

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

IN THE MATTER OF APPLICATION 36783)
FILED TO APPROPRIATE THE PUBLIC)
WATERS OF CHERRY CREEK WITHIN THE)
GARDEN VALLEY HYDROGRAPHIC BASIN)
(172), LINCOLN COUNTY, NEVADA.)

RULING
#5710

GENERAL

I.

Application 36783 was filed on February 14, 1979, by Michael Heizer to appropriate 5.4 cubic feet per second (cfs) of water from Cherry Creek, which is an easterly flowing stream found within the Garden Valley Hydrographic Basin. The proposed manner of use was originally for the irrigation of 320.0 acres of land located within the W½ of Section 14, T.2N., R.58E., M.D.B.&M. Application 36783 also requests a domestic use, which is a common secondary use found in many of the irrigation applications that the Office of the State Engineer receives. The proposed point of diversion is described as being located within the NW¼ NW¼ of said Section 14.

By letter dated May 28, 1981, the Applicant reduced the proposed place of use to 40.0 acres of land, which also reduced the annual duty of irrigation water to 160.0 acre-feet or less.¹

II.

Application 36783 was timely protested by two separate parties whose protest issues were identical. Charles E. Wadsworth and D. Clayton Wadsworth, Gracian Uhalde and Gracian N. Uhalde all contend that the approval of Application 36783 would:

...impair and conflict with the value of existing rights; that it would be against public policy to grant said application, and contrary to statute; that the granting of said application would interfere with the customary

¹ File No. 36783, official records in the Office of the State Engineer.

use of Protestants' grazing of said areas and Protestants' existing water rights and ranges.¹

FINDINGS OF FACT

I.

Once a water right application has been timely protested, the grounds of the protest must be resolved before the application can proceed through the State Engineer's application review process. Resolution of a formal protest can be accomplished through mutual compromise between the Applicant and the Protestant, by a field investigation or through an administrative hearing. The record of information maintained under Application 36783, indicates that a formal field investigation was conducted in the Cherry Creek area on March 20, 1981, by a representative of the State Engineer's office. The information developed during the visit is summarized within Report of Field Investigation No. 698, which has been incorporated into the application file maintained under Application 36783. This report states that at the time of the visit, there was some movement towards a settlement between the parties, in which the proposed place of use would be reduced in exchange for a withdrawal of the protests. A reduction in acreage did occur, by letter dated May 28, 1981; however, this letter also advised the State Engineer that the parties were unable to reach any sort of agreement. It was not until December 12, 2005, that a letter regarding the Uhalde protest was received from Laurel Marshall, who represented the Uhalde Ranch. Ms. Marshall requested that the Uhalde protest be withdrawn from consideration, on the condition that the proposed place of use be limited to 40.0 acres. Since this reduction in acreage had already occurred, the Uhalde protest was withdrawn from consideration on December 15, 2005. The State Engineer finds that Charles E. and D. Clayton Wadsworth represent the sole remaining protestants in the matter of Application 36783.

II.

The Wadsworth protest is based upon two basic issues:

1. whether the approval of Application 36783 will conflict with their existing water and grazing rights; and
2. whether the approval of the application will be contrary to the statutes, which are assumed to be those found under the Nevada Revised Statutes (NRS) chapters 533 and 534.

The answer to the first question begins with an examination of the Protestants water right holdings within the Garden Valley Hydrographic Basin. A listing of these rights can be generated through the State Engineers water right database, which is updated on a daily basis. If the search criterion is limited to include only active surface water rights within the Cherry Creek drainage, the database does not identify any active water right filings in the name of Wadsworth or any of its common variations. Expanding the search area to include the entire hydrographic basin produces an identical result. The State Engineer finds that the Protestants currently have no surface water filings within the Garden Valley Hydrographic Basin that could be impacted by the approval of Application 36783.

III.

