

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

FILED
2008 JUL 25 AM 10:30 *dy*
STATE ENGINEERS OFFICE
STATE ENGINEER
PROTEST

IN THE MATTER OF APPLICATION NUMBER 76795
FILED BY ROCKVIEW DAIRIES, INC
ON MARCH 11, 2008
TO APPROPRIATE THE PUBLIC WATERS OF THE STATE OF NEVADA

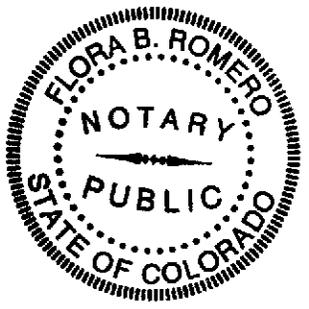
Comes now Daniel J. McGlothlin, on behalf of the United States Department of the Interior, National Park Service, whose post office address is 1201 Oak Ridge Drive, Suite 250, Fort Collins, Colorado, 80525, whose occupation is Acting Chief, Water Rights Branch, Water Resources Division, National Park Service, and protests the granting of Application 76794 for the following reasons and on the following grounds, to wit:

See Exhibit A attached.

THEREFORE the protestant requests that the application be denied.

Signed: *Daniel J. McGlothlin*
Agent or protest

Daniel J. McGlothlin
Printed or Typed Name



Address: 1201 Oak Ridge Dr., Suite 250
Street No. or P.O. Box No.

Fort Collins, Colorado 80538
City, State and Zip Code No.

Subscribed and sworn to before me this 24th day of July, 2008.

Notary Public *Flora B. Romero*

State of *Colorado*

County of *Larimer*

My Commission expires Flora B. Romero, Notary Public
State of Colorado
My Commission Expires 7/31/2010

dy

IN THE MATTER OF APPLICATION 76795

EXHIBIT A

Protest by Daniel J. McGlothlin, on behalf of
the United States Department of the Interior,
National Park Service

- I. Death Valley National Monument was created by Presidential Proclamation in 1933 to preserve unusual features of scenic, scientific, and educational interest. The national significance of Death Valley and its environs was reaffirmed in October 1994 through enactment of the California Desert Protection Act. The Act acknowledged Death Valley's extraordinary and inestimable value, increased its area, and changed the area's status to that of a National Park. The Act specifically charged the Secretary of the Interior and all other officers of the United States to take all steps necessary to protect the reserved water rights and water resources of the Park, which includes the Devil's Hole detached management unit.
- II. The mission of the National Park Service (NPS) may be paraphrased from 16 U.S.C. 1, as conserving scenery, natural and historic objects, and wildlife, and providing for enjoyment of the same in such a manner and by such means as will leave them unimpaired for the enjoyment of future generations.
- III. The NPS is entitled to Federal reserved water rights for reserved lands within Death Valley National Park. The priority dates for reserved rights are senior to the appropriation sought by this application. These rights have not been judicially quantified.

In the eastern part of the Park, Grapevine, Keane Wonder, Nevares, Texas, Travertine and Saratoga Springs provide water for park facilities, domestic use, public campgrounds, resorts, vegetation, wildlife, public enjoyment, scenic value and other related needs. Nevares, Texas, and Travertine Springs collectively discharge about 2,000 gallons per minute (about 3,200 acre-feet per year) and are critical for domestic and commercial use.

The Park supplies water for visitors from the above-named springs. For example, in 1995, water from these springs supported approximately 262,000 overnight campers in Death Valley NP campgrounds, 74,500 motel/hotel rooms rented to park visitors, 220 National Park Service employees and their families (at the height of the visitor season), 400 resort employees and a population of 60 Native Americans.

