

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

IN THE MATTER OF APPLICATION )  
71124 FILED TO CHANGE THE POINT )  
OF DIVERSION OF A PORTION OF THE )  
PUBLIC WATERS OF AN UNDERGROUND )  
SOURCE PREVIOUSLY APPROPRIATED )  
UNDER PERMIT 58714 WITHIN THE )  
WILLOW CREEK VALLEY HYDROGRAPHIC )  
BASIN (063), ELKO COUNTY, NEVADA. )

RULING

**#5632**

GENERAL

I.

Application 71124 was filed on April 27, 2004, by the Midas Water Cooperative to change the point of diversion of 0.05 cubic feet per second (cfs) of water, that being a portion of the underground water previously appropriated under Permit 58714. The proposed manner and place of use is for quasi-municipal purposes within the E½ E½ of Section 20 and the SW¼ NW¼ and the NW¼ SW¼ of Section 21, T.39N., R.46E., M.D.B.&M. The proposed point of diversion is described upon the application as being located within the NW¼ SE¼ of Section 20, T.39N., R.46E., M.D.B.&M. The remarks section of the application defines the proposed quasi-municipal use as water service to 60+ residential service connections, 2 commercial service connections in addition to the old school house, which now serves as a community center.<sup>1</sup>

II.

Application 71124 was timely protested by Tim Woolford, Alan Woolford, Mark Woolford, Angie Woolford, DeRosa Woolford, Elizabeth Stern and William Timmons on the following grounds:<sup>1</sup>

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<sup>1</sup> File No. 71124, official records in the Office of the State Engineer.

The proposed point of diversion and withdrawal will potentially adversely affect the water right owned and put to beneficial use by the protestants. Further the proposed point of diversion and withdrawal is within the same structural fault line within the same structural fabric from the mountains into the Midas Quadrangle. There is a very high probability that the springs will be impacted and the protesters will lose the quality and quantity of their water right if this application is granted.<sup>1</sup>

For clarification, the surface water right that the Protestants are referring to is represented by Permit 27488, Certificate 8638.

### III.

A review of the records of the Office of the State Engineer indicates that title to Permit 27488, Certificate 8638 was transferred into the names of Tim Woolford, Alan Woolford, Mark Woolford, Angie DeRosa, Elizabeth Stern and William Timmons on April 16, 2003.<sup>1</sup>

### FINDINGS OF FACT

#### I.

The Nevada Revised Statutes (NRS) require that before a water right application can be considered for approval, it must be determined that its issuance will not have an adverse effect upon existing water rights.<sup>2</sup> It is the Protestants' contention that the quasi-municipal use proposed under Application 71124 would have a negative impact on their nearby spring, whose waters are permitted for quasi-municipal use under Permit 27488, Certificate 8638.

In considering the Protestant's case, it is useful to review the history of Permit 27488. This permit was filed in the Office of the State Engineer on May 25, 1973, under the names of Wilbur V. Timmons, Edna G. Timmons, Joseph L. Baker, Donald Swindlehurst and Loretta Pullen. Permit 27488 requested a diversion rate of 1.0 cfs of water from an unnamed

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<sup>2</sup> NRS § 533.370(5).

spring source a.k.a. Woolford Spring. The proposed point of diversion is described as being within the NW¼ SE¼ of Section 20, T.39N., R.46E., M.D.B.&M. The proposed manner and place of use were stated on the application form as being for quasi-municipal service to 25 separate dwellings within the town of Midas. After consideration of the application, a water right permit was issued on January 22, 1974. The draft permit terms written by the State Engineer's staff for Permit 27488 assigned a value of 1,000 gallons of water per day to each of the twenty five residences. The final version of Permit 27488, which was signed by the State Engineer allowed a diversion rate of 1.0 cfs with an annual duty of 9.125 million gallons.<sup>3</sup>

## II.

The State Engineer's permitting process has been structured to allow for a gradual development of the water resource, which typically gives the permittee several years to construct the necessary works of diversion. Upon completion of the diversion works, additional years may be granted to allow the permittee sufficient time to establish a beneficial use of the water. Once a development stage has been completed, the permittee is required to submit a proof form to the Office of the State Engineer. The information found on the proof provides a general description of the work that was performed, including a general cost estimate. The deadlines for filing these proof forms are set by the terms and conditions issued with the permit. When Permit 27488 was approved, the Permittees were required to submit a Proof of Commencement of Work, Proof of Completion of Work and a Proof of Beneficial Use, within a given set of deadlines. The approval of the Proof of Beneficial Use, signifies that the water right has been perfected by the permittee.