A similar search of the database was performed to locate underground permits and certificates held under the Wadsworth name. Unlike the previous query, this search produced a list that included three pending applications that are classified as ready for action. The term, ready for action, is given to water right applications that have passed through the statutory publication and public protest periods, and are now ready for a determination as to their compliance with the NRS. All three applications were filed to support Carey Land Act applications, with their respective points of diversion located approximately eleven miles to the north of the Applicant's point of diversion on Cherry

Creek. There is also some uncertainty as to whether the Wadsworths who protested Application 36783 are the same family members that appear on the three pending water right applications. The first names of the Protestants do not match those found upon the water right applications and therefore they are not recognized as the owners of record of these applications. This leaves the Protestants in the position of having neither surface water nor underground water rights within the entire hydrographic basin. The State Engineer finds that the Protestants do not hold any water rights within the Garden Valley Hydrographic Basin; therefore, their concerns regarding a potential water right conflict with Application 36783 are unfounded.

IV.

It is also the Wadsworths' contention that the approval of Application 36783 would be contrary to the statutes. It is assumed that the Protestants are referring to the NRS chapters 533 and 534, which govern the appropriation and allocation of surface and underground water. All water right permits that are issued by the State Engineer must comply with these statutes in full, or they will be denied. The State Engineer finds that the matter of statutory compliance is a cornerstone of the permit review process, which will be applied to Application 36783 when it is considered for approval.

V.

Although the issue of existing rights has been examined as it relates to the Protestants, it must be expanded to include all of the existing water right holders on the Cherry Creek system. A query of the State Engineer's current water rights database indicates that the following active water rights have been issued to appropriate water from Cherry Creek, with the majority of these filings held by the Uhalde Ranch. A compilation of all active

water rights, arranged by their respective priority dates is presented as follows:²

Uhalde Ranch Active Water Right Filings on

Cherry Creek Drainage System

<u>File No.</u>	<u>Status</u>	<u>Source</u>	<u>MOU</u>	<u>Duty</u>	<u>Priority Date</u>
V-01543	VST	Str	Stk	7.30 mga	1873
V-01152	VST	Str	Irr	179.48 afs	11/10/1904
V-01153	VST	Str	Irr	89.20 afs	1881/1911
V-01539	VST	Spr	Stk	0.12 mgs	1875
V-01541	VST	Spr	Stk	1.10 mga	1873
V-01542	VST	Spr	Stk	7.30 mga	1878
2715	Cer	Str	Irr	78.82 afs	05/16/1913
4635	Cer	Str	Irr	141.25 afs	10/13/1917
4799	Cer	Str	Irr	29.16 afs	12/22/1917
6047	Cer	Spr	Stk	6.06 mgs	04/03/1920
6679	Cer	Str	Stk	4.35 mga	05/19/1922

Remaining Water Rights on Cherry Creek

V-01154	VST	Str	Irr	27.96 afs	7/26/1912	Frenzi
9592	Cer	Str	Irr	36.00 afs	5/31/1932	Youngs
36783	RFP	Str	Irr	1,280.00 afa	2/14/1979	Heizer

Based upon this ranking, it can be determined that the Heizer application is, despite its age, the junior water right filing on Cherry Creek. The priority of a surface water right is set by the date of its filing in the Office of the State Engineer, or it can be determined, in the case of a prestatutory right, through the formal adjudication process. All of the streams in Nevada are regulated by an allocation system that is based upon priority

² The water rights included within the table are contained within the official records in the Office of the State Engineer. The abbreviation, VST refers to a claim of a vested use of water that was initiated prior to the State's modern permitting process. None of the claims of vested right listed within the table have been formally adjudicated; hence they remain only a claim of historic use.

dates. Priority in time gives the better water right, with the senior right entitled to first use of the water, against all subsequent claims. Once the senior right has been fully satisfied, water can be passed to the junior appropriator.

