

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

IN THE MATTER OF APPLICATIONS 74576)
AND 75403 FILED TO CHANGE THE POINT)
OF DIVERSION AND/OR PLACE OF USE)
OF THE PUBLIC WATERS OF AN)
UNDERGROUND SOURCE PREVIOUSLY)
APPROPRIATED UNDER PERMITS 52136)
AND 65077, RESPECTIVELY WITHIN THE)
SMOKE CREEK DESERT HYDROGRAPHIC)
BASIN (21), WASHOE COUNTY, NEVADA.)

RULING
5840

GENERAL

I.

Application 74576 was filed on July 31, 2006, by Jackrabbit Properties, LLC, to change the point of diversion of 3.0 cubic feet per second (cfs), not to exceed 1,600 acre-feet annually (afa), of underground water previously permitted for appropriation under Permit 52136. The proposed manner of use and place of use is unchanged and described as being for irrigation purposes within portions of Sections 10, 11 and 14, T.29N., R.19E., M.D.B.&M. The change requested by Application 74576, if approved, would transfer the Applicant's existing point of diversion from the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 10, T.29N., R.19E., M.D.B.&M. to a point which is located within the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 10, T.29N, R.19E., M.D.B.&M. It is further indicated in the remarks section that this change is sought to correct the actual point of diversion under Permit 52136.¹

II.

Application 75403 was filed on March 1, 2007, by Jackrabbit Properties, LLC, to change the point of diversion and place of use of 1.4 cfs, not to exceed 1,013.6 afa, of underground water previously permitted for appropriation under Permit 65077. The proposed manner of use is unchanged and described as being for irrigation purposes. The proposed place of use is described as being located within the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 5, NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 7, W $\frac{1}{2}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ of Section 8, SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 9, W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 15, NW $\frac{1}{4}$ NW $\frac{1}{4}$, S $\frac{1}{2}$ N $\frac{1}{2}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 16, NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 17, all within T.31N., R.18E., M.D.B.&M. The existing place of use is described as being within the subdivisions described in Attachment

¹ File No. 74576, official records in the Office of the State Engineer.

“A” of the application. The change requested by Application 75403, if approved, would transfer the Applicant’s existing point of diversion from the NW¼ SE¼ of Section 24, T.32N., R.17E., M.D.B.&M. to a point which is located within the NE¼ NW¼ of Section 8, T.31N, R.18E., M.D.B.&M.²

III.

Application 74576 was timely protested by the Pyramid Lake Paiute Tribe of Indians (PLPT) on the following grounds:¹

1. The proof of the application of water to beneficial use under Permit No. 52136 has not been made for over 18 years since the date the application was originally filed. Granting Application No. 74576 to change the point of diversion of Permit No. 52136 would amount to granting a new appropriation for groundwater from the basin which should not be allowed for the reasons set forth below.
2. Given the prolonged period of non-use under Permit No. 52136, this application to change the point of diversion should not be granted on the basis that the water rights under Permit No. 52136 have been forfeited and/or abandoned.
3. On information and belief, a Petition for Adjudication of the water rights in the Smoke Creek Desert Hydrographic Basin #21 was filed with the State Engineer’s office in 2005. The application should not be considered, and certainly not granted, until the issues involving the Petition for Adjudication have been properly addressed and resolved.
4. As of August 2006, the records of the State Engineer’s office report the perennial yield of Smoke Creek Desert Hydrographic Basin #21 at 16,000 acre-feet, committed groundwater rights at 12,200 acre-feet, and pending groundwater rights in excess of 15,700 acre-feet. Given the prolonged period of non-use under Permit No. 52136, this application to change the point of diversion for Permit No. 52136 should not be granted and should be considered in the context of all other pending water rights in the Hydrographic Basin #21.
5. Granting the application would threaten to prove detrimental to the public interest.
6. Granting the application would threaten to prove detrimental to the public interest in ways that are not yet known to this Protestant, but which may arise or first become known to this Protestant in the period between the date of filing of the Application and the hearing on the protested Application – by way of example Fernley’s Application #57555 was filed on May 1, 1992, and the hearing was not held until February 6, 2006 – and in light of the position of the State Engineer that a specifically stated protest ground may not be amended regardless of the extensive passage of time between the date the protest is required to be filed, and the date of the hearing on a protested application.