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<sup>3</sup> File No. 27488, official records in the Office of the State Engineer.

The information contained within the Proof of Commencement of Work submitted under Permit 27488, is especially useful because it states the number of residential water service connections that were made. When this proof was filed on July 23, 1974, Edna Timmons stated that a water connection had been made from Woolford Spring to one dwelling. The filing of this proof was followed one year later by the submittal of the Proof of Completion of Work, which verified that a single residential connection had been made, in addition to water service outlets to two additional dwellings.<sup>3</sup>

The final proof that was submitted on behalf of the Permittees, was the Proof of Application of Water to Beneficial Use. The Proof of Beneficial Use documents the Permittees actual diversion of water and contains a more detailed description of the manner of use. Once this proof has been submitted, the information supplied by the permittee is typically verified through an on site inspection. Upon verification, a Certificate of Appropriation is issued under the permit. The diversion rate and annual duty issued under a certificate is derived from the actual water use recorded by the permittee and entered into the Proof of Beneficial Use.

In the case of Permit 27488, the Permittees submitted their Proof of Application of Water to a Beneficial Use on July 15, 1975. It was stated on this form that an average of 4.0 gallons per minute (gpm) of water was actually diverted and beneficially used for the purpose for which the proof was made. Edna Timmons described the measuring point as the location where the pipeline from the unnamed spring discharged into the Permittees' 2,000-gallon water storage tank. From this tank, the collected spring water was piped through a 1.5-inch pipe to a single residence.<sup>3</sup> No mention was made regarding the two additional water connections referenced in the preceding proofs.

Beneficial Use is considered to be the basis, the measure and the limit of the right to use water.<sup>4</sup> Based upon the information contained within the Proof of Beneficial Use, the appropriation of water under Permit 27488 was limited to water service to a single residence. Accordingly, Certificate 8638 was issued for a reduced diversion rate of 0.0089 cfs and an annual duty that was not to exceed 0.365 million gallons per year. The State Engineer finds the Permittees were unable to beneficially use the entire amount of water originally issued under Permit 27488, which resulted in a reduction in the original permitted diversion rate and annual duty when Certificate 8638 was issued.

### III.

The Office of the State Engineer does not monitor the domestic use of springs within the Midas area. Therefore there is no record of the Protestants water use beyond the water measurements found on the 1975 Proof of Beneficial Use form. The scheduling of the September 14, 2005, public hearing was seen by the State Engineer as an opportunity for the Protestants to bring forth new information relating to their current use of the spring water. Testimony on the Protestants behalf established that the residence served through Permit 27488, Certificate 8638 had been connected to the municipal water system operated by the Town of Midas approximately 20 years ago. As testified by the witness, once the municipal connection had been made, the water from Woolford Spring was no longer used within the house for culinary purposes.<sup>5</sup> The State Engineer finds that the original spring water that supplied the Protestants' residence with domestic water was replaced many years ago by water supplied through a municipal connection.

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<sup>4</sup> NRS 533.035.

<sup>5</sup> Transcript, pg. 56.

IV.

Once the municipal water connection had been made, the Protestants were no longer dependent upon the Woolford Spring for their domestic water supply. As part of the connection agreement, the owners of the house were required to install a dedicated municipal line that could not be cross-connected to the pipeline served by the spring. The Protestants were left in a situation where two pipelines serviced their property, with the new municipal line providing domestic water and the preexisting line from Woolford Spring used for outside watering. When the question was raised by the Applicant's counsel if the current household use provided through the municipal system could be extended for outside use, the witness replied that the existing water system serving the house could be modified to allow outside watering. What prevented this from being done was the concern that outside watering could be temporarily curtailed, if the municipal system was unable to meet its peak water demands.<sup>6</sup> Testimony presented during the Applicant's case did verify that several times during the summer months, restrictions had been placed on outside watering.<sup>7</sup> If the question now becomes, which is the more reliable source of water, a case could be made that the municipal water is more dependable based upon the following analysis.

The reliability of a spring is expressed over time by an extended record of its discharge. Until recently, this type of record did not exist for Woolford Spring, with the record of measurements limited to the single observation found on the 1975 Proof of Beneficial Use. A more useful source of spring discharge data is found within the Protestants' Exhibit No. 12, which is a technical report authored by Chip Porter. Beginning on October 26, 2004, a series of bi-weekly flow measurements were taken under Mr. Porter's direction on

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<sup>6</sup> Transcript, pg. 57.

