigation and domestic purposes on 320 acres of land within the S $\frac{1}{2}$ of Section 24, T.1N., R.46E., M.D.B.&M.⁴ The proposed point of diversion is described as being located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 24. Under the remarks portion of the application, it is indicated that the application is filed in support of a Carey Act application.

¹ The current owner of record in the records of the State Engineer is Mary Louise Carlson.

² Application 31542, official records in the office of the State Engineer.

³ The current owner of record in the records of the State Engineer is Vernon V. Fredrickson.

⁴ Application 31544, official records in the office of the State Engineer.

III.

Application 31545 was filed on May 9, 1977, by Green Ridge Water Co.⁵ to appropriate 5.4 cfs of water for irrigation and domestic purposes on 320 acres of land within the S½ of Section 26, T.1N., R.46E., M.D.B.&M.⁶ The proposed point of diversion is described as being located in the NW¼ SE¼ of said Section 26. Under the remarks portion of the application, it is indicated that the application is filed in support of a Carey Act application.

IV.

Application 65019 was filed on April 7, 1999, by Mary Louise Carlson to change the point of diversion and place of use of 2.7 cfs, a portion of the water previously requested for appropriation under Application 31542.⁷ The water is to be used for irrigation and domestic purposes within the SW¼ of Section 12, T.1N., R.46E., M.D.B.&M. The existing place of use under Application 31542 is described as being located within the S½ of Section 27, T.1N., R.46E., M.D.B.&M. The proposed point of diversion is described as being located in the SW¼ SW¼ of Section 12, T.1N., R.46E., M.D.B.&M. The existing point of diversion is described as being located within the NW¼ SE¼ of Section 27, T.1N., R.46E., M.D.B.&M. Under the remarks portion of the application, it is indicated that the application is filed in support of a Carey Act application.

V.

Application 65020 was filed on April 7, 1999, by Vernon V. Fredrickson to change the point of diversion and place of use of 2.7 cfs, a portion of the water previously requested for appropriation under Application 31544.⁸ The water is to be used

⁵ The current owner of record in the records of the State Engineer is Gary J. Fredrickson.

⁶ Application 31545, official records in the office of the State Engineer.

⁷ Exhibit No. 10, public administrative hearing before the State Engineer, August 22, 2000.

⁸ Exhibit No. 12, public administrative hearing before the State Engineer, August 22, 2000.

for irrigation and domestic purposes within the SW $\frac{1}{4}$ of Section 11, T.1N., R.46E., M.D.B.&M. The existing place of use under Application 31544 is described as being located within the S $\frac{1}{2}$ of Section 24, T.1N., R.46E., M.D.B.&M. The proposed point of diversion is described as being located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 11, T.1N., R.46E., M.D.B.&M. The existing point of diversion is described as being located within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 24, T.1N., R.46E., M.D.B.&M. Under the remarks portion of the application, it is indicated that the application is filed in support of a Carey Act application.

VI.

Application 65021 was filed on April 7, 1999, by Vernon V. Fredrickson to change the point of diversion and place of use of 2.7 cfs, a portion of the water previously requested for appropriation under Application 31544.⁹ The water is to be used for irrigation and domestic purposes within the SE $\frac{1}{4}$ of Section 11, T.1N., R.46E., M.D.B.&M. The existing place of use under Application 31544 is described as being located within the S $\frac{1}{2}$ of Section 24, T.1N., R.46E., M.D.B.&M. The proposed point of diversion is described as being located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 11, T.1N., R.46E., M.D.B.&M. The existing point of diversion is described as being located within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 24, T.1N., R.46E., M.D.B.&M. Under the remarks portion of the application, it is indicated that the application is filed in support of a Carey Act application.

VII.

Application 65022 was filed on April 7, 1999, by Gary J. Fredrickson to change the point of diversion and place of use of 2.7 cfs, a portion of the water previously requested for appropriation under Application 31545.¹⁰ The water is to be used

⁹ Exhibit No. 14, public administrative hearing before the State Engineer, August 22, 2000.