² File No. 75403, official records in the Office of the State Engineer.

7. Granting the application would threaten to prove detrimental to the public interest and the interests and existing water rights of the Pyramid Lake Paiute Tribe for the reasons stated above, and because among other things, it would:
 - A. deplete water from the Pyramid Lake by depleting the underflow from the Smoke Creek Desert Basin to the Pyramid Lake Basin;
 - B. degrade or impair water quality in the Pyramid Lake Basin as a result of increasing groundwater withdrawals from the Smoke Creek Desert Basin;
 - C. adversely affect regional groundwater levels to the detriment of Pyramid Lake and the groundwater resources of the Pyramid Lake Paiute Tribe;
 - D. have a detrimental effect on the quality of the Pyramid Lake Paiute Tribe's groundwater resources;
 - E. prevent or interfere with the conservation or recovery of the two principal fish in the lower Truckee River and Pyramid Lake, the endangered cui-ui and the threatened Lahontan cutthroat trout, in violation of (i) the Endangered Species Act, 16 U.S.C. § 1531 et seq., and (ii) Nevada law protecting the cui-ui;
 - F. adversely affect the recreational value of Pyramid Lake;
 - G. Interfere with the purposes for which the Pyramid Lake Indian Reservation was established;
 - H. deplete the supply of water within the Pyramid Lake Indian Reservation portion of the Smoke Creek Basin;
 - I. affect the suitability of irrigation water within the Pyramid Lake Indian Reservation portion of the Smoke Creek Basin;
 - J. increase the cost of supplying irrigation water within the Pyramid Lake Indian Reservation portion of the Smoke Creek Basin;
 - K. adversely affect springs and flowing wells within the Pyramid Lake Indian Reservation portion of the Smoke Creek Basin; and
 - L. otherwise adversely affect the interest of the Tribe.
8. This Protestant incorporates in this Protest by reference, as if fully set forth herein, every relevant protest ground set forth in any other Protest filed by any other Protestant regarding this application.

IV.

Application 75403 was timely protested by the Pyramid Lake Paiute Tribe of Indians (PLPT) on the following grounds:²

1. If granted, the application would decrease recharge to the Smoke Creek Desert groundwater basin, to the detriment of existing water rights including those of the Pyramid Lake Paiute Tribe.
2. On information and belief, the water rights sought for transfer have been forfeited and/or abandoned and the application should therefore be denied.
3. On information and belief, a Petition for Adjudication of the water rights in the Smoke Creek Desert Hydrographic Basin #21 was filed with the State Engineer's office in 2005. The application should not be considered, and certainly not granted, until the issues involving the Petition for Adjudication have been properly addressed and resolved.
4. Granting the application would threaten to prove detrimental to the public interest in ways that are not yet known to this Protestant, but which may arise or first become known to this Protestant in the period between the date of filing of the

Application and the hearing on the protested Application – by way of example Fernley’s Application #57555 was filed on May 1, 1992, and the hearing was not held until February 6, 2006 – and in light of the position of the State Engineer that a specifically stated protest ground may not be amended regardless of the extensive passage of time between the date the protest is required to be filed, and the date of the hearing on a protested application.

