

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

IN THE MATTER OF APPLICATIONS)
79366 AND 79367 FILED TO)
APPROPRIATE THE PUBLIC WATERS)
FROM A SURFACE WATER SOURCE)
WITHIN THE LONG VALLEY)
HYDROGRAPHIC BASIN (9), WASHOE)
COUNTY, NEVADA.)

RULING
#6046

GENERAL

I.

Application 79366 was filed on January 29, 2010, by Comstock Compadres, LLC to change the point of diversion, place and manner of use of 16.20 acre-feet annually and a pro rata share of the diversion rate of a portion of Permit 9810, Certificate 2090, for quasi-municipal purposes. The proposed place of use is described as being located within the SW $\frac{1}{4}$ NE $\frac{1}{4}$, S $\frac{1}{2}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$ and N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 3, all of Section 4, NE $\frac{1}{4}$ and portions of the N $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 9, T.42N., R.19E., and the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 33, T.43N., R.19E., M.D.B.&M. The proposed point of diversion is described as being located within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 4, T.42N., R.19E., M.D.B.&M.¹

II.

Application 79367 was filed on January 29, 2010, by Comstock Compadres, LLC to change the point of diversion, place and manner of use of 2.92 acre-feet annually and a pro rata share of the diversion rate of a portion of Permit 9810, Certificate 2090, for irrigation purposes. The proposed place of use is described as being located within the SW $\frac{1}{4}$ NE $\frac{1}{4}$, S $\frac{1}{2}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$ and N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 3, all of Section 4, NE $\frac{1}{4}$ and portions of the N $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 9 T.42N., R.19E., and the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 33, T.43N., R.19E., M.D.B.&M. The proposed point of diversion is described as being located within NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 4, T.42N., R.19E., M.D.B.&M.²

¹ File No. 79366, official records in the Office of the State Engineer.

² File No. 79367, official records in the Office of the State Engineer.

III.

Applications 79366 and 79367 were timely protested by Anthony Z. Stobiecki and Glenn W. Dyer on grounds summarized as follows:

1. The members of the Comstock Compadres, LLC had no involvement or knowledge that the managing member of the organization was filing the application and are not in agreement with the application.
2. The Comstock Compadres, LLC does not have a good faith intention or the financial resources to build the project and the members have not consented to the construction of the project.
3. The application does not contain sufficient information to obtain a full understanding of the proposed change, for example, identity of the location of the lands to be irrigated and who owns them.
4. The managing partner has trenched a ditch and built a pipeline without the knowledge of the other members and has been using water illegally.
5. The application fails to include all properties held by LLC members.
6. The use of the water is not beneficial for all the members of the LLC.
7. The State Engineer should not act until the court action for dissolution of the LLC is final.

IV.

Applications 79366 and 79367 were timely protested by Darrell Ferguson on grounds summarized as follows:

1. The application does not contain sufficient information for a full understanding of the proposed changes and lacks sufficient specificity to understand the changes.
2. The Applicant does not have the ability to construct the works in that it has commenced legal proceedings to dissolve itself.
3. The Applicant does not have the financial ability and reasonable expectation to actually construct the works and apply the water to the intended beneficial use.
4. The proposed change threatens to prove detrimental to the public interest.
5. The Applicant does not have an ownership interest or contractual relationship with the owner of the proposed places of use.
6. The proposed use conflicts with existing rights.

V.

Applications 79366 and 79367 were timely protested by John Charles McCoy on grounds summarized as follows:

1. NRS 533.370(1)(b) does not allow the granting of an application if the proposed change will adversely affect the cost of the water for the other holders of water rights.
2. The application does not provide sufficient information.
3. The managing partner is misleading the other members of the LLC and cannot show a good faith intention.
4. The LLC does not have a good faith intention to construct the works or the financial ability to construct the works and the amount of money needed to construct the works needs approval of the members.
5. The State Engineer should not act while the court action to dissolve the LLC is pending.

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 79366 and 79367 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.

Information provided to the State Engineer indicates that the Comstock Compadres, LLC is a limited liability company and there are six voting members: Anthony Z. Stobiecki and Diane I. Hagelthorn, Charles and Gloria McCoy, Charles and Patricia Gentry, Glenn and Leslie Dyer, Jon M. and Linda D. Walters, and Troy and Tracy Dupre Walters.³ The State Engineer finds based on the information provided that Jon Walters was voted as the Managing Partner of the LLC.

³ File 79366, Personal communication with Glenn Dyer, June 8, 2010, official records in the Office of the State Engineer.

III.

In a letter dated November 24, 2009, the State Engineer's office advised Comstock Compadres, LLC that any diversion of water from the subject spring that is outside the certificated place of use or for a different manner of use than that authorized under Permit 9810, Certificate 2090 is unlawful.⁴ The letter further requested that Comstock Compadres, LLC submit applications to change the place and manner of use of their portion of Permit 9810, Certificate 2090. The State Engineer finds that Comstock Compadres, LLC complied with this request and timely filed change Applications 79366 and 79367 on January 29, 2010.

IV.

Four protests were filed to Applications 79366 and 79377. Three of four Protestants are members of Comstock Compadres, LLC. The proposed place of use of the subject applications encompasses lands owned by the Walters Living Trust, Gentry Living Trust, Comstock Compadres, LLC and Darrel E. and Margaret L. Ferguson.⁴ The State Engineer finds the Fergusons are not members of Comstock Compadres, LLC.

V.

