

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

IN THE MATTER OF APPLICATIONS 71649, 71651,)
71652, 71653, 71654, 71655, AND 71657 FILED TO)
APPROPRIATE THE PUBLIC WATERS OF AN)
UNDERGROUND SOURCE WITHIN THE GOLD)
FLAT HYDROGRAPHIC BASIN (147), KAWICH)
VALLEY HYDROGRAPHIC BASIN (157),)
EMIGRANT VALLEY-GROOM LAKE VALLEY)
HYDROGRAPHIC BASIN (158A), YUCCA FLAT)
HYDROGRAPHIC BASIN (159), FORTYMILE)
CANYON-BUCKBOARD MESA HYDROGRAPHIC)
BASIN (227B), AND STONEWALL FLAT)
HYDROGRAPHIC BASIN (145), RESPECTIVELY)
ALL LOCATED WITHIN NYE COUNTY, NEVADA.)

RULING

#5644

GENERAL

I.

Application 71649 was filed on September 7, 2004, by Nye County to appropriate 2.0 cubic feet per second (cfs) of underground water from the Gold Flat Hydrographic Basin for quasi-municipal purposes within portions of the NE $\frac{1}{4}$ of Section 28, T.2S., R.49E., M.D.B.&M. The proposed point of diversion is described as being located within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 22, T.2S., R.49E., M.D.B.&M.¹

II.

Application 71651 was filed on September 7, 2004, by Nye County to appropriate 0.7 cfs of underground water from the Gold Flat Hydrographic Basin for quasi-municipal purposes within Section 1, T.3S., R.49E., M.D.B.&M. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 5, T.3S., R.50E. M.D.B.&M.²

¹ File No. 71649, official records in the Office of the State Engineer.

² File No. 71651, official records in the Office of the State Engineer.

III.

Application 71652 was filed on September 7, 2004, by Nye County to appropriate 2.5 cfs of underground water from the Kawich Valley Hydrographic Basin for quasi-municipal purposes within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 11, T.3S., R.51E., M.D.B.&M. The proposed point of diversion is described as being located within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 11.³

IV.

Application 71653 was filed on September 7, 2004, by Nye County to appropriate 3.8 cfs of underground water from the Emigrant Valley - Groom Lake Valley Hydrographic Basin for quasi-municipal purposes within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 6, T.8S., R.54E., M.D.B.&M. The proposed point of diversion is described as being located within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 6.⁴

V.

Application 71654 was filed on September 7, 2004, by Nye County to appropriate 0.5 cfs of underground water from the Yucca Flat Hydrographic Basin for quasi-municipal purposes within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 10, T.11S., R.53E., M.D.B.&M. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 10.⁵

VI.

Application 71655 was filed on September 7, 2004, by Nye County to appropriate 5.0 cfs of underground water from the Fortymile Canyon - Buckboard Mesa Hydrographic Basin for quasi-municipal purposes within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 25, T.9S., R.50E., M.D.B.&M. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 25.⁶

VII.

Application 71657 was filed on September 7, 2004, by Nye County to appropriate 0.1 cfs of underground water from the Stonewall Flat Hydrographic Basin for quasi-municipal purposes within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 15, T.4S., R.45E., M.D.B.&M. The proposed point of diversion is described as being located within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 15.⁷

³ File No. 71652, official records in the Office of the State Engineer.

⁴ File No. 71653, official records in the Office of the State Engineer.

⁵ File No. 71654, official records in the Office of the State Engineer.

⁶ File No. 71655, official records in the Office of the State Engineer.

⁷ File No. 71657, official records in the Office of the State Engineer.

VIII.

The United States Air Force, Nellis Air Force Base – Nevada Test and Training Range (NAFB), the United States Department of Energy, National Nuclear Security Administration – Nevada Test Site (DOE) and the United States Department of Interior, National Park Service – Death Valley National Monument (NPS) timely protested Applications 71649, 71651, 71652, 71653 and 71657. The DOE and NPS timely protested Applications 71654 and 71655.

The NPS's protest is focused on its concern with additional appropriations of water from the Death Valley Flow System and the effect those additional appropriations would have on the water sources within the Death Valley National Park. The NPS alleges there is no water available for appropriation, that use of water as proposed under the applications will impair the NPS's water rights and water-related resources within the Park, which would threaten to prove detrimental to the public interest.

