

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

IN THE MATTER OF APPLICATION)
67163 FILED TO APPROPRIATE)
WASTEWATER FROM WITHIN THE)
AMARGOSA DESERT HYDROGRAPHIC)
BASIN (230), NYE COUNTY,)
NEVADA.)

RULING

5311

GENERAL

I.

Application 67163 was filed on January 25, 2001, by Rockview Farms, Inc., to appropriate 2.6 cubic feet per second, not to exceed 800 acre-feet annually, of waste water generated by the outfall from the Ponderosa Dairy operation. The proposed manner and place of use is described on the application as for irrigation purposes within 1,160.0 acres of land located within portions of Sections 9, 10 and 15, all within T.17S., R.49E., M.D.B.&M. The proposed point of diversion is described as being within the NE¼ SE¼ of said Section 9. The remarks section of the application states that the purpose of the application is to dispose of the effluent water produced from the appropriation of water under Permits 43524, 59729, 61080, 62115, 62116, 64766, 64767, 65144, 65145, 66041 and 66042. This section of the application form also states that it was filed in accordance with State Engineer's Ruling Number 4836.¹

II.

Application 67163 was timely protested by the United States Department of the Interior, National Park Service (NPS) on the condition that its protest would be withdrawn if the applicant agreed to retire sufficient land from irrigation in the Amargosa Desert Hydrographic Basin to offset the consumptive use of ground

¹ Files No. 67163, official records in the Office of the State Engineer.

water for irrigation pursuant to this application. A portion of this protest cites issues that are common to those brought forth in previous protests to water applications, which requested new appropriations of underground water from the Amargosa Desert Hydrographic Basin. This section of the NPS protest is found under Attachment I, which is made part of this ruling. The remainder of the NPS protest is centered on contentions that are specific to the appropriation of water proposed under the subject application. These specific issues can be summarized as follows:¹

- 1) Both the point of diversion and place of use described under Application 67163 are located within the Amargosa Desert Hydrographic Basin, which was designated by the State Engineer in 1979, pursuant to NRS chapter 534.
- 2) The State Engineer has since 1982, denied water right applications, which requested new appropriations of underground water for irrigation purposes within the Amargosa Desert Hydrographic Basin. These denials were based upon the conclusion that additional withdrawals and consumption of underground water for irrigation would conflict with prior existing rights and would prove detrimental to the public interest. Also brought forth was the issue that the consumptive use of ground water to irrigate additional acreage, is not considered a preferred use of the basins limited groundwater resources.
- 3) In accordance with State Engineer's Ruling No. 4836, any use of wastewater for irrigation purposes must be obtained through the proper water right permit issued by the State Engineer.
- 4) The use of wastewater for irrigation purposes would represent an additional consumptive use of water for a nonpreferred use. Use of this water would circumvent the State Engineer's designation of the basin by allowing

additional irrigation of land and consumptive use. The NPS has concerns that this represents an expansion of land. The State Engineer should only approve this application if it can be demonstrated that the proposed use serves a need to treat water for environmental protection and not growing forage.

- 5) NPS would agree to withdraw this protest if it can be shown that the applicant will retire other irrigated lands to compensate for the increased irrigation sought by this application.

III.

The water requested for appropriation under Application 67163 has been referred to as runoff water produced by the cleaning of barns, cooling misters, the general dairy operation and for the purposes of this ruling, this water will be termed "wastewater".

FINDINGS OF FACT

I.

The State Engineer when considering a protest may, in his discretion, hold hearings and require the filing of such evidence, as he may deem necessary to gain a full understanding of the rights involved.² In the case of the subject application, the State Engineer finds that there is sufficient information contained within the records of the Office of the State Engineer to proceed in an evaluation of Application 67163 and its protest, and that a hearing in this matter is not required.

II.

