

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

IN THE MATTER OF APPLICATIONS 80453, 80454, )  
80455 AND 80456 FILED TO CHANGE THE )  
PUBLIC WATERS OF NEGRO CREEK AND )  
TRIBUTARIES WITHIN THE SPRING VALLEY )  
HYDROGRAPHIC BASIN (184), WHITE PINE )  
COUNTY, NEVADA. )

**RULING**

**#6159**

**GENERAL**

**I.**

Application 80453 was filed on January 12, 2011, by the Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints to change the point of diversion, place and manner of use of 1.6 cubic feet per second (cfs) of water from Negro Creek previously appropriated under Permit 3186, Certificate 567. The proposed manner of use is unchanged and is described as being for irrigation; however, the season of use is changed from April 1 to October 1 of each year to January 1 to December 31 of each year. The proposed place of use is described as being located within the E $\frac{1}{2}$  of Section 34, N $\frac{1}{2}$ , N $\frac{1}{2}$  SE $\frac{1}{4}$ , SW $\frac{1}{4}$  of Section 35, T.17N., R.67E., and the N $\frac{1}{2}$  NW $\frac{1}{4}$ , SW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 2, NE $\frac{1}{4}$  of Section 3, T.16N., R.67E., M.D.B.&M. The existing place of use is described as being located within the N $\frac{1}{2}$  SW $\frac{1}{4}$ , S $\frac{1}{2}$  NW $\frac{1}{4}$  of Section 35, T.17N., R.67E., M.D.B.&M. The change requested by Application 80453, if approved, would transfer the Applicant's existing point of diversion from the SE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 2, T.16N., R67E., M.D.B.&M. to a point that is located within the NW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 17, T.16N., R.68E., M.D.B.&M.<sup>1</sup>

**II.**

Application 80454 was filed on January 12, 2011, by the Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints to change the point of diversion and place of use of 1.512 cfs, not to exceed 544.86 acre-feet per season, of water from Negro Creek previously appropriated under Permit 8393, Certificate 3213. The manner of use is unchanged and is described as being for irrigation purposes. The season of use remains the same and will be from October 1 to April 1 of the following year. The proposed place of use is the same as described

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<sup>1</sup> File No. 80453, official records in the Office of the State Engineer.

under Application 80453. The existing place of use is described as being located within the SW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 35, T.17N., R.67E., and the NW $\frac{1}{4}$  NW $\frac{1}{4}$ , SW $\frac{1}{4}$  NW $\frac{1}{4}$ , SE $\frac{1}{4}$  NE $\frac{1}{4}$ , NE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 2, T.16N., R.67E., M.D.B.&M. The change requested by Application 80454, if approved, would transfer the Applicant's existing point of diversion from the SE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 2, T.16N., R.67E., M.D.B.&M. to a point that is located within the NW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 17, T.16N., R.68E., M.D.B.&M.<sup>2</sup>

### III.

Application 80455 was filed on January 12, 2011, by the Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints to change the point of diversion and place of use of 2.873 cfs, not to exceed 1,149.2 acre-feet per year, of water from Negro Creek and Tributaries previously appropriated under Permit 10487, Certificate 5042. The manner of use is unchanged and is described as being for irrigation purposes. The season of use remains the same and will be from January 1 to December 31 of each year. The proposed place of use is the same as described under Application 80453. The existing place of use is described as being located within the NW $\frac{1}{4}$  NW $\frac{1}{4}$ , SW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 2, NE $\frac{1}{4}$  NE $\frac{1}{4}$ , SE $\frac{1}{4}$  NE $\frac{1}{4}$ , NW $\frac{1}{4}$  NE $\frac{1}{4}$ , SW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 3, T.16N., R.67E., M.D.B.&M. and the NE $\frac{1}{4}$  SE $\frac{1}{4}$ , SE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 34, SW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 35, T.17N., R.67E., M.D.B.&M. The change requested by Application 80455, if approved, would transfer the Applicant's existing point of diversion from the SE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 2, T.16N., R.67E., M.D.B.&M. to a point that is located within the NW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 17, T.16N., R.68E., M.D.B.&M.<sup>3</sup>

