

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

IN THE MATTER OF APPLICATIONS 75838,)
75839, 75840, AND 75841 FILED TO CHANGE)
THE POINT OF DIVERSION, PLACE OF USE)
AND MANNER OF USE OF THE PUBLIC)
WATERS OF AN UNDERGROUND SOURCE)
HERETOFORE APPROPRIATED UNDER)
PERMITS 67363, 66534, 66533, AND 66635,)
WITHIN THE TRACY SEGMENT)
HYDROGRAPHIC BASIN (83), STOREY)
COUNTY, NEVADA.)

RULING

5819

GENERAL

I.

Application 75838 was filed on June 5, 2007, by Stonefield, Inc., to change the point of diversion, place of use and manner of use of 1.249 cubic feet per second (cfs), not to exceed 285.6 acre-feet annually (afa), of underground water previously appropriated under Permit 67363. The existing manner of use is for industrial and domestic purposes and the proposed manner of use is for quasi-municipal purposes. The proposed place of use is described as being located within Section 21, those portions of the N $\frac{1}{2}$ S $\frac{1}{2}$ S $\frac{1}{2}$ lying north of Interstate 80 of Section 26, the N $\frac{1}{2}$ and those portions of the S $\frac{1}{2}$ lying north of Interstate 80 of Section 27, the N $\frac{1}{2}$ and those portions of the S $\frac{1}{2}$ lying north of Interstate 80 of Section 28, the N $\frac{1}{2}$, the SW $\frac{1}{4}$, and those portions of the SE $\frac{1}{4}$ lying north of Interstate 80 of Section 29, the E $\frac{1}{2}$ SE $\frac{1}{4}$ and the E $\frac{1}{2}$ W $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 30, the NW $\frac{1}{4}$ and those portions of the NE $\frac{1}{4}$ and SW $\frac{1}{4}$ lying north of Interstate 80 of Section 31, and those portions of the NW $\frac{1}{4}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ lying north of Interstate 80 of Section 32, T.20N., R.22E., M.D.B.&M. The existing place of use is within the TRI General Improvement District and is further described in Exhibit "B" attached to the application. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 29, T.20N., R.22E., M.D.B.&M. The existing point of diversion is described as being located within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 1, T.19N., R.22E., M.D.B.&M.¹

¹ File No. 75838, official records in the Office of the State Engineer.

II.

Application 75839 was filed on June 5, 2007, by Stonefield, Inc., to change the point of diversion and place of use of 1.68 cfs, not to exceed 742.74 afa, of underground water previously appropriated under Permit 66534. The proposed and existing manner of use is for quasi-municipal purposes. The proposed place of use is the same as that described under Application 75838. The existing place of use is the same as that described under Application 75838. The proposed point of diversion is described as being located within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21, T.20N., R.22E., M.D.B.&M. The existing point of diversion is described as being located within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 33, T.20N., R.22E., M.D.B.&M.²

III.

Application 75840 was filed on June 5, 2007, by Stonefield, Inc., to change the point of diversion and place of use of 1.68 cfs, not to exceed 742.74 afa, of underground water previously appropriated under Permit 66533. The proposed and existing manner of use is for quasi-municipal purposes. The proposed place of use is the same as that described under Application 75838. The existing place of use is the same as that described under Application 75838. The proposed point of diversion is described as being located within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21, T.20N., R.22E., M.D.B.&M. The existing point of diversion is described as being located within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 36, T.20N., R.22E., M.D.B.&M.³

IV.

Application 75841 was filed on June 5, 2007, by Stonefield, Inc., to change the point of diversion, place of use and manner of use of 1.249 cfs, not to exceed 285.60 afa, of underground water previously appropriated under Permit 66635. The existing manner of use is for industrial purposes and the proposed manner of use is for quasi-municipal purposes. The proposed place of use is the same as that described under Application 75838. The existing place of use is the same as that described under Application 75838. The proposed point of diversion is described as being located within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21, T.20N., R.22E., M.D.B.&M. The existing point of diversion is described as being located within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 36, T.20N., R.22E., M.D.B.&M.⁴

² File No. 75839, official records in the Office of the State Engineer.