Application 67163 represents the applicant's second attempt to gain a right to place the wastewater produced by its dairy to a beneficial use. A previous attempt was made with the filing of Applications 64766 and 64767 on January 13, 1999. These earlier applications proposed a commercial manner of use, which would generate wastewater, which in turn would be used to irrigate

² NRS § 533.365.

nearby fields.³ This proposal was rejected by the State Engineer with the issuance of Ruling No. 4836, which limited the permits derived from Applications 64766 and 64767, to a primary commercial use. The State Engineer's ruling also contained a finding of fact, which required the applicant to file a separate water right application to secure the use of its wastewater for irrigation purposes.⁴ This requirement was met by the applicant with the filing of Application 67163. The State Engineer finds that the applicant is following the correct procedure for acquiring a right to use the wastewater generated by its dairy for irrigation purposes.

III.

Application 67163 does not request a new appropriation of water from the Amargosa Desert Hydrographic Basin. Its appropriation would come from water, which has been permitted for appropriation under a set of existing commercial water right permits that service the dairy. The amount of underground water which is permitted for appropriation under these rights is limited to their total combined duty. The fact that wastewater is generated and ultimately captured for use would not raise the combined duty to a higher level. The State Engineer finds that the approval of Application 67163 would not create an additional appropriation of water from the subject groundwater basin.

IV.

The approval of Application 67163 would not increase the committed groundwater resource of the Amargosa Desert Hydrographic Basin. No additional pumpage will result from its approval, and although additional irrigated acreage may be created, the utilization of wastewater may have a positive effect upon the

³ File Nos. 64766 and 64767, official records in the Office of the State Engineer.

⁴ State Engineer's Ruling No. 4836, dated January 11, 2000, official records in the Office of the State Engineer.

groundwater basin, since some degree of secondary recharge may be achieved through the irrigation.

V.

The majority of the Amargosa Desert Hydrographic Basin has been designated as a basin in need of additional regulation by the Office of the State Engineer.³ Under the conditions that exist today, water right applications, which request new appropriations of underground water for irrigation purposes are not being considered for approval. The denial of new appropriations is based upon several issues, which relate to the availability of unappropriated water, existing water rights and the public interest.⁴ The use of wastewater as proposed by the applicant, places to beneficial use a water resource, which until now has been stored in ponds, and subject to evaporation. The value of this source of water is underscored by the Legislative Decalration found within NRS § 533.025, which states that, "it is the policy of the State, to encourage and promote the use of effluent, where it is not contrary to the public health, safety or welfare." The State Engineer finds that the use of wastewater to support the irrigation of the applicant's land represents a higher use of this water than is currently attained and that the reuse of this water, if it meets the criteria set under NRS 533.025 should be encouraged within a groundwater basin where agricultural activities are dependent upon a limited groundwater resource.

VI.

While the Office of the State Engineer no longer permits additional acreage to be irrigated through the approval of new appropriations of underground water, this limitation does not include secondary use of water that has already been removed from the ground under existing water rights. The State Engineer finds

³ State Engineer's Order No. 724, dated May 14, 1979, official records in the Office of the State Engineer.

⁴ State Engineer's Ruling Database, selection criteria, "irrigation, denied, basin 230", official records in the Office of the State Engineer.

that there are no previous orders, rulings or regulations, which would disqualify the reuse of the applicant's wastewater for irrigation purposes.⁵

VII.

The approval of Application 67163 does not give the applicant the right to appropriate water under its prior commercial permits solely to generate water, which could be passed on for irrigation use. The State Engineer finds that the applicant can be required to create and maintain an effective water metering plan to assure that the appropriation of water under Permit 67163 is confined to whatever level of wastewater is generated by the dairy under its commercial permits.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁶

II.

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:⁷

- 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 existing 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 question of unappropriated water is not applicable to this application, since the water sought for appropriation is generated by the applicant's primary commercial use. The State

⁵ Hydrographic Basin Summary, Basin 230, Division of Water Resources database, December 9, 2003, official records in the Office of the State Engineer.

⁶ NRS chapter 533.

⁷ NRS § 533.370(3).

Engineer concludes that there is water available for appropriation as proposed under Application 67136. The State Engineer also concludes that the primary commercial use cannot be perpetuated solely to maintain a secondary irrigation use under Application 67136.

IV.

