

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

IN THE MATTER OF APPLICATIONS 72117)
AND 72118 FILED TO CHANGE THE POINT OF)
DIVERSION, THE PLACE OF USE AND THE)
MANNER OF USE OF A PORTION OF THE)
PUBLIC WATERS OF AN UNDERGROUND SOURCE)
PREVIOUSLY APPROPRIATED UNDER PERMIT)
62322 AND PERMIT 25636, CERTIFICATE)
7696, RESPECTIVELY, WITHIN THE)
AMARGOSA DESERT HYDROGRAPHIC BASIN)
(230), NYE COUNTY, NEVADA.)

RULING
#5610

I.

Application 72117 was filed on January 10, 2005, by Alosi Investment Group, LLC, to change the point of diversion, the place of use and the manner of use of 0.0455 cubic feet per second (cfs), not to exceed 7.0 acre-feet annually (afa), which represents a portion of the underground water previously permitted for appropriation under Permit 62322. The proposed manner and place of use is described as being for commercial purposes within 37.65 acres of land situated within the NW¼ NW¼ of Section 11, T.16S., R.48E., M.D.B.&M. The existing manner and place of use issued under Permit 62322 was for irrigation and domestic purposes upon 1.40 acres of land located within the NE¼ NW¼ SE¼ of Section 5, T.16S., R.49E., M.D.B.&M. If a permit is issued under this application, it would transfer the existing point of diversion, which is described as being within the NW¼ SE¼ of Section 5, T.16S., R.49E., M.D.B.&M. to a new well site located within the NW¼ NW¼ of Section 11, T.16S., R.48E., M.D.B.&M.¹

¹ File No. 72117, official records in the Office of the State Engineer.

II.

Application 72118 was filed on January 10, 2005, by Alosi Investment Group, LLC, to change the point of diversion, the place of use and the manner of use of 0.0458 cfs, not to exceed 7.04 afa, which represents a portion of the underground water previously permitted for appropriation under Permit 25636, Certificate 7696. The proposed manner and place of use is described as being for commercial purposes within 37.65 acres of land situated within the NW¼ NW¼ of Section 11, T.16S., R.48E., M.D.B.&M. The existing manner and place of use issued under Permit 25636 was for irrigation and domestic purposes upon 1.41 acres of land located within the NW¼ SE¼ of Section 5, T.16S., R.49E., M.D.B. & M. If a permit is issued under this application, it would transfer the existing point of diversion, which is described as being within the SW¼ SE¼ of Section 5, T.16S., R.49E., M.D.B.&M. to a new well site located within the NW¼ NW¼ of Section 11, T.16S., R.48E., M.D.B.&M.²

III.

Applications 72117 and 72118 were timely protested by the United States Department of the Interior, National Park Service (NPS) on similar grounds that were summarized by the NPS as follows.^{1,2}

- A. The amount of water granted in this change application should be limited to the amount that has historically been placed to a beneficial use. The public interest will not be served by granting a change application where the water has not been put to beneficial use under the base right and the basin is over-appropriated.
- B. It is not in the public interest to grant a water right application where the applicant itself does not have a specific project pursuant to which it would put the water to beneficial use.

² File No. 72118, official records in the Office of the State Engineer.

IV.

On May 24, 2005, Alosi Investment Group, LLC, was assigned title to 0.0458 cfs and 7.04 afa of water from of Permit 25636, Certificate 7696, in addition to 0.0455 cfs and 7.00 afa held under Permit 62322.^{1,2}

FINDINGS OF FACT

I.

Once a water right application has been timely protested, its progress through the State Engineer's permitting process is delayed until the protest issues are resolved. The Nevada Revised Statutes (NRS) provide the State Engineer with several tools that can be used to resolve the protest issues. These can range from simple informal field investigation to extensive public hearings, all of which are intended to provide the State Engineer with sufficient information to gain a full understanding of the water right application and its associated protest. The NRS also place the decision as to the necessity of a public hearing with the State Engineer, who may forego the hearing process if the existing record of information is sufficient to address the issues at hand.³ In the case of Applications 72117 and 72118, the State Engineer finds that there is no need to supplement the existing record with evidence and testimony received at a public hearing.

II.

Considering Application 72118 first, the NPS contends that the permittee has failed to maintain a beneficial use of the water issued under Permit 25636, Certificate 7696, for a period of ten years. The validity of this claim can be determined through an examination of the basin inventories that the Office of the State Engineer has created for the Amargosa Desert

³ NRS 533.365(3).

Groundwater Basin. Since 1983, representatives from the State Engineer's Las Vegas Branch office have visited the points of diversion and places of use of most of the irrigation permits found within the Amargosa Valley.⁴ The purpose of these annual site inspections is to document the amount of land that is being irrigated under each water right permit, from which an estimate of the basin wide groundwater pumpage can be derived.

