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

IN THE MATTER OF APPLICATIONS 66555, 66556 AND 66557 FILED TO CHANGE THE MANNER AND PLACE OF USE OF WATER PREVIOUSLY APPROPRIATED FROM AN UNDERGROUND SOURCE WITHIN THE DODGE FLAT HYDROGRAPHIC BASIN (082), WASHOE COUNTY, NEVADA

RULING

5079

GENERAL

I.

Application 66555 was filed on July 13, 2000, by Nevada Land and Resource Co., LLC (NLRC) to change the manner and place of use of 4.0 cubic feet per second (cfs) of water previously appropriated under Permit 46908 from the underground waters of the Dodge Flat ground-water basin, Washoe County, Nevada, for industrial power generating purposes within the NW¼, the NE¼ and the SE¼ of Section 25, T.21N., R.23E., M.D.B.&M.[1] The proposed point of diversion is described as being located within the SW¼ SW¼ of Section 19, T.21N., R.24E., M.D.B.&M. The existing manner of use is for mining, milling and domestic purposes.

II.

Application 66556 was filed on July 13, 2000, by NLRC to change the manner and place of use of 4.0 cfs of water previously appropriated under Permit 57310 from the underground waters of the Dodge Flat ground-water basin, Washoe County, Nevada, for industrial power generating purposes within the NW¼, the NE¼ and the SE¼ of Section 25, T.21N., R.23E., M.D.B.&M.[2] The proposed point of diversion is described as being located within the NE¼ SE¼ of Section 24, T.21N., R.23E., M.D.B.&M. The existing manner of use is for mining, milling and domestic purposes.

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[1] File No. 66555, official records in the office of the State Engineer. Exhibit No. 2, public administrative hearing before the State Engineer, June 19-21, 2001, official records in the office of the State Engineer. (Hereinafter exhibits will be identified solely by the exhibit number.)

[2] File No. 66556, official records in the office of the State Engineer. Exhibit No. 3.

III.

Application 66557 was filed on July 13, 2000, by NLRC to change the manner and place of use of 4.0 cfs of water previously appropriated under Permit 52763 from the underground waters of the Dodge Flat ground-water basin, Washoe County, Nevada, for industrial power generating purposes within the NW¼, the NE¼ and the SE¼ of Section 25, T.21N., R.23E., M.D.B.&M.[3] The proposed point of diversion is described as being located within the NE¼ NE¼ of Section 25, T.21N., R.23E., M.D.B.&M. The existing manner of use is for mining, milling and domestic purposes.

IV.

Permits 46908, 52763 and 57310 were issued for a total annual consumptive use of 943.6 million gallons per year.[4]

V.

Applications 66555, 66556 and 66557 were timely protested by Washoe County on the grounds that: the applications represent a change of a temporary water right to a permanent one thereby mining ground water and violating the Washoe County Development Code; the use of water as applied for may have an adverse impact on the County water systems at Stampmill Estates and Wadsworth; the proposed applications may adversely impact the efforts on the lower Truckee River to obtain water or water rights for instream/water quality purposes; and, depletion of Truckee River flows may result in an Endangered Species Act Jeopardy Opinion.[5]

VI.

Applications 66555, 66556 and 66557 were timely protested by the Pyramid Lake Paiute Tribe of Indians on the grounds that: the applications would withdraw water from the Truckee River and

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[3] File No. 66557, official records in the office of the State Engineer. Exhibit No. 4.

[4] File Nos. 46908, 52763 and 57310, official records in the office of the State Engineer.

[5] Exhibit No. 6.

conflict with water rights of the Tribe under Claims No. 1 and 2 of the Orr Ditch Decree and other water rights of the Tribe; the applications request a change from a temporary use to a permanent use; the water rights being sought to be changed have never been put to beneficial use demonstrating a lack of diligence; the applications will intercept regional ground-water recharge and reduce surface-water flows in the Truckee River; water quality in the Truckee River will be diminished; regional ground-water levels will be adversely affected; ground-water quality will be adversely affected; the changes will interfere with the conservation or recovery of the endangered cui-ui and threatened Lahontan cutthroat trout; the applications will adversely affect the recreational value of Pyramid Lake; the applications will interfere with the purposes for which the Pyramid Lake Indian Reservation was established; and adversely affect the interests of the Tribe.[6]

VII.