- IV. A unique and endangered species of pupfish exists at Devil's Hole, a detached unit of Death Valley National Park in Nevada, within the Amargosa Desert hydrographic basin. A decision by the U.S. Supreme Court (later refined by the U.S. District Court) determined that a Federal reserved water right exists at Devil's Hole for the purpose of maintaining a water level of no more than 2.7 feet below a brass pin located on the rock wall of Devil's Hole. This level was determined to be the minimum elevation needed to

inundate the shelf on which the pupfish spawn (Cappaert v. United States, 1976). Recent data indicate that the water level in Devil's Hole has been declining since about 1988.

- V. The proposed appropriation is located within the Amargosa Desert hydrographic basin, which is part of the Death Valley regional flow system (Harrill, et al., 1988). According to the Nevada Department of Conservation and Natural Resources (1992), the perennial yield for the Amargosa Desert (230) is combined with Mercury Valley (225), Rock Valley (226), Fortymile Canyon - Jackass Flats (227A), Fortymile Canyon - Buckboard Mesa (227B), and Crater Flat (229). The combined perennial yield for these basins is listed as 24,000 acre-ft/yr. In the Amargosa Desert (230) alone, existing appropriations (including about 17,000 acre-ft of appropriated spring discharge in the Ash Meadows area) are estimated to be about 60,000 acre-ft/yr, as of July 2004. Therefore, the amount already appropriated greatly exceeds the perennial yield.
- VI. In 1979, the Nevada State Engineer (NSE) designated the Amargosa Desert hydrographic basin as a basin coming under the provisions of Chapter 534 NRS. Additional management considerations are warranted in a designated basin.
- VII. Application 76795 was filed March 11, 2008 to change the point of diversion, place and manner of use of a portion of water heretofore appropriated under Permit 64491. Permit 64491 was granted in 1999 for the use of 3.12 cfs not to exceed 250 acre-ft/acre.
- VIII. Permits 64491, 64489 and 64490 have a combined total duty of 1,050 acre-ft per acre. According to Monthly Pumpage Reports provided by the applicant to the NSE as part of an administrative hearing in 2007, the well associated with these three permits is identified as the Sod Farm well, and one volume of water is reported for all three permits. However, the points of diversion listed in the permits on file with the NSE are all in different quarter sections. The point of diversion for 64489 is located within NE SE Section 9 17S 49E. The point of diversion for 64490 is located within NE NW Section 9 17S 49E. The point of diversion for 64491 is located within NE SW Section 9 17S 49E.
- IX. The amount of water use reported in the Monthly Pumpage Reports under these three permits for 2004 is 60.8 million gallons or 224.98 acre-ft. This is an incorrect conversion of units. The amount of water use reported under these three permits in the 2004 Ground Water Pumpage Inventory, prepared by the NSE, is 775 acre-ft, which appears to be an annual duty not based on a meter reading. The meter readings described in the Field Report for 2004 sums to 97 acre-ft, however the Remarks section indicates these were based on new meters. It is not clear which number most accurately reflects the actual water use, and from which point of diversion the water was withdrawn.
- X. In 2005, 2006 and 2007, the amount of water use reported in the Ground Water Pumpage Inventory for Permits 64489, 64490, 64491 is combined with Permits 68218, 70719, 70720, 70721, and 70722. Total use is reported as 285.4 acre-ft in 2005, 872.89 acre-ft in

2006, and 1013 acre-ft in 2007. Apparently the point of diversion for 64489 is the same as 68218, and 70719 – 70722. However, the place of use for 64489 is not the same as that for 68218, and 70719 – 70722. Yet one meter is used for all of these permits (64489, 68218, and 70719 – 70722).