The DOE's protest alleges there is no unappropriated water at the source. The points of diversion are on property controlled by the DOE and the Applicant will not be able to prove upon the works of diversion. The use of the water as proposed under the applications will impair the DOE's water rights and the rights of other appropriators, and the proposed appropriation has the potential to adversely impact wildlife on the Nevada Test Site. The Applicant does not own or otherwise have access to the points of diversion, and the applications propose an inter-basin transfer of ground water, which does not meet the criteria for such transfers under Nevada water law.

The NAFB's protest alleges that the use of water as proposed under the applications would conflict with its water rights. The proposed points of diversion under Applications 71649, 71651, 71652, 71653, and 71657 are within the boundaries of the Nevada Test and Training Range. No access will be granted to allow water development infrastructure to be constructed, operated and maintained and the use of water as proposed under the applications is not in the public interest.

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 71649, 71651, 71652, 71653, 71654,

71655, and 71657 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.

A water right application is filed to request an appropriation of water to be appropriated from a specific point of diversion and to be used for a specific purpose within a well defined place of use. Applications 71649, 71651, 71652, 71653, 71654, 71655, and 71657 all contain a statement relating to the proposed place of use. Under Item 12: Remarks, the comment indicates that the Applicant's proposed beneficial use will not occur within the place of use as specified on each of the applications and that an interbasin transfer of the ground water must be approved through the approval of a subsequent change application before any beneficial use of the water can be made. The State Engineer finds that the applicant has inaccurately stated the proposed place of use on the applications.

III.

Prior to the approval of a water right application, it must be determined that there is a reasonable expectation that the water requested for appropriation will be placed to its proposed beneficial use. An examination of the land ownership records in the Office of the State Engineer shows that all of the subject applications request appropriations of underground water from points of diversion and places of use that are located upon land that has been withdrawn from public use. The NAFB holds stewardship of the lands specified in Applications 71649, 71651, 71652, and 71657, and the DOE holds stewardship of the lands specified in Applications 71653, 71654, and 71655.⁸ The protest by NAFB specifically stated, that no access would be granted to allow water development infrastructure to be constructed, operated and maintained. Similarly the DOE protest specifically states the points of diversion are on property controlled by the Department of Energy, which the Applicant does not own or have access to and therefore will not be able to prove upon the works of diversion. The State Engineer finds that the Applicant cannot gain control of the respective points of diversion or the places of use as described under Applications 71649, 71651, 71652, 71653, 71654, 71655, and 71657 without the consent of the Protestants and that the ability to divert and use water as proposed under the subject applications does not exist; therefore, there is

⁸ BLM Surface Management Status Maps, 1:100,000, Goldfield, Last Chance Range, Cactus Flat, Pahute Mesa, Tempiute, Pahrnagat Range, Indian Spring.

no reasonable expectation that beneficial use will occur under any permits granted under the subject applications.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁹

II.

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:¹⁰

- 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.

A water right application is filed to request an appropriation of water to be used for a specific purpose from a specified point of diversion and within a well defined place of use. Applications 71649, 71651, 71652, 71653, 71654, 71655, and 71657 all indicate that the Applicant's beneficial use is not within the place of use as specified on the application and will require an interbasin transfer of the groundwater before any beneficial use can be made. The Applicant has inaccurately stated the proposed place of use. The State Engineer concludes that to approve water right applications that do not properly identify the proposed place of use or for which the Applicant cannot obtain access to the proposed point of diversion would threaten to prove detrimental to the public interest.

IV.

Applications 71649, 71651, 71652, 71653, 71654, 71655, and 71657 request appropriations of underground water from and for sites that are located upon land that has been withdrawn from public use. Protests submitted by the lawfully recognized stewards of the lands in question

⁹ NRS chapters 533 and 534.

¹⁰ NRS § 533.370(5).

pointedly indicate they will not authorize access or the development of any water infrastructure. The absence of the land steward's consent to the Applicant's access and development of the water sought under these applications eliminates the expectation that the water will be put to beneficial use. The State Engineer concludes that under these circumstances, the approval of the subject applications would threaten to prove detrimental to the public interest.

RULING

The protests are upheld in part and Applications 71649, 71651, 71652, 71653, 71654, 71655, and 71657 are hereby denied on the grounds that their approval would threaten to prove detrimental to the public interest. No ruling is made on the remaining protest issues.

Respectfully submitted,



TRACY TAYLOR, P.E.
State Engineer

TT/WHR/jm

Dated this 24th day of

August, 2006.