³ File No. 75840, official records in the Office of the State Engineer.

⁴ File No. 75841, official records in the Office of the State Engineer.

V.

Applications 75838, 75839, 75840 and 75841 was timely protested by the Pyramid Lake Paiute Tribe (PLPT) on the following grounds as summarized below:^{1,2,3,4}

1. The base water rights sought for change have their origin in prior permits, which were filed in 1978 to appropriate ground water. The water rights originally appropriated nearly 30 years ago have been reassigned multiple times for various reasons and purposes. The Proof of Beneficial Use associated with the water rights originally appropriated and currently sought for change by the applications has not been made and the appropriation has not been pursued with reasonable diligence. For these reasons the applications should be denied and the base right permits cancelled.
2. The water rights sought for change (Permit 66635) were for an industrial use and a power plant project in the name of Reliant Energy. The necessity for the use, and the interest in pursuing the power plant project as originally intended no longer exists. For Permits 67363, 66534 and 66533, the Applicant has not complied with the permit terms, which require the submission of quarterly pumpage reports. For these reasons the applications should be denied and the base right permits cancelled.
3. On information and belief, the base water rights sought for change have been forfeited and/or abandoned, the applications should be denied and the permits cancelled.
4. The committed ground-water rights in the Tracy Segment Basin, which include the base water rights sought for change, exceed the perennial yield of the basin. The perennial yield of the basin was changed by the State Engineer in Ruling No. 5747, which ruling has been appealed. The State Engineer should not act on the applications until the appeal has been resolved.
5. Granting the applications would threaten to prove detrimental to the public interest in light of the over-appropriation of the ground water available in the basin, and the resulting inability of the perennial yield to serve existing permits and commitments with ground water, and in light of the obligations of the State Engineer pursuant to NRS chapters 533, 534, and 278 to require that there be adequate plans to protect existing rights, uses an commitments of ground water, and to exercise all appropriate

authority and discretion to control over-demand on the source and to protect both the public and other right holders of both surface and ground-water rights.

6. Granting the application would threaten to prove detrimental to the Tribe, to the purposes for which the Pyramid Lake Indian Reservation was created, and to the public interest, by depleting flows in the Truckee River and reducing inflows to Pyramid Lake, for the reasons stated above and because of the connection, both legal and physical, between ground water and surface water in the basin, and which depleted Truckee River flows would operate to the detriment of the threatened and endangered species inhabiting Pyramid Lake and the lower Truckee River, would impair instream flows, and would harm the right of the Tribe to all unappropriated water in the Truckee River, which rights were awarded to the Tribe in State Engineer Ruling No. 4683, and which harm would specifically threaten to prove detrimental to the public interest by endangering the Truckee River Operating Agreement (TROA) among Nevada, California, the United States, the Tribe, and the the Truckee Meadows Water Authority because TROA is specifically conditioned upon the right of the Tribe to all unappropriated water in the Truckee River.
7. Granting the application may threaten to prove detrimental to the public interest in ways that are not yet known to the Protestant, but which may arise or first become known to the Protestant in the period between the date of filing of the applications and the hearing on the protested applications.
8. Granting the application would threaten to prove detrimental to the public interest.
9. This Protestant incorporates in its Protest by reference as fully set forth herein every relevant protest ground set forth in any other protest filed by any other Protestant regarding these applications.

FINDINGS OF FACT

I.

Nevada Revised Statute (NRS) § 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 75838, 75839, 75840 and 75841 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 Permits 67363, 66534, 66533, and 66635, which are the basis for change Applications 75838, 75839, 75840 and 75841, in 2001 and 2002. In approving Permits 67363, 66534, 66533, and 66635, the State Engineer made the determination that these permits complied with the provisions of NRS § 533.370(5).

Applications 75838, 75839, 75840 and 75841 do not seek an additional appropriation of water, only a change in the point of diversion, place of use and manner of use of existing water right permits within the Tracy Segment Hydrographic Basin.

