

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

IN THE MATTER OF APPLICATIONS 78671,)
78672 AND 78673 FILED TO CHANGE THE)
POINT OF DIVERSION, PLACE OF USE AND)
MANNER OF USE OF A PORTION OF THE)
PUBLIC WATERS OF AN UNDERGROUND)
SOURCE PREVIOUSLY APPROPRIATED)
UNDER PERMIT 66396 WITHIN THE)
AMARGOSA DESERT HYDROGRAPHIC)
BASIN (230), NYE COUNTY, NEVADA.)

RULING

6024

GENERAL

I.

Application 78671 was filed on June 29, 2009, by John T. and Teresa D. Jacobs to change the point of diversion, place of use and manner of use of 0.02512 cubic feet per second (cfs) not to exceed 6.72 acre-feet annually (afa), a portion of underground water previously appropriated under Permit 66396. The proposed manner of use is for quasi-municipal purposes. The proposed place of use is described as being Little Nevada Subdivision Lots 143, 186, 187, 192, 193, 226, 194, 224, 223, 222, 203 and 200 located within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 2, and NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, T.18S., R.49E., M.D.B.&M. The existing manner and place of use is described as being irrigation and domestic use located within portions of the SW $\frac{1}{4}$ and SE $\frac{1}{4}$ of Section 2, T.18S., R.49E., M.D.B.&M. The proposed point of diversion is described as being located within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, T.18S., R.49E., M.D.B.&M. The existing point of diversion is described as being located within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, T.18S., R.49E., M.D.B.&M.¹

II.

Application 78672 was filed on June 29, 2009, by John T. and Teresa D. Jacobs to change the point of diversion, place of use and manner of use of 0.02512 cfs not to exceed 6.72 afa, a portion of underground water previously appropriated under Permit 66396. The proposed manner of use is for quasi-municipal purposes. The proposed place of use is described as being Little Nevada Subdivision Lots 178, 179, 153, 176, 177, 202, 204, 175, 173, 174, 206 and 207 located within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ and NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, T.18S., R.49E., M.D.B.&M. The existing manner and place of use is described as being irrigation and domestic use located within

¹ File No. 78671, official records in the Office of the State Engineer.

portions of the SW¼ and SE¼ of Section 2, T.18S., R.49E., M.D.B.&M. The proposed point of diversion is described as being located within the NE¼ NW¼ of Section 11, T.18S., R.49E., M.D.B.&M. The existing point of diversion is described as being located within the NE¼ SW¼ of Section 2, T.18S., R.49E., M.D.B.&M.²

III.

Application 78673 was filed on June 29, 2009, by John T. and Teresa D. Jacobs to change the point of diversion, place of use and manner of use of 0.02302 cfs not to exceed 6.16 afa, a portion of underground water previously appropriated under Permit 66396. The proposed manner of use is for quasi-municipal purposes. The proposed place of use is described as being Little Nevada Subdivision Lots 72, 73, 74, 154, 155, 172, 106, 107, 123, 156 and 157 located within the NE¼ NW¼ and NW¼ NE¼ of Section 11, T.18S., R.49E., M.D.B.&M. The existing manner and place of use is described as being irrigation and domestic use located within portions of the SW¼ and SE¼ of Section 2, T.18S., R.49E., M.D.B.&M. The proposed point of diversion is described as being located within the SE¼ SW¼ of Section 2, T.18S., R.49E., M.D.B.&M. The existing point of diversion is described as being located within the NE¼ SW¼ of Section 2, T.18S., R.49E., M.D.B.&M.³

IV.

Applications 78671, 78672 and 78673 were timely protested by John F. Bosta, Antonio Guerra Martínez, David K. Kalan, and Charles K. Hollis. The complete protests can be found within the associated application files. Many of the protest grounds are similar and are briefly summarized as follows:^{1,2,3}

1. A large part of the protests discuss the history and problems surrounding the Little Nevada Subdivision and associated water right Permits 28062 and 45061. Included are issues regarding the Embry Water System and T-N-T Enterprises, the connection and disconnection of water service from various lots within the subdivision, the removal of water meters, the refusal of water service to specific lots, and issues regarding the use of existing water lines within the subdivision. In addition, the protests raise issues such as the Public Utility Commission regulation of water systems of 15 or more connections or 25 or more people, State Engineer's Ruling No. 5895, the appeal of Ruling No. 5895 by

² File No. 78672, official records in the Office of the State Engineer.

