

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

IN THE MATTER OF APPLICATIONS)
72634 AND 72635 FILED TO CHANGE)
THE POINT OF DIVERSION, PLACE OF)
USE AND MANNER OF USE OF A PORTION)
OF THE PUBLIC WATERS PREVIOUSLY)
APPROPRIATED UNDER PERMIT 52123,)
CERTIFICATE 13512 FROM UNDERGROUND)
SOURCES WITHIN THE PAHRUMP VALLEY)
HYDROGRAPHIC BASIN (162), NYE)
COUNTY, NEVADA.)

RULING

5613

GENERAL

I.

Application 72634 was filed on April 18, 2005, by John J. and Deborah A. Mischel to change the point of diversion and the place of use of 0.0218 cubic feet per second (cfs), not to exceed 2.0 acre-feet annually (afa), a portion of the underground water previously permitted for appropriation under Permit 52123, Certificate 13512. The proposed place of use is described as being located within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 35, T.19S., R.52E., M.D.B.&M. The existing place of use is located upon 1.11 acres within the E $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 12, T.21S., R.53E., M.D.B.&M. If a permit was issued under this application, it would transfer the existing point of diversion, which is described as being within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 12, T.21S., R.53E., M.D.B.&M., to a new well site located within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 35, T.19S., R.52E., M.D.B.&M.¹

¹ File No. 72634, official records in the Office of the State Engineer.

II.

Application 72635 was filed on April 18, 2005, by John J. and Deborah A. Mischel to change the point of diversion, place of use and manner of use of 0.0109 cfs, not to exceed 1.0 acre-foot annually, of a portion of the underground water previously permitted for appropriation under Permit 52123, Certificate 13512. The proposed place of use is described as being located within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 35, T.19S., R.52E., M.D.B.&M. The existing place of use is located upon 0.557 acres within the E $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 12, T.21S., R.53E., M.D.B.&M. If a permit was issued under this application, it would transfer the existing point of diversion, which is described as being within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 12, T.21S., R.53E., M.D.B.&M., to a new well site located within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 35, T.19S., R.52E., M.D.B.&M.²

FINDINGS OF FACT

I.

Applications 72634 and 72635 were reviewed and evaluated according to the permitting process established by the Office of the State Engineer. Both of these applications passed through the statutory publication and public protest periods and became ready for action on July 24, 2005. The term "ready for action", refers to the stage in the permitting process where the initial recommendation is made to deny or approve the water right application. If a determination is made to approve the application, the applicant is notified by mail to submit the required permit fees. By letter dated December 14, 2005, the Applicants were advised that Applications 72634 and 72635 were ready to be approved by the Office of the State Engineer and that it would be necessary for them to submit the respective permit fees. This request for fees was answered with the submittal of the permit fees on February 10, 2006.¹ Although the permit fees were timely received, and permits issued, the State Engineer finds it

² File No. 72635, official records in the Office of the State Engineer.

was ultimately determined that the request for permit fees was premature and was sent in error and permits should not have been issued under these applications. The State Engineer finds that the permit fees associated with applications must be remitted to the applicants, upon issuance of this ruling.

II.

Nevada Revised Statute § 534.120(1) provides that within an area that has been designated by the State Engineer where, in his judgment, the groundwater basin is being depleted, the State Engineer in his administrative capacity is empowered to make such rules, regulations and orders as are deemed essential for the welfare of the area involved. The application of this provision of the NRS, to the Pahrump Valley Hydrographic Basin is evidenced in a series of orders handed down by the State Engineer beginning with Order No. 176, which was issued on March 11, 1941.³ This initial order described and designated a portion of the Pahrump Valley Hydrographic Basin as a groundwater basin in need of additional administration. The boundaries of the designated portion of the Pahrump Valley Hydrographic Basin were expanded by the issuance of State Engineer's Order Nos. 193 and 205 on January 15, 1948, and January 23, 1953, respectively.^{4,5} By designating the Pahrump Valley Hydrographic Basin, the State Engineer set the stage for further restrictions relating to the appropriation of underground water from the basin. State Engineer's Order No. 381, issued on June 1, 1970, gave notice that no further appropriations of underground water would be approved for irrigation purposes.⁶ State Engineer's Order No. 955, signed on October 26, 1987, denied new appropriations on the Pahrump and Manse alluvial fan and

³ State Engineer's Order No. 176, official records in the Office of the State Engineer.

