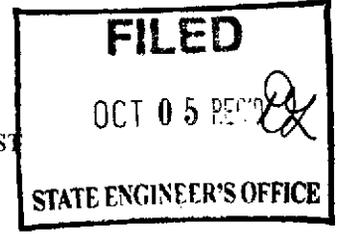


IN THE OFFICE OF THE STATE ENGINEER OF THE STATE OF NEVADA

IN THE MATTER OF APPLICATION NUMBER 85386E  
FILED BY Rockview Dairies, Inc.  
ON August 14, 2015



PROTEST

Comes now Ren Lohofener

Printed or typed name of protestant

whose post office address is 2800 Cottage Way W-2606 Sacramento, California 95825

Street No. or PO Box, City, State and ZIP Code

whose occupation is Federal government agency and protests the granting

of Application Number 85386E, filed on August 14, 2015

by Rockview Dairies, Inc. for the

waters of underground situated in Nye County

an underground source or name of stream, lake, spring or other source

County, State of Nevada, for the following reasons and on the following grounds, to wit:

See Attachment A

THEREFORE the Protestant requests that the application be

Denied

Denied, issued subject to prior rights, etc., as the case may be

and that an order be entered for such relief as the State Engineer deems just and proper.

Signed

Agent or protestant

Ren Lohofener

Printed or typed name, if agent

Address 2800 Cottage Way W-2606

Street No. or PO Box

Sacramento, California 95825

City, State and ZIP Code

(916) 414-6469

Phone Number

ren\_lohofener@fws.gov

E-mail

State of Nevada

County of

Subscribed and sworn before me on

by

See attached

Signature of Notary Public Required

Notary Stamp or Seal Required

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+ \$30 FILING FEE MUST ACCOMPANY PROTEST. PROTEST MUST BE FILED IN DUPLICATE.

ALL COPIES MUST CONTAIN ORIGINAL SIGNATURE.

**ADDITIONAL INFORMATION TO SUPPORT THE PROTEST  
OF THE U.S. FISH AND WILDLIFE SERVICE  
IN THE MATTER OF APPLICATIONS 85386E**

**ATTACHMENT A**

**INTRODUCTION**

Application No. 85386E was filed by Rockview Dairies, Inc. on August 14, 2015 requesting a diversion rate of 1.1 cubic feet per second (797 ac-ft/year) from an underground source for environmental purposes in Amargosa Desert Hydrographic Basin as a new (base) right.

The U.S. Fish and Wildlife Service (Service) requests that Application No. 85386E be denied because:

- Water is not available to appropriate in the manner described.
- Granting of the application is likely to cause injury to Service-owned senior water rights for water on the Ash Meadows National Wildlife Refuge (NWR).
- Granting of the application may damage habitat for thirteen species that are currently listed as endangered or threatened under the Endangered Species Act at Ash Meadows NWR, including the Federally endangered Devils Hole pupfish at Devils Hole and; therefore, is not in the public interest.
- Whereas the application is for an environmental permit, the use may not meet the definition of “temporary” given its stated purpose is pumping from a “recovery well.” Pumping from a recovery well ordinarily involves pumping to prevent migration of any contamination within the aquifer and to extract any contaminated groundwater from the aquifer for a relatively long duration. Such pumping may be more consistent with submission of this application as a request for a new (permanent base) right due to the long duration of the pumping.

**GENERAL**

Ash Meadows NWR, established in 1984, provides habitat for at least 33 unique plants and animals. Of these, twenty-seven species are restricted to this limited geographic area (endemic), making the refuge one of the highest concentrations of endemic species in the world. The Refuge was established with the purpose of conserving, protecting, and enhancing the habitats and populations of endemic, resident, and migratory species for the continuing benefit of the American people. All of these species are critically dependent on groundwater and springs. Negative effects to the water resources of the Refuge will also negatively impact the health and well-being of species within the Refuge, conflict with its primary purpose, and would not serve the public interest.

