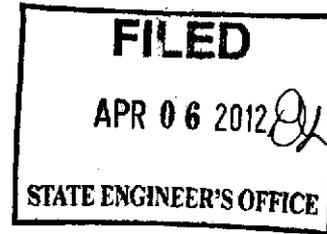


**BEFORE THE STATE ENGINEER, STATE OF NEVADA
DEPARTMENT OF CONSERVATION AND NATURAL
RESOURCES, DIVISION OF WATER RESOURCES**

In the Matter of Application Nos. 81398, 81399,
81400 and 81401 Filed By The City Of Fernley on
December 19, 2001 for Permission to Change the
Point of Diversion and Place of Use of a Portion of
Water Appropriated Under Application Nos. 35976,
40004, 70288, and 70289



2012 APR -6 AM 9:30

ANSWER TO PROTESTS

COMES NOW, the City of Fernley ("Fernley"), by and through its attorney of record, PAUL G. TAGGART, ESQ., and GREGORY H. MORRISON, ESQ., of the law firm TAGGART & TAGGART, LTD, and hereby files this Answer to Protests pursuant to Section 533.140 of the Nevada Administrative Code, as amended by Section 13 of Adopted Regulation of the State Engineer R129-08 (Feb. 11, 2009).

I. BACKGROUND.

On December 19, 2011, the City of Fernley ("Fernley") filed Application Nos. 81398, 81399, 81400, and 81401 (the "Applications"). Application No. 81398 was filed to change the Point of Diversion and Place of Use of 1,375.54 acre-feet annually of water with an underground source in the Fernley Basin. Application 81399 was filed to change the Point of Diversion and Place of Use of 723.97 acre-feet annually of water with an underground source in the Fernley Basin. Application 81400 was filed to change the Point of Diversion and Place of Use of 1,448.34 acre-feet annually of water with an underground source in the Fernley Basin. Application 81401 was filed to change the Point of Diversion and Place of Use of 1,448.94 acre-feet annually of water with an underground source in the Fernley Basin. As before, the water will be used for municipal purposes as part of Fernley's municipal water supply.

The Applications were filed pursuant to a 2011 City of Fernley Water Rights Optimization Plan. The existing points of diversion were developed in the Town of Fernley before it grew into the City of Fernley. As the City's population grew and its demographics and needs shifted, so did its demand on its groundwater resources. With the benefit of multiple years of operations and the knowledge that came with them, Fernley now seeks to align the correct burden on the wells that can support it. The City can then use its underground water resources in the most efficient manner.

The Applications are not a new appropriation of water. Under the Applications, there will be no change in the total combined duty of the Fernley wells. Fernley wishes to increase pumpage on certain wells while decreasing pumpage by a corresponding amount on other wells. The basin-wide impact on groundwater resources will remain unchanged.

On February 3, 2012, the Pyramid Lake Paiute Tribe ("Tribe") filed protests to each of the Applications. Fernley was served by the State Engineer with notice of the Tribe's protests on or about March 16, 2012.

The Tribe protests each of the Applications on either ten or eleven grounds.

II. ANSWERS TO SPECIFIC PROTEST GROUNDS.

A. The State Engineer should Overrule the First Protest Ground because all Water Rights Involved are in Good Standing with Proofs of Beneficial Use Not Yet Due.

The first protest ground alleged by the Tribe is:

The water rights sought for transfer have not been put to beneficial use within the periods prescribed by the State Engineer and have been forfeited and/or abandoned.

The date for filing Proof of Beneficial Use for the water rights sought for transfer under Application No. 81398 is July 2, 2016. The date for filing Proof of Beneficial Use for the water rights sought for transfer under Application No. 81399 is May 1, 2016. The

date for filing Proof of Beneficial Use for the water rights sought for transfer under Application Nos. 81400 and 81401 is April 17, 2016. Proof of Beneficial use is not due for any of the water sought for transfer under the Applications.

“Permits in good standing are not subject to a determination of cancellation.” State Engr Ruling No. 5823 at 38. All permitted rights involved in the Applications are presently in good standing and are therefore not subject to cancellation.

In addition, “forfeiture is only applicable to certificated water rights.” State Engr Ruling No. 5823 at 38. None of the Applications includes a certificated water right, so forfeiture is not applicable to the water rights included in the Applications. Because the water rights under the Applications are all permitted rights in good standing, the first protest ground should be overruled.

