

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

IN THE MATTER OF APPLICATION)
70285 FILED TO APPROPRIATE THE)
SURFACE WATER OF BEAVER)
DAM CREEK WITHIN THE VIRGIN)
RIVER VALLEY HYDROGRAPHIC)
BASIN (222) LINCOLN COUNTY,)
NEVADA.)

RULING

6016

GENERAL

I.

Application 70285 was filed on August 1, 2003, by the Ross & Orma Mathews 1990 Family Trust (Mathews Trust) to appropriate 5.56 cubic feet per second (cfs) of the surface water of the Beaver Dam Creek within the Virgin River Valley Hydrographic Basin, Lincoln County, Nevada for irrigation and domestic purposes within 43.05 acres, more specifically described as the NE $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ SE $\frac{1}{4}$, and SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 28, T.5S, R.71E., 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 Section 21, T.5S., R.71E., M.D.B.&M.¹

II.

Application 70285 was timely protested by the United States Department of Interior, National Park Service on the grounds that:

- I. There is no water available for appropriation because:
 - A. Committed water resources exceed the total inflow rate of the ground-water and surface-water system for the basin;
 - B. Committed water resources (underground and surface) exceed the basin's system yield; and
 - C. Pending water right applications (underground and surface) exceed the basin's system yield.

- II. The approval and development of the appropriation proposed by this application will impair the rights of the United States, because:

¹ File No. 70285, official records in the Office of the State Engineer.

- A. The proposed appropriation in combination with existing appropriations and those proposed by the Las Vegas Valley Water District, Lincoln County and the Vidler Water Company, Inc., and the Virgin Valley Water District, will eventually reduce the flow of the Virgin River.
 - B. The proposed appropriation in combination with existing appropriations and those proposed by the Las Vegas Valley Water District, Lincoln County and the Vidler Water Company, Inc., and the Virgin Valley Water District, could reduce the discharge of Lake Mead NRA springs.
- III. The public interest would not be served by granting this application, because the water and water-related resources in the nationally important Lake Mead NRA would be diminished or impaired, as a result of the appropriation proposed by this application.¹

III.

Application 70285 was timely protested by the Virgin Valley Water District on the grounds that:

- 1. The subject application should be denied on the ground that there is no unappropriated water in the proposed source.
- 2. The granting of the subject application will adversely impact existing rights, including, but not limited to, the rights of this Protestant.
- 3. The granting of the subject application is not in the public interest in that, on information and belief, such approval will result in adverse impacts on various threatened and endangered species protected under State and Federal law.

FINDINGS OF FACT

I.

Nevada Revised Statutes § 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 sufficient evidence is available in the Office of the State Engineer to evaluate the merits of Application 70285 and a hearing is not necessary.

II.

Mathews Trust holds title to Permit 7508, Certificate 1857, which provides for the appropriation of 0.3412 cfs or 186 acre-feet per season for the irrigation of 34.12 acres within the the NW $\frac{1}{4}$ NE $\frac{1}{4}$ (2.77 acres), NE $\frac{1}{4}$ SE $\frac{1}{4}$ (1.9 acres), NW $\frac{1}{4}$ SE $\frac{1}{4}$ (8.0 acres), SE $\frac{1}{4}$ SE $\frac{1}{4}$ (7.65 acres), and SW $\frac{1}{4}$ NE $\frac{1}{4}$ (4.0 acres) in Section 28, T.5S, R.71E., M.D.B.&M. and NE $\frac{1}{4}$ NE $\frac{1}{4}$ (9.8 acres), in Section 33, T.5S, R.71E., M.D.B.&M. The certificated point of diversion is described as being located within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 21, T.5S., R71E., M.D.B.&M.² Under Permit 7508, Certificate 1857, the duty of water for each acre of land is limited to 5.45 acre-feet annually. Application 7508 was filed in 1925 and the use of the water was certificated in 1932, which demonstrates the Mathews Trust has been irrigating land in this location for over 80 years. The appropriation requested under Application 70285 presents an unusual situation that the State Engineer has been attempting to remedy.