Applications 66555, 66556 and 66557 were timely protested by the Town of Fernley on the grounds that they could have a potential adverse impact on a proposed regional water system source of supply (ground water) in the Fernley/Wadsworth area.

VIII.

Application 66557 was timely protested by Northern Nevada Placer Resources, Inc. on the grounds that it appreciates the need for electricity, but they "do not appreciate the way in which Duke Energy (through NLRC) is maneuvering its way through the channels by shortcutting their way to operation. Especially when this way can destroy or definitely set-back a part of Nevada so very dear to all of us, the success of the Olinghouse mining district and the gainful employment by large numbers of local residents. Although gold mining is taking a beating at present, the license plates that

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[6] Exhibit No. 7.

say "100 years of vision" rings so true for the forefathers and protectors of this state."[7]

IX.

After all parties of interest were duly noticed by certified mail, a public administrative hearing was held on June 19-21, 2001, before the State Engineer at Carson City, Nevada.[8]

FINDINGS OF FACT

I.

In State Engineer's Ruling No. 4656,[9] it was provided that the magnitude of the Dodge Flat ground-water basin's ground-water resource can be determined by an evaluation of the ground-water basin's recharge and discharge components. Sources of ground-water recharge which contribute to the amount of ground water which is available for appropriation consist of precipitation, subsurface inflow of ground water from adjacent basins, infiltration of water from surface-water sources and return flows generated from man-developed activities. Under developed conditions, ground water discharges from the Dodge Flat ground-water basin by evaporation, outflow, transpiration, and pumpage from domestic and permitted wells.

State Engineer's Ruling No. 4656, further provided that the perennial yield of a hydrologic basin is the maximum amount of water of usable chemical quality that can be consumed economically each year for an indefinite period of time. Perennial yield cannot exceed the natural replenishment to an area indefinitely, and ultimately is limited to the maximum amount of natural recharge that can be salvaged for beneficial use. If the perennial yield is continually exceeded, ground-water levels will decline until the ground-water reservoir is depleted. Withdrawals of ground water in

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[7] Exhibit No. 9.

[8] Transcript, public administrative hearing before the State Engineer, June 19-21, 2001 (hereinafter "Transcript").

[9] Exhibit No. 58.

excess of the perennial yield contribute to adverse conditions such as water quality degradation, storage depletion, diminishing yield of wells, increase in cost due to increase in pumping lifts, land subsidence and possible reversal of ground-water gradients, which could result in significant changes in the recharge-discharge relationship.[10]

The United States Geological survey estimates that the perennial yield of the Dodge Flat ground-water basin is approximately 2,100 acre-feet.[11] This 2,100 acre-feet is comprised of 1,400 acre-feet of recharge and 700 acre-feet of inflow from the Tracy Segment hydrographic area.[12] Witnesses were presented at this hearing to either concur with or challenge the perennial yield numbers.

A witness for Washoe County was presented to concur with estimates of recharge to the Dodge Flat area off the Pah Rah Range of 1,250 to 1,400 acre-feet and 700 acre-feet of ground water movement beneath the Truckee River for the total of 2,100 acre-feet annual perennial yield of the Dodge Flat ground-water basin.[13] The witness further concurred, given the uncertainties of techniques, that actual recharge could range from a minimum of 1,400 acre-feet to a maximum of 2,000 acre-feet annually.[14] The witness discussed 700 acre-feet of recharge off the Virginia Range and 9,000 acre-feet of irrigation return flow that discharges to the Truckee River

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[10] State Engineer's Office, Water for Nevada, State of Nevada Planning Report No. 3, p. 13, Oct. 1971.