If the record of water use specific to Permit 25636, Certificate 7696, is reviewed, it can be seen that this particular water right has a long history of inactivity that reaches back to 1993. Prior to this date, Permit 25636, Certificate 7696 was the subject of a forfeiture determination initiated by Amargosa Resources, Inc. The period of alleged forfeiture spanned the years 1985 through 1992, during which the petitioner claimed no water had been used within the certificated place of use. After a public hearing was held in this matter, the State Engineer concluded that 105.96 acre-feet of water rights should be forfeited, leaving the remainder of Permit 25636, Certificate 7696, in good standing, for the period being considered.⁵

For clarity, it is important to define the remaining water rights under Permit 25636, Certificate 7696. This irrigation permit was originally certificated for 200.0 afa, with 105.96 afa permanently lost through the 1996 forfeiture decision. The remaining portion was divided into 90.0 afa of irrigation rights, in addition to 4.04 afa committed to a quasi-municipal use serving two dwellings within the place of use.⁶ Since the issuance of State Engineer's Ruling No. 4322, the majority of the water remaining under Permit 25636, Certificate 9676, was transferred through the approval of change Permits 62322 and

⁴ Amargosa Valley (230) Pumpage Inventories, official records in the Office of the State Engineer.

⁵ File No. 25636, official records in the Office of the State Engineer.

⁶ State Engineers Ruling No. 4322, issued April 9, 1996, official records in the Office of the State Engineer.

69313, leaving a balance of 7.04 afa.⁴ It is this remaining portion that the applicant proposes for transfer under Application 72118.

The decision to limit the forfeiture to only a portion of Permit 25636, Certificate 7696, that was made by the State Engineer in 1996, did not permanently remove the remainder of Permit 25636, Certificate 7696, from future forfeiture consideration. Under the provisions set forth under NRS § 534.090, failure for five successive years on the part of any water right holder to use beneficially all or any part of the underground water for the purpose for which the right is acquired or claimed works a forfeiture to the extent of the nonuse.

In those groundwater basins where an annual inventory of water use is taken, the holder of a perfected underground water right permit must be notified, if four successive years of nonuse have been recorded. Accordingly, by letter dated March 9, 2004, the owners of record of Permit 25636, Certificate 7696 were advised that 3.0 afa of the remaining 7.04 afa had not been placed into its intended beneficial use over a period of four successive years. Fred L. White and Dixie J. White were then put on notice that they had one year to reestablish their beneficial use, or seek relief pursuant to NRS § 534.090. Both permittees were also advised that a failure to meet this condition would result in the forfeiture of the 3.0 afa in question.

It must be assumed that the permittees were unable to place their acreage back into production during the fifth year, since a Proof of Beneficial Use was not submitted in 2005. The permittees' optioned, instead, to file an Application for Extension of Time to Prevent a Forfeiture, which was received in the Office of the State Engineer on February 18, 2005.⁵ The intent of the Application for Extension of Time to Prevent a Forfeiture is to provide a certificate holder additional time to

establish a renewed use of water after the right has been dormant for four consecutive years. It can only be granted for one year and requires an annual filing. Failure to file either the extension of time form or a Proof of Resumption of Water Use results in a forfeiture of the certificate in question.

After a review of the information provided by the permittees upon the extension form, the extension of time request was granted, extending the forfeiture deadline to February 18, 2006. This approval was made with the standard provision that no further extensions would be granted in order to prevent the working of a forfeiture except for good cause show as provided under NRS § 534.090.

While the NPS is correct in stating that the water issued under Permit 25636, Certificate 7696, has not been placed to its intended beneficial use during the past ten years, the right to use this water has been preserved through the filing of an extension of time request. Having retained its good standing, the State Engineer finds that the Applicant can request a transfer of this water right as proposed under Application 72118.

III.

The NPS also contends that the base right permit requested for transfer under Application 72117 has a similar record of nonuse, and again they are correct. The base right permit for Application 72117 is represented by Permit 62322, which was approved to change a portion of Permit 25636, Certificate 7696.⁷ This means that the lineage of both Applications 72117 and 72118 can be traced back to Permit 25636, Certificate 7696. The common origin of these two change applications translates into a shared history of non-use, which in the case of Application 72117, was extended under Permit 62322. This fact is based upon the information contained within the annual pumpage inventory that

⁷ File No. 62322, official records in the Office of the State Engineer.

indicates that the place of use issued under Permit 62322 was not irrigated during the years 2002 through 2004.⁴ Under the forfeiture statute, the loss of a water right through non-use can only be applied to perfected water rights that have been issued certificates of appropriation. The water right issued under Permit 62322 has yet to be perfected, and as such is not subject to the forfeiture statutes even if five successive years of nonuse have occurred. Forfeiture can only be applied to permits that have been issued Certificates of Appropriation.