³ File No. 78673, official records in the Office of the State Engineer.

Applicant Jacobs, and the issue of domestic wells on ½ acre lots. The protests also allege that T-N-T Enterprises is an “existing public water system” pursuant to NAC 445A.6591; a public water system that has operated for 5 or more years.

2. This proposal would place two wells in Lot 40; both of these wells would be within a currently vacant lot; violation of NRS 278.0165.
3. Permit 66396 should have been cancelled in 2006; no proof of beneficial use has been filed.
4. Irrigation use should not be changed to quasi-municipal use.
5. Applicant needs to establish proof that he purchased or leases the Embry Water Supply System so that T-N-T Enterprises is entitled to use the 4½ miles of water distribution lines in the ground and to file an application with the Public Utility Commission to operate a public water system.
6. [Guerra protest only] I claim ownership of 8.96 acre-feet annually of water rights [Permits 28062 and 45061] not used by the Embry Water Supply System on ten lots that have been combined and allowed to drill domestic wells.

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 in the case of Applications 78671, 78672 and 78673 there is no need to supplement the records of the Office of the State Engineer with additional information relating to the applications and protests and an administrative hearing is not necessary.

II.

The State Engineer finds a review of Applications 78671, 78672 and 78673, show that the proposed change in points of diversion comply with State Engineer’s Order No. 1197.⁴

⁴ State Engineer’s Order No. 1197, November 4, 2008, official records in the Office of the State Engineer.

III.

The Little Nevada Subdivision was granted Permit 28062 to provide water to the subdivision on August 29, 1974. The original permittees were W.D. and Gertrude Embry, Sr. and the community water system associated with the permit was referred to as the Embry Water Supply System. Permit 45061 was later approved to provide a back-up well for the water system. Permits 28062 and 45061 were approved for a total combined duty of 88.6 million gallons annually or 271.90 acre-feet annually (afa), to serve residential lots and commercial development within the subdivision. Each lot was assigned 1.12 afa for a total commitment of 253.12 afa. The remaining 18.78 afa was assigned to serve commercial purposes.⁵

Subsequently, the Little Nevada Subdivision was revised and reduced to 209 residential lots at 234.08 afa with the difference in the residential commitment increasing the allocation for commercial purposes to 37.82 afa; the total water allocation for the project remained at 271.90 afa. A quasi-municipal water system was designed and the first stage of the water system was completed in 1984. The water system was designed to initially serve 63 customers and to accommodate expansion as additional lots were sold. Through 1985, approximately 112 lots were sold (38 different property owners) and about 25 customers were receiving water service; however, due to adverse economic conditions, many of these customers eventually moved away.⁶

On November 20, 1989, water was sold and moved from the subdivision for a separate commercial project outside the place of use of the subdivision. On July 22, 1993, a portion of water under Permits 28062 and 45061 that was uncommitted to beneficial use or to specific development in progress, and that was not obligated to specific future service by a binding commitment between the water purveyor and customer, was cancelled by the State Engineer.⁷

Currently, there is a remaining combined duty of 119.85 afa under Permits 28062 and 45061. The remaining duty is sufficient to serve 107 lots,⁸ at 1.12 afa per lot; leaving 102 lots within the Little Nevada Subdivision without water rights under Permits 28062 and 45061. The

⁵ State Engineer's Ruling No. 5895, dated October 20, 2008, official records in the Office of the State Engineer.

⁶ State Engineer's Ruling No. 5895, dated October 20, 2008, official records in the Office of the State Engineer.

⁷ Cancellation Notice, July 22, 1993, File No. 28062 vol. 2 of 4, official records in the Office of the State Engineer.

⁸ Note, the Marsh transfer actually removed the equivalent amount of water for ~55.5 lots and the cancellation removed ~46.5 lots, such that the original 209 lots minus 55.5 minus 46.5 equals 107 lots remaining with water.