¹⁰ Exhibit No. 16, public administrative hearing before the State Engineer, August 22, 2000.

for irrigation and domestic purposes within the SW¼ of Section 23, T.1N., R.46E., M.D.B.&M. The existing place of use under Application 31545 is described as being located within the S½ of Section 26, T.1N., R.46E., M.D.B.&M. The proposed point of diversion is described as being located in the NE¼ SW¼ of Section 23, T.1N., R.46E., M.D.B.&M. The existing point of diversion is described as being located within the NW¼ SE¼ of Section 26, T.1N., R.46E., M.D.B.&M. Under the remarks portion of the application, it is indicated that the application is filed in support of a Carey Act application.

VIII.

Applications 65019, 65020, 65021, and 65022 were timely protested by E. Wayne Hage on the following grounds summarized below:¹¹

1. No permit has ever been issued on Applications 31542, 31544, 31545 and since no permits have been issued, the water in question is not "water already appropriated" within the meaning of NRS § 533.324; therefore, the State Engineer should dismiss or deny the applications.
2. The water right in question has never been perfected due to non-use, non-diversion, and/or failure to appropriate and apply the water to beneficial use within a reasonable period of time.
3. The applicants have abandoned the water right.
4. The applicants have forfeited the water right.
5. The applicants have no legal right to enter the BLM administered land on which the proposed points of diversion and/or places of use exist.
6. The granting of the applications would result in an illegal infringement of protestant's certificated and/or vested water rights, including, but not limited to Permit 43016, Certificate 10697, such being a right to divert 0.0094 cfs of water or sufficient to water 300 head of cattle from an underground source located within the SW¼ NE¼ of Section 9, T.1N., R.46E., M.D.B.&M., with a priority date of December 26, 1980, and other surface and groundwater rights.

¹¹ Exhibit Nos. 11, 13, 15, & 17, public administrative hearing before the State Engineer, August 22, 2000.

7. The applicants do not own the land on which they intend to apply the water, but rather the point of diversion and place of use of the water proposed under these applications would be on property the surface estate of which is owned by the protestant, and granting the applications would interfere with the vested property rights of the protestant, including water rights, ditch rights of way under the Mining Act of 1866 and related access rights, as well as forage rights, historic grazing rights, and surface estate rights.

Therefore, the protestant requested that the applications be denied.

IX.

After all parties of interest were duly noticed by certified mail, an administrative hearing was held at Carson City, Nevada, on August 22, 2000, before representatives of the office of the State Engineer regarding the protests to Applications 65019, 65020, 65021, and 65022.¹²

FINDINGS OF FACT

I.

At the public administrative hearing, the protestant withdrew his protest claims as to abandonment and forfeiture.¹³

II.

As is the case in many water right applications, these applications present their own unique set of facts, and the State Engineer believes a recitation of the history of how these applicants got to this point is warranted for the record. In May 1977 Roger Hockersmith, on behalf of Green Ridge Water Company, filed 14 water right applications in support of Carey Act entries,¹⁴ those being Applications 31532 through 31545, inclusive.

¹² Exhibit No. 1, and Transcript, public administrative hearing before the State Engineer, August 22, 2000. Hereinafter the Exhibits will be referred to merely by "Exhibit No." and the transcript will be referred to by "Transcript, p."

¹³ Transcript, p. 18.

¹⁴ 43 U.S.C. 641.

The State Engineer by Ruling No. 2397¹⁵ denied Applications 31532 through 31545, inclusive, on the grounds that existing water rights in Stone Cabin Valley exceeded the estimated perennial yield of the groundwater reservoir, and that the appropriation of additional water from the area would tend to impair the value of existing water rights and otherwise be detrimental to the public interest and welfare. Mr. Hockersmith, on behalf of Green Ridge Water Company, filed an appeal from the State Engineer's decision in the Fifth Judicial District Court of the State of Nevada, in and for the County of Nye. The matter was decided by the Court in favor of Green Ridge Water Company on May 3, 1983.

The Court's Memorandum of Decision and Order,¹⁶ indicates that on or about May 10, 1977, Green Ridge Water Company filed Carey Act application(s) with the Nevada Division of State Lands for 4,480 acres of land situated within Sections 14, 15, 22, 23, 24, 26, and 27, T.1N., R.46 E., M.D.B.&M., Stone Cabin Valley, Nye County, Nevada. The Carey Act applications were subsequently amended substituting Sections 21 and 28 in lieu of Sections 14 and 23. Concurrently, Green Ridge Water Company filed fourteen (14) water right applications with the Nevada Division of Water Resources since water right permits are a necessary step in meeting the requirements of the Carey Act.