- XI. The place of use described under Permits 68218, and 70719 – 70722 is limited to 113 acres and not to exceed 5 acre-ft per acre, or 574.38 acre-ft per year. The amount of water use reported in 2006 for this area of land is based on an applied duty per acre and not a meter reading. The amount of water use reported in 2007 is 735.9 acre-ft, which exceeds the annual duty.
- XII. Ruling 5479 states that “Water right permits are issued for a specific point of diversion, place of use, and manner of use and with specific terms and conditions.” Permit 64489, 64490, and 64491 all have permit conditions requiring that a totalizing meter must be installed and maintained in the discharge pipeline near the point of diversion, and that accurate measurements must be kept of water placed to beneficial use. The applicant has not complied with these permit conditions.
- XIII. Permit 64491 was issued for a point of diversion in the NE SW Section 9, T17S R49E. The place of use includes 210 acres within the W ½ and SE ¼ of Section 9. The place of use is the same as that listed under 64489 and 64490. Field Inventories indicate that only a portion of this land is being irrigated.
- XIV. Proof of beneficial use under Permit 64491, the base permit, was originally scheduled for October 14, 2002. Proof of beneficial use was then extended to October 14, 2008. The applicant now seeks to change the point of diversion, yet adequate records of water use under this Permit have not been provided.
- XV. The applicant has a long history of non-compliance with Nevada statutes. This includes failure to submit requested pumpage or power records in a timely manner, use of ground-water wells without a permit, and discrepancies in pumpage data submitted to the NSE. Details of this non-compliance were outlined in a letter sent to the applicant in February 2008 by the NSE.
- XVI. Ruling 5750 states that “Withdrawals of ground water in excess of the perennial yield contribute to adverse conditions such as water quality degradation, storage depletion, diminishing yield of wells, increase in cost due to increased pumping lifts, land subsidence and possible reversal of groundwater gradients...” The Ruling further states that “existing water rights in the Amargosa Desert Hydrographic Basin exceeds the perennial yield of the basin.” Well AD-9a, a monitoring well located in Section 15, T17S R49E, has declined more than 45 feet since 1964. In water right applications 68218, and 70719 – 70722, the applicant noted that well yields at the existing points of diversion in Section 15, are not producing an adequate yield of water. A potentiometric map included

within the Wellhead Protection Plan for Nye County Operated Systems, prepared in March 2006, suggests as much as 200 feet of drawdown in the vicinity of the dairy. These data suggest that existing ground-water withdrawals are contributing to adverse conditions in the vicinity of the dairy, and may constitute ground-water mining.

XVII. The NPS protests the granting of this application on the following grounds:

The public interest will not be served by granting a change application where the water has not been put to beneficial use in compliance with the terms and conditions of the base water right.

The public interest will not be served by granting a change application to an applicant that has a history of non-compliance with the terms and conditions of water right permits and the statutes governing the use of water in Nevada.

The public interest will not be served by granting a change application to an applicant that has a history of non-compliance in a basin that is over-appropriated, and where careful management is needed to protect sensitive resources and senior water rights.

The public interest will not be served by granting a change application to an applicant that has contributed to ground-water mining.

The proposed change in use would conflict with the existing rights of the NPS that are located within Death Valley NP, particularly the existing right associated with Devils Hole.

XVIII. The NPS requests that if the NSE grants this application, that the NSE limit the amount available to be changed to the amount put to beneficial use under the base permit from the correct point of diversion, for the correct place of use and correct manner of use, and in compliance with the terms and conditions of the base water right.

XIX. The NPS requests that if the Nevada State Engineer grants this application, that meters must be placed on the applicant's wells to validate the amount of water that is actually used, and the amount of water available to be changed under new change applications.

XX. The NPS requests that if the NSE grants this application, that a monitoring well be installed in the vicinity of the point of diversion to monitor ground-water level changes resulting from pumping this well and that monthly water levels are reported to the NSE on an annual basis with the water use reports.

The NPS reserves the right to amend this exhibit as more information becomes available.

REFERENCES CITED

Cappaert v. United States, 426 US 128, 1976.

Harrill, J.R., Gates, J.S., and J.M. Thomas, 1988. Major ground-water flow systems in the Great Basin region of Nevada, Utah, and adjacent states: U.S. Geological Survey Hydrologic Investigations Atlas HA-694-C, 2 sheets.

Nevada Department of Conservation and Natural Resources, 1992. Hydrographic Basin Statistical Summary, Ground Water Basins 001-232: unpublished report, Division of Water Resources and Water Planning, Carson City, Nevada.