As demonstrated by correspondence dated December 28, 1988, the Mathews Trust attempted to file a new proof of beneficial use under Permit 7508 in order to show the appropriation of 5.56 cfs for the irrigation of 38.98 acres of land. However, by letter dated August 22, 2000, the State Engineer informed the permit holder that a new proof of beneficial use could not be filed after the issuance of the original certificate. The letter informed the permittee that if additional land had been irrigated over the 34.12 certificated acres, it would be necessary to file an application for an additional appropriation of water from Beaver Dam Creek. The State Engineer also indicated that since the current orientation of the irrigated place of use is different than that described under Certificate 1857, a change application was necessary to correct this discrepancy. The State Engineer finds it was these actions that precipitated the filing of Application 70285.

III.

On August 1, 2003, the Applicant filed Applications 70285 and 70286.³ Application 70285 was filed as a new appropriation of water for 5.56 cfs, for the irrigation of 43.05 acres of land, which is 8.93 acres over that certificated under Permit 7508. Application 70286 was filed to change the point of diversion, place and manner of use of a

² File No. 7508, official records in the Office of the State Engineer.

³ File Nos. 70285 and 70286, official records in the Office of the State Engineer.

portion of the water certificated under Permit 9009. Permit 9009, Certificate 2046, allowed for the appropriation of 0.006 cfs of water from Fort Creek for stock-watering purposes. Fort Creek is tributary to Beaver Dam Creek. Application 70286 requested to change 0.0045 cfs of that water from stock-watering purposes to irrigation and domestic use on 1.18 acres within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 28, T.5S., R.71E., M.D.B.&M.⁴ Application 70929 was filed on March 5, 2004, to change the point of diversion and place of use of 0.0015 cfs, which is the remaining water under Permit 9009 with the manner of use remaining for stock-watering purposes.⁵ Application 70999 was filed on April 2, 2004, by the Mathews Trust to appropriate 0.138 cfs of the surface water of Fort Creek for the irrigation of 1.18 acres within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 28, T.5S., R.71E., M.D.B.&M.⁶

On March 23, 2006, the State Engineer granted change Application 70286 for a diversion rate of 0.0045 cfs, not to exceed 3.22 acre-feet annually, for the irrigation of 1.18 acres and Application 70999 for a diversion rate of 0.138 cfs, not to exceed 5.9 acre-feet annually, for the irrigation of an additional 1.18 acres with a total combined duty of water issued under Permits 7508, Certificate 1857; Permit 72086 and Permit 70999 not to exceed 186 acre-feet annually. The State Engineer finds that Permits 70286 and 70999 do not increase the duty of water appropriated by the Mathews Trust, because the duty is no higher than that which already is allowed under Permit 7508, Certificate 1857, being 186 acre-feet annually. The issuance of the change proposed under Application 70286 and the additional appropriation of water under Application 70999 merely updated the records with the historical use on a ranch that has been in existence for generations and using permitted water rights since the early 1900s. The State Engineer finds there is also a claim of vested water right from Beaver Dam Creek for use on this same land that has not been adjudicated.⁷

⁴ File No. 9009, official records in the Office of the State Engineer.

⁵ File No. 70929, official records in the Office of the State Engineer.

⁶ File No. 70999, official records in the Office of the State Engineer.

⁷ File No. V-00782, official records in the Office of the State Engineer.

IV.

In an attempt to resolve the protests, by letter dated October 24, 2008, the State Engineer requested the Mathews Trust to provide additional information regarding the requested diversion rate, along with other information. Mathews Trust responded indicating that the difference between the place of use of Permit 7508 and the 43.05 acres filed for under Application 72085 results from the extensions of the corners and ends of fields over the years to make better use of the land and water.¹ The Applicant indicated that five separate diversion ditches are required because of the steep and rocky terrain. Each ditch requires 1.1 cfs in order to fill and flood irrigate the fields and orchards; for a combined need of 5.56 cfs between all five ditches. This letter notes that on November 10, 2004, Nevada Division of Water Resources staff visited the ranch and were shown the gravel dominated soil conditions and how nearly all the water used to irrigate the Mathews Trust property returns to the creek. The staff found that the only water being lost to the system is that being consumptively used with the non-consumptive portion flowing back to Beaver Dam Creek.