B. The State Engineer should Overrule the Second Protest Ground, because the Changes in Points of Diversion will not Increase Net Diversions or Adversely Affect the Groundwater Supply.

The second protest ground alleged by the Tribe is that the Applications should be denied due to proximity of the proposed points of diversion to either the Truckee Canal or the Tracy Segment Basin. The Tribe asserts that water pumped will include canal seepage, and the increased pumping will adversely affect the local and regional groundwater supply. Fernley believes that this protest ground is contrary to both science and precedent, and should be overruled. As noted above, the total combined duty will remain unchanged under the Applications. Additionally, the proposed points of diversion are all existing wells, and the Applications are intended only to ensure that Fernley is most efficiently using its already existing groundwater resources.

The Truckee Canal provides substantial recharge to the Fernley Area Groundwater Basin, and “local recharge belongs to the groundwater basin.” State Engr Ruling No. 5823 at 40. Because recharge belongs to the groundwater basin, Fernley’s in-basin permitted groundwater rights allow it to be withdrawn from the basin. When

groundwater is removed from a well nearer to the source of the recharge, it changes only the time it takes for that seepage to reach the well. As stated by the State Engineer, “[b]y moving points of diversion closer to or further from the [source], the principal effect will be the timing of potential interaction with the [source].” State Engr Ruling No. 5823 at 39.

Additionally, although Application 81399 does move the point of diversion to a point nearer the Tracy Segment Basin than the previous point of diversion, it is a move to an existing well that is thousands of feet away from the Tracy Segment Basin. The Tribe presents no evidence to show how water interests in the Tracy Segment Basin would be adversely affected.

All proposed points of diversion are existing wells, all points of diversion will remain in the original basin, and there will be no net increase in pumpage under the Applications. Therefore, the Tribe’s assertion that granting the Applications will lower groundwater levels and prove detrimental to groundwater resources is unsupported by scientific evidence. The second protest ground should therefore be overruled.

C. The State Engineer should Overrule the Third Protest Ground, as there will not be Increased Groundwater Withdrawals within the Basin, there will be no Effect on Truckee Canal Flows, and there will not be Increased Truckee River Diversions.

The third protest ground asserted by the Tribe is that the proposed rates of diversion from the points of diversion requested in the Applications will affect Truckee Canal flows, and will subsequently increase diversions from the Truckee River to the same extent. The Tribe requests that the Applications be denied, or that the State Engineer require Fernley to conduct studies under NRS 533.368. Fernley believes that this ground should be overruled, and that no study is necessary. The State Engineer has sufficient understanding of the Fernley Basin to grant the Applications.

The groundwater budget for the Fernley Area Basin was set by the State Engineer using information compiled by the United States Geological Survey. Using this information, the State Engineer ensured that the total duty permitted for the basin was within the perennial yield. So long as total combined duty of withdrawals remains consistent, there will be no adverse effects in the groundwater basin.

“[I]n Nevada, the groundwater resources have been managed on a perennial yield basis of the entire hydrographic basin.” State Engr Ruling No. 5079 at 7. Nevada has never managed groundwater basins where the perennial yield available is only that water actually recharged on a smaller portion of the hydrographic basin. State Engr Ruling No. 5612 at 8. This approach should again be rejected and the basin-wide approach employed.

As noted above, the Applications will not increase the total combined duty withdrawn from the basin under current permits. The Applications simply shift pump volumes from certain existing wells to different wells. All points of diversion remain in the same basin, and all are existing wells. The proposed points of diversion will therefore only change the timing of the interaction with the water from the Truckee Canal. They will not adversely affect local or regional groundwater levels.

Further, diversions from the Truckee River will not be increased if the Applications are granted. Diversions into the Truckee Canal are determined by multiple factors. One factor is the volume of water needed to satisfy irrigation demands under Claim 3 of the *Orr Ditch Decree*. Another factor is the predicted shortfall in the amount of Carson River water received into Lahontan Reservoir from the Carson Division of the Newlands Project.¹ Both of these amounts are determined before the irrigation season, and are independent of eventual carriage losses within the canal. For these reasons, the third protest ground should be overruled.

¹ See Newlands Project Operating Criteria and Procedure, 43 CFR § 418.20 (1997) (stating that the amount of diversion at Derby Dam is determined by yearly runoff forecasts).