⁴ State Engineer's Order No. 193, official records in the Office of the State Engineer.

⁵ State Engineer's Order No. 205, official records in the Office of the State Engineer.

⁶ State Engineer's Order No. 381, official records in the Office of the State Engineer.

declared new appropriations of water for commercial purposes, off the fan and requiring 5,000 gallons a day or less, preferred uses.⁷ This trend towards further restriction of groundwater pumping in the Pahrump Valley Hydrographic Basin was continued with the issuance of State Engineer's Order No. 1107, on November 8, 1994. Under the guidelines set forth under this order, all applications that requested new appropriations of underground water from the designated portion of the Pahrump Valley Hydrographic Basin would be denied with the following exceptions: those applications filed for commercial (non living units) or for industrial purposes off the alluvial fan, which seek to appropriate 1,800 gallons per day or less and where the property is zoned for such purposes and those applications filed for environmental purposes pursuant to NRS chapter 533.⁸ The State Engineer finds that the approval of the subject applications is dependent upon their compliance with the conditions governing the appropriation of water from the Pahrump Valley Hydrographic Basin established by the State Engineer's orders.

III.

With one notable exception, the practice of approving water right applications requesting new appropriations of underground water from the Pahrump Valley Hydrographic Basin for irrigation purposes was discontinued with the issuance of Order No. 381. An exception to this policy occurred on October 26, 1987, when Order No. 381 was modified to allow consideration of a very select group of irrigation applications. State Engineer's Order No. 955, allowed the holder of a forfeited irrigation permit to file for a new appropriation of underground water for irrigation purposes, if the forfeiture had occurred prior to January 1, 1988. Also included within this order was a provision that all replacement

⁷ State Engineer's Order No. 955, official records in the Office of the State Engineer.

⁸ State Engineer's Order No. 1107, official records in the Office of the State Engineer.

applications must be filed within sixty days of the forfeiture.⁷ Accordingly, Application 52123 was filed on May 23, 1988, to restore the right to appropriate water for irrigation purposes that had been forfeited for the place of use issued under Permit 24180, Certificate 8642. Since Applications 72634 and 72635 request changes in Permit 52123, the State Engineer finds that both water right filings share a common lineage and originated from water rights established under Order No. 955.

IV.

Every water right permit that is issued by the Office of the State Engineer comes with a set of conditions that must be adhered to by the permittee or any successor in interest. The permit terms, under which Permit 52123 operates, contain the statement that the issuance of the permit was for those lands, which previously had the water right forfeited under Permit 24180, Certificate 8642.⁹ It was not the intention of the State Engineer to reestablish an irrigation permit upon ground for which the water right was forfeited to create a water right that could eventually be transferred to a new place of use within the groundwater basin. This fact is underscored in the certificate issued under Permit 52123 which provides that the "use is restricted to the place and for the purpose as set forth herein."

The State Engineer finds the history of the events related to the Pahrump Valley Hydrographic Basin and the approval of Permit 52123 clearly states that any irrigation right created under Order No. 955 is intended to remain appurtenant to the original place of use that was forfeited. The State Engineer finds that, under the policy created by Order No. 955, the transfer requested under Applications 72634 and 72635 cannot be approved.

V.

