

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

IN THE MATTER OF APPLICATION 70260 FILED)
TO CHANGE THE POINT OF DIVERSION OF)
WATER APPROPRIATED WITHIN THE LOWER)
MEADOW VALLEY WASH HYDROGRAPHIC)
BASIN (205), LINCOLN COUNTY, NEVADA.)

RULING
5990

GENERAL

I.

Application 70260 was filed on July 23, 2003, by Bradshaw, Inc., to change the point of diversion of 3.971 cubic feet per second of water in the Meadow Valley Wash previously appropriated under Proof 02274 under the Meadow Valley Wash Decree. The proposed point of diversion is described as being located within the SW¼ SE¼ of Section 1, T.7S., R.66E., M.D.B.&M. The existing point of diversion is described as being located within the SE¼ NE¼ of Section 12, T.7S., R.66E., M.D.B.&M. ¹

II.

Application 70260 was timely protested by Roger Dieleman on the grounds that:

1. The benefit to Bradshaw does not exceed potential damage to riparian ecosystem in Meadow Valley Wash.
2. This diversion would greatly magnify negative conditions in Meadow Valley ecosystem caused by Bradshaw's prior diversion change.
3. No good cause is given for this change
4. Downstream users are denied benefit of water use.¹

III.

Application 702605 was timely protested by the Nevada Department of Wildlife (NDOW) on the grounds that:

Permanent movement of diversion from the current authorized legal location of SE¼ NE¼ S.12 T7S R66E MDM and location of diversion within SE¼ SE¼ S.1 T7S R66E MDM will result in severe impacts to existing important wildlife riparian habitats along approximately 1 mile of Meadow Valley Wash downstream of the proposed point of legal diversion and will negatively impact occupied habitat for State protected sensitive fish species including the Meadow Valley Wash desert sucker and Meadow Valley Wash speckled dace which have been proposed previously as candidate species for listing under Endangered Species Act by the US

¹ File No. 70260, official records in the Office of the State Engineer.

Fish and Wildlife Service. Applicant has failed to properly monitor use and withdrawal of water from Meadow Valley Wash from the existing actual point of diversion, which is the location for which the application is now being made. Applicant has exceeded allocation under Proof #02274 for the Decree and Determination of the Relative Rights in and to the Waters of Meadow Valley Wash dated June 9, 1999, resulting in complete dewatering of the channel of Meadow Valley Wash below the existing point of diversion, and subsequent negative impacts to wildlife and wildlife habitats, in excess of that necessary to obtain his legal adjudicated water right relative to total use, season of use and authorized cultural acreage. Continued operation of the diversion within the SW¼ SE¼ S.1 T7S R66E MDM in its present manner will continue negative impacts to State protected and Federal candidate wildlife species and their habitats and may contribute to actions for listing of those species for protection under the Endangered Species Act.¹

IV.

By way of an Answer to the protests, the Applicant asserts in reference to the NDOW protest, that the application merely requests to move its authorized point of diversion 1,700 feet north of its decreed point of diversion because the creek has become infiltrated with trees and growth to the extent that the creek does not carry enough water to the current point of diversion. The Applicant asserts that the protest by NDOW is dramatically exaggerated and given the fact that the creek below the existing point of diversion is dry for much of the year the only possible harm to wildlife would be the 1,700 feet below the new point of diversion. The Applicant asserts there is no proof or reason to believe that the referenced species of desert sucker or speckled dace will be impacted by just moving the point of diversion and asserts it has not exceeded its allocation under Proof 02274 nor has its use of the water dewatered the stream.

In reference to the Dieleman protest, the Applicant asserts that the use of the water does not damage the riparian ecosystem, the requested change would have little impact on the wash, good cause exists for the change as it is necessary in order to allow the Applicant its rightful use of the water and downstream users of the water are nonexistent, except for limited times in years when the subject canyon experiences significant flooding.¹

FINDINGS OF FACT

I.

By letter dated August 21, 2008, the State Engineer provided the Protestants the opportunity to file a response to the Applicant's Answer to the protests. The State Engineer finds that Protestant Dieleman filed a response.¹

II.