At the time of the hearing on Green Ridge Water Company's appeal from the State Engineer's denial of the water right applications, the Division of Water Resources was subject to the provisions of Nevada Revised Statutes chapter 233B, and the Court, therefore, allowed the admission of additional evidence which was outside the realm of the State Engineer's consideration in the ruling from which Green Ridge appealed. Throughout the

¹⁵ State Engineer's Ruling No. 2397, dated August 31, 1978, official records in the office of the State Engineer. Exhibit No. 18.

¹⁶ Memorandum of Decision and Order, Case No. 8694, Green Ridge Water Co. v. State of Nevada, Roland D. Westergard, State Engineer, In the District Court of the Fifth Judicial District of the State of Nevada, In and For the County of Nye.

proceeding, the State Engineer maintained that the perennial yield of Stone Cabin Valley is 2,000 acre-feet, and Green Ridge Water Company maintained that the 2,000 acre-foot perennial yield estimate is only a preliminary estimate and that such estimates are considered to be the minimum quantities that could be developed without causing any appreciable reduction of the supply in downstream valleys. The Court found that the public has an interest in seeing that the waters of Nevada are put to beneficial use, and based on the additional evidence provided by Green Ridge Water Company, it reversed the State Engineer's denial of the applications.

After the Court's decision, the State Engineer filed a Motion to Amend Findings, to Make Additional Findings and to Alter or Amend Judgment. The purpose of the motion was to request that the Court reconsider its decision after taking into consideration the requirements of the Carey Act, and the State Engineer's requirement for adequate well spacing where applications are filed for substantial amounts of water over a limited area as is the general rule with Carey Act applications.

The State Engineer pointed out to the Court that the requisite determination of the suitability and availability of the land for agricultural development had not yet been made by the Bureau of Land Management and the fourteen (14) applications to appropriate ground water for the subject 4,480 acres represented a substantial amount of water that could arguably over-appropriate the basin to the detriment of all present and future groundwater users. The State Engineer alleged that the Court's decision that the Green Ridge Water Company was entitled to all the permits applied for was excessive and premature in respect to the potential over-appropriation of the basin and the lack of definitive information on the recharge of the same.

The State Engineer further alleged that the most probable result of the Court requiring that all the applications be granted at one time would be to have outstanding permits for excessive amounts of water appurtenant to land that may ultimately be

determined to be unsuitable for agricultural purposes under Carey Act applications. The State Engineer's motion noted that well spacing requirements could necessitate the amendment of some of the original applications.

As a result of the State Engineer's Motion to Amend Findings, to Make Additional Findings, and to Alter or Amend Judgment, the parties stipulated to vacate the hearing set for the above-referenced motion in an effort to negotiate to resolve the substance of the motion. Said negotiations resulted in an Amended Stipulation dated February 15, 1984.¹⁷ Pursuant to the Amended Stipulation, Mr. Hockersmith and the State Engineer agreed that:

1. the Motion to Amend Findings be withdrawn;
2. eight (8) of the fourteen (14) applications would be expeditiously granted by the State Engineer on land not to exceed 2,560 acres upon submittal of a proper suitability and availability determination in accordance with 43 CFR Section 2611.1-2 and allowance of entry to the lands in accordance with the Bureau of Land Management policy, procedure and determination;
3. the selection of which eight (8) applications would be initially granted would be at the election of the applicant subject only to the well spacing requirements set forth below;
4. the applicant would proceed in good faith and with due diligence, as required by chapters 533 and 534 of the Nevada Revised Statutes, to drill and develop the water source and place the permitted water to beneficial use, and that the State Engineer may review the permits any time after five (5) years from the date of the issuance to determine whether the permittee is proceeding in good faith and with reasonable diligence to perfect the appropriation as provided under NRS § 533.395(1);
5. the State Engineer was allowed to develop additional hydrologic and technical data and information as to the effects on the groundwater resource, including the reasonable requirement of test wells and allowance for comprehensive monitoring of the static water level;
6. the remaining six (6) applications were to be held in abeyance in a "ready for action" status, and subject to a review and evaluation of the hydrologic and technical data and information, and would be approved and permits granted by the State Engineer providing no unreasonable depletion of the

¹⁷ Exhibit No. 19.

groundwater resource by the initial applications is evident due to the withdrawal of ground water under the approved permits and other existing water rights in the groundwater basin; and

7. adequate spacing of points of diversion was necessary to prevent concentrated pumping and large cones of depression.