By restricting the place of use of Permit 52132 to the lands encompassing the area upon which a water right was previously

⁹ File No. 52123, official records in the Office of the State Engineer.

forfeited, the State Engineer avoids problems, which may occur if this right was to be transferred to a new place of use, while retaining its junior priority date. All water right applications which are accepted for filing within the Office of the State Engineer are assigned a priority date. The priority date for a permit that requests a new appropriation of water is established by the date that it was filed in the Office of the State Engineer. If a water right permit is abrogated through the approval of a subsequent change permit, the priority date set under the permit being changed is carried over with the approval of the change permit. In the case of multiple generations of changes, the initial water right permit determines the priority date for all of the changes emanating from it. Once the priority date of a water right filing has been identified, it is possible to determine its seniority within the groundwater basin. If the March 23, 1988, date is used as a benchmark to divide the senior and junior active underground water rights of the Pahrump Valley Hydrographic Basin, it can be found through a query of the State Engineer's water right database that a majority of the active applications, permits and certificates have priority dates, which are senior to Permit 52123.¹⁰ Simply stated, any right to appropriate underground water granted by the approval of Permits 72634 and 72635, as well as that already existing under Permit 52123 would occupy a position in the basin-wide priority that is within the junior active rights. Based upon this determination, the State Engineer finds that Permit 52123 and Applications 72634 and 72635 all share a common priority date, which is junior to most of the active underground filings in the basin.

VI.

Nevada Revised Statute § 534.120 provides that within an area that has been designated by the State Engineer if, in the judgment of the State Engineer the groundwater basin is being depleted, the

¹⁰ Nevada Division of Water Resources Water Right Permit Database.

State Engineer may make rules and regulations to control the withdrawal of the ground water as is deemed essential for the public welfare. Nevada is a prior appropriation state where first in time is considered first in right. If the State Engineer were to regulate the Pahrump Valley Hydrographic Basin to the extent that the use of ground water would be reduced on a priority basis, the first water right to be curtailed would be the junior filing. The State Engineer finds that since any permits issued under Applications 72634 and 72635 would be assigned a priority date junior to the majority of the existing groundwater permits and certificates contained within the Pahrump Valley Hydrographic Basin, they would be among the first permits to have their pumpage curtailed.

VII.

For an appropriation of water to legally occur, a water right permit must be approved and maintained in good standing. This does not apply to domestic use of underground water, which does not require a permit. All commercial and irrigation activities found within the Pahrump Valley Hydrographic Basin are supported and dependent upon an underlying water right permit. Should the State Engineer initiate a curtailment program, within the valley, the higher uses of water, such as municipal and commercial would be the most severely affected. This can be illustrated by the existing and proposed manners of use found on the subject applications. If an irrigation permit was lost through curtailment, further irrigation would not be sanctioned and the land would become fallow. The curtailment of a quasi-municipal water right is more complex, since it would be difficult to terminate water service to a person's home, which in the case of the Application 72635 would be mobile homes. The State Engineer finds that there is no justification to allow a homeowner to become dependent upon a quasi-municipal water right permit that, due to its junior priority date, is vulnerable to curtailment.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.¹¹

II.

The State Engineer is prohibited by law from granting a change application to appropriate the public waters where:¹²

- 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.

Permit 52123 belongs to a select group of irrigation permits that were approved under State Engineer's Order No. 955. Its approval reestablished the right to irrigate land under a new priority date, which had been lost through forfeiture. This new right was intended to remain appurtenant to its permitted place of use, as was Permit 52123. Applications 72634 and 72635 seek to transfer these water right permits to new places of use contrary to the policy set under State Engineer's Order No. 955. The State Engineer concludes that any violation of a policy established to protect the underground water resources of the Pahrump Valley Hydrographic Basin would threaten to prove detrimental to the public interest and would conflict with existing groundwater rights.

IV.

The State Engineer concludes that the creation of water right permits under junior priority dates would leave any

¹¹ NRS chapters 533 and 534.

¹² NRS § 533.370(5).

subsequent water users vulnerable to curtailment, which would also threaten to prove detrimental to the public interest.

RULING

The Permits issued under Applications 72634 and 76235 are hereby revoked and the applications denied on the grounds that their approval would conflict with existing water rights and would threaten to prove detrimental to the public interest.

Respectfully Submitted,



HUGH RICCI, P.E.
State Engineer

HR/SJT/jm

Dated this 24th day
of April 2006.