

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

IN THE MATTER OF PROTESTED)
APPLICATIONS 73428, 73429 AND 73430)
FILED TO CHANGE THE POINT OF)
DIVERSION OF THE PUBLIC WATERS OF AN)
UNDERGROUND SOURCE PREVIOUSLY)
APPROPRIATED UNDER PERMIT 66400)
WITHIN THE DRY VALLEY HYDROGRAPHIC)
BASIN (95), WASHOE COUNTY, NEVADA.)

RULING

#5622

GENERAL

I.

Application 73428 was filed on November 3, 2005, by Intermountain Pipeline, Ltd., and later assigned to Intermountain Water Supply, Ltd., to change the point of diversion of 0.45 cubic feet per second (cfs), not to exceed 325 acre-feet annually (afa), a portion of the underground water previously permitted for appropriation under Permit 66400. The proposed manner of use and place of use is described as being for municipal and domestic purposes within the Lemmon Valley Hydrographic Basin. The proposed place of use is further described as being located within Sections 1 through 36, T.21N., R.19E., M.D.B.&M., Section 36, T.21N., R.18E., M.D.B.&M., Sections 1 through 12, 15, 16, and 17, T.20N., R.19E., M.D.B.&M., and Sections 1 and 12, T.20N., R.18E., M.D.B.&M. The change requested by Application 73428, if approved, would transfer the Applicant's existing point of diversion from the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 10, T.24N., R.18E., M.D.B.&M., to a point located within the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 11, T.24N., R.18E., M.D.B.&M.¹

II.

Application 73429 was filed on November 3, 2005, by Intermountain Pipeline, Ltd., and later assigned to Intermountain Water Supply, Ltd., to change the point of diversion of 0.97 cfs, not to exceed 700 afa, a portion of the underground water previously permitted for appropriation under Permit 66400. The proposed manner of use and place of use is described on the application as being for municipal and domestic purposes within the Lemmon Valley Hydrographic Basin as described above. The change requested by Application 73429, if approved, would transfer the Applicant's existing point of diversion from the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of

¹ File No. 73428, official records in the Office of the State Engineer.

Section 10, T.24N., R.18E., M.D.B.&M., to a point located within the SE¼ NE¼ of Section 14, T.24N., R.18E., M.D.B.&M.²

III.

Application 73430 was filed on November 3, 2005, by Intermountain Pipeline, Ltd., and later assigned to Intermountain Water Supply, Ltd., to change the point of diversion of 0.22 cfs, not to exceed 159 afa, a portion of the underground water previously permitted for appropriation under Permit 66400. The proposed manner of use and place of use is described on the application as being for municipal and domestic purposes within the Lemmon Valley Hydrographic Basin. The change requested by Application 73430, if approved, would transfer the Applicant's existing point of diversion from the SW¼ SE¼ of Section 10, T.24N., R.18E., M.D.B.&M. to a point located within the NW¼ SE¼ of Section 15, T.24N., R.18E., M.D.B.&M.³

IV.

Applications 73428, 73429 and 73430 were timely protested by Washoe County on the following grounds:^{1,2,3}

The above referenced applications propose to change the point of diversion of a portion of water rights appropriated under permit 66400 in Dry Valley Hydrographic Basin. Washoe County opposes the granting of these applications because: 1) there is no unappropriated water in the source; and, 2) granting of these permits could threaten to prove detrimental to the public interest. Washoe County's opposition to these applications are in accordance with County's Development Code adopted in 1992 which in part states:

"PSF.1.10.1 Washoe County shall work with state and federal agencies to manage local groundwater resources to provide for annual use of these resources which does not exceed levels sustainable at current rates of inflow and recharge."

And

"PSF 1.10.2 The Washoe County Board of County Commissioners shall not approve land development activities dependent upon groundwater supplies which will cause the groundwater basin(s) to fall below self sustaining levels as a result of the project's water consumption or effluent discharge method."

² File No. 73429, official records in the Office of the State Engineer.

³ File No. 73430, official records in the Office of the State Engineer.

The State Engineer issued Ruling # 5568 dated February 28, 2006, in response to a similar protest on application 69664 filed to change the point of diversion of permit 64978. In this Ruling the State Engineer determined as follows:

“The State Engineer finds that the issues related to water availability and inter-basin transfer have been settled with the issuance of Permit 64978 and will not be revisited for a point of diversion change as proposed under Application 69664.”

Washoe County respectfully disagrees with the above finding and the reasoning behind it. All permits issued by the State Engineer are subject to review and revision, under appropriate circumstances, at any time. The filing of change application allows the State Engineer the discretion to review all aspects of the original Permit, including those of water availability. Permits 64978, 64977 & 66400 were granted in January 2002 for a total combined duty of nearly 3,000.00 acre-feet annually. At that time there was limited objective information and data on the safe yield of the Dry Valley Hydrographic Basin.