107 lots (97 parcels due to subsequent lot line changes) with remaining water are referred to as wet lots and all other lots are dry.⁹

In recent years, there have been numerous complaints and inquiries from lot owners within the subdivision regarding water service to their lots. For wet lots, the complaints revolved around the inadequacy of the Embry Water Supply System and the refusal of the operator to serve more than 14 lots.¹⁰ Residents have complained of being disconnected from water service and of being denied water service.¹¹ Some owners of the dry lots were unaware that there was no water service to their lots and some were unsure of how to remedy the dry lot situation in order to develop their lot. In an attempt to assist these lot owners, the Office of the State Engineer held a public workshop on September 12, 2009 in Amargosa, Nevada. Several scenarios and options were discussed to assist lot owners with bringing water service to their lots. For owners of dry lots less than one acre in size, one option was to purchase existing water rights within the Amargosa Desert groundwater basin and transfer the water rights to the dry lots through the State Engineer's change application process. The water rights could then be used to establish a community well for two or more residential units.¹² The State Engineer finds that change Applications 78671, 78672 and 78673 comply with this particular option.

Applications 78671, 78672 and 78673 propose to change the point of diversion, place of use and manner of use of Permit 66396. If approved, the applications would change water formerly permitted for irrigation use to quasi-municipal uses within the Little Nevada Subdivision in Amargosa Valley. The water will be used on a total of 35 dry lots at 0.56 acre-feet per lot within the subdivision that currently do not have a domestic well or any other water rights or water service available.

The State Engineer finds that change Applications 78671, 78672 and 78673 seek to change water previously appropriated under Permit 66396 and the applications do not change any water under Permits 28062 and 45061. Further, the State Engineer finds that the change applications do not involve any lots within the Little Nevada Subdivision that may be eligible for

⁹ State Engineer's Ruling No. 5895, dated October 20, 2008, official records in the Office of the State Engineer.

¹⁰ Note, the remnants of the Embry Water system is currently operated by Applicant Jacobs, a.k.a. T-N-T Enterprises, and provides water service to 14 lots within the subdivision under Permits 28062 and 45061. At this time the operator has indicated that he is refusing to serve more than 14 lots because service to 15 or more lots would trigger regulation by the Public Utilities Commission and the cost of such regulation would be prohibitive.

¹¹ Note, the Office of the State Engineer does not have regulatory authority over the operation of water systems; water systems are regulated by the Public Utilities Commission.

¹² Note, water rights sought for transfer must comply with State Engineer's Order No. 1197.

water service under Permits 28062 and 45061. The State Engineer finds that any protest issues related to the ongoing dispute between the Protestants and the Applicant regarding Permits 28062 and 45061 and associated water service issues are not within the purview of this ruling and this is not the proper venue for addressing these issues.

IV.

The protests indicate that this proposal would place two wells in Lot 40 and both of these wells would be within a currently vacant lot. The Protestants believe this would be in violation of NRS § 278.0165.¹ A review of Chapter 278 shows that it contains laws pertaining to planning and zoning and, under general provisions, the definition of a lot is defined by NRS § 278.0165. The statute defines a "Lot" as follows:

"Lot" means a distinct part or parcel of land which has been divided to transfer ownership or to build. The term does not include a parcel of land used or intended solely for use as a location for a water well.

The statute cited by the Protestants states the definition of a lot; however, there is nothing in the plain reading of this statute that indicates the Applicant is prohibited from having wells located as described in the Applications. In fact, within the Little Nevada Subdivision itself there are numerous lots with domestic wells and two lots containing the community wells drilled under Permits 28062 and 45061. In addition, any water right permits issued under Applications 78671, 78672 and 78673 would not waive any permitting requirements by other state, federal, and local agencies.

The Nevada Division of Water Resources derives its authority through the collective statutes known as the Nevada water law. These statutes are found under Title 48 - Water, Chapters 532 to 538, Inclusive and Chapters 540, 543 and 544 and, under Chapter 532, NRS § 232.005, 232.010 through 232.150. A review of Nevada water law does not reveal any restrictions to the placing of a well at the proposed points of diversion of the applications.

The State Engineer finds that this protest issue is without merit and that it is the Applicant's responsibility to ensure he is in compliance with laws and regulations outside the purview of the Office of the State Engineer.