<sup>7</sup> Transcript, pg. 75.

Woolford Spring, with the final measurement occurring on February 15, 2005. The witness explained that the zero flow recorded on November 9, 2005, marked the beginning of a three day period of no flow that he attributed to the influence created by the operation of the Applicant's new municipal well. During this time, the well drilled and equipped under Application 71124 was briefly pumped to test its newly constructed storage tank. Upon completion of this test, it was stated that the flow of the spring rebounded to approximately 4 gpm. An acknowledgement was made by Mr. Porter, that the reduction to zero flow happened during a time of year when the spring was already experiencing extremely low flow. A concern was then expressed that once the well was permitted, its operation would have similar adverse effect upon Woolford Spring.<sup>8</sup>

There is no debate between the Protestants and Applicant that Woolford Spring experiences a substantial seasonal reduction in its flows. However, there appears to be a difference of opinion as to whether, prior to Application 71124, this source has ever been completely dry. The Protestant testified that over a period of 40 years, he had never seen Woolford Spring diminished to a degree where it produced no flow of water.<sup>9</sup> A contrary view was expressed by a witness for the Applicant, who recalled that Woolford Spring had gone dry during 1990, and that it was for this reason that the municipal connection had been made.<sup>10</sup> Both parties may be correct in their observations, since it is improbable that the spring was subjected to constant monitoring by each individual. The occasional observations made by each of these parties represent snap-shots in time that do not necessarily

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<sup>8</sup> Transcript, pg. 26.

<sup>9</sup> Transcript, pg. 59.

<sup>10</sup> Transcript, pg. 82.

reflect the flow conditions that may dominate the spring at a later date. The State Engineer finds that the value of Woolford Spring as an independent source of water for the Protestants' trees and landscaping is diminished by its tendency to reach extremely low discharge levels during certain times of the year.

V.

The municipal water system that services Midas is not without its problems. Testimony was received that the municipal water system had, during peak summer demand, experienced occasional shortfalls, which limited outside watering.<sup>11</sup> One of the reasons that the Applicant filed for the change requested under Application 71124, was to create a back up source of municipal water, to help alleviate the stress placed on the existing system. The Applicant through several witnesses, entered into the record, a brief overview of the town's existing municipal water system and the need to supplement it with an additional well under Application 71124. It was explained that 51 municipal connections exist within the town of Midas, with 13 of them used by year round residences, in addition to two commercial hook ups. Additional testimony indicated that due to the connection criteria, the Applicant anticipated that future municipal hook ups would be limited to only 3 to 4 additional service connections.<sup>12</sup> Prior to the construction of the storage tank at the well drilled under Application 71124, the town's water supply was dependent upon a water storage tank that had a history of maintenance problems. This older tank was constructed at the site of Permit 58714, and it is the intent of the Applicant to move a portion of this water right to the site under consideration for Application 71124. The town was also experiencing occasional declines in municipal groundwater production, to a point where the well associated with Permit

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<sup>11</sup> Transcript, pg. 81.

<sup>12</sup> Transcript, pf. 83.

58714 was producing 4.0 to 6.0 gpm by the end of the summer.<sup>13</sup> Rather than continue with these problems, the town sought to acquire a second well site that would be incorporated into the existing municipal water system.

The Applicant's witness estimated the pumping rate of the new well to be in the range of 20 to 30 gpm, and that it was intended to be a backup source of water that would make up any shortfalls at the primary municipal well under Permit 58714.<sup>14</sup> The State Engineer finds that one of the primary benefits that would be derived from the approval of Application 71124 would be an increase in the reliability of the municipal system. This equates to a more dependable source of water for outside use, should the Protestants choose to modify their existing municipal water line to include outside use.

#### VI.

All water wells constructed within the state must comply with the Nevada well drilling regulations.<sup>15</sup> A contention was made during the hearing, that the well constructed under Application 71124 was not properly sealed, as required by the regulations. This point is verified by the well drillers report filed when the well was completed. This report characterizes the well as a new "test well" that was not constructed with a surface seal.<sup>16</sup> The State Engineer finds that the Midas Water Cooperative is responsible for fixing any deficiencies in the well constructed under Application 71124.