Since the time of the granting of these permits, Washoe County through funding recommended by the Regional Water Planning Commission (RWPC) has employed the United States Geological Survey (U.S.G.S.) to conduct a detailed study of the groundwater discharge from Dry Valley. [Footnote omitted.] Extensive geophysical studies and hydrologic evaluation by the U.S.G.S. suggests that the original U.S.G.S. estimates of the perennial yield of 1,000 acre-feet annually for this basin were within reasonable range. The results of these studies were presented to the RWPC with the State Engineer's permanent staff assigned as a member to RWPC present and copies of reports provided for his review.

Furthermore, The Nevada Revised Statutes do not exempt “Change Applications” from the provisions of NRS 533.370 which prohibits the State Engineer from granting a permit if:

“1) There is no unappropriated water at the proposed source” and “2) the proposed use or change threatens to prove detrimental to the public interest.” These issues can properly be heard “De Novo” in order to protect the public interest and prevent long-term groundwater mining.

It is Washoe County's position that neither one of these criteria can be satisfied in light of the recent findings by the U.S.G.S. and that therefore, the above referenced applications should be denied and the base permits amended as appropriate.

V.

Applications 73428, 73429 and 73430 were timely protested by Lassen County, on the following grounds:^{1, 2, 3}

The U.S. Geological Survey in cooperation with Washoe County has completed a comprehensive Ground-Water Resource Evaluation of Dry Valley Washoe County, Nevada; Scientific Investigation Report 2004-5155 (EXHIBIT "B"). The objectives and scope of this 3-year study of the Nevada portion of Dry Valley were to: (1) describe the hydrologic framework; (2) characterize the groundwater flow system and water quality; and (3) quantify ground-water discharge. Results from the evaluation estimate total natural ground-water discharge from Dry Valley to range from a minimum of 700 acre-ft to a maximum of 1,000 acre-ft annually.

Based on the foregoing, and on information and belief, this Protestant offers the following reasons and following grounds:

1. Approval of the subject application will have an adverse impact on flows of Long Valley Creek and, accordingly, will adversely impact existing water rights and existing down-gradient ground-water users.
2. Approval of the subject application will, on information and belief, constitute a withdrawal of more water from the basin than is allowed by law, pursuant to Nevada Revised Statutes 533.271 (perennial yield principal), particularly when combined with other applications seeking to have the points of diversion changed to the same general area.
3. Approval of the subject application will, on information and belief, adversely impact existing water sources (springs and seeps) presently utilized and depended upon by livestock, wildlife, fisheries, and riparian vegetation.
4. Approval of the subject application is not in the public interest because on the information and belief, pumping of the volume of ground-water represented by the subject application, particularly when combined with other applications seeking to have the points of diversion changed to the same general area, will result in a water mining situation and long-term detrimental impact on the aquifer.
5. There is insufficient water in the proposed source.

FINDINGS OF FACT

I.

Nevada Revised Statute § 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 state of Nevada. The State Engineer finds that in the case of protested Applications 73428, 73429 and 73430 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.

The State Engineer issued Permit 66400, which is the basis for change Applications 73428, 73429 and 73430, on January 11, 2002, for an individual duty of water that was not to exceed 1,549 afa. This permit was also approved with a condition that it would share a total combined duty of Permits 64977, 64978 and 66400 that was not to exceed 2,996 afa. Permit 66400 was approved for an inter-basin transfer of water with the point of diversion located in Dry Valley and the place of use in Lemmon Valley. In approving Permit 66400, the State Engineer made the determination that Permit 66400 complied with all the statutory requirements for approval including the inter-basin transfer provisions of NRS § 533.370. Applications 73428, 73429 and 73430 do not seek an additional appropriation of water, only a change in the point of diversion of an existing water right permit within Dry Valley.⁴