By letter dated January 14, 1994, in response to a request by Mr. Hockersmith to drill exploratory wells in Stone Cabin Valley as to Applications 31539, 31540, 31542, 31544, and 31545, the State Engineer's office indicated that before such request could be considered, the Division of Water Resources needed written verification from the Division of State Lands and the Bureau of Land Management that Green Ridge Water Company had been given a right of entry, and Mr. Hockersmith needed to pick the eight (8) applications the State Engineer was to approve pursuant to the Amended Stipulation.¹⁸ In response to the State Engineer's letter, Mr. Hockersmith noted that a "catch-22" situation existed with the Division of State Lands and the Bureau of Land Management in that they were requiring verification of a substantial water supply before they would grant formal entry.¹⁹

Roger Hockersmith and his legal counsel, William Nork, had a meeting with the State Engineer during which the fourteen (14) water right applications were discussed. Mr. Hockersmith's legal counsel memorialized the meeting by letter dated April 24, 1995,²⁰ indicating that it was his understanding that the Division of Water Resources would grant eight (8) of the applications in accordance with the Amended Stipulation upon the receipt of a formal "entry allowed" decision by the Bureau of Land Management, selection by Green Ridge Water Company of which eight (8) applications would initially be granted, upon receipt of certified copies of the deeds identifying those individuals to whom the

¹⁸ Exhibit No. 20.

¹⁹ Exhibit No. 21.

²⁰ Exhibit No. 23.

applications had been transferred, and that the approval of the remaining six (6) applications would be held in abeyance pending evaluation of supplementary information.

Mr. Nork's letter indicated that considerable discussion centered on the potential redistribution of waters and the land to which said waters would be applied, and that the State Engineer agreed to entertain granting approval of applications to change the location and number of diversion points as well as the places of use of the eight (8) permits, provided that the total amount of irrigated land, duty and diversion rate remained unchanged. In response, the State Engineer by letter dated June 27, 1995, indicated that essentially Mr. Nork's letter was accurate; however, he did not mention the well spacing issue which was still a concern and would be evaluated as part of the review of any change application.²¹

On October 4, 1995, Mr. Nork, on behalf of Green Ridge Water Company, sent a letter to the State Engineer which identified eight (8) applications at the top of the letter, those applications being 31536, 31537, 31540, 31541, 31542, 31543, 31544, and 31545. The State Engineer finds, pursuant to the letter of Green Ridge Water Company's legal counsel, the eight (8) applications to be granted pursuant to the Amended Stipulation were identified as being Applications 31536, 31537, 31540, 31541, 31542, 31543, 31544, and 31545.²²

III.

There is no evidence in the files of the State Engineer as to these water right applications that a right of entry has ever been granted by the Nevada Division of State Lands or the United States Department of Interior, Bureau of Land Management.²³ This issue

²¹ Exhibit No. 24.

²² Exhibit No. 22.

²³ Files Nos. 31542, 31544, 31545, 55019, 65020, 65021, and 65022, official records in the office of the State Engineer.

was raised at the public administrative hearing, and evidence presented at the administrative hearing indicated that these applicants have pursued Desert Land Entry applications,²⁴ instead of Carey Act Land entry applications, but that the Bureau of Land Management would not grant the Desert Land Entries until proof of the water right permits was received.²⁵

The applications which are being requested to be changed and the change applications at issue here were originally filed pursuant to Carey Act Land entry applications.²⁶ However, with a few exceptions, the Carey Act did not measure up to expectations, and on the whole was considered a failure.²⁷ The State Engineer has worked closely with the Bureau of Land Management for years and the Bureau of Land Management notifies the State Engineer when it is ready to issue a right of entry in order for the State Engineer to issue a water right application.