With the exception of Permits 64766 and 64767, no prior applications have been filed in the Office of the State Engineer, which request appropriations of wastewater from the applicant's commercial operation. The State Engineer concludes that the approval of Application 67163 will not conflict with existing water rights within the Armagosa Desert Hydrographic Basin, including those held and claimed by the federal government.

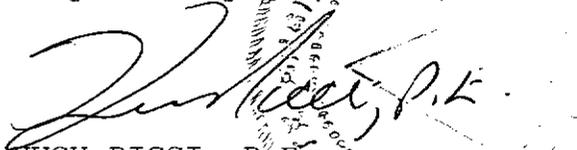
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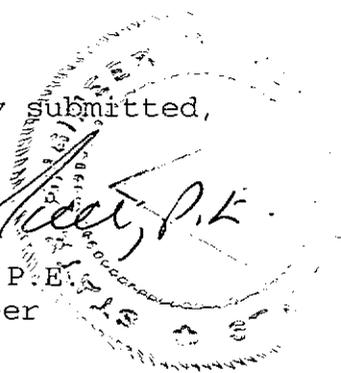
The State Engineer concludes that to transform unused wastewater, which has been previously impounded and subject to evaporation, to a beneficial use under a secondary irrigation use would not threaten to prove detrimental to the public interest.

RULING

The protest to Application 67163 is overruled and Application 67163 is hereby approved subject to existing water rights and the payment of the statutory permit fee.

Respectfully submitted,


HUGH RICCI, P.E.
State Engineer



HR/MDB/jm

Dated this 23rd day

of December, 2003.

ATTACHMENT

I.

I. Death Valley National Monument was created by Presidential Proclamation in 1933 to preserve unusual features of scenic, scientific, and educational interest. The proclamation gave warning to unauthorized persons not to appropriate, injure, destroy, or remove any feature of the monument. Springs and water-related resources are important features.

The national significance of Death Valley and its environs was elevated in October 1994 through enactment of the California Desert Protection Act. The Act acknowledged Death Valley's extraordinary and inestimable value, increased its area, and changed the area's status to that of a National Park. The Act specifically charged the Secretary of the Interior and all other officers of the United States to take all steps necessary to protect the reserved water rights and water resources of the Park, which includes the Devil's Hole detached management unit.

II. The mission of the National Park Service (NPS) may be paraphrased from 16 U.S.C. 1, as conserving scenery, natural and historic objects, and wildlife, and providing for enjoyment of the same in such a manner and by such means as will leave them unimpaired for the enjoyment of future generations. The public interest will not be served if water and water-related resources in the nationally important Death Valley National Park (Death Valley NP) are diminished or impaired as a result of the appropriation proposed by this application.

A. The NPS is entitled to Federal reserved water rights for reserved lands within Death Valley NP. The priority dates for reserved rights are senior to the appropriation sought by this application. These rights have not been judicially quantified.

B. In the eastern part of the Park, Grapevine, Keane Wonder, Nevares, Texas, Travertine and Saratoga Springs provide water for park facilities, domestic use, public campgrounds, resorts, vegetation, wildlife, public enjoyment, scenic value and other related needs. Nevares, Texas, and Travertine Springs collectively discharge about 2,000 gallons

per minute (about 3,200 acre-feet per year) and are critical for domestic and commercial use.

Public visitation to Death Valley NP for 1985 - 1998 was approximately as follows:

| | |
|--------|-----------|
| 1985 - | 601,000 |
| 1986 - | 611,000 |
| 1987 - | 693,000 |
| 1988 - | 721,000 |
| 1989 - | 692,000 |
| 1990 - | 720,000 |
| 1991 - | 775,000 |
| 1992 - | 905,000 |
| 1993 - | 1,037,000 |
| 1994 - | 1,009,000 |
| 1995 - | 1,150,000 |
| 1996 - | 1,234,000 |
| 1997 - | 1,234,000 |
| 1998 - | 1,222,000 |

The Park supplies water for visitors from the above-named springs. For example, in 1995, water from these springs supported approximately 262,000 overnight campers in Death Valley NP campgrounds, 74,500 motel/hotel rooms rented to park visitors, 220 National Park Service employees and their families (at the height of the visitor season), 400 resort employees and a population of 60 Native Americans.