The Protestant has indicated that the subject water was originally appropriated almost 30 years ago and it does not believe any beneficial use of water has been made since the water was first appropriated. Therefore, granting change Applications 75838, 75839, 75840 and 75841 would amount to granting a new appropriation of ground water from the basin.

Under Permit 67363, the due date for the filing of the Proof of Completion of Work (POC) and the Proof of Beneficial Use (PBU) was set at July 26, 2003, and July 26, 2004, respectively. The Applicant was unable to meet the deadlines for the filing of the POC and PBU and has opted to file annual extensions of time. These extensions of time have been approved by the State Engineer and the current due date for the POC and PBU has been extended to July 26, 2008. A review of Permit 67363 shows that it is not subject to cancellation at this time and the permit is currently in good standing.⁵

Under Permit 66534, the due date for the filing of the POC and PBU was set at July 26, 2002, and July 26, 2003, respectively. The required POC was filed on August 22, 2002. The Applicant was unable to meet the deadline for the filing of the PBU and has opted to file annual extensions of time. These extensions of time have been approved by the State Engineer and the current due date for the PBU has been extended to July 26, 2008. A review of Permit 66534 shows that it is not subject to cancellation at this time and the permit is currently in good standing.⁶

⁵ File No. 67363, official records in the Office of the State Engineer.

⁶ File No. 66534, official records in the Office of the State Engineer.

Under Permit 66533, the due date for the filing of the POC and PBU was set at July 26, 2002, and July 26, 2003, respectively. The Applicant was unable to meet the deadlines for the filing of the POC and PBU and has opted to file annual extensions of time. These extensions of time have been approved by the State Engineer and the current due date for the POC and PBU has been extended to July 26, 2008. A review of Permit 66533 shows that it is not subject to cancellation at this time and the permit is currently in good standing.⁷

Under Permit 66535, the due date for the filing of the POC and PBU was set at July 26, 2002, and July 26, 2004, respectively. The Applicant was unable to meet the deadlines for the filing of the POC and PBU and has opted to file annual extensions of time. These extensions of time have been approved by the State Engineer and the current due date for the POC and PBU has been extended to July 26, 2008. A review of Permit 66535 shows that it is not subject to cancellation at this time and the permit is currently in good standing.⁸

The State Engineer finds that the doctrine of forfeiture only applies to perfected water rights, that is, water that has been placed to beneficial use and a certificate of appropriation issued. Applications 75838, 75839, 75840 and 75841 seek to change water that has not yet been placed to beneficial use under Permits 67363, 66534, 66533, and 66635; therefore, the State Engineer finds the doctrine of forfeiture is inapplicable and any protest claim as to forfeiture is overruled. The Permittee has filed extensions of time under Permits 67363, 66534, 66533, and 66635, in order to keep the water in good standing thus demonstrating a lack of intent to abandon the water.

The State Engineer finds that Applications 75838, 75839, 75840 and 75841 are change applications of existing water rights and are not requests for a new appropriation of water from the Tracy Segment Hydrographic Basin. The State Engineer finds that the permits that form the basis for change Applications 75838, 75839, 75840 and 75841, are currently in good standing and are not subject to cancellation, abandonment or forfeiture.

III.

The Protestant has alleged that the Tracy Segment Basin is over-appropriated and there is insufficient water within the basin to serve the existing water rights. In State Engineer's Ruling No. 5747, a determination was made that there was additional water available for appropriation

⁷ File No. 66533, official records in the Office of the State Engineer.

⁸ File No. 66535, official records in the Office of the State Engineer.

and the yield of the basin was estimated at 11,500 afa. Based on this new estimate of water availability some new appropriations of water were allowed, such that the amount of water committed through domestic wells, permits and certificates is approximately equal to the estimated yield of the basin. The Protestant has noted that this ruling is under appeal and has asked that a determination on the subject change applications be withheld until the appeal of State Engineer's Ruling No. 5747 is resolved.

