

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

IN THE MATTER OF TEMPORARY)
APPLICATION 82952-T FILED TO)
CHANGE THE PUBLIC WATERS OF)
SUNNYSIDE CREEK AND TRIBUTARIES)
WITHIN THE WHITE RIVER VALLEY)
HYDROGRAPHIC BASIN (207), NYE)
COUNTY, NEVADA.)

**RULING¹
#6235-A**

GENERAL

I.

Temporary Application 82952-T was filed on July 5, 2013, by the Nevada Department of Wildlife (NDOW) to change the place and manner of use of 0.0321 cubic feet per second and a pro rata portion of the duty (9.2 acre-feet) of water claimed to have been appropriated prior to the permitting statutes under Claim of Vested Right V-04605 from Sunnyside Creek and Tributaries. The proposed manner of use is for powerline construction and the existing manner of use is irrigation. Pre-statutory Claim of Vested Right V-04605 was filed July 16, 1987, and claims a pre-statutory right for the irrigation of 551.596 acres of land with a stated priority date of 1880. The existing point of diversion is described as being located within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 33, T.7N., R.62E., M.D.B.&M. The large proposed place of use of Temporary Application 82952-T is described as being located within portions of T.5N., R.60E.; T.5N., R.61E; T.5N., R.62E; T.6N., R.60E.; T.6N., R.61E; T.6N., R.62E; T.7N., R.60E.; T.7N., R.61E; T.7N., R.62E; T.8N., R.60E.; T.8N., R.61E; T.8N., R.62E; T.9N., R.60E.; T.9N., R.61E; T.9N., R.62E; T.10N., R.60E.; T.10N., R.61E; T.11N., R.60E.; T.11N., R.61E., M.D.B.&M. A more detailed place of use description can be found within Application 82952-T. The remarks section of the application indicates that 2.3 acres of the existing place of use will be followed.^{2, 3}

II.

Temporary Application 82952-T was protested by Bruce Jensen through two separate agents. A protest filed on August 26, 2013, by George N. Benesch, Esq., acting as legal counsel,

¹ State Engineer's Ruling No. 6235 is hereby rescinded and replaced upon issuance of this Ruling No. 6235-A.

² File No. 82952-T, official records in the Office of the State Engineer.

³ File No. V-04605, official records in the Office of the State Engineer.

asserts that the granting of the Application will adversely impact Mr. Jensen's existing rights and that the Applicant's lease of a publicly held water right is not in the public interest in that it is, among other things, contrary to the mission of the Applicant and the protection of wildlife resources that NDOW is duty bound to protect; and, that NDOW has entered into competition with others in the public sector. The protest also asserts that the Applicant has not followed the proper procedures for disposal of publicly held property even if it is only on a temporary basis.

A second protest was filed on August 29, 2013, on Mr. Jensen's behalf by Robert Coache, P.E., acting as agent, and asserts that the approval of the application will impair the existing rights of senior water right holders.¹

FINDINGS OF FACT

I.

Nevada Revised Statute § 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 sufficient information is available in the records of the Office of the State Engineer to evaluate the merits of Temporary Application 82952-T and associated protests; therefore, publication and a hearing is not necessary.

II.

The State Engineer finds Nevada Revised Statute § 533.345 provides the following:

1. Every application for a permit to change the place of diversion, manner of use or place of use of water already appropriated must contain such information as may be necessary to a full understanding of the proposed change, as may be required by the State Engineer.
2. If an applicant is seeking a temporary change of place of diversion, manner of use or place of use of water already appropriated, the State Engineer shall approve the application if:
 - (a) The application is accompanied by the prescribed fees;
 - (b) The temporary change is in the public interest; and
 - (c) The temporary change does not impair the water rights held by other persons.
3. If the State Engineer determines that the temporary change may not be in the public interest, or may impair the water rights held by other persons, the State Engineer shall give notice of the application as provided in NRS § 533.360 and hold a hearing and render a decision as provided in this chapter.
4. A temporary change may be granted for any period not to exceed 1 year.

The State Engineer finds there is no provision in the water law that specifies a time frame for the filing of a protest of a temporary application that has not gone through the publication process; however, the State Engineer has, in his discretion, allowed the filing of protests if the temporary change application has not been acted on at the time the protest is received. The State Engineer finds the Applicant paid the fees for the issuance of the permit under Temporary Change Application 82952-T prior to the filing of either protest; however, the protests were filed prior to action being taken on the Application. Therefore, the State Engineer finds that it is ambiguous whether the protests were timely filed, but in the interest of affording Protestant all process he may be due, the State Engineer, in his discretion, finds that he will consider the protest grounds here.