V.

The protests request that Permit 66396 be cancelled as proof of beneficial use has not been filed. When an application is approved by the Office of the State Engineer, it becomes a

permit and the permit is subject to the filing of a Proof of Completion of Work (POC) and a Proof of Beneficial Use (PBU) within a specific time-frame. Once the POC and PBU have been accepted, the water right is considered perfected and a certificate of appropriation is issued on said permit. Under Permit 66396, the due date for the filing of the POC and PBU was set at June 25, 2003, and June 25, 2006, 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 to push back the due date of the required proofs. The POC was ultimately filed June 24, 2006, and the PBU has not been filed to date. Extensions of time have been approved by the State Engineer for the filing of the PBU and the current due date for the PBU has been extended to June 25, 2010. A review of Permit 66396 shows that it is not subject to cancellation at this time and the permit is currently in good standing.¹³

The State Engineer finds that the permit that forms the basis for change Applications 78671, 78672 and 78673, is in good standing and is not subject to cancellation.

VI.

The Protestants request that the change from irrigation use to quasi-municipal use not be allowed. In support, the protest states, "On June 19, 2009 the Nevada Board of Agriculture is [sic] posted the following policy for the Department of Agriculture to follow in regard to protecting all aspects of water that is used either directly, or indirectly, for agriculture [sic] production. To monitor and report to the Board in a timely fashion any and all proposed reallocation of any Nevada water for any use other than for its historic application to agriculture [sic] production."

The State Engineer finds that Nevada water law provides for the change in manner of use of an existing water right; the proposed change from irrigation to quasi-municipal purposes has not been restricted by the Office of the State Engineer in this particular case and changes from irrigation to quasi-municipal uses are common in Nevada.

VII.

The protests indicate that the Applicant needs to establish proof that he purchased or leases the Embury Water Supply System so that T-N-T Enterprises is entitled to use the 4½ miles of distribution lines in the ground and to file an application with the Public Utility Commission to operate a public water system.

¹³ File No. 66396, official records in the Office of the State Engineer.

The State Engineer finds that the ownership and use of any existing water lines are not water right related issues and are beyond the scope of the criteria that must be considered under NRS § 533.370. The State Engineer finds that authority for classification of water systems lies with the Public Utility Commission and any water right permits issued under Applications 78671, 78672 and 78673 would not waive any permitting requirements by other state, federal, and local agencies.

VIII.

Protestant Guerra stated in his protest that he claims ownership of 8.96 acre-feet annually of water rights [Permits 28062 and 45061] not used by the Embry Water Supply System on ten lots that have been combined and allowed to drill domestic wells.

The State Engineer finds that any protest issues related to the ongoing dispute being the Protestants and the Applicant regarding Permits 28062 and 45061 are not within the purview of this ruling and this is not the proper venue for addressing these issues.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this determination.¹⁴

II.

The State Engineer is prohibited by law from granting a permit under a change application that requests to appropriate the public waters where:¹⁵

- 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 on the findings contained herein, the State Engineer concludes there is substantial evidence that the use of the water as proposed under change Applications 78671, 78672 and 78673

¹⁴ NRS Chapters 533 and 534.

¹⁵ NRS § 533.370 (5).

will not impair existing rights or protectible interests in existing domestic wells and approval of the change applications will not threaten to prove detrimental to the public interest.

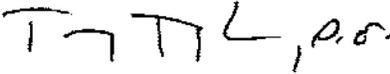
IV.

The State Engineer concludes that many of the issues raised in the protests are unrelated to the specific change applications at issue in this ruling and are instead related to water service issues under Permits 28062 and 45061 and related ongoing disputes between the Applicant and Protestants; therefore, those protests are dismissed. Protest issues related to Applications 78671, 78672 and 78673 were considered in this ruling and found to be without merit; therefore, the State Engineer concludes that these protest issues must be overruled.

RULING

The protests to Applications 78671, 78672 and 78673 are hereby overruled and the applications are granted subject to existing rights and the payment of statutory permit fees.

Respectfully submitted,


TRACY TAYLOR, P.E.
State Engineer

Dated this 20th day of
January, 2010.