[11] Nowlin, Jon, Groundwater Quality in Nevada - A Proposed Monitoring Program, Open File Report 78-768, U.S. Geological Survey, p. 195.

[12] State Engineer's Office, Water for Nevada, State of Nevada Planning Report No. 3, p. 44, Oct. 1971.

[13] Transcript, pp. 72-74, 90-103.

[14] Transcript, pp. 72-74, 90-92.

from the Fernley farming area,[15] but retained his ultimate opinion that the recharge to the ground-water basin is in the range of 1,400 to 2,100 acre-feet.[16]

A witness for the Town of Fernley concurred with a recharge number of 1,400 to 2,000 acre-feet annually.[17]

Witnesses for the PLPT presented testimony and evidence in support of an argument that the State Engineer should not consider recharge to the whole ground-water basin in the determination of the quantity of water available under these change applications, but rather should consider only that recharge available in the subbasin,[18] and that the surface-water and ground-water resources should be considered together in terms of priority of appropriation, because part of the ground-water recharge and all of the subsurface flow under the Truckee River should be considered as part of the appropriated flows of the Truckee River.[19]

These witnesses provided testimony that if the applications are granted as filed, there could be potential large drawdowns of water levels in the Dodge Flat and Wadsworth area eventually resulting in stream depletion of the Truckee River if the water levels fall below the streambed.[20] A witness testified that only 37% of a recharge figure of 1,400 acre-feet annually (approximately 500 acre-feet) should be considered as available for use from these wells, because only 37% of the recharge to the ground-water basin is available from 3 subdrainage basins contributing to the recharge

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[15] Transcript, p. 103.

[16] Transcript, p. 106.

[17] Transcript, p. 121.

[18] Transcript, pp. 210-311.

[19] See generally, testimony of Peter Pyle and Ali Sahroody; Transcript, pp. 182-385; Exhibit Nos. 20 and 21.

[20] Transcript, pp. 183-186.

available for these wells.[21] Further, that the 700 acre-feet of subsurface flow under the Truckee River should be considered as part of the river flows appropriated and not as part of the ground-water basin's water available for appropriation.

The State Engineer finds that in Nevada the ground-water resources have been managed on a perennial yield basis of the entire hydrographic basin. Each ground-water basin in Nevada was defined and a perennial yield figure calculated based on a recharge/discharge relationship, which keeps the basin in balance. The water that is not calculated as the water contributing to recharge of the ground-water system is accounted for in the amounts available for appropriation from surface-water sources. There is no logical reason to deviate from the management scheme now in place and accept the PLPT's proposal that the ground-water basin should be managed drainage by drainage. The State Engineer finds that the ground-water discharge to the Truckee River should not be counted as part of the PLPT's surface-water rights in the Truckee River whether established under Claims No. 1 and 2 of the Orr Ditch Decree or appropriated pursuant to Permits 48061 and 48494 ("the unappropriated water applications") issued by the State Engineer, since this ground-water discharge was determined to be utilized as part of the ground-water system by previous studies in the basin.

The State Engineer further finds there is nothing in the Orr Ditch Decree that indicates possible ground-water discharge to the Truckee River was even contemplated by the decree court as a part of the water of the river. The State Engineer finds the water requested for appropriation under these applications is not part of what was considered the unappropriated water of Truckee River granted to the PLPT in State Engineer's Ruling No. 4683.[22] The water under consideration in that ruling is the most junior water right on the river in terms of priority, and the right can only be

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[21] Transcript, pp. 268-269; Exhibit No. 29.

[22] Exhibit No. 10.

exercised in those years where there is high flow in the river in excess of senior rights (flood flows).

The State Engineer finds to instigate a management technique such as that suggested by the PLPT for the ground-water basins of Nevada is impractical, overly burdensome and unnecessary because of how the perennial yields are calculated. In addition, the water law provides for the appropriation of ground water. Quantifying the amount available using a perennial yield analysis for the entire ground-water basin is a reasonable tool for determination of the amount of water available for appropriation and has been the method utilized to date.