D. The State Engineer should Overrule the Fourth Protest Ground, as the Proposed Points of Diversion will not Affect Groundwater Levels on the Reservation, and will not Interfere with any of the Tribe's Permitted Wells.

The fourth protest ground alleged by the Tribe is that the proposed points of diversion are in close proximity to areas needed for future development of the Tribe's water supply, and will lower regional groundwater levels and reduce flows to the lower Truckee River. For the following reasons, this protest ground should be overruled.

Only one of the four Applications, Application No. 81399, will move the point of diversion nearer to the Pyramid Lake Indian Reservation. This Application involves the least water of any of the four. The other three Applications will move points of diversion farther away from the reservation and from the Tribe's existing wells. In fact, Application Nos. 81400 and 81400 will move the point of diversion of over 2,800 acre-feet annually approximately 9,000 feet farther away from the Tribe's reservation. None of the proposed points of diversion is proximate enough to any of the Tribe's existing wells to adversely affect water levels at those wells.

None of the proposed points of diversion is proximate to a point of diversion for which the Tribe has filed an application. The Tribe asserts in its fourth protest ground that the area proximate to the proposed points of diversion is "needed for development of the Tribe's potable water supply expansion." In essence, the Tribe asserts that the State Engineer should deny the Applications because they will interfere with the Tribe's future plans, for which no applications have been filed. It appears that the Tribe is claiming to have additional, not yet permitted rights in the lower Truckee River basins.

The Tribe has no additional water rights in the lower Truckee River basins. The Tribe does not have pending senior applications for future development, and both the State Engineer and Nevada Supreme Court have clearly indicated that the Tribe has no

additional implied groundwater rights in the lower Truckee River area.² Therefore, any adverse effects suffered, such as a lowered regional groundwater table or decreased lower Truckee River flows would be due to increased pumping by the Tribe or other non-permitted users, and not due to Fernley's continued pumping of its permitted duty.

The State Engineer should overrule this protest ground as contrary to NRS 533.370, as there are no existing rights or protectable interests which would be injured by an approval of the Applications.

E. The State Engineer should Overrule the Fifth Protest Ground because Although Fernley's City Limits Span Multiple Groundwater Basins, Fernley does not Intend to Deliver Water to all Areas Within the City Limits.

The Tribe's fifth protest ground alleges that the proposed place of use expands the existing place of use into multiple groundwater basins, which will result in losses of return flows within the basin of origin. The reason for this proposed place of use is due to considerations of simplicity in filing, and does not reflect any intent on the part of Fernley to deliver water to other basins.

By using the city limits as the place of use, Fernley can reference that area in each application without updating the place of use map for all of its permits if the city limits actually change. These city limits are defined by statute, and were not defined with groundwater basins in mind. At this point in time, Fernley has neither the infrastructure nor the intent to deliver water to all locations within its city limits. Neither does the city intend to expand its service area beyond the limits of the basin. Because Fernley does not intend to deliver water to multiple basins, this protest ground should be overruled.

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² See *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. Adv. Op. 48, 55, 245 P.3d 1145, 1149 (2010) (stating that the *Orr Ditch Decree* fully adjudicated the Tribe's implied water rights).

F. The State Engineer should Overrule the Sixth Protest Grounds, as the Applications are not a New Appropriation of Water, and the Cited Statute is not Applicable.

The sixth protest ground alleged by the Tribe is that, because the manner of use specified for the Applications is municipal, they should be denied pursuant to NRS 533.340 for failure to state information regarding the number of persons to be served. Fernley believes that the Tribe applies the statute in error, and that the cited statute does not apply to applications to change the points of diversion and places of use of existing permitted rights.

NRS 533.340 states that additional information is required for applications to *appropriate* water for specific uses. When water is to be *appropriated* for municipal purposes, the approximate number of persons to be served must be included. These Applications are not to appropriate water, but are to change the points of diversion and places of use of already permitted rights. Therefore, NRS 533.340 is not applicable, and this protest ground should be overruled.

G. The State Engineer should Overrule the Seventh Protest Ground because, without Increased Pumpage, none of the Detriments Predicted by the Tribe will Occur.

The Tribe's seventh protest ground is that approval of the Applications will prove detrimental to the Tribe and the public interest for multiple reasons, all of which involve lowering the groundwater table or diminished flows to the Truckee River. The Tribe asserts that Truckee River flows will be depleted and that water quality will be impaired. It also asserts that groundwater levels will be adversely affected and subsequently, quality will be diminished. Finally, the Tribe asserts that the recreational value of Pyramid Lake and recovery of listed species will be threatened.