²⁴ Exhibit No. 29, Attachments 7-D, 7-G, and 7-H.

²⁵ Exhibit No. 29, Attachment 22.

²⁶ To encourage the settlement and reclamation of arid western lands, Congress enacted the Carey Act in 1894. It provided that 1,000,000 acres of arid lands of the public domain would be donated to each of the western "public land states", if those states would see to its reclamation and settlement. This was done by making it possible for such states, or for private industry under State supervision, to promote and construct irrigation and reclamation projects as necessary to deliver sufficient water on such lands to successfully irrigate and reclaim the same. A great number of reclamation projects were proposed in almost every part of the State pursuant to the provisions of the Carey Act. In almost all cases, proposals were by promoters, but lack of "water supply" proved to be one of the major obstacles. Lacking an adequate water supply, the promoters were unable to raise necessary funds to construct irrigation works necessary to get water to the land to be reclaimed. In approving the Carey Act, Congress made it possible for private enterprises to furnish water for reclamation purposes on irrigable lands that could not be accomplished by individual undertakings.

²⁷ H. Shamberger, EVOLUTION OF NEVADA'S WATER LAWS, AS RELATED TO THE DEVELOPMENT AND EVALUATION OF THE STATE'S WATER RESOURCES FROM 1866 TO 1960, Water-Resources Bulletin 46, United States Geological Survey at 85-87 (1991).

The State Engineer finds he is not really concerned whether entry to the lands is pursued pursuant to Carey Act applications or the Desert Land Entry applications, since entry pursuant to either act was for in essence the same purpose. It is the ultimate right of entry for irrigation purposes which is more at issue than which act pursuant to which entry was gained. The State Engineer finds the evidence indicates that these applicants have pursued the entry process; however, even eight months after the close of the administrative hearing there is no evidence that right of entry has been granted. The State Engineer finds the applicants did not comply with the terms of the Amended Stipulation dated February 15, 1984, in particular Item 2; therefore, the applications will not be granted.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.²⁸

II.

The State Engineer is prohibited by law from granting a permit under an application or a change application to appropriate the public waters where:²⁹

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

III.

The State Engineer concludes that it would threaten to prove detrimental to the public interest to grant water right permits under Applications 31542, 31544, and 31545 since the applicants have never complied with the terms of the stipulated settlement.

²⁸ NRS chapters 533 and 534.

²⁹ NRS § 533.370.

IV.

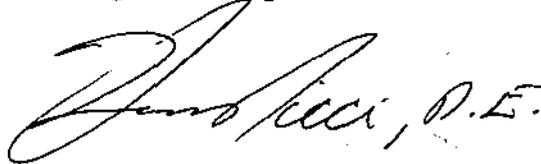
Nevada Revised Statute § 533.345(1) provides that an application can be filed to change the point of diversion, manner or place of use of "water already appropriated." In reference to a change application, water already appropriated refers to water represented by a water right permit or certificate in good standing.³⁰ Where no permit is issued under the application which forms the basis for the change application, there is no permit in good standing and those applications cannot be used to support the change applications. The State Engineer concludes that change Applications 65019, 65020, 65021, and 65022 cannot be granted as the underlying applications which supported the change applications were denied; therefore, no water right exists that can be used to support the change applications, and to issue such applications would threaten to prove detrimental to the public interest.

³⁰ NRS § 533.324.

RULING

Applications 31542, 31544, and 31545 are hereby denied on the grounds that since the applicants did not comply with the provisions of the Amended Stipulation, to issue permits under said applications would threaten to prove detrimental to the public interest. Applications 65019, 65020, 65021, and 65022 are hereby denied on the grounds that since the applicants did not comply with the provisions of the Amended Stipulation, to issue permits under said applications would threaten to prove detrimental to the public interest, and since no permits were issued under the water rights that are sought to be changed, there are no water rights to support the change applications. No ruling is made on the merits of the protest.

Respectfully submitted,



HUGH RICCI, P.E.
State Engineer

HR/SJT/hf

Dated this 9th day of

May, 2001.