5. Granting the application would threaten to prove detrimental to the public interest and the interests and existing water rights of the Pyramid Lake Paiute Tribe for the reasons stated above, and because among other things, it would:
 - A. deplete water from the Pyramid Lake by depleting the underflow from the Smoke Creek Desert Basin to the Pyramid Lake Basin;
 - B. degrade or impair water quality in the Pyramid Lake Basin as a result of increasing groundwater recharge in the Smoke Creek Desert Basin;
 - C. adversely affect regional groundwater levels to the detriment of Pyramid Lake and the groundwater resources of the Pyramid Lake Paiute Tribe;
 - D. have a detrimental effect on the quality of the Pyramid Lake Paiute Tribe’s groundwater resources;
 - E. prevent or interfere with the conservation or recovery of the two principal fish in the lower Truckee River and Pyramid Lake, the endangered cui-ui and the threatened Lahontan cutthroat trout, in violation of (i) the Endangered Species Act, 16 U.S.C. § 1531 et seq., and (ii) Nevada law protecting the cui-ui;
 - F. adversely affect the recreational value of Pyramid Lake;
 - G. interfere with the purposes for which the Pyramid Lake Indian Reservation was established;
 - H. deplete the supply of water within the Pyramid Lake Indian Reservation portion of the Smoke Creek Basin;
 - I. affect the suitability of irrigation water within the Pyramid Lake Indian Reservation portion of the Smoke Creek Basin;
 - J. increase the cost of supplying irrigation water within the Pyramid Lake Indian Reservation portion of the Smoke Creek Basin;
 - K. adversely affect springs and flowing wells within the Pyramid Lake Indian Reservation portion of the Smoke Creek Basin; and
 - L. otherwise adversely affect the interests of the Tribe.
6. This Protestant incorporates in this Protest by reference, as if fully set forth herein, every relevant protest ground set forth in any other Protest filed by any other Protestant regarding this application.

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. On July 24, 2007, the Applicant and the Protestant were notified that there was insufficient specificity and supporting documentation to evaluate the merits of the protests and in

that regard the Protestant was requested to file additional information clarifying its protest issues and file any such evidence it feels is necessary to substantiate its protest claims. The Applicant was given the opportunity to provide any evidence in answer or rebuttal to the protest claims and in support of its applications. Based in part on the information filed by both the Applicant and Protestant, the State Engineer finds that in the case of protested Applications 74576 and 75403 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 52136, which is the basis for change Application 74576, on October 22, 2002, for an individual duty of 3.0 cfs and a total combined duty of Permits 52136 and 52137 not to exceed 1,600 afa. In approving Permit 52136, the State Engineer made the determination that Permit 52136 complied with the provisions of NRS § 533.370(5). Specifically, the State Engineer found that there was unappropriated water at the proposed source and the additional allocation of water sought under then Applications 52136, 52137 and 52138 would not exceed the estimated perennial yield of the basin.³

Application 74576 does not seek an additional appropriation of water, only a change in the point of diversion of an existing water right, Permit 52136, within the Smoke Creek Desert Hydrographic Basin. Further, this change application is only being filed to correct the location of the point of diversion described in Permit 52136. The Applicant has indicated that the discrepancy in the point of diversion was discovered based on work that is being done to move forward with development of the property. It was indicated that the property and water rights previously owned by John and Vela Torvik were acquired by Jackrabbit Properties in 2002 and since that time the Applicant has been diligently proceeding with the property development.⁴ The proposed point of diversion under Application 74576 is approximately 1/3 of a mile to the northwest of the point of diversion described by Permit 52136.

The Protestant has indicated that beneficial use under Permit 52136 has not been made for over 18 years since the date the application was originally filed and therefore, granting Application 74576 to change the point of diversion of Permit 52136 would amount to granting a new appropriation of groundwater from the basin. This argument seems to overlook the fact that the Applicant and his predecessor were not allowed under Nevada water law to place water to beneficial use prior to obtaining the permit. Although the application was filed in 1988, the

³ State Engineer's Ruling No. 5142, July 22, 2002, official records in the Office of the State Engineer.

⁴ See, Application for Extension of Time, Attachment "A", December 15, 2006, File No. 52136, official records in the Office of the State Engineer.

permit was not issued until October 22, 2002. Hence, only 5 years have passed since Permit 52136 was approved.