The State Engineer finds there are not sufficient reasons to deviate from using the United States Geological Survey's estimate that the perennial yield of the Dodge Flat ground-water basin is approximately 2,100 acre-feet.[23]

II.

The committed ground-water resource in the form of permits and certificates issued by the State Engineer's office to appropriate underground water from the Dodge Flat ground-water basin currently exceeds 5115.00 acre-feet annually.[24]

The State Engineer finds that only 672.00 acre-feet of the resource of the Dodge Flat ground-water basin has been committed to permanent uses out of the 2,100 acre-feet perennial yield of the ground-water basin. The remaining water resources are committed to temporary uses under mining and milling permits. The mining and milling permits requested to be changed under Applications 66555, 66556 and 66557 are the most senior permits in the groundwater basin for mining and milling purposes.

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[23] Nowlin, Jon, Groundwater Quality in Nevada - A Proposed Monitoring Program, Open File Report 78-768, U.S. Geological Survey, p. 195.

[24] Transcript, pp. 161-164; Exhibit No. 13; Hydrographic Basin Summary, Water Rights Database, August 31, 2001, official records in the office of the State Engineer.

III.

Applications 66555, 66556 and 66557 seek to change the manner of use of Permits 46908, 57310 and 52763, respectively. Permits 46908, 57310 and 52763 were issued to provide underground water for a precious metals mining and milling project located within the Olinghouse Mining District.

A permit term under which Permits 46908 and 52763 and Permit 45042, which was changed by Permits 46910 and 57310, were issued provides:

> The manner of use of water under this permit is by nature of its activity a temporary use and any application to change the manner of use granted under this permit will be subject to additional determination and evaluation with respect to the permanent effects on existing rights and resources within the groundwater basin.[25]

Given the above-referenced permit term, the State Engineer finds that Applications 66555, 66556 and 66557 must be reviewed to determine their potential effects on existing water rights and to determine the availability of water for the Dodge Flat ground-water basin available to be changed from a temporary use to a permanent use.

IV.

Duke Energy North America ("Duke") filed a written response to the protest issue alleging that these change applications request a change of a use from one that is temporary to one that is permanent. In that response, Duke "declares as a matter of public record that the proposed use of water under the Change Applications is indeed a temporary use and not a permanent use."[26]

> It is the position of Duke that the contemplated power-generation facilities utilizing natural gas fueled combined cycle operations is a power-generating facility with an economic life and equipment life range between 30 to 50 years. Based on that analysis, Duke is prepared to

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[25] Files Nos. 45042, 46908, 52763 and 57310, official records in the office of the State Engineer.

[26] Exhibit No. 71.

> stipulate to the State Engineer and for the record that the contemplated use of the Change Applications is temporary and is estimated to be approximately 35 years. If it is determined by the State Engineer and as a result of a monitoring plan to be administered for the above Change Applications that it would be necessary to terminate the temporary use of this water after 35 years of use, Duke will agree to such conditions which would be imposed by the Office of the State Engineer including reduction and/or termination of the water rights.[27]

Testimony provided by a witness for the PLPT indicates the belief that the use of water by either the Tribe or anyone else for the purpose enunciated under these applications is considered a permanent use of water.[28] Other testimony presented, by a representative of a power company the PLPT is working with for the development of its own power plant project in the Dodge Flat area, indicated that potential sites for power plants around the country are limited and the market is further limited from a transmission standpoint, particularly as to the alternating current system. Therefore, any plant that is located on that alternating current system, such as the power plant under consideration by Duke, would be beneficial to the plant owner for a long period of time, and once that plant was in operation it would certainly operate past 35 years.[29]

Testimony provided by a representative for Duke indicated that if other economically viable water sources become available to the project, Duke would agree to reduce or terminate the use of water under the rights applied for under these applications.[30]

The State Engineer finds on the one hand Duke alleges the use is temporary, but then indicates that it would only agree to terminate the "temporary use" if a monitoring plan indicates such

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[27] Ibid.

