

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

IN THE MATTER OF APPLICATIONS 63263,)
63264, 63265, 63266 AND 63267 FILED)
TO APPROPRIATE THE PUBLIC WATERS FROM)
AN UNDERGROUND SOURCE WITHIN THE)
FORTY MILE CANYON - JACKASS FLAT)
GROUNDWATER BASIN (227A), NYE COUNTY,)
NEVADA.)

RULING

4848

GENERAL

I.

Application 63263 was filed on July 22, 1997, by the United States Department of Energy - Yucca Mountain Site Characterization Project Office ("DOE") to appropriate 1.0 cubic foot per second (cfs), not to exceed 430 acre-feet annually (afa), from the underground waters of the Fortymile Canyon - Jackass Flat Groundwater Basin, Nye County, Nevada, for industrial purposes within portions of Sections 31 through 36, inclusive, T.11S., R.49E., Sections 31 through 36, inclusive, T.11S., R.50E., all of T.12S., R.49E., all of T.12S., R.50E., Sections 10 through 15, inclusive, Sections 22 through 27, inclusive, Sections 34 through 36 inclusive, all in T.13S., R.48E., all of T.13S., R.49E., Sections 7 through 10, inclusive, Sections 15 through 22, inclusive, Sections 27 through 34 inclusive, all in T.13S., R.50E., Sections 1 through 3, inclusive, Sections 10 through 15, inclusive, Sections 22 through 27, inclusive, Section 35, and portions of Sections 34 and 36, all in T.14S., R.48E., all of T.14S., R.49E., Sections 3 through 10, inclusive, Sections 15 through 22, inclusive, Sections 27 through 34, inclusive, all in T.14S., R.50E., portions of Sections 1, 2 and 3, in T.15S., R.48E., Sections 1 through 6, inclusive, portions of Sections 7 through 10, inclusive, Sections 11 and 12, all in T.15S., R.49E., and Sections 3 through 10, inclusive, in T.15S., R.50E., M.D.B.&M.¹ The proposed point of diversion is described as being

¹ File No. 63263, official records in the office of the State Engineer.

Ruling
Page 2

located within the NE¼ SW¼ of Section 19, T.13S., R.50E.,
M.D.B.&M.

II.

Application 63264 was filed on July 22, 1997, by the United States Department of Energy - Yucca Mountain Site Characterization Project Office to appropriate 1.0 cfs, not to exceed 430 afa, from the underground waters of the Fortymile Canyon - Jackass Flat Groundwater Basin, Nye County, Nevada, for industrial purposes within the same places of use identified under Application 63263. The proposed point of diversion is described as being located within the SW¼ NE¼ of Section 6, T.14S., R.50E., M.D.B.&M.²

III.

Application 63265 was filed on July 22, 1997, by the United States Department of Energy - Yucca Mountain Site Characterization Project Office to appropriate 0.9 cfs, not to exceed 430 afa, from the underground waters of the Fortymile Canyon - Jackass Flat Groundwater Basin, Nye County, Nevada, for industrial purposes within the same places of use identified under Applications 63263 and 63264. The proposed point of diversion is described as being located within the NW¼ NE¼ of Section 14, T.13S., R.49E., M.D.B.&M.³

IV.

Application 63266 was filed on July 22, 1997, by the United States Department of Energy - Yucca Mountain Site Characterization Project Office to appropriate 0.9 cfs, not to exceed 430 afa, from the underground waters of the Fortymile Canyon - Jackass Flat Groundwater Basin, Nye County, Nevada, for industrial purposes within the same places of use identified under Applications 63263, 63264 and 63265. The proposed point of diversion is described as

² File No. 63264, official records in the office of the State Engineer.

³ File No. 63265, official records in the office of the State Engineer.

Ruling
Page 3

being located within the NW¼ NE¼ of Section 14, T.13S., R.49E., M.D.B.&M.⁴

V.