By comparing the appropriate topographic map with the State Engineer's water right plats, it is possible to locate the point of diversion described under the subject application as it relates to other active surface water rights on the Cherry Creek system.³ With a single exception, all of the active water rights, which divert Cherry Creek water, are positioned upstream from the Applicant's proposed point of diversion. The only downstream water right is represented by V-01543, which claims an 1873 priority for the use of Cherry Creek water for the watering of 1,000 head of cattle. The history of Proof V-01543 includes an agreement that was made between the Sharp Land and Livestock and Carl Ray on February 7, 1922. A signed copy of this agreement is present within the record of information maintained under Permit 6047, Certificate 1137. Under the terms of the agreement, the Sharp Land and Cattle Company agreed to "...relinquish a claim of prior right recorded in the Office of the State Engineer under serial No. 01543, filed in said Office on February 19, 1918...".⁴ The relinquishment of this claim of vested right leaves no active water rights downstream of Application 36783 that would be affected by its approval.

VI.

The next issue that must be addressed pertains to the amount of unappropriated water that is available from Cherry Creek. The presence of unappropriated water in the Cherry Creek system can be determined by subtracting its committed resource from the amount of water generated by the stream. The committed resource of a stream can be calculated by identifying the permits, certificates and claims of vested right on the stream and its tributaries and

³ BLM Edition Surface Management Map 1: 100,000 Caliente Sheet, 1989.

⁴ File No. 6047, official records in the Office of the State Engineer.

summing their diversion rates and annual duties. If the Cherry Creek permits and certificates listed in the priority table are added, a combined annual duty of approximately 900 afa is arrived at. This annual duty of water equates to approximately 1.25 cfs. The State Engineer finds that for unappropriated water to be available within the Cherry Creek system, its flow must exceed 1.5 cfs.

VII.

The calculation of the committed resource is not difficult since the diversion rates and annual duties can be derived from the State Engineer's records. The question of stream flow is more difficult to answer, since the preference is to base this analysis on a reliable record of stream flow taken over a substantial period of time. The United States Geological Survey does not maintain a gauging station on Cherry Creek and there appears to be no long standing record of stream flows associated with this source. Report of Field Investigation No. 698, notes that at that time of the visit, the flow of Cherry Creek at the proposed point of diversion was approximately 1.5-2.0 cfs. In addition a photograph taken during a field visit on an unrelated matter, in May 2005, depicts a substantial flow of Cherry Creek water, several miles downstream of the Applicant's proposed point of diversion.¹ It is recognized that the 1981 and 2005 observations are essentially snap shots in time that may or may not reflect the true character of the stream over the summer irrigation season. At least one of the citizens attending the 1981 field investigation, expressed the opinion that the flow of Cherry Creek did not reach the Heizer Ranch during dry years. In this respect, the flow of Cherry Creek is similar to numerous streams found within the basin and range, many of which support irrigated acreage under permits and certificates issued by the State Engineer. In much the same manner, the fact that water reaches the Applicant's proposed point of diversion in sufficient quantities during some years offers some potential for irrigation. Whether the flow of Cherry Creek

can support the irrigation of 40.0 acres each season remains to be seen. The State Engineer finds that the true value of Cherry Creek as an irrigation source will ultimately be reflected in the degree of beneficial use that the Applicant is able to achieve, should an irrigation permit be issued.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁵

II.

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:⁶

- 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.

Based upon an analysis of his records, the State Engineer finds that the approval of Application 36783 for the irrigation of 40 acres within the described place of use will not conflict with existing water rights located on the Cherry Creek system.

IV.

The State Engineer concludes that there is sufficient unappropriated water available at the Applicant's proposed point of diversion to achieve a reasonable level of beneficial use.

⁵ NRS chapter 533.

⁶ NRS § 533.370(5).

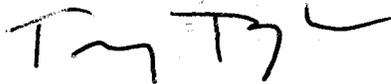
V.

The State Engineer concludes that, under these circumstances, the approval of Application 36783 would not threaten to prove detrimental to the public interest.

RULING

The Wadsworth protest to Application 36783 is overruled and Application 36783 is approved subject to existing water rights and the payment of the statutory permit fee.

Respectfully submitted,



TRACY TAYLOR, P.E.
State Engineer

TT/MB/jm

Dated this 26th day of
January, 2007.