III.

Nevada Revised Statute § 533.365 provides that any interested person may file a written protest setting forth with reasonable certainty the grounds of such protest, which must be verified by affidavit of the protestant, agent or attorney thereof. The State Engineer finds that Mr. Jensen failed under either protest to state with reasonable certainty the specific water rights of his or other senior water right holders he believes will be impaired by the granting of this temporary change application and, as such, fails to meet the statutory criteria as setting forth protest grounds with reasonable certainty.

IV.

A search of the database maintained by the Nevada Division of Water Resources shows that Mr. Jensen owns two certificates and has filed two claims of pre-statutory vested water rights in the area that could potentially be impacted by upstream activity. Permit 5486, Certificate 1977, which has a priority date of May 5, 1919, is for the irrigation of 153.7 acres of land from December 1st through April 1st.⁴ Permit 5486 was issued for the use of water from White River Slough.

Permit 12517, Certificate 4130, which has a priority date of June 28, 1948, allows for the appropriation of water from the White River and Hot Creek Channel through a reservoir and ditches to irrigate 463.3 acres of land from October 1st through June 1st.⁵

⁴ File No. 5486, official records in the Office of the State Engineer.

⁵ File No. 12517, official records in the Office of the State Engineer.

Claim of Vested Right V-02232 was filed on April 22, 1931, and claims a stock-water right for approximately 75.402 acre-feet between November 1st and May 31st from White River Channel and Sink. The claim states a use beginning around 1899.⁶

Claim of Vested Right V-02429 was filed on September 11, 1957, and claims a stock-water right for approximately 11.201 acre-feet between December 1st and May 31st, also taking water from White River Channel and Sink. This claim states that use began around 1904, asserts that no artificial means of diversion was made and 1,000 head of cattle were watered along the channel.⁷

The State Engineer finds that Claims of Vested Rights V-02232 and V-02429 have not been adjudicated.

V.

The Applicant seeks to temporarily change a relatively small portion of Claim of Vested Right V-04605 for a period of one year. Claim of Vested Right V-04605 claims the year-round irrigation of 551.596 acres of pasture meadows and grasses beginning about 1880 with the source claimed as the Sunnyside Creek and Tributaries. Temporary Change Application 82952-T requests to utilize 9.2 acre-feet of water from V-04605, (fallowing 2.3 acres of land) for dust control and construction of an electrical transmission line. The State Engineer finds that Claim of Vested Right V-04605 has not been adjudicated but also finds there will be next to no impact on existing water users with the change of this relatively small quantity of water.

VI.

The Protestant asserts that the lease of publicly held water rights is not in the public interest because it is, among other things, contrary to the mission of the Applicant and the protection of wildlife resources and that additionally NDOW has entered into competition with others in the public sector. The protest also asserts that the Applicant has not followed the proper procedures for disposal of publicly held property even it is only on a temporary basis.

Nevada Revised Statute § 533.550 provides for the sale or lease of water right by public body that does not exceed a 5-year term and also provides an exception, stating:

1. Notwithstanding any other provision of law and except as otherwise provided in NRS § 533.560, a public body shall not sell or lease for a term of more than 5 years a water right owned by the public body unless the public body, after holding at least one public hearing at which public comment was solicited, has issued written findings that:

⁶ File No. V-02232, official records in the Office of the State Engineer.

⁷ File No. V-02429, official records in the Office of the State Engineer.

- (a) The sale or lease of the water right is consistent with the prudent, long-term management of the water resources within the jurisdiction of the public body;
 - (b) The sale or lease of the water right will not deprive residents and businesses within the jurisdiction of the public body of reasonable access to water resources for growth and development;
 - (c) The sale or lease of the water right is a reasonable means of promoting development and use of the water right; and
 - (d) The means by which the water right is sold or leased reasonably ensures that the public body will receive the actual value of the water right or comparable economic benefits.
2. As used in this section, "public body" means the State or a county, city, town, school district or any public agency of this State or its political subdivisions. The term does not include a water district organized pursuant to a special act of the Legislature or a water authority organized as a political subdivision created by a cooperative agreement or created by a special act of the Legislature.