Under Permit 52136, the due date for the filing of the Proof of Completion of Work (POC) and the Proof of Beneficial Use (PBU) was set at November 22, 2004, and November 22, 2007, respectively. The Applicant was unable to meet the deadline for the filing of the proofs 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 November 22, 2008. A review of Permit 52136 shows that it is not subject to cancellation at this time and the permit is currently in good standing.⁵

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. Application 74576 seeks to move water that has not yet been placed to beneficial use under Permit 52136; therefore, the State Engineer finds the doctrine of forfeiture is inapplicable and the protest claim as to forfeiture is overruled. The Permittee has filed extensions of time under Permit 52136, the base right which Application 74576 seeks to change, in order to keep the water in good standing and ultimately place the water to beneficial use thus demonstrating a lack of intent to abandon the water. In addition, the Protestant did not provide any specific evidence in support of a claim of abandonment.

The State Engineer finds that Application 74576 is a change application of an existing water right and is not a request for a new appropriation of water from the Smoke Creek Desert Hydrographic Basin. The State Engineer finds that the water sought for change under Application 74576, represented by Permit 52136, is currently in good standing and is not subject to cancellation, abandonment or forfeiture.

III.

The Protestant has alleged that no action should be taken on the subject change applications until a general adjudication is completed for the Smoke Creek Desert Hydrographic Basin. The Protestant cites that several petitions for adjudication have been filed with the Office of the State Engineer and that pending applications have been filed for over 73,400 afa of water. A review of the basin abstract shows 2,196.90 afa has been claimed under vested ground-water rights. The total committed ground-water resource is shown as 12,205.31 afa, including all

⁵ File No. 52136, official records in the Office of the State Engineer.

claims of vested right, permits, and certificates, which indicate ground water as the source.⁶ The estimated perennial yield of the Smoke Creek Desert Hydrographic Basin currently stands at 16,000 afa.

The pending applications referred to by the Protestant, in the amount of over 73,400 afa of water, are not claims of vested right but rather applications to appropriate water. A review of the water sought for change under Applications 74576 and 75403 shows that these water rights do not originate from any claim of vested right.

A review of records in the Office of the State Engineer failed to locate any instance where action was withheld on a change application of an existing ground-water permit in anticipation of a ground-water adjudication. Conversely, it was found that a majority of approved change applications for ground water occur in basins that have not been fully adjudicated with respect to ground water. As previously indicated, claims of vested right are counted as committed resources whether an adjudication has or has not been commenced. In addition, the water sought for change represents water that has been previously appropriated and therefore, accounted for in the ground-water basin budget for the Smoke Creek Desert Hydrographic Basin.

The State Engineer finds that there is no basis for withholding action on Applications 74576 and 75403 pending any future adjudication that may or may not occur, as the evidence demonstrates that the subject water rights would not be part of any adjudication and would not be affected by any adjudication in the Smoke Creek Desert Hydrographic Basin; therefore, this protest issue, for both Applications 74576 and 75403, is dismissed.

IV.

The Protestant alleges that the granting of Application 74576 will threaten to prove detrimental to the public interest (protest issue #5). There is no additional information contained within protest issue #5 and a review of the additional documentation submitted by the Protestant fails to clarify this protest issue. A protest against the granting of an application must set forth, with reasonable certainty, the grounds of the protest.⁷

The State Engineer finds that the Protestant has failed to clarify this protest issue or to file additional information specific to this protest issue and therefore, protest issue #5 for Application 74576 is dismissed.

⁶ Nevada Division of Water Resources' Water Rights Database, *Hydrographic Basin Summary by Manner of Use and Hydrographic Basin Summary by Application Status*, Smoke Creek Desert Hydrographic Basin, October 22, 2007, official records in the Office of the State Engineer.

⁷ NRS § 533.365(1).

V.

Protest issue #6 for Application 74576 and protest issue #4 for Application 75403 are similar and allege that the granting of the applications would threaten to prove detrimental to the public interest in ways that are not yet known to the Protestant but that may arise at a later time. This protest issue also notes that it is the position of the State Engineer that a specifically stated protest ground cannot be amended at a later date regardless of the amount of time that passes between the filing of the protest and its resolution.