[28] Transcript, pp. 337, 374-378.

[29] Transcript, pp. 635-637.

[30] Transcript, pp. 477-479, 488-492, 511.

to be necessary after 35 years of use thereby indicating a much longer contemplated use. The State Engineer finds that use of water for 35 years by a power-generating facility is not a temporary use of water.

The State Engineer finds that currently an imbalance exists between the perennial yield of the Dodge Flat ground-water basin and its committed ground-water resource.[31] The State Engineer finds that the temporary nature of these mining and milling permits makes them unsuitable for changes to a permanent manner of use such as a power-generating facility without further restrictions on the quantity of water that can be used in order to bring the use more in line with the perennial yield of the ground-water basin.

V.

Duke addressed mitigation potential by testifying that it has an option to acquire what is called the Cowles water right Permits 61931 and 62584,[32] and by pursuing that option it could either relinquish or terminate those water rights upon operation of this facility. Permit 61931 was granted pursuant to a change application filed on Permit 46997, and has a maximum duty of 224.04 afa.[33] Permit 62584 has a maximum duty of 1,223.96 afa.[34] These permits were also issued for the temporary purposes of milling and mining.

Since the Cowles' rights were also issued under the temporary terms of mining and milling rights, they are not considered as part of the permanent use of the ground-water resource and will be discounted from the analysis of permanent ground-water rights in

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[31] Exhibit No. 58. State Engineer's Ruling No. 4656, dated August 13, 1998, official records in the office of the State Engineer.

[32] Transcript, pp. 483-484.

[33] File No. 61931, official records in the office of the State Engineer.

[34] File No. 62584, official records in the office of the State Engineer.

the basin. Deducting the 672.00 acre-feet committed in water rights from the 2,100 acre-feet perennial yield of the basin leaves a difference in 1,428.00 acre-feet annually available from the perennial yield on a permanent basis.

VI.

The State Engineer finds that the protest filed by Northern Nevada Placer Resources, Inc. provides no legitimate grounds that need to be addressed.

VII.

The Town of Fernley claimed that the applications could have a potential adverse impact on a proposed regional water system source of supply (ground water) in the Fernley/Wadsworth area.[35] Testimony indicated that a regional water system is still in the exploratory stages.[36] The State Engineer finds that Nevada is a prior appropriation state and contemplated applications to be filed in the future are not part of the consideration of whether applications or change applications conflict with existing water rights or threaten to prove detrimental to the public interest.

VIII.

Washoe County protested the applications on the ground that the water rights as applied for may have an adverse impact on County owned water systems at Stampmill Estates and Wadsworth. The County provided testimony that in 10 years the pumping as contemplated under these applications would draw down the water level at the Gregory Street well between 23 and 38 feet, but further testimony provided a tenuous opinion that if water levels within the Wadsworth area decline, the Gregory Street well will be affected,[37] and the County's witness indicated that he could not form an opinion whether the proposed pumping would impact the

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[35] See generally, testimony of George Ball, Transcript, pp. 110- 153; Exhibit No. 64.

[36] Transcript, pp. 381-382.

[37] Transcript, pp. 75-107.

Stampmill Estates wells.[38] The State Engineer finds that Washoe County did not provide substantial evidence that the granting of these applications would conflict with its existing rights. The State Engineer finds that by reducing the quantity of water requested under the change applications any conflict with existing rights on the Washoe County owned water systems at Wadsworth should be minimized to reasonable levels or eliminated.

IX.

The PLPT claimed that the applications would withdraw water from the Truckee River and conflict with the water rights of the Tribe under Claims No. 1 and 2 of the Orr Ditch Decree and other water rights of the Tribe.[39] The PLPT's own witness admitted, however, that the Tribe's water rights under Claims No. 1 and 2 would not be affected if the change applications were approved.[40] The PLPT provided testimony that the base flow of the Truckee River is supported by ground-water recharge that occurs from the edge of the basin, and it is that ground-water recharge that sustains the stream during dry periods.[41] The PLPT advances the position that the 700 acre-feet of subsurface flow under the Truckee River is more a part of the river than the ground water, and that capture of ground water in excess of approximately 500 acre-feet (37% of 1,400 afa available recharge)[42] will capture water that belongs to the river thereby interfering with its existing water rights, and that most of the recharge captured under these applications will deplete the flow of the river.[43] The PLPT advances an argument that eventually the recharge, which is the base flow of the river and

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[38] Transcript, p. 107.