Application 63267 was filed on July 22, 1997, by the United States Department of Energy - Yucca Mountain Site Characterization Project Office to appropriate 0.9 cfs, not to exceed 430 afa, from the underground waters of the Fortymile Canyon - Jackass Flat Groundwater Basin, Nye County, Nevada, for industrial purposes within the same places of use identified under Applications 63263, 63264, 63265 and 63266. The proposed point of diversion is described as being located within the NW¼ NE¼ of Section 14, T.13S., R.49E., M.D.B.&M.⁵

VI.

The remarks under Item 12 of the applications indicate the following:

This application to appropriate the waters of the State of Nevada is being filed by the Department of Energy in order to provide water for meeting the Department of Energy's responsibilities under the Nuclear Waste Policy Act. Said uses will include, but are not limited to, road construction, facility construction, drilling, dust suppression, tunnel and pad construction, testing, culinary, domestic and other related site uses.

Existing Permits 57373, 57374, 57375, 57376, 58827, 58828 and 58829 were issued for site characterization and aquifer characteristic studies as part of the overall site characterization for the Yucca Mountain Project. These permits (with the exception of Permit 57375) had a limited life and are scheduled to expire within a few years. Although no final determination has been made on whether or not the Repository will be located at Yucca Mountain, these applications are being filed in order to ensure priority of filing and establishment of a claim for the use of the water. Accordingly, under the provisions of NRS 533.370(2)(a),

⁴ File No. 63266, official records in the office of the State Engineer.

⁵ File No. 63267, official records in the office of the State Engineer.

it is requested that, after this application becomes ready for action, that the State Engineer withhold final approval until the Department of Energy provides notification to proceed.

The total combined duty of this application to appropriate and its four companion applications to appropriate, along with Permit 57375, is not to exceed 430.00 acre-feet annually from any and all sources.¹⁻⁵

VII.

Applications 63263, 63264, 63265, 63266 and 63267 were protested by: Robert Loux, Executive Director of the Nevada Agency for Nuclear Projects; Ralph McCracken, farmer and Vice-President of the Southern Nye County Conservation District; Richard Nielsen, Executive Director of Citizen Alert; and Michael DeLee, farmer and Chairman of the Amargosa Water Committee.

The Nevada Agency for Nuclear Projects protested the applications on the following grounds:

1. There is no unappropriated water in the source of supply.
2. The proposed use conflicts with existing rights, particularly water rights owned and controlled by the State of Nevada for purposes of mitigating adverse impacts to threatened and endangered species in the Ash Meadows area.
3. The proposed industrial use threatens to prove detrimental to the public interest for the following reasons:
 - a. The proposed use, to the extent it facilitates the storage of high level radioactive waste, is prohibited by NRS 459.910.
 - b. The United States has failed to obtain the Legislature's consent for the proposed use.
 - c. The Congress has discontinued funding to Nevada for oversight and monitoring of the proposed use under Section 116 of the Nuclear Waste Policy Act (NWPA), 42 U.S.C. § 10136.
 - d. The proposed use contemplates the pollution of the source of supply.
 - e. The proposed use, if consummated pursuant to DOE's present administration of the NWPA, will deprive Nevada of important classes of police power in violation of the Tenth Amendment and the Equal Footing Doctrine.
 - f. The objective and manner of implementing the proposed use is unconstitutional in numerous respects.

g. The proposed use for a permanent repository at Yucca Mountain will be detrimental to Nevada's socioeconomic interests and will adversely impact the environment.

4. Beneficial use cannot be proven because the proposed place of use is not suitable for the proposed use.

Citizen Alert protested the applications on the following grounds:

1. Use of the water will adversely affect the water rights of the State of Nevada and the residents of the Amargosa Valley, particularly the Amargosa Farms area and the Ash Meadows wildlife refuge and endangered species.

2. There is no unappropriated water in the area.

3. The DOE, in Item 12 states that the water will be used for "meeting the Department of Energy's responsibilities under the Nuclear Waste Policy Act," and that, "[a]lthough no final determination has been made on whether or not the Repository will be located at Yucca Mountain, these applications are being filed in order to ensure priority of filing and establishment of a claim for the use of the water." The primary responsibility of the DOE under the Act is the building and operation of a high-level nuclear waste repository. This application seeks to permanently appropriate water as opposed to the temporary permits now held by the Department. This clearly indicates that the intended use of the water is not limited to site characterization but rather for the establishment of a repository which is prohibited by state statute, and therefore is not in the public interest.