### IV.

Application 80456 was filed on January 12, 2011, by the Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints to change the point of diversion and place of use of a portion of water previously appropriated under Proof of Appropriation V-01080, Certificate 31. The proposed manner of use is unchanged and is described as being as Decreed. The proposed place of use is the same as described under Application 80453. The existing place of use is described as being located within the NW $\frac{1}{4}$  NW $\frac{1}{4}$ , NE $\frac{1}{4}$  NW $\frac{1}{4}$ , SE $\frac{1}{4}$  NW $\frac{1}{4}$ , NW $\frac{1}{4}$  NE $\frac{1}{4}$ , SW $\frac{1}{4}$  NE $\frac{1}{4}$ , NE $\frac{1}{4}$  NE $\frac{1}{4}$ , SE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 17 and the NW $\frac{1}{4}$  NW $\frac{1}{4}$ , SW $\frac{1}{4}$  NW $\frac{1}{4}$ , NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 16, all in T.16N., R.68E., M.D.B.&M. The change requested by Application 80456, if

<sup>2</sup> File No. 80454, official records in the Office of the State Engineer.

<sup>3</sup> File No. 80455, official records in the Office of the State Engineer.

approved, would transfer the Applicant's existing point of diversion from the NW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 16, T.16N., R.68E., M.D.B.&M. to a point that is located within the NW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 17, T.16N., R.68E., M.D.B.&M.<sup>4</sup>

V.

Applications 80453, 80454, 80455 and 80456 were timely protested by George Eldridge & Son, Inc. on March 10, 2011, on the following grounds:

These applications would change the point of diversion from the lower ranch to the upper ranch to facilitate putting all of the Applicant's Negro Creek water into a pipeline, which would transport the stream to the lower ranch, thus eliminating percolation through the streambed. George Eldridge & Son, Inc. holds irrigation rights to North and South Millick Springs, which lie at the toe of the Negro Creek alluvial fan and it is believed those springs are fed by percolation through the fan. The Applicant and Protestant may hold vested stockwater rights on either of those springs, and the springs rise on two federal 40-acre Public Water Reserves. Due to the likelihood that eliminating percolation through the Negro Creek alluvial fan will severely impair flows from both North and South Millick Springs, the Protestant anticipates its rights being impaired or destroyed. Also for Applications 80454 and 80455, approximately 145 acres in the NE $\frac{1}{4}$  of Section 3, T. 16N., R. 67E., M.D.B.&M. has not been irrigated since 1956 and, if it ever was irrigated prior to 1956 and after filing proof of beneficial use, has obviously been abandoned; therefore, Certificates 3213 and 5042 should be reduced accordingly.

**FINDINGS OF FACT**

I.

Nevada Revised Statutes § 533.365(4) 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 sufficient evidence is available in the Office of the State Engineer to evaluate the merits of Applications 80453 through 80456 and a hearing is not necessary.

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<sup>4</sup> File No. 80456, official records in the Office of the State Engineer.

## II.

The Decree of Negro Creek was the result of ongoing contention as to the delivery of Negro Creek water with respect to Permits 3186 and 10487 appurtenant to the Rogers property (Lower Property). As Negro Creek flows out of the mountains it was first used at a property located at the base of the mountain block and start of the alluvial fan (Upper Property) and then flowed across the alluvial fan to the west and northwest to the Lower Property at or near the floor of Spring Valley. At that time, the Upper and Lower Properties were separately owned.