[39] Transcript, pp. 342-345.

[40] Transcript, pp. 359-360.

[41] Transcript, pp. 210-215; Exhibit Nos. 20, 21, 23, 24, 25.

[42] Transcript, pp. 221-239.

[43] Transcript, p. 301.

maintains stream flow during dry periods, will be cut off and water will be taken from the stream.[44] Its witness testified that the ground-water development of approximately 3,000 afa as proposed by these applications will deplete the Truckee River by 3 to 3½ cfs over the life of the project.[45]

The State Engineer finds that Nevada has never managed ground-water basins where the perennial yield available is only that water actually recharged on a smaller portion of the hydrographic basin. The point of assessing a perennial yield number is management of the system as a whole.

The State Engineer finds the subsurface flow under the Truckee River is not part of the water decreed to the Tribe pursuant to the Orr Ditch Decree, but is part of those waters counted as the perennial yield of the ground-water system. While many stream systems have some hydrologic connection to ground water, based on the very fact that it starts as water falling on the surface of the land, in Nevada, the underground water and surface water have been managed separately under different statutory schemes for more than half a century. To change the policy set forth in that statutory scheme at this late date would upset the entire history of Nevada water law and would not be prudent. The State Engineer finds that the water rights under Claims No. 1 and 2, which are the most senior water rights on the Truckee River system, are to be satisfied from the flows of the Truckee River.

X.

The PLPT provided evidence as to water rights it obtained through a land exchange with Mary DePaoli,[46] water rights it holds

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[44] See generally, testimony of Peter Pyle; Transcript, pp. 210-304.

[45] Transcript, pp. 185-186.

[46] Transcript, pp. 316-317.

to the unappropriated water of the Truckee River,[47] as to ground water it uses in the Dodge Flat area,[48] and as to future growth anticipated for the Dodge Flat-Wadsworth area.[49] The State Engineer finds the water requested for appropriation under these applications is not part of what was considered the unappropriated water of the Truckee River granted to the PLPT in the State Engineer's Ruling No. 4683. The water under consideration in that ruling is the most junior water right on the river in terms of priority, and the right can only be exercised in those years where there is high flow in the river in excess of senior rights (flood flows). The State Engineer finds the restriction as to pumping quantities that are being placed on these change applications will protect those state appropriative rights acquired pursuant to the land exchange. The State Engineer finds the State of Nevada does not subscribe to the federal implied reserved right to ground water theory; therefore, use of ground water on the reservation is without the benefit of a permit. The State Engineer finds that, just as with the Town of Fernley, anticipated projects for which applications are not on file cannot be considered as relevant to the decision making on these applications.

XI.

A protestant alleged that the applications may adversely impact the efforts on the lower Truckee River to obtain water or water rights for instream/water quality purposes and impact water quality in the Truckee River and ground-water quality could be adversely affected. Testimony was provided that if the applications are granted in the quantities for which they are filed they would eventually deplete flows in the Truckee River thereby

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[47] Transcript, pp. 323-336; Exhibit Nos. 10, 11 and 30.

[48] Transcript, pp. 191-195; Exhibit Nos. 15-17.

[49] Transcript, pp. 349-353.

affecting water quality in the lower river.[50]

The State Engineer finds that whether or not the granting of these change applications may or may not impact the efforts to obtain water rights for instream/water quality purposes on the lower Truckee River is not a relevant factor he needs to consider as to the granting of these applications. The difficulty of obtaining those rights may go to the consideration of whether the purchase of water rights for mitigation is plausible. The State Engineer finds the reduction in the amount authorized for appropriation under these change applications should protect ground-water quality, and that if there is any impact on the Truckee River it will be unmeasurable.