Based on a review of the additional information filed by the Protestant in support of its protests, it is apparent that there were no new issues raised beyond the protest grounds originally submitted. Furthermore, any attempt to add additional protest issues not yet known to the Protestant but that may arise or first become known to the Protestant in the period between the date of the filing of the protest and any hearing on the protest would not be allowed. A protest against the granting of an application must set forth, with reasonable certainty, the grounds of the protest.⁸

The State Engineer finds that this protest issue is not valid and therefore, is dismissed.

VI.

Protest issue #8 for Application 74576 and protest issue #6 for Application 75403 are similar and seek to incorporate any other protest issue that may be raised by any other protestant regarding these applications. A review of the application files show there are no other protestants to these applications. In addition, the attempt to co-opt another protest in this manner would not be allowed. A protest against the granting of an application must set forth, with reasonable certainty, the grounds of the protest.⁸

The State Engineer finds that this protest issue is irrelevant and therefore, is dismissed.

VII.

The State Engineer issued Permit 65077, which is the basis for change Application 75403, on January 13, 2004, for an individual duty of 1.4 cfs not to exceed 1,013.6 afa. The permit was issued supplemental to vested claims and for a total combined duty not to exceed 6,332.0 afa. In approving Permit 65077, the State Engineer made the determination that Permit 65077 complied with the provisions of NRS § 533.370(5). Specifically, the State Engineer found that there was unappropriated water at the proposed source and the additional allocation of water sought under the permit would not exceed the estimated perennial yield of the basin.⁹

⁸ NRS § 533.365(1).

⁹ State Engineer's Ruling No. 5142, July 22, 2002, official records in the Office of the State Engineer.

Application 75403 does not seek an additional appropriation of water, only a change in the point of diversion and place of use of an existing water right permit within the Smoke Creek Desert Hydrographic Basin. In addition, the water sought for change represents water that has been previously appropriated and therefore, accounted for in the ground-water basin budget for the Smoke Creek Desert Hydrographic Basin.

The State Engineer finds that the issues related to water availability have been settled with the issuance of Permit 65077 and will not be revisited for a change in point of diversion and place of use as proposed under Application 75403. The State Engineer finds that the water sought for change under Application 75403 has already been accounted for in the ground-water basin budget and therefore, will have no additional effect on the ground-water resource.

VIII.

The Protestant has indicated that beneficial use under Permit 65077 has not been made and the proof of completion of work and proof of beneficial use, originally due February 13, 2005, and February 13, 2009, respectively, have not been filed. Therefore, Application 75403 should be cancelled or forfeited on the grounds that the water has not been put to use and that good faith and reasonable diligence to complete the work have not been pursued as demonstrated by the long time that has passed since the application was filed.

Although Application 65077 was filed on April 22, 1999, the permit was not issued until January 13, 2004. Hence, only 4 years have passed since Permit 65077 was approved. Under Permit 65077, the Applicant was unable to meet the deadline for the filing of the POC 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 has been extended to February 13, 2008. A review of Permit 65077 shows that it is not subject to cancellation at this time and the permit is currently in good standing.¹⁰

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. Application 75403 seeks to move water that has not yet been placed to beneficial use under Permit 65077; therefore, the State Engineer finds the doctrine of forfeiture is inapplicable and the protest claim as to forfeiture is overruled. The Permittee has filed extensions of time under Permit 65077, the base right which Application 75403 seeks to change, in order to keep the water in good standing and ultimately place the water to beneficial use thus demonstrating a lack of intent to abandon the water. In

¹⁰ File No. 65077, official records in the Office of the State Engineer.

addition, the Protestant did not provide any specific evidence in support of a claim of abandonment.

The State Engineer finds that Application 75403 is a change application of an existing water right and is not a request for a new appropriation of water from the Smoke Creek Desert Hydrographic Basin. The State Engineer finds that the water sought for change under Application 75403, represented by Permit 65077, is currently in good standing and is not subject to cancellation, abandonment or forfeiture.