- C. At least three biologically significant springs or spring complexes are located on Death Valley NP lands in proximity to Amargosa Desert. These water sources include Travertine and Nevares Springs (wetlands) and Devils Hole. As a combined unit these water sources provide for at least 9 plant and animal species which are considered endangered, threatened or rare.

Desert bighorn sheep also have historically used Travertine and Nevares Springs as a water source. This animal is relatively rare in the local area, and is critically dependent on a permanent water supply during the summer months.

If approved, the appropriation proposed by this application will increase the consumptive use of ground water in the Amargosa Desert Ground Water Basin. This increase will reduce the flows from springs at Death Valley NP which are discharge areas for regional ground water flow systems. The NPS's

senior appropriative and Federal reserved water rights, water resources, and water-related resource attributes will thus be impaired. Such impacts are not in the public interest.

III. A unique and endangered species of pupfish exists in a pool at Devil's Hole, a detached unit of Death Valley NP in Nevada. Ground water withdrawals near the unit previously caused a decline in the water level of the pool, exposing a rock shelf vital to the spawning of the pupfish (Dudley and Larson, 1976). Subsequently, a decision by the U.S. Supreme Court (later refined by the U.S. District Court) determined that a Federal reserved water right exists at Devil's Hole for the purpose of maintaining a water level sufficient to inundate the shelf on which the pupfish spawn (Cappaert v. United States, 1976). In addition, the Endangered Species Act and its amendments impose obligations on Federal agencies to conserve endangered species such as the Devil's Hole pupfish. The appropriation and diversion proposed by this application will, eventually, cause the water level at Devil's Hole to fall, thereby impairing the senior Federal reserved water right for Devil's Hole. Here, water level data analysis indicates a slow decline.

IV. The proposed appropriation is located within the Amargosa Desert Hydrographic Area which is part of the regional Death Valley flow system which discharges in the Ash Meadows and Death Valley areas (Harrill, et al., 1988, Sheet 1, Figure 5; and Sheet 2). According to Nevada Department of Conservation and Natural Resources (1992), the perennial yield for Amargosa Desert is 24,000 afy. This value is a combined perennial yield. Other basins to which this combined yield is applied are Mercury Valley (225), Rock Valley (226), Fortymile Canyon - Jackass Flats (227A), Fortymile Canyon - Buckboard Mesa (227B), Crater Flat (229), and Amargosa Desert (230) (Nevada Department of Conservation and Natural Resources, 1992). Existing appropriations exceed the combined perennial yield (DOE, 1988, Tables 3-16 and 3-18; and Ruling 3870). Thus, there is no water available for appropriation.

V. In sum, the NPS protests the granting of Application Number 67163 by Rockview Farms, Inc., of Amargosa Valley, State of Nevada, to use ground water for irrigation, on the following grounds:

- A. The application represents an increase in the consumptive use of ground water in the Amargosa Desert Ground Water Basin for irrigation. Such a use is contrary to the State Engineer's designation of the basin and recognition that additional irrigation in the basin is not a preferred use. Therefore, approval of this application is contrary to the public interest.
 - B. The public interest will not be served if water and water-related resources in the nationally important Death Valley NP including Devil's Hole, are diminished or impaired as a result of the appropriation proposed by this application.
 - C. The appropriation proposed by this application will reduce the flows of springs in Death Valley NP which are discharge areas for regional ground water flow systems, thereby impairing senior NPS water rights.
 - D. The appropriation proposed by this application, in combination with existing appropriations, will cause the water level at Devil's Hole to fall, thereby impairing the senior Federal reserved water right for Devil's Hole.
 - E. The proposed appropriation would result in further over-appropriation above the combined perennial yield for the Amargosa Desert area. Since the area's water resources are already overcommitted, there is no water remaining to appropriate.
 - F. The State Engineer has denied previous applications to appropriate water for irrigation in the Amargosa Desert, and thus Application Number 64766 should also be denied.
- VI. The NPS reserves the right to amend this exhibit as more information becomes available.