XII.

Protests allege that depletion of Truckee River flow may result in an Endangered Species Act jeopardy opinion and could interfere with the conservation or recovery of the endangered cui-ui and threatened Lahontan cutthroat trout, and adversely affect the recreational value of Pyramid Lake, interfere with the purposes for which the Pyramid Lake Indian Reservation was established and adversely affect the interests of the Tribe. Testimony was provided as to the cui-ui and Lahontan cutthroat trout, which indicates that depletion in flows in the river could harm both fish.[51] A witness for the PLPT indicated that the use of more than 500 afa is water that would have gone to the river and is 100% reduction in river flow;[52] and therefore, in time would reduce the flow in the river. However, the testimony provided by the fisheries witness was not at all conclusive as to whether it would

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[50] Transcript, pp. 315, 329-334, 338-341, 392-401; Exhibit No. 32.

[51] See generally, testimony of Chester Buchanan, Transcript, pp. 386-413.

[52] Transcript, pp. 228-229.

be biologically significant.[53]

The State Engineer finds, particularly in light of the decision to reduce the amount authorized for use under these change applications, that there is not substantial evidence to support the claims of the threat of an Endangered Species Act jeopardy opinion, interference with the conservation or recovery of the endangered cui-ui and threatened Lahontan cutthroat trout, adverse affects to the recreational value of Pyramid Lake, interference with the purposes for which the Pyramid Lake Indian Reservation was established, or adverse affects to the interests of the Tribe.

XIII.

Testimony was presented which indicates that the amount of water sought to be changed under Application 66556 is more than is available under the base permitted water right sought to be changed.[54] Application 66556 requested the change of 4.0 cfs, not to exceed 943.6 million gallons annually (mga), of water previously appropriated under Permit 57310. Permit 57310 was granted in the amount of 0.864 cfs, not to exceed 203.758 mga.

Testimony and evidence presented indicates that Permit 42609, which was changed by Permit 45042, which was changed by Permit 46910 were all granted for 4.0 cfs, not to exceed 943.6 mga. However, a Proof of Beneficial Use was filed under Permit 46910 for 0.864 cfs and 203.758 mga. Therefore, the only amount availble to be changed by Permit 57310 was that amount. The State Engineer finds that when Permit 57310 was issued a permit term was imposed that totally abrogated Permit 46910. The State Engineer finds that Application 66556 cannot be considered for an amount greater than available under the water right sought to be changed.

XIV.

The PLPT provided testimony and evidence to support its argument that the water rights being sought to be changed have

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[53] Transcript, pp. 407, 435.

[54] Transcript, p. 167; Exhibit No. 33.

never been put to beneficial use thereby demonstrating a lack of diligence.[55] Nevada Revised Statute § 533.345(1) provides that an application can be filed to change the place of diversion, manner or place of use of water already appropriated. Water already appropriated, in reference to a change application, refers to water represented by a water right permit or certificate in good standing.[56] The water rights requested for change here are in good standing under extensions of time with the limitation that due to their temporary nature they require further scrutiny before they can be considered for a permanent use such as a power plant.

The State Engineer finds that diligence arguments raised by the PLPT are ones that can be addressed upon the filing of applications for extension of time, but are not relevant to the consideration of change applications where the rights being sought to be changed are in good standing.

XV.

Duke Energy, as the real party in interest who wants to put water to beneficial use under these applications, indicated that it would plan to mitigate any effects its pumping had on the Truckee River. However, Duke did not provide any evidence as to surface-water rights it owns that could be used to mitigate such effects, and testified that the alternative proposal for water cooling using Truckee River water was deemed not viable based on the various settlements and agreements that exist to date with regards to the use of Truckee River water.[57] Furthermore, it has been seen through the efforts undertaken in reference to the Water Quality Settlement[58] only 2,000 acre-feet of water has been acquired, which is far short of the intended goal. Acquisition of water rights on

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[55] Exhibit Nos. 34-52; testimony of Allan Richards.