IX.

A determination was made, after an examination of the records of the Office of the State Engineer, that the Protestant does not possess any water rights within the Smoke Creek Desert Hydrographic Basin.¹¹ A review of the evidence submitted also fails to indicate that the Protestant owns or possesses water rights within the Smoke Creek Desert Hydrographic Basin nor does the Protestant assert a claim to any reserved water rights within the basin.

The State Engineer finds that the Protestant does not possess existing ground-water appropriations in the Smoke Creek Desert Hydrographic Basin.

X.

A protest claim common to both applications is that granting the applications would threaten to prove detrimental to the public interest and existing water rights of the PLPT. The Protestant further lists a subset of issues listed as items A through L. In support of this protest, evidence was submitted on estimates of perennial yield and impacts of ground water pumping on the PLPT's resources.¹² The protestant reviewed two studies and concluded that there is a great deal of uncertainty in the 16,000 afa perennial yield number and it is likely that the perennial yield of the Smoke Creek Desert is lower than this currently accepted number. Also, a 1993 United States Geological Survey (USGS) report indicates that an unknown amount of underflow occurs from the Smoke Creek Desert basin to the Pyramid Lake basin and granting the applications would decrease this underflow.¹³

The Office of the State Engineer has reviewed the information submitted by the Protestant, including the cited reports, and has determined that the perennial yield of the Smoke Creek Desert Hydrographic Basin should remain at 16,000 afa. It is recognized that there is

¹¹ Nevada Division of Water Resources' Water Rights Database, *Hydrographic Basin Abstract*, Smoke Creek Desert Hydrographic Basin, October 22, 2007, official records in the Office of the State Engineer.

¹² See, *Report of Stetson Engineers and Robert C. Maddox & Associates in support of the Protests of the Pyramid Lake Paiute Tribe of Indians to Two Applications to Change Smoke Creek Desert Basin Groundwater Rights*, September 4, 2007, official records in the Office of the State Engineer.

¹³ *Ibid*, pp.4-5.

uncertainty in this perennial yield estimate, as the study used to arrive at this number is a reconnaissance level report, but it is the best information available at this time.

The Applicant has the right to pump water under its existing base right permits or if approved, pump the same amount of water from Applications 74576 and 75403. The net impact on the ground-water resources of the Smoke Creek Desert basin 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, as previously indicated, the committed resources of the basin are well below the estimated perennial yield. To recap, the total committed ground-water resource is 12,205.31 afa, including all claims of vested right, permits, and certificates, which indicate ground water as the source.¹⁴ The estimated perennial yield of the Smoke Creek Desert Hydrographic Basin currently stands at 16,000 afa.

The Protestant also states that no matter what the actual perennial yield is, the applications should still be denied because the proposed wells will reduce the recharge to the Smoke Creek playa and result in a reduction of water available for withdrawal on the Pyramid Lake Reservation.¹⁵ The State Engineer rejects this argument. As previously found, the Protestant does not have existing ground-water rights within the Smoke Creek Desert Hydrographic Basin. Also, Nevada water law allows for the appropriation of ground water. The Office of the State Engineer has historically made an effort to keep the amount of groundwater pumped to less than the estimated safe yield of the basin, thus preventing conflicts with adjacent basins that may occur if over-pumping were allowed. In the case of the Smoke Creek Desert Hydrographic Basin, the basin is under-appropriated by almost 25%. Regarding the effects of more localized pumping, NRS § 534.110(4) provides that for each appropriation of ground water, the right must allow for a reasonable lowering of the static water level at the appropriator's point of diversion.

The State Engineer finds that after a review of the evidence there is nothing contained in the Protestants argument that would disallow approval of the subject change applications. The

¹⁴ Nevada Division of Water Resources' Water Rights Database, *Hydrographic Basin Summary by Manner of Use and Hydrographic Basin Summary by Application Status*, Smoke Creek Desert Hydrographic Basin, October 22, 2007, official records in the Office of the State Engineer.