Thus, the State Engineer finds a provision of the water law specifically allows the Applicant, as a public body, to lease its water.

VII.

The Protestant asserts that the leasing of the Applicant's water is in competition with others in the public sector. The State Engineer finds this protest issue is not related to matters of Nevada water law and he has no jurisdiction in the matters of competitive leasing of water rights, whether by public or private entities.

VIII.

The State Engineer finds the use of this relatively small quantity of water for construction and dust control purposes, to build 47 miles of transmission powerline through Nye County, is in the public interest.

IX.

The State Engineer finds that the use of 9.2 acre-feet of water will not impair water rights held by other persons because Applicant is following an equivalent amount of acreage in exchange for the water to be drafted under Application 82952-T. Thus there would be no appreciable loss of flow to the Protestant's or senior water right holders downstream rights, and the State Engineer finds that the Protestant's rights will not be affected by the approval of the subject temporary application.

X.

Protestant filed a document titled Legal Argument in Support of Protest to Nevada Department of Wildlife Temporary Change Application 82952-T. The State Engineer finds there is nothing in the water law that provides for the filing of legal briefs separate from the filing of a

protest, particularly when the brief raises issues not presented in the protest. On that basis, the State Engineer finds that Protestant's legal brief improperly attempts to enlarge the protest grounds after-the-fact by raising new arguments not contained in the protest. In addition, the State Engineer finds that the legal brief is a fugitive document in that it was filed absent an order directing briefing by the State Engineer. Notwithstanding these findings, the State Engineer will address Protestant's argument set out in the brief.

XI.

Protestant correctly asserts that NRS § 533.345(2) provides authority for change applications. However, Protestant then offers an interpretation of the change application statute in conjunction with NRS § 533.324 to argue for denial of the application. Protestant argues that "water already appropriated" only applies to permitted rights and not pre-statutory claims; therefore, as the application here concerns a pre-statutory claim, no change application can be granted pursuant to NRS § 533.345. Nevada Revised Statute 533.324 defines "water already appropriated," stating:

As used in NRS 533.325, 533.345 and 533.425, "water already appropriated" includes water for whose appropriation the State Engineer has issued a permit but which has not been applied to the intended use before an application to change the place of diversion, manner of use or place of use is made.

The State Engineer finds that use of the word "includes" in NRS § 533.324 includes permitted rights, but is not exclusive to permitted rights alone. Stated otherwise, the statute includes permitted rights and it also includes claims of pre-statutory water rights. Inasmuch as it often takes years and even decades to adjudicate pre-statutory claims to an eventual decreed right, such a narrow reading of the statute as only applying to permitted rights may unfairly prevent holders of pre-statutory claims from continuing to place water to beneficial use if the claimed pre-statutory right cannot be changed. Protestant's narrow interpretation of the statute would result in an inequitable application of the change application statute to promote the rights of permit holders over holders of pre-statutory claims. The State Engineer rejects Protestant's narrow reading of NRS § 533.324 and finds that NRS § 533.324 includes claims of pre-statutory rights, including the claim at issue in this application.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁸

II.

Nevada Revised Statute § 533.345 provides that the State Engineer shall approve an application seeking a temporary change of place of diversion, manner of use or place of use of water already appropriated if the application is accompanied by the prescribed fees, the temporary change is in the public interest, and the temporary change does not impair the water rights held by other persons. The State Engineer has found both the application and permitting fees were paid, the temporary change is in the public interest and will not impair the water rights held by others; therefore, the law mandates the granting of Temporary Application 82952-T.

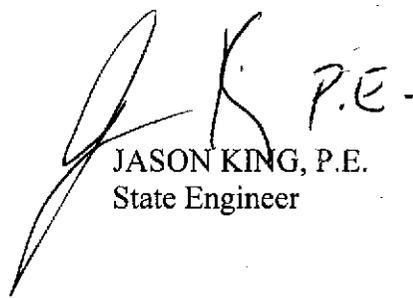
III.

The State Engineer concludes there is no basis or foundation under the applicable facts or law to support the positions of the Protestant.

RULING

The protests to Temporary Application 82952-T are hereby overruled and Temporary Application 82952-T is hereby approved subject to existing rights.

Respectfully submitted,



JASON KING, P.E.
State Engineer

Dated this 20th day of
September, 2013.

⁸ NRS Chapter 533.