Four species of fish, one bird, and one plant at Ash Meadows NWR are currently listed as endangered under the Endangered Species Act (ESA). These species are:

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Warm Springs pupfish - *Cyprinodon nevadensis pectoralis*;  
 Ash Meadows Amargosa pupfish - *C. n. mionectes*;  
 Ash Meadows speckled dace - *Rhinichthys osculus nevadensis*;  
 Devils Hole pupfish - *Cyprinodon diabolis*  
 Amargosa niterwort - *Nitrophila mohavensis*.  
 Southwestern willow flycatcher - *Empidonax traillii extimus*

Ash Meadows NWR also contains populations of the following species listed as threatened under the ESA:

Ash Meadows naucorid - *Ambrysus amargosus*;  
 Ash Meadows milk-vetch - *Astragalus phoenix*;  
 Spring-loving centauray - *Centaureum namophilum*;  
 Ash Meadows sunray - *Enceliopsis nudicaulis var. corrugata*;  
 Ash Meadows gumplant - *Grindelia fraxino-pratensis*;  
 Ash Meadows ivesia - *Ivesia eremica*;  
 Ash Meadows blazing star - *Mentzelia leucophylla*.

In addition, research is being conducted on several other species under consideration for protection under the ESA.

Ash Meadows NWR also supports migratory bird populations, which are dependent on the water resources of the refuge. Impacts to these water resources would interfere with the Service's trust responsibilities under the Migratory Bird Treaty Act. Desert bighorn sheep also depend on the springs at Ash Meadows NWR during the summer.

Devils Hole contains the only native population of the endangered Devils Hole pupfish which depends on conditions in the same aquifer supplying the Ash Meadows springs.

## FINDINGS

- I. Application No. 85386E seeks to appropriate the public waters of the state of Nevada for environmental purposes. The proposed point of diversion is located within the Amargosa Desert hydrographic basin. The proposed rate of withdrawal is 1.1 cfs (797 acre-ft/yr).
- II. In 1979, the Nevada State Engineer pursuant to Order No. 724 designated the Amargosa Desert hydrographic basin as a basin coming under the provisions of Chapter 534 NRS. Additional management considerations are warranted in a basin designated under these provisions.
- III. On November 4, 2008, the Nevada State Engineer issued Order No. 1197, acknowledged the Federal reserved water right at Devils Hole and ordered "...any applications appropriate underground water and any application to change the point of diversion of an existing ground-water right to a point of diversion closer to Devils Hole, described as

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*being within a 25 mile radius from Devils Hole within the Amargosa Desert Hydrographic Basin, will be denied. "*

- IV. The Nevada State Engineer determined in Order No. 1197 that applications to appropriate additional groundwater within 25 miles of Devils Hole would be denied, with five possible exceptions, including applications for environmental permits filed pursuant to NRS 533.437.
- V. NRS 533.437 defines an environmental permit as "a temporary permit to appropriate water to avoid the pollution or contamination of a water source." The Nevada State Engineer may approve an environmental permit if the application is accompanied by the prescribed fees and a copy of a letter or order issued by the Nevada Division of Environmental Protection (NDEP), the appropriation is in the public interest, and the appropriation does not impair water rights held by other persons.
- VI. The exact purpose of the proposed environmental pumping is unclear from the application. It is described as from a "recovery well" ordinarily used to prevent migration of contaminated groundwater away from a site and extraction of contaminated groundwater from a contaminated aquifer. The application states that the NDEP requires a "recovery well" as a condition of NPDES permit NV0023027 to mitigate increasing nitrogen levels in groundwater. The applicant has additionally shared that they propose to pump clean water under the environmental permit, mix it with water in green water lagoons, and apply the process water to land as part of the remediation. According to NDEP NV0023027, Ponderosa Dairy has identified the Barn #3 east lagoon as a potential source for the elevated levels of nitrogen detected in the underlying aquifer over several years at monitoring well MW-3.
- VII. It seems unlikely that the proposed pumping would be "temporary" e.g., a year or two. Even if pumping from the NDEP-required "recovery well" is limited to pumping of clean water for mixing with lagoon water prior to land disposal, or containment and extraction of any possible locally contaminated groundwater within the underlying aquifer, the pumping proposed under this application would likely be required for some years to remedy the situation.
- VIII. The proposed groundwater withdrawal is located within the Amargosa Desert Hydrographic Basin, which has an estimated perennial yield of 24,000 ac-ft/year (Ruling Nos. 3870, 5750, 5971 and 5992). As detailed in Ruling No. 5750, the perennial yield estimate of 24,000 acre-feet consists of 17,000 acre-feet annually discharged by springs in Ash Meadows and 7,000 acre-feet available for groundwater pumping. The 17,000 acre feet discharged by springs in Ash Meadows is appropriated by senior certificated water rights held by the Service. Therefore, only 7,000 acre-feet is available for appropriation in the Amargosa Desert.
- The committed groundwater rights in Amargosa Desert are equal to approximately 27,320 acre-feet. Combined with the 17,000 acre-feet of certificated water rights for springs, committed water resources in the Amargosa Desert hydrographic basin are more than 44,000

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acre-feet per year, much greater than the estimated perennial yield. Therefore, there is no additional water available for appropriation in the Amargosa Desert.