¹⁵ See, *Report of Stetson Engineers and Robert C. Maddox & Associates in support of the Protests of the Pyramid Lake Paiute Tribe of Indians to Two Applications to Change Smoke Creek Desert Basin Groundwater Rights*, p. 6, September 4, 2007, official records in the office of the State Engineer.

State Engineer finds that the Protestants evidence contained numerous allegations, but such allegations were not supported by the evidence and, at times, conflict with Nevada water law.

XI.

The Protestant alleges a number of deleterious effects on Pyramid Lake, but a review of the evidence shows the claims to be unsubstantiated. There was no substantial evidence submitted to establish a connection between Pyramid Lake, a surface water source, and the ground water within the Smoke Creek Desert. Also, pumpage within the Smoke Creek Desert Hydrographic Basin does not exceed the perennial yield of the basin.

The State Engineer finds that this protest issue is without merit and unsupported by the factual evidence.

XII.

The Protestant notes that prior change applications were filed under Applications 72557 and 72535 on the same water sought for change under the subject applications. These change applications sought to move the subject water to the Granite Fox power project. This project is apparently no longer viable and most of the applications filed in support of this project were withdrawn.¹⁶ Recently, the remaining applications associated with this project were also withdrawn, including Applications 72557 and 72535.¹⁷

The State Engineer finds that with the withdrawal of Applications 72557 and 72535, Applications 74576 and 75403 may be considered for review.

XIII.

The State Engineer finds that Permit 65077 was issued entirely supplemental to surface water and will remain entirely supplemental to surface water if the changes sought by Application 75403 are approved.

¹⁶ See, Withdrawal letter of August 20, 2007, File Nos. 72488, 72489, 72490, 72491, 72492, 72493, 72500, 72501, 72502, 72503, 72504, 72505, 72506, 72507, 72508, 72509, 72510, 72511, 72512, 72513, 72514, 72515, 72516, 72517, 72518, 72519, 72520, 72521, 72522, 72523, 72524, 72525, 72526, 72527, 72528, 72529, 72530, 72531, and 72532, official records in the Office of the State Engineer.

¹⁷ See, Withdrawal letter of October 11, 2007, File Nos. 72533, 72534, 72535, 72536, 72537, 72538, 72539, 72540, 72542, 72543, 72544, 72545, 72546, 72547, 72548, 72549, 72550, 72551, 72552, 72553, 72554, 72555, 72556, 72557, 72558, 72559, 72726, and 72727, official records in the Office of the State Engineer.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.¹⁸

II.

The State Engineer is prohibited by law from granting a permit under a change application that requests to appropriate the public waters where:¹⁹

- 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.²⁰

IV.

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

V.

The State Engineer concludes that the Protestant does not possess an existing ground-water appropriation within the Smoke Creek Desert Hydrographic Basin. The State Engineer further concludes that Applications 74576 and 75403 will not conflict with existing rights.

VI.

The Protestant provided additional evidence in support of its protest claims and a review of that evidence found that the Protestant failed to substantially support its allegations. The State Engineer concludes that the Protestant did not provide sufficient evidence to support denial of the applications under consideration in this ruling. The State Engineer further concludes that the protest issues raised are without merit and unsupported by the evidence and therefore, must be overruled.

¹⁸ NRS chapters 533 and 534.

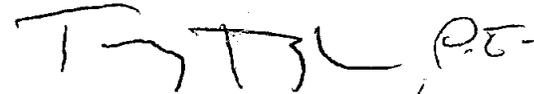
¹⁹ NRS § 533.370(5).

²⁰ NRS § 533.040(2).

RULING

The protests to Applications 74576 and 75403 are hereby overruled and the change applications are approved subject to existing water rights and payment of the statutory permit fees.

Respectfully submitted,



TRACY TAYLOR, P.E.
State Engineer

TT/TW/jm

Dated this 16th day of

April, 2008.