Under the terms and conditions issued with Permit 62322, the permittee was granted 5 years to establish a beneficial use of the water, with the deadline for achieving this goal set at December 2, 2006. At this point in time, the permittee is in compliance with the terms of the permit, and Permit 62322 is considered to be in good standing. The State Engineer finds that the right to use water issued under Permit 62322 remains intact and that this water right permit can be considered for the transfer proposed under Application 72117.

IV.

The State Engineer is aware of the long record of non-use associated with Permit 25636, Certificate 7696, and Permit 62322 and does not intend to perpetuate this nonuse through the approval of the subject change applications. If Applications 72117 and 72118 are issued permits, they will be approved with a set of deadlines to construct the well and to place the water to its intended beneficial use. In the event that the permittee is unable to meet these deadlines, any request for additional time through the extension of time option would be viewed with the entire history of the water rights taken into consideration. The State Engineer finds that the approval of Applications 72117 and 72118 will be made with the condition that an actual beneficial use of the water must occur within a reasonable period of time or the permits will be subject to cancellation.

V.

The filing of a water right application for use within the Amargosa Desert Hydrographic Basin is often followed by a timely protest by the NPS. The NPS' protests are not limited to applications that request additional appropriations of underground water, and have been extended to include applications that request changes in existing water rights. The protests that are received by the State Engineer's office typically contain a set of standard points, similar to those found under Sections I. through V. of the protests being considered in this ruling. A review of these sections finds that they focus primarily upon the issues of existing water rights and the lack of unappropriated water in the Amargosa Desert Hydrographic Basin.

Regarding the issue of existing rights, there has been much opposition by the NPS to change applications that would transfer existing water rights to points of diversion that are closer to its areas of concern. The NPS is responsible for the continued health of numerous surface-water sources that are located within the Death Valley National Park, some of which are populated by threatened or endangered species. It is feared by the NPS that, in some instances, the accumulative effect of water right transfers within the Amargosa Valley, will ultimately have a negative impact on the water levels found at these sources. Of particular concern is the decline of water levels that have recorded at Devils' Hole, which is a detached unit of the Death Valley National Park.

While the effects that the appropriation of underground water may have on a spring source is not entirely a function of distance it is useful to compare the locations of the existing point of diversions with those proposed under the subject applications as they relate to Devil's Hole. Once these well sites are plotted on the appropriate 1:100 000 Bureau of Land

Management Surface Management Map, it can be seen that the approval of Applications 72117 and 72118 would add an additional 2 miles to the 15 miles that already separate the existing point of diversion from Devil's Hole. Therefore, the State Engineer finds that this net gain in distance would appear to be a desirable transfer in regard to the alleged potential negative effect on Devil's Hole.

VI.

The NPS also requests that the approval of the subject applications be conditioned with a totalizing meter requirement, which is already a standard permit term for all change permits issued within the valley. The State Engineer finds that the permittee will be required to properly install and maintain a totalizing meter at the proposed point of diversion.

VII.

The Protestant alleges that the Applicant has not properly defined the manner of use requested on the applications. The manner of use is described as commercial, but admits in the remarks section of the applications that the project has not, "been clearly defined at this time."^{1,2} It is not uncommon for an applicant to describe the proposed manner of use in general terms. It is also not uncommon for the State Engineer to request additional information from the applicant to better define the consumptive use of water that is anticipated. The State Engineer finds that should the need arise, the Applicant can be required to provide a more detailed explanation of the proposed manner of use, and that this portion of the NPS protest can be overruled.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁸

⁸ NRS chapters 533 and 534.

II.

The State Engineer is prohibited by law from granting an application that requests a transfer of an existing water right where:⁹

- 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.

Applications 72117 and 72118 request changes in existing groundwater permits that are currently considered to be in good standing. As change applications, their approval would not represent an additional appropriation of underground water from the Amargosa Desert Hydrographic Basin. The State Engineer concludes that the issue of unappropriated water does not apply to the subject applications.

IV.

The approval of Applications 72117 and 72118 will increase the distance that previously existed between the NPS' areas of concern and the points of diversion issued under Permit 25363, Certificate 7696 and Permit 62322. Additionally, as part of the application review process, a more localized analysis was made regarding those existing water rights in the immediate area of the proposed point of diversion. This examination also supports the conclusion that the approval of Application 72117 and 72118 will not have an adverse effect upon existing water rights.

⁹ NRS § 533.370(5).

V.

The State Engineer concludes that the approval of the changes proposed under Applications 72117 and 72118 will not threaten to prove detrimental to the public interest.

RULING

The protests to Applications 72117 and 72118 are overruled and Applications 72117 and 72118 are hereby approved subject to existing water rights and the timely payment of the statutory filing fees.

Respectfully Submitted,



HUGH RICCI, P.E.
State Engineer

HR/MB/jm

Dated this 17th day
of April 2006.