- IX. The Nevada State Engineer has acknowledged in recent rulings (eg., Ruling Nos. 5971 and 5992) that existing water rights in the Amargosa Desert hydrographic basin exceed the available perennial yield and that the granting of additional water rights in the Amargosa Desert would conflict with existing rights and prove detrimental to the public interest. Both Devils Hole and Ash Meadows NWR are located within the Amargosa Desert hydrographic basin. The Federally reserved water right at Devils Hole is senior to all but one other groundwater right in the Amargosa Desert hydrographic basin. State appropriative water rights at Ash Meadows would be senior to the proposed water right and are senior to many of the water rights currently held by the applicant within the basin. Therefore, additional appropriations would increase the imbalance that exists between committed water rights and the perennial yield, and would interfere with water rights in the basin and be detrimental to the public interest, including the Federal reserved water right at Devils Hole and state appropriative water rights at Ash Meadows NWR.

## CONCLUSIONS

Nevada Revised Statute § 533.437 grants to the Nevada State Engineer the discretion to reject an application for an environmental permit if the proposed use will impair water rights held by other persons or is not in the public interest.

The water rights of the U.S. Fish and Wildlife Service will be impaired by granting Application No. 85386E because:

- The proposed consumptive use of groundwater, in combination with existing appropriations, will increase the total amount of water withdrawn and consumptively used from a basin which has already experienced significant groundwater level declines (Ruling 5971 and 5992) and is already over-appropriated.
- The proposed consumptive use of groundwater, in combination with existing appropriations, will expand the area and the magnitude of groundwater declines that already exist in the area of Ash Meadows NWR and Devils Hole.
- The proposed consumptive use of groundwater, in combination with existing appropriations, would reduce the flows of regionally-fed springs at Ash Meadows NWR in addition to affecting the level of water in Devils Hole which occurs within the same aquifer. Consequently, approval of Application No. 85386E could potentially injure the senior water rights of the Service at Ash Meadows NWR.

The public interest would not be served by approving Application No. 85386E because:

- The water and water-related resources of the nationally and internationally important Ash Meadows NWR would be diminished or impaired as a result of Application No. 85386E.

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- Application No. 85386E seeks a permit to appropriate groundwater for consumptive use in a hydrographic basin where there is no unappropriated water in the proposed source of supply.
- The imbalance between committed groundwater resources and the perennial yield in Amargosa Desert would increase, leading to further groundwater level declines and spring discharges and the need for additional administration by the Nevada State Engineer.

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

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**CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT**

**CIVIL CODE § 1189**

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California )  
County of Sacramento )

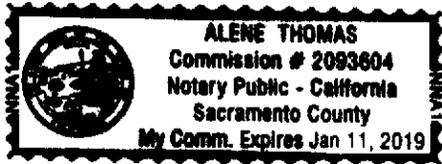
On Oct. 2, 2015 before me, Alene Thomas, Notary Public  
Date Here Insert Name and Title of the Officer

personally appeared Ren Lohaefer  
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/~~she/they~~ executed the same in his/~~her/their~~ authorized capacity(ies), and that by his/~~her/their~~ signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Signature A. Thomas  
Signature of Notary Public

Place Notary Seal Above

**OPTIONAL**

Though this section is optional, completing this information can deter alteration of the document or fraudulent reattachment of this form to an unintended document.

**Description of Attached Document**

Title or Type of Document: Application Denial Document Date: Aug. 14, 2015

Number of Pages: 6 Signer(s) Other Than Named Above: N/A  
+ Acknowledgment

**Capacity(ies) Claimed by Signer(s)**

Signer's Name: Ren Lohaefer  
 Corporate Officer - Title(s): Regional Director  
 Partner -  Limited  General  
 Individual  Attorney in Fact  
 Trustee  Guardian or Conservator  
 Other: \_\_\_\_\_

Signer's Name: \_\_\_\_\_  
 Corporate Officer - Title(s): \_\_\_\_\_  
 Partner -  Limited  General  
 Individual  Attorney in Fact  
 Trustee  Guardian or Conservator  
 Other: \_\_\_\_\_

Signer Is Representing: US Fish & Wildlife Service

Signer Is Representing: \_\_\_\_\_

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