The Tribe provides no evidence to support its claims of diminished water resources. Once again, the Applications involve no net increases in water pumped in the

basin, and contemplate no new wells. Total combined duty of Fernley's groundwater rights remains constant. The total duty remains within the recorded perennial yield of the basin. The proposed points of diversion under the majority of the Applications are further away from the Tribe's reservation, existing wells, and the Truckee River than previous points of diversion. Because the adverse effects predicted by the Tribe will not occur, the public interest will not be harmed in the manners predicted by the Tribe. This ground should therefore be overruled.

H. The Tribe's Eighth and Ninth Protest Grounds should be Overruled, as the Applications Pose No Threats to the Public Interest.

The Tribe's eighth protest ground simply asserts that granting the Applications would prove detrimental to the public interest. The ninth protest ground is detriment to the public interest in light of the declining quality and quantity of groundwater available in the Fernley Area Basin. The Tribe also asserts that the subject rights should be devoted to groundwater recharge to protect existing rights before additional rights are allocated to new development.

Again, the Applications request only a change in points of diversion of pre-existing permitted groundwater rights, and do not request either a new appropriation or an increase in total combined duty. The Tribe fails to describe how shifting diversion from one existing well to another existing well will impair either quality or quantity of groundwater in the Fernley Area Basin.

The Tribe asserts that the subject rights should be devoted to groundwater recharge. The water under the Applications cannot be devoted to groundwater recharge, as the subject rights are themselves groundwater. The Tribe presents no evidence of interbasin flow between the Fernley basin and the Tribe's water interests, and seems to be confusing the subject water rights for surface water. The water rights under the Applications are not surface water and do not contribute to recharge.

The State Engineer has previously determined that the Tribe may not rely on continued recharge from water rights which had previously been used for irrigation and were changed to municipal use. See State Engr Ruling No. 6047 at 12. Even if the subject rights could somehow be devoted to recharging groundwater, the Applications do not request that any “additional rights [be] allocated to new development.” Therefore the Tribe’s assertion that the subject rights should be made available to recharge rather than being allocated to new development is irrelevant and should be overruled.

I. The State Engineer should Dismiss the Tribe’s Tenth protest Ground because it is an Invalid Form of Protest.

The Tribe’s tenth protest ground is that granting the Applications would threaten to prove detrimental to the public interest in ways not yet known to the protestant, but which may become known prior to any hearing on the Applications. This protest ground has previously been found by the State Engineer to be invalid, and has been rejected. State Engr Ruling No. 6121 at 4. This protest ground is no more valid in this instance than it was when previously dismissed. Therefore, the State Engineer should once again dismiss this protest ground.

J. The Tribe’s Final Protest Ground is Impermissible and Irrelevant.

The Tribe’s final protest ground is an incorporation by reference of any and all other protest grounds filed by other protestants. “A protest against the granting of an application must set forth, with reasonable certainty, the grounds of the protest.” NRS 533.365(1). This protest ground, deemed an “attempt to co-opt another protest,” has been found impermissible by the State Engineer. State Engr Ruling No. 6121 at 4. Regardless, the Tribe is the only protestant to the Applications. Therefore, the final ground is both impermissible and irrelevant and should be overruled.

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III. CONCLUSION.

For the foregoing reasons, Fernley respectfully requests that the State Engineer overrule the Trib's protests to the Applications and grant the Applications in full.

DATED this 6 day of April, 2012.

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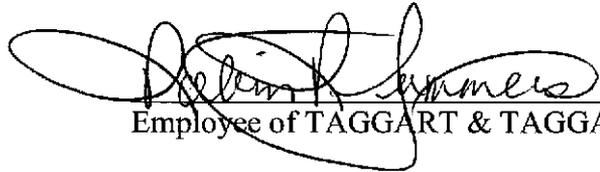

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of TAGGART & TAGGART, LTD., and that on this date I served, or caused to be served, a true and correct copy of the ANSWER TO PROTESTS, addressed to:

Don Springmeyer, Esq.
Christopher W. Mixson, Esq.
3556 East Russell Road, 2nd Floor
Las Vegas, Nevada 89120

DATED this 6th day of April, 2012.



Employee of TAGGART & TAGGART, LTD.