4. DOE's repository waste containment and isolation strategy relies on dilution in the groundwater which is the clear intention to pollute the water, and therefore is not in the public interest.

5. Congress and the DOE have denied oversight funding required to be provided to the State of Nevada by the same Act cited [sic] by the Department as justification for this water request to "meet their responsibilities."

6. The intended use of this water is clearly not beneficial to the State of Nevada or its citizens because it is illegal and unconstitutional.

The Amargosa Water Committee and the Southern Nye County Conservation District filed nearly identical protests, and protested the applications on grounds summarized as follows:

1. There is no unappropriated water available to support the applications.

2. To permit these applications would exceed the perennial safe yield, lower the groundwater table, degrade the quantity and quality of water from existing wells, change the hydraulic gradient causing contamination to move off the Nevada Test Site, and threaten springs and seeps which are critical to the flora and fauna of the region.
3. To permit these applications would unreasonably lower the water table and sanction water mining contrary to Nevada law and policy.
4. Diversion of the quantity applied for would deprive the area of water needed for its environmental and economic well-being, and the contemplated use is not fully described in the applications, therefore, the applications threaten to prove detrimental to the public interest.
5. The approval of these applications without comprehensive water-resource development planning is detrimental to the public interest.
6. The approval of these applications would threaten to prove detrimental to the public interest because it would jeopardize threatened and endangered species, prevent or interfere with the conservation of species, take or harm species, and interfere with the purpose for which federal lands are managed.
7. The Department of Energy cannot show the water will be put to beneficial use as it has not obtained the necessary interests in land to extract, develop, transport or apply the water to the claimed beneficial use.
8. The Department of Energy has not demonstrated its financial capability for developing this water, therefore, the applications violate NRS § 533.375.
9. The applications should be denied because they failed to adequately include statutorily required information.
10. The applications will exceed the perennial yield thereby creating air pollution in violation of state and federal laws.
11. The applicant has failed to provide information to adequately safeguard the public interest.
12. The State Engineer has previously denied applications in the Amargosa Desert Groundwater Basin.
13. There are still applications previously denied that are under appeal.
14. Economic activity in the area is water-dependent and a reduction in the quantity or quality of said water would impact the area's way of life.
15. Removing water will adversely impact current and future economic activity.
16. The possible potential adverse effects cannot be known without further information and study.
17. The State Engineer should withhold approval of the applications until potential court cases are resolved.

18. The State Engineer should withhold approval until water studies are completed.

VIII.

On April 2, 1998, protestant Nevada Agency for Nuclear Projects filed a Motion to Dismiss the applications on the grounds summarized below:

1. The applicant does not now have the legal capability and authority under the law of the United States to apply the water to the intended use. 42 U.S.C. § 10101, et seq.

a) Since the applicant has not completed the site characterization activities at Yucca Mountain as required by 42 U.S.C. § 10133(a), and does not expect to complete such activities until 2001, the applications violate the Nuclear Waste Policy Act.

b) Since the applicant has not determined that the Yucca Mountain site is suitable for the development of a high-level nuclear waste repository as required by 42 U.S.C. § 10132(b), considering, among other things, the effect of such a repository on the rights of users of water as required by 42 U.S.C. § 10132(a), the applications violate the Nuclear Waste Policy Act.

c) Since the applicant has not prepared an environmental impact statement on the development of a high-level nuclear waste repository at the Yucca Mountain site as required by 42 U.S.C. § 10134(f) and 42 U.S.C. § 4321, et seq., the applications violate the Nuclear Waste Policy Act and the National Environmental Policy Act.

d) Since the applicant has not given full consideration to whether the development, construction and operation of a high-level nuclear waste repository at the Yucca Mountain site may require the purchase or other acquisition