Protests submitted by Msrs. Stobiecki and Dyer are similar and are addressed together. They contend not all members of Comstock Compadres, LLC had involvement or knowledge of the filing of the new applications. Both applications were submitted in the name of Comstock Compadres, LLC; therefore, the water will remain in the name of Comstock Compadres, LLC. They further state Comstock Compadres, LLC does not have the good faith intention or financial resources to build the project. Based on a field investigation on November 19, 2009, and documented by letter dated November 24, 2009, valves and pipelines are already in place to divert water to lands owned by Msrs. Walters and Gentry and also to storage tanks on Comstock Compadres, LLC land. At the time of the November 19, 2009, field investigation, it was apparent that water had been diverted to lands not authorized for use of the water under Permit 9810. This illegal diversion was addressed in the November 24, 2009, letter and again in a cease and desist order letter issued by the State Engineer's office on April 7, 2010.³ Another protest issue raised by Protestants Stobiccki and Dyer is that the new applications fail to include all properties owned by Comstock Compadres, LLC members. Item No. 14 in an agreement

⁴ File No. 9810, official records in the Office of the State Engineer.

signed by four members (Walters, Gentry, Dyer, and Stobiecki) in March 2006 states any water (underground, spring, or pond) located on the Member Purchaser's or purchaser's parcel is available for the Member Purchaser's or purchaser's domestic use.⁵ This item addresses the issue of where Comstock Compadres, LLC water can be moved. Item No. 15 of the above-referenced agreement provides that all water rights appurtenant to Comstock Compadres, LLC property shall remain the property of Comstock Compadres, LLC. The State Engineer finds that even though the water under Applications 79366 and 79367 can be used for the benefit of Messrs. Walters and Gentry, the water remains in name (and an asset) of Comstock Compadres, LLC and not in Messrs. Walters and Gentry's names.

VI.

Protestants Ferguson and McCoy allege that the applications do not contain sufficient information for a full understanding of the changes. Both applications were correctly filled out and were accompanied by a place of use map that met all specifications as required by the state statutes. The State Engineer finds the applications provided sufficient information to comply with Nevada water law and for the State Engineer to act upon them.

VII.

The State Engineer finds the fact that Comstock Compadres, LLC has allegedly commenced legal proceedings to dissolve the LLC is beyond the scope of the State Engineer's jurisdiction and is not relevant to the ability to act on these applications.

VIII.

The State Engineer finds the protest issues regarding the ability of Comstock Compadres, LLC to construct the works is not an issue as the valves and pipelines are already in place.

IX.

Protestant Ferguson's next concern deals with the fact that Comstock Compadres, LLC does not have an ownership interest or contractual relationship with the owner of the proposed places of use. The only portion of the proposed place of use not owned by Comstock Compadres, LLC and Messrs. Walters and Gentry is a 40-acre parcel owned by Mr. and Mrs. Ferguson. According to Mr. Ferguson's legal counsel there is an easement

⁵ File No. 79366, official records in the Office of the State Engineer.

agreement between Mssrs. Walters and Ferguson that permitted a pipeline be constructed across Mr. Ferguson's property to Mr. Walter's property.⁶ In that easement agreement, Mr. Walters agreed to "give" water for the use of Mr. Ferguson. The State Engineer finds there is adequate evidence that the managing partner of the LLC has made an agreement that allows the use of water on the proposed place of use.

X.

Protestant McCoy asserts that the granting of an application for a proposed change will adversely affect the cost of waters for other holders of water and cited NRS § 533.370(1)(b). The State Engineer finds this provision of the statute deals with irrigation districts and the subject waters are not part of any recognized irrigation district; therefore, the protest claim lacks merit.

XI.

Protestant McCoy alleges that the managing partner mislead other members and did not show good faith. The State Engineer finds this is not a matter of Nevada water law and is beyond the State Engineer's jurisdiction.

XII.

Protestant McCoy asserts that the Applicant cannot construct the works without approval of the other members. As noted above, the pipelines and valves are already in place. The State Engineer finds issues between the LLC members about what they can and cannot do is not within the State Engineer's jurisdiction and the fact that there is ongoing litigation amongst the members to dissolve the LLC is not a reason to deny these applications. The right sought to be changed and the change applications are in the same name.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁷

II.

The State Engineer is prohibited by law from granting a permit under a change application that requests to appropriate the public waters where:⁸

⁶ File No. 9810, letter dated February 9, 2010, official records in the Office of the State Engineer.

⁷ NRS Chapters 533 and 534.

⁸ NRS § 533.370(5).

- 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.

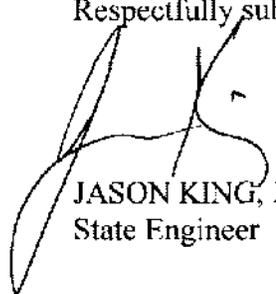
The State Engineer finds that the issuance of Applications 79366 and 79367 will not interfere with water rights currently held by Comstock Compadres, LLC or any of its members and there is no evidence that the use of the water will threaten to prove detrimental to the public interest.

RULING

The protests to Applications 79366 and 79367 are hereby overruled and Application 79366 is approved for 16.20 acre-feet annually at a diversion rate of 0.38 cubic feet per second and Application 79367 is approved for 2.92 acre-feet annually at a diversion rate of 0.007 cubic feet per second subject to:

1. Existing rights, and
2. The payment of the statutory permit fees.

Respectfully submitted,

 P.E.
JASON KING, P.E.
State Engineer

Dated this 23rd day of
June, 2010.