Protestant Washoe County has requested the State Engineer go back and re-evaluate Permit 66400 on the basis of new evidence found in U.S.G.S. Scientific Investigations Report 2004-5155. This new report suggests a revised perennial yield estimate of 1,000 afa for the Dry Valley Hydrographic Basin. In State Engineer's Ruling No. 5568, similar argument regarding re-evaluation of an existing permit was rejected by the State Engineer on the grounds that the issue of water availability and interbasin transfer were settled with the issuance of the base right permit and would not be revisited under a change in point of diversion. When Permits 64977, 64978 and 66400 were issued, the State Engineer made a determination, based on the limited information available at that time, that 2,996 afa of underground water was available for appropriation in the Dry Valley Hydrographic Basin and the statutory requirements for the proposed interbasin transfer had been met. From an administrative standpoint, it would be problematical for the State Engineer to reduce or extinguish water rights held by existing permit holders based solely upon a newer and lower estimate of perennial yield and the fact that a change application had been filed. When a permit is issued to appropriate the public waters of the state of Nevada there must be some expectation on the part of the permit holder that he may go forward with the development of his project, which necessitates certain expenses and obligations, without a cloud of uncertainty that some future hydrological report may be utilized to take all or a portion of his existing water right permits. This does not mean that existing water rights cannot be regulated. On the contrary, the Nevada Revised Statutes provide regulatory authority to the State Engineer should adverse effects from the pumping of existing groundwater

⁴ Permit No. 66400, official records in the Office of the State Engineer.

permits occur.⁵ Permit 66400 also carries a set of specific requirements referred to as permit terms, which provides additional regulatory authority to the State Engineer. The State Engineer finds the regulatory authority within the Nevada Revised Statutes and the terms of Permit 66400 provide additional protection for senior existing water right appropriators and domestic well owners.

The State Engineer finds that the issues related to water availability and inter-basin transfer have been settled with the issuance of Permit 66400 and will not be revisited for a point of diversion change as proposed under Applications 73428, 73429 and 73430. The State Engineer further finds that reducing the annual duty of Permits 64977, 64978 and 66400 is not appropriate and sufficient protections exist within the Nevada Revised Statutes to protect senior existing water right appropriators and domestic well owners from any adverse effects that may occur in the future.

III.

A determination was made, after an examination of the records of the Office of the State Engineer, that there is only one additional water right permit, proof or claim filed for the proposed underground water source within the Dry Valley Hydrographic Basin exclusive of the Applicant's permits. This is a certificated water right for irrigation and domestic purposes at a duty not to exceed 25.60 afa. The permit number is Permit 28097, Certificate 10521 and the current owner of record is shown as John G. Lenz.⁶ It should be noted that Mr. Lenz is not listed as a protestant to Applications 73428, 73429 and 73430. The State Engineer finds that the Protestants do not possess existing groundwater appropriations in the Dry Valley Hydrographic Basin.

IV.

Records in the Office of the State Engineer indicate that up to nine domestic wells have been drilled in the Dry Valley Hydrographic Basin. The Applicant has indicated that there is currently only one house in Dry Valley utilizing an underground domestic water supply.⁷ Nevada water law does not prevent the granting of permits to applicants later in time on the ground that the diversions under the proposed later appropriations may cause the water level to be lowered at the point of diversion of a prior appropriator, so long as any protectible interests in existing domestic wells and the rights of existing appropriators can be satisfied. The State

⁵ NRS § 534.110.

⁶ Nevada Division of Water Resources, *Water Rights Database Special Hydrographic Abstract*, May 9, 2006.

⁷ See, Intermountain Pipeline, Ltd. letter to State Engineer, October 3, 2005, within File No. 69664, official records in the Office of the State Engineer.

Engineer finds that protections exist within the Nevada water law to protect domestic well owners and existing water right holders from an unreasonable lowering of the water table, should such impacts occur as a result of pumping water at the proposed well site.

CONCLUSIONS

I.

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

II.

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

When Permits 64977, 64978 and 66400 were issued, the State Engineer made a determination, based on the information available at that time, that 2,996 afa of water was available for appropriation in the Dry Valley Hydrographic Basin and the requirements for interbasin transfer were met. Applications 73428, 73429 and 73430 seek to change the point of diversion of Permit 66400 and do not request any additional water from the Dry Valley Hydrographic Basin. The State Engineer concludes he is not required to reevaluate the determination as to water availability under the change application and that the proposed changes in point of diversion will not threaten to prove detrimental to the public interest.

IV.

The State Engineer concludes that the protest issues regarding the inter-basin transfer of water and water availability were settled by the issuance of Permit 66400; therefore, those protest issues are dismissed.

⁸ NRS chapters 533 and 534.

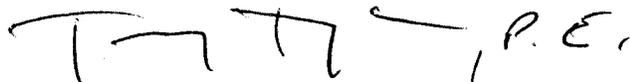
⁹ NRS § 533.370 (5).

RULING

The protest claims are overruled and Applications 73428, 73429 and 73430 are hereby approved subject to:

1. Existing rights;
2. The payment of the statutory permit fees;
3. A monitoring program approved by the State Engineer prior to the diversion of any water appropriated under these permits.

Respectfully submitted,



TRACY TAYLOR, P.E.
State Engineer

TT/TW/jm

Dated this 27th day of

June, 2006.