#### VII.

During the course of the hearing a significant amount of time was spent examining several geotechnical reports.<sup>17</sup> ~~The authors of these reports offered testimony to support the findings and conclusions put forth in the reports. The~~

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<sup>13</sup> Transcript, pg. 78.

<sup>14</sup> Transcript, pg. 121.

<sup>15</sup> NAC chapter 534.

<sup>16</sup> Exhibit 10.

<sup>17</sup> Exhibits 6, 12 and 16.

protest to the approval of Application 71124 rests squarely upon an alleged hydraulic connection between Woolford Spring and the source of underground water that would be appropriated under a permit issued from Application 71124. As expected, there was no agreement as to what effect the change requested by Application 71124 would have on the surface discharge found at Woolford Spring. It would not be possible to uphold the protest to Application 71124, based solely upon the technical information provided by the subject parties during the public hearing. After reviewing the technical information provided by the Applicant and the Protestants, the State Engineer finds that there is insufficient scientific information to gain a complete understanding of the impact, if any, that the approval of Application 71124 would have on the flow of Woolford Spring.

#### VIII.

A statement was made earlier in this ruling that a water right cannot be issued by the State Engineer if it has been determined that its approval would have an adverse effect upon an existing water right. In this instance, the existing water right is represented by Permit 27488, Certificate 8638. It has been determined through the information presented at the September 15, 2005, hearing that the culinary use granted under this permit has been replaced by a municipal water connection. The only remnant that remains of this original beneficial use is the watering of the Protestants' garden and trees, which both sides agree could be serviced through a modification of the current municipal line. The State Engineer finds if an interference with this existing right is demonstrated the Applicant will need to address it.

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**IX.**

A question was raised by the Protestant as to what would be the final amount of water that would be transferred by the Midas Water Cooperative to the proposed well. The Applicant through testimony described the new well as a back up source of water that would only be used during times when the water demand peaked. The Applicant's counsel characterized this use as amounting to 3 or 4 acre-feet per year.<sup>18</sup> During the Applicant's case the new well's pumping rate was estimated to be in the 20 to 30 gpm range, with only an occasional use.<sup>15</sup> If the application is examined, the amount of water requested for transfer to the new well site is 0.05 cfs, which if pumped continuously over the entire year equates to 11.8 mga. At this pumping rate, most of the existing annual duty issued under Permit 58714 would be expended at the new well site. Based upon the testimony, the Applicant does not intend to operate the municipal system in this manner. What must be determined prior to the issuance of any permit, is what annual duty of water will be sufficient to meet the Applicant's proposed manner of use. It is within the State Engineers authority to assign a value that is suited for the need. If it is the Applicant's intention, as stated in the testimony, to only appropriate 3 to 4 acre-feet annually, this limitation can be included within the permit terms and conditions issued with the permit. The State Engineer finds that the maximum annual duty requested by the Applicant is 4.0 acre-feet, and that this limitation can be included within the permit terms, should Application 71124 be approved.

**CONCLUSIONS**

**I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>19</sup>

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<sup>18</sup> Transcript, pg. 67.

<sup>19</sup> NRS chapters 533 and 534.

II.

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:<sup>20</sup>

- 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.

Application 71124 requests a transfer of a portion of an existing water right permit, under which water has already been appropriated. Since it does not seek additional water from the groundwater basin, the issue of unappropriated water does not come into consideration.

IV.

The State Engineer concludes the evidence does not support there will be an adverse effect upon the flow of Woolford Spring.

RULING

The protest to Application 71124 is hereby overruled and Application 71124 is approved subject to;

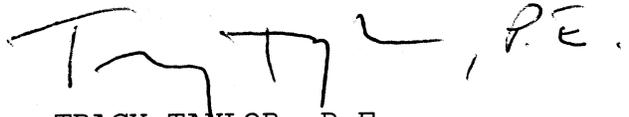
- A. a permit term limiting its annual duty of water to a maximum of 4.0 acre-feet and a diversion rate of 0.005 cubic feet per second, and
- B. existing water rights, and
- C. the requirement that if the impacts on existing water rights are demonstrated, the Applicant or any assignee will be required to mitigate the same. Including cessation of pumping, and

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<sup>20</sup> NRS § 533.370(5).

- D. the Applicant monitoring the flow of the spring on a monthly basis and annually submitting a report to the State Engineer, and
- E. the payment of the statutory permit fee.

Respectfully submitted,



TRACY TAYLOR, P.E.  
State Engineer

TT/MB/jm

Dated this      1st day of  
     August     ,      2006 .