In an attempt to resolve the protests on Application 72085, the State Engineer requested that the Protestants review their protests. In response, Protestant Virgin Valley Water District indicated that it found the diversion rate of 5.56 cfs confusing and somewhat excessive, but agreed to withdraw its protest on the condition that no more than five acres of additional land were allowed to be flood irrigated over and above what is presently permitted for irrigation. By letter dated June 24, 2009 [sic], actually received on April 24, 2009, the National Park Service indicated it would withdraw its protest on the condition that the Applicant be limited to the irrigation of an additional three to five acres and the Nevada State Engineer's annual duty guidelines for irrigation be followed with whatever modifications are necessary and appropriate to account for the unusual soil conditions at the Applicant's ranch.¹

The State Engineer finds that Application 70285 is filed for the irrigation of 43.05 acres of land, that being 8.93 acres over and above the place of use certificated under Permits 7508, not including the 1.18 acres under Permit 72086 and the 1.18 acres under Permit 70999. Excluding those acreages, Application 70285 is requesting to irrigate 6.57 acres above the amount of acreage currently permitted. The State Engineer finds that

under Permit 7508, Certificate 1857, the Applicant had an annual duty of 186 acre-feet per year and was not to exceed an annual duty of 5.45 acre-feet per acre from any and all sources.

The State Engineer finds the diversion rate requested is a reflection of the quantity of water necessary to push enough water through the ditches in the gravel and sandy soils to water the fields. The State Engineer finds the consumptive use for pasture grass at the proposed place of use under Application 70285 is estimated to be between 2.9 and 3.6 acre-feet per acre annually. The State Engineer finds that the total of new acreage being applied for under Application 70285 is 6.57 acres, being the 43.05 total acres less the 34.12 acres under Permit 7508, the 1.18 acres under Permit 70286 and the 1.18 acres under Permit 70999. The State Engineer finds that while the 6.57 acres of new irrigated land is higher than the three to five acres noted by the Protestants for withdrawal of their protests, the amount is minimal enough and has been used for substantial period of time with no apparent impact to existing rights. The State Engineer finds that the annual duty of water issued under Permits 7508, 70285, 70286, and 70999 will be limited to 5.0 acre-feet per acre from any and all sources that and all permits on the Mathews Trust Ranch will be tied together for a total combined duty of 215 acre-feet annually resulting in an increased duty of 29.25 acre-feet annually, (a consumptive use equivalent of 19 to 23.7 acre-feet) being the equivalent of 5.85 acres, which is in effect very close to the stated acreages whereby the Protestants would agreed to withdraw their protests.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁸

II.

The State Engineer is prohibited by law from granting a permit to appropriate the public waters where:⁹

- A. there is no unappropriated water at the proposed source;
- B. the proposed use or change conflicts with existing rights;

⁸ NRS chapters 533 and 534.

⁹ NRS 533.370(5).

- 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 granting of Application 70285 will not interfere with existing rights or threaten to prove detrimental to the public interest.

IV.

The State Engineer concludes that the granting of Application 70285 as limited in this ruling is in substantial agreement with the Protestants conditional withdrawal of their respective protests.

RULING

The protests to Application 70285 are overruled and the Application is granted subject to existing rights and the payment of statutory permit fees. Permits 7508, 70285, 70286, and 70999 will be limited to 5.0 acre-feet per acre from any and all sources and all permits on the Mathews Trust Ranch will be comingled together for a total combined duty of 215 acre-feet annually. No ruling is made on the merits of the protests.

Respectfully submitted,



TRACY TAYLOR, P.E.
State Engineer

Dated this 10th day of
November 2009