The waters of Negro Creek and its Tributaries were decreed in the Seventh Judicial Court of the State of Nevada in and for the County of White Pine by decree filed on April 1, 1935.<sup>5</sup> A search of the records of the Office of the State Engineer show the current appropriations on Negro Creek and are tabulated below:

App	Status	Div CFS	Use	Period of use	Duty	Units	Owner of Record
10487	Cer.	2.873	Irr	Annual	1149.2	AFA	Corp. of Church of Latter-Day Saints
3186	Cer.	1.600	Irr	4/1-10/1	640.00	AFS	Corp. of Church of Latter-Day Saints
8393	Cer.	1.512	Irr	10/1-4/1	544.86	AFS	Corp. of Church of Latter-Day Saints
V01080	VST	0.940	Irr	4/1-11/1	266.52	AFS	Corp. of Church of Latter-Day Saints
Sum		6.925			2600.58	AF	

As can be seen on the above table, the Applicant now owns all the water rights, which divert water from Negro Creek and its tributaries. The purpose of Applications 80453 through 80456 is, in part, to change the existing points of diversion to a point near the Upper Property for the purpose of conveying the water via pipeline to the Lower Property. Piping the water will reduce any conveyance losses that may occur when the water flows in the natural channel across the alluvial fan.

A review of records on file in the Office of the State Engineer show that the average calculated flow of Negro Creek between July 2002 and November 2010 is 1.33 cfs. The calculated median over the same time period is 0.87 cfs.<sup>6</sup> The committed resource on the creek

<sup>5</sup> Judgment and Decree, *Washington Rogers v R. A. Yellard*, In the Seventh Judicial District Court In and For the County of White Pine, Nevada April 1, 1935.

<sup>6</sup> Spring Valley Hydrographic Basin 10-184 NRS § 533.364 Inventory, NDWR, August 2011, official records in the Office of the State Engineer.

totals 6.925 cfs. The higher diversions were likely granted due to the fact that Negro Creek can be considered a flash stream or a small stream, whereby the head-waters are in the higher elevations of the mountain range where spring snowmelt and seasonal precipitation events can be intense, but usually of a short duration.

Based on the stream flow data and the existing water rights on the source, the State Engineer finds Negro Creek to be fully appropriated. The State Engineer finds that all active water rights on Negro Creek are now owned by the Applicant. The State Engineer finds that the Applicant, by Applications 80453 through 80456, is attempting to utilize its water more efficiently to provide increased water supply to its Lower Property.

**III.**

The Protestant asserts that the approval of Applications 80453, 80454 and 80455 would change the points of diversion from Section 2, T.16N., R.67E. to Section 17, T.17N., R.68E., and would enclose the entire flow of Negro Creek into a pipeline for transmission to the new place of use. Protestant George Eldridge and Son, Inc., holds irrigation rights on North and South Millick Springs, which lie at the toe of the Negro Creek alluvial fan. It is asserted that these springs are fed by percolation of Negro Creek water through the fan. By eliminating this source of recharge the Protestant argues that its water rights within the Negro Creek alluvial fan will be severely impaired or destroyed, particularly the flows of North and South Millick Springs.

A search of the records of the Office of the State Engineer shows three active water rights appurtenant to North and South Millick Springs as tabulated below:

App	Status	Div CFS	Use	Duty	Units	Owner of Record	
10921	Cer.	0.79	Irr.	570.73	AFA	George Eldridge & Son, Inc.	South Millick Spring
10993	Cer.	0.60	Irr.	433.62	AFA	George Eldridge & Son, Inc.	North Millick Spring
8721	Cer.	0.02	STK	14.49	AFA	Corp. of Church of Latter-Day Saints	South Millick Spring
	Sum	1.41		1018.84	AFA		

The average calculated flow from records submitted to the Office of the State Engineer of North Millick Spring between June 2004 and November 2010 is 0.56 cfs and the calculated median of the same period is 0.59 cfs.<sup>6</sup> Comparing the difference in the average flow and the median flow reveals that the relative difference is small. The average calculated flow from

records submitted to the Office of the State Engineer of South Millick Spring between June 2004 and November 2010 is 1.04 cfs and the calculated median of the same period is 1.00 cfs. Again, comparing the difference in the average flow and the median flow reveals that the relative difference is small.