A review of State Engineer's Ruling No. 5747 shows that the subject applications sought new appropriations of ground water. Those applications with the senior most priority were approved up to the estimated yield of the basin with the remaining applications being denied. The perennial yield of the Tracy Segment Hydrographic Basin was updated from the previous reconnaissance estimate of 6,000 afa to the current estimate of 11,500 afa. Permits 67363, 66534, 66533, and 66635 were changes of water that can be traced back to their original appropriations in 1978, under Permits 35281, 35282, 35363 and 35364. The original appropriations were reviewed in accordance to Nevada water law, which includes a determination that there was sufficient water available at the proposed source. After the original applications to appropriate were permitted, the water is counted as a committed resource of the basin from that point forward, and therefore, is also accounted for in the ground-water basin budget for the Tracy Segment Hydrographic Basin. A review of Permits 67363, 66534, 66533, and 66635 shows that the priority dates of these permits, which traces back to the original appropriations under Permits 35281, 35282, 35363 and 35364, are senior to the permits approved under State Engineer's Ruling No. 5747.

The State Engineer finds that the water sought for change under Applications 75838, 75839, 75840 and 75841 has already been accounted for in the ground-water basin budget, and therefore, the changes sought will have no additional effect on the ground-water resource. The State Engineer finds that any decision on appeal of State Engineer's Ruling No. 5747 will have no affect on the existing water rights sought for change.

IV.

The Protest indicates that the Tracy Segment Hydrographic Basin is over-appropriated and therefore, if the existing committed resources are pumped to their fullest extent Truckee River flows will be depleted and harm the surface water rights of the Tribe and the threatened and endangered species of inhabiting Pyramid Lake.

The Applicant has the right to pump water under its existing permits, or if approved, pump the same amount of water from change Applications 75838, 75839, 75840 and 75841. The net impact on the ground-water resources of the Tracy Segment would be unchanged whether the applications are granted or denied. It is important to remember that the Applicant is not seeking to pump additional water from the basin under new appropriations, but only seeking to change existing ground-water rights. The water sought for change has been accounted for in the basin budget as a committed resource and, the committed resources of the basin are approximately equal to the current estimate of perennial yield.⁹

The State Engineer finds that the proposed changes will have no net increased effect on the ground water resources of the Tracy Segment.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.¹⁰

II.

The State Engineer is prohibited by law from granting a permit under a change application that requests to appropriate the public waters where:¹¹

- 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.

The State Engineer concludes that the water sought for change is in good standing and the filing of change applications on these existing rights are allowed by Nevada water law.¹²

⁹ Nevada Division of Water Resources' Water Rights Database, *Hydrographic Basin Summary by Manner of Use and Hydrographic Basin Summary by Application Status*, Tracy Segment Hydrographic Basin, January 3, 2008, official records in the Office of the State Engineer.

¹⁰ NRS chapters 533 and 534.

¹¹ NRS § 533.370(5).

¹² NRS § 533.040(2).

IV.

The State Engineer concludes that the proposed changes in point of diversion, place of use and manner of use will not threaten to prove detrimental to the public interest.

V.

The State Engineer concludes that the proposed change applications will not conflict with existing rights.

VI.

The State Engineer concludes that the protest issues raised are without merit and unsupported by the facts and therefore, are overruled.

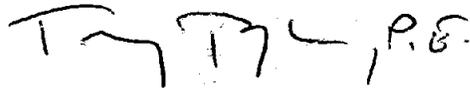
VII.

The change applications are filed in the name of Stonefield, Inc. and the permits sought for change are in the name of TRI General Improvement District. The State Engineer concludes that the title of the permits must be updated prior to any approval of the applications.

RULING

The protests to Applications 75838, 75839, 75840 and 75841 are hereby overruled and the change applications are approved subject to title update, existing water rights and payment of the statutory permit fees.

Respectfully submitted,



TRACY TAYLOR, P.E.
State Engineer

TT/TW/jm

Dated this 1st day of
February, 2008.