

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

IN THE MATTER OF APPLICATION )  
70032 FILED TO APPROPRIATE THE )  
PUBLIC WATERS WITHIN THE )  
LAMOILLE VALLEY HYDROGRAPHIC )  
BASIN (045), IN ELKO COUNTY, )  
NEVADA. )

**RULING**

**#5462**

**GENERAL**

**I.**

Application 70032 was filed on May 15, 2003, by Lynn R. and Penny K. Forsberg to appropriate 0.50 cubic feet per second of water described as wastewater from irrigation under Proof 00401 of the Edwards Decree. The proposed place of use is described as a pond located within the SW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 19, T.33N., R.58E., M.D.B.&M. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 19, T.33N., R.58E., M.D.B.&M., with the manner of use described as fire protection.<sup>1</sup>

**II.**

Application 70032 was timely protested by Joseph Michael Presti, Leland W. Krugerud and Paula C. Krugerud on the following grounds:<sup>1</sup>

See Exhibit "A" attached hereto and made a part hereof. Waste water is not subject to appropriation under the statutory procedure relating to the appropriation of waters of watercourses. See Bidleman v. Short, 38 Nev. 467, 470 (1915); Ryan v. Gallio, 52 Nev. 330 (1930); and In re Bassett Creek and Its Tributaries, 62 Nev. 461 (1945).

Attachment A also raised issues of there being no unappropriated water and current practices by the Applicants that demonstrate disregard for state law.

**FINDINGS OF FACT**

**I.**

Nevada Revised Statute (NRS) § 533.365(3) provides that it is within the State Engineer's discretion to determine whether a public administrative hearing is necessary to address the merits of a protest to an application to appropriate the public waters of the

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<sup>1</sup> File No. 70032, official records in the Office of the State Engineer.

State of Nevada. The State Engineer finds that in the case of protested Application 70032 there is sufficient information contained within the records of the Office of the State Engineer to gain a full understanding of the issues and a hearing on this matter is not required.

## II.

On April 5, 2004, Humboldt River Water Commissioner Kirk Owsley conducted an informal field investigation on Application 70032 at the request of the State Engineer. The Commissioner offered an opinion that the application should be denied on the basis that the water source is fully appropriated by decree.

An examination of the proposed source of water shows that the Applicants intend to appropriate wastewater from irrigation under Proof 00401 of the Edwards Decree. The Decree shows the source of water as Lamoille Creek and the land irrigated under Proof 00401 is described as being located within the  $W\frac{1}{2} W\frac{1}{2}$ ,  $S\frac{1}{2} SW\frac{1}{4}$ , and  $E\frac{1}{2} W\frac{1}{2}$  of Section 30, T.33N., R.58E., M.D.B.&M., which is south (upstream) of the Applicants' property. The waters of Lamoille Creek have been adjudicated under the Humboldt River Adjudication, which includes the Bartlett and Edwards Decrees.<sup>2</sup>

The Humboldt River Adjudication settled the relative rights of claimants and appropriators of the waters of the Humboldt River Stream System and its Tributaries. The Sixth Judicial Court of the State of Nevada, in its Findings of Fact, Conclusions of Law and Decree, has determined that the waters of the Humboldt River Stream System are fully appropriated and that in the average year, as shown by the flow in the said stream system, there is no surplus water for irrigation.<sup>3</sup>

In this case, the Applicants are requesting an appropriative right on water draining from an adjacent property during irrigation allowed under Proof 00401. During flood irrigation, it is not uncommon for excess water to drain off an agricultural field. This water is sometimes referred to as wastewater and should not be confused with contaminated or polluted water. Sometimes, this wastewater is collected in drain ditches, returned to the stream system or simply allowed to runoff and either evaporate or infiltrate into the ground.

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<sup>2</sup> In the Matter of the Determination of the Relative Rights of Claimants and Appropriators of the Waters of the Humboldt River Stream System and Tributaries, October 20, 1931 (Bartlett Decree) and Edwards Decree, October 8, 1935, Case No. 2804, Sixth Judicial District Court, State of Nevada.

<sup>3</sup> Bartlett Decree, No. 44, p. 28.

The Nevada Supreme Court has addressed the issue of whether wastewater could be appropriated in the case of Bidleman v. Short, 38 Nev. 467, 150 Pac. 834 (1915) and held that wastewaters are not subject to appropriation so as to establish a permanent right therein. In Ryan v. Gallio, 52 Nev. 330, 344, 345-348, 286 Pac. 963 (1930) and In Re Bassett Creek and Its Tributaries, 62 Nev. 461, 469, 155 Pac. 2d 324 (1945) the Nevada Supreme Court held that wastewater is subject to capture and use, but that it is the limit and extent of the right, and such water is not subject to appropriation under the statutory procedure relating to the appropriation of waters of watercourses.<sup>4</sup>

The State Engineer finds that the waters of the Humboldt River Stream System are fully appropriated by decree. The State Engineer finds that any wastewater that may result from the lawful irrigation of land under the Humboldt River Decree is not subject to further appropriation as requested by Application 70032.

### CONCLUSIONS

#### I.

The State Engineer has jurisdiction over the parties and of the subject matter of this action and determination.<sup>5</sup>

#### II.

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:<sup>6</sup>

- A. there is no unappropriated water at the proposed source;
- B. the proposed use conflicts with existing rights;
- C. the proposed use conflicts with protectible interests in existing domestic wells as set forth in NRS § 533.024; or
- D. the proposed use threatens to prove detrimental to the public interest.

#### III.

The State Engineer concludes that wastewater is not subject to appropriation and there is no further water available for appropriation on this fully appropriated stream system.

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<sup>4</sup> See, State Engineer's Ruling No. 829, January 4, 1966, official records in the Office of the State Engineer.

<sup>5</sup> NRS chapter 533.

<sup>6</sup> NRS § 533.370(4).

IV.

The State Engineer concludes that to approve this application would impair the value of and conflict with existing decreed rights in the Humboldt River System.

**RULING**

The protest to Application 70032 is upheld and the application is hereby denied on the grounds that no water is available for appropriation, the source of water is not subject to appropriation under the statutory procedure for appropriating water, and the approval of said application would conflict with existing decreed water rights and threaten to prove detrimental to the public interest. No ruling is made on the merits of the other grounds of the protest.

Respectfully submitted,



HUGH RICCI, P.E.  
State Engineer

HR/TW/jm

Dated this 1st day of

December, 2004.