Analysis of North and South Millick Springs indicate that the springs are primarily groundwater that is emerging with the assistance of past excavation to increase access to the water source. The overflow of the springs then flows out of the spring area and seeps back into the ground. A review of topographic maps shows that North and South Millick Springs are approximately 1 to 2 miles north of the proposed place of use of Applications 80453 through 80456. North and South Millick Springs are not within the immediate drainage of Negro Creek. North and South Millick Springs appear to arise at the geologic intersection of the alluvial fan and the valley floor. An examination of the topography and spring characteristics indicate that the springs could be recharged from the adjacent alluvial fan and mountain block and could include some component of recharge from Negro Creek.

The table below shows the priority dates for the water rights of Negro Creek and North and South Millick Springs germane to the water rights considered in this ruling:

Water right Number	Change Application Number	Priority date	Source	Owner
3186	80453	11/27/1914	Negro Creek	Corp. of Church of Latter-Day Saints
8393	80454	11/18/1927	Negro Creek	Corp. of Church of Latter-Day Saints
10487	80455	4/8/1940	Negro Creek	Corp. of Church of Latter-Day Saints
V01080	80456	1/1/1887	Negro Creek	Corp. of Church of Latter-Day Saints
10921		2/3/1943	South Millick Spring	George Eldridge & Son, Inc.
10933		9/1/1943	North Millick Spring	George Eldridge & Son, Inc.
8721		10/13/1928	South Millick Spring	Corp. of Church of Latter-Day Saints

The priority date is the date of establishment of a water right; the officially recognized date associated with a water right. Relative to other water rights, the priority date may make a water right senior or junior. Nevada water law is modeled on the concept of the doctrine of prior appropriation. The prior appropriation doctrine is a concept in water law under which a right to a given quantity of water is determined by such a procedure as having the earliest priority date. This system for allocating water is used in most of the western United States due to arid

conditions limiting the supply of water. The prior appropriation doctrine can be simply stated as “first in time, first in right,” with higher priority or senior rights satisfied before junior rights. However, case law has concluded in some instances that junior right holders have a right to the continuation of conditions as they existed at the time of their appropriation. The data is inconclusive as to whether the change proposed by these applications will affect the Protestant’s spring rights albeit junior in priority; therefore, the State Engineer finds that if Applications 80453, 80454, 80455 and 80456 are approved, a monitoring plan must be submitted and approved by the State Engineer before water can be diverted.

#### IV.

The abandonment of a water right in Nevada is the relinquishment of a right with the intention to forsake it. Within the meaning of the term abandonment an intent to abandon is a necessary element. The protest alleges non-use of a portion of the water rights sought for change; however, non-use of a surface water right is only some evidence of an intent to abandon the right and does not create a rebuttable presumption of abandonment under Nevada law. The Applicant’s intent to place the water to beneficial use is evidence by the filing of Applications 80453, 80454, 80455 and 80456.

The State Engineer finds that the water that forms the basis for the change applications is in good standing and that the Applicant has shown no intent to abandon these water rights.

### CONCLUSIONS

#### I.

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

#### II.

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

- 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 protectable interests in existing domestic wells as set forth in NRS § 533.024; or

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<sup>7</sup> NRS Chapter 533.

<sup>8</sup> NRS § 533.370(2).

D. the proposed use or change threatens to prove detrimental to the public interest.

**III.**

The State Engineer concludes that the Applicant is the sole water right holder on Negro Creek and the Applicant does not intend to abandon its water rights.

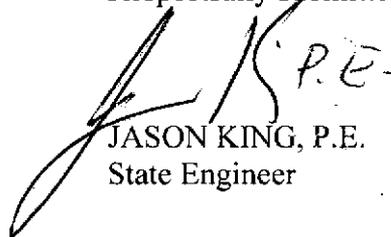
**IV.**

Based on the findings, the State Engineer concludes that the proposed change applications will not conflict with existing rights or threaten to prove detrimental to the public interest; therefore, the protest claims may be overruled.

**RULING**

The protest to Applications 80453, 80454, 80455 and 80456 is hereby overruled and the applications are granted subject to existing rights and payment of the statutory permit fees and an approved monitoring plan by the State Engineer.

Respectfully submitted,

  
JASON KING, P.E.  
State Engineer

Dated this 1st day of  
February, 2012.