Protestants take issue with the fact that the Applicant moved the point of diversion without prior authorization by the State Engineer. The State Engineer also takes issue with that and instructed the Applicant to file a change application so that all interested persons could be put on notice of the change and the State Engineer could consider the change in accordance with Nevada Water Law. The State Engineer finds he will never sanction water right holders not complying with Nevada's Water Law, which requires a permit be issued before water can be appropriated at a new point of diversion and that is the matter under consideration in this ruling

III.

Protestants take issue with the proposed change asserting damage to the riparian ecosystem in Meadow Valley Wash. Protestants seem to ignore the fact that the Applicant has a decreed water right with an 1890 priority for 793.5 acre-feet annually for the irrigation of 158.7 acres of land using the water of Meadow Valley Wash. The State Engineer finds the Applicant has a decreed water right to divert and beneficially use the quantity of water authorized by decree on the decreed lands when in priority. The State Engineer finds that the Applicant is only entitled to use the quantity decreed under Proof 02274 from the Meadow Valley Wash.

IV.

There is a continuing issue that the Applicant has failed to properly monitor the amount of water it withdraws from the Meadow Valley Wash and to only withdraw the amount to which it is entitled. The issue is raised by Protestant NDOW and is an issue that has been raised by the State Engineer. The State Engineer informed the Applicant by letter dated June 26, 2003, that it may be exceeding its diversion limitation and ordered the Applicant to file a change application within 30 days, to install a suitable measuring device to monitor its diversions and maintain accurate records and to modify the existing diversion structure to allow for excess flows to return to Meadow Valley Wash when not in use or diversion limitations have been met.

On March 3, 2009, personnel from the Office of the State Engineer conducted a field investigation regarding Application 70260. It was found that during periods of non-use of water within the decreed place of use water is returned to the natural channel south of the place of use over one mile down gradient of the point of diversion. It was found there is no diversion structure at the proposed point of diversion to return water to the natural channel and there is no measuring device at the proposed point of diversion even though the Applicant was ordered to install these six years ago. The State Engineer finds the failure to comply with the order to install these is not

acceptable. The field investigation noted that the original diversion structure could not be located and there was evidence of severe flooding, which may have destroyed the original diversion structure. The State Engineer finds that the Applicant, when instructed, timely filed the change application to move the point of diversion, but has failed to comply with the order to install an adequate diversion structure, that water be returned to the natural channel during periods of non-use at the proposed point of diversion and that a suitable measuring device be installed at the proposed point of diversion to monitor its diversions and accurate records of diversions be maintained.

The State Engineer finds pursuant to this ruling that he is ordering the Applicant, within 30 days of the date of this ruling, to install a diversion structure at the point of diversion that allows for excess flow to be returned to Meadow Valley Wash when not in use in the amount as decreed or when diversion limitations have been met at the point of diversion. Within this same time frame the Applicant is also ordered to install a measuring device at the point of diversion and a control gate to limit flow into the diversion pipe to the actual permitted diversion rate and to monitor and report its diversions.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.²

II.

The State Engineer is prohibited by law from granting a permit under a change application that requests to appropriate the public waters where:³

- 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 the Applicant has a decreed right to use water from Meadow Valley Wash but only in the quantity authorized by decree and only on the decreed lands.

² NRS chapter 533.

³ NRS 533.370(5).

IV.

The State Engineer concludes the Applicant moved the point of diversion authorized under Proof 02274 without the benefit of law.

V.

The State Engineer concludes the Applicant must comply with the order to install proper diversion and measuring devices and failure will result in further action by the State Engineer.

RULING

The protests to Application 70260 are hereby overruled and the Application granted subject to:

1. Existing rights;
2. Payment of statutory permit fees;
3. Within 30 days of the date of this ruling the installation of a diversion structure at the point of diversion that allows for excess flow to be returned to Meadow Valley Wash when not in use in the amount as decreed or when diversion limitations have been met at the point of diversion;
4. Within 30 days of the date of this ruling the installation of a measuring device at the point of diversion and a control gate to limit flow into the diversion pipe to the actual permitted diversion rate; and
5. Monitoring its diversions and filing a report on those diversions on a quarterly basis with the State Engineer starting from the date of this ruling.

Respectfully submitted,



TRACY TAYLOR, P.E.
State Engineer



TT/SJT/jm

Dated this 4th day of

June, 2009.