[56] NRS § 533.324.

[57] Transcript, pp. 521-522.

[58] Exhibit No. 31; Transcript, pp. 329-334, 450-452.

the Truckee River for mitigation purposes has been slow and difficult[59] and many different entities are seeking water rights for mitigation purposes.

Duke further addressed mitigation potential by testifying that it has an option to acquire what is called the Cowles water right Permits 61931 and 62584,[60] and by pursuing that option it could either relinquish or terminate those water rights upon operation of this facility. Permit 61931 was granted pursuant to a change application filed on Permit 46887, and has a maximum duty of 224.04 afa. Permit 62584 has a maximum duty of 1,223.96 afa. These permits were also issued for the purposes of milling and mining and with the same permit term regarding the temporary nature of the water rights.

The State Engineer finds that the purchase of significant quantities of surface-water rights on the Truckee River with senior priorities, which could be used to keep the river flowing in times of drought, is not a task readily accomplished. The State Engineer finds the possibility of future purchases of river water by Duke Energy to support possible impacts under these applications as filed is not a viable mitigation base on which to grant the full amounts requested. The State Engineer finds that the possible future option on the purchase of the Cowles' water rights and relinquishment of those rights is too speculative at this point for consideration in this ruling and would not change the calculations of water available under these change applications even if they were acquired by Duke as those water rights are also temporary appropriations.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and

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[59] Transcript, p. 451.

[60] Transcript, pp. 483-484.

subject matter of this action and determination.[61]

II.

The State Engineer is prohibited by law from granting a permit under a change application to appropriate the public waters where:[62]

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 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 the water rights sought to be changed were in good standing and that the protest argument as to lack of diligence is without merit during the consideration of these change applications.

IV.

The State Engineer concludes that Nevada water law provides for the management of surface water and ground water as distinct sources. The State Engineer concludes that to change that scheme of water management at this point in time would conflict with existing rights and threaten to prove detrimental to the public interest. The State Engineer also concludes that since he has found the requested use under the change Applications 66555, 66556 and 66557 to be permanent in nature, the permit terms required re-evaluation of the amounts appropriated. This re-evaluation is necessary in order to determine the availability of water for permanent appropriation, conflict with existing rights and if the changes threaten to prove detrimental to the public interest. The State Engineer concludes that the water available for appropriation on a permanent basis must not allow the perennial yield of the

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[61] NRS chapters 533 and 534.

[62] NRS § 533.370(3).

Dodge Flat ground-water basin to be exceeded with long-term permits. The State Engineer concludes that by taking the perennial yield of 2,100 acre-feet and deducting the 672.00 leaves a difference of 1,428.00 acre-feet annually available from the perennial yield on a permanent basis under change Applications 66555, 66556 and 66557.

V.

The State Engineer concludes the grounds of the protests filed by Northern Nevada Placer Resources, Inc. and the Town of Fernley are without merit.

VI.

The State Engineer concludes by limiting the ground water allowed to be utilized under these permits to the amount available for permanent rights from the perennial yield of the ground-water basin, the use will not conflict with existing rights of the PLPT or Washoe County.

VII.

The State Engineer concludes by limiting the ground water allowed to be utilized under these permits to the amount available from the perennial yield of the ground-water basin, the use will not be detrimental to the water quality of the ground-water basin or the surface-water source and will not present risk of injury to the endangered cui-ui or threatened Lahontan cutthroat trout.

RULING

The protests to change Applications 66555, 66556 and 66557 are hereby overruled in part and granted in part. The amount of water allowed for appropriation under Applications 66555, 66556 and 66557 is limited to a total combined duty of 1,428.00 acre-feet annually and the requested transfers are subject to:

1. the payment of statutory permit fees;
2. existing water rights.

Respectfully submitted,

HUGH RICCI, P.E.
State Engineer

HR/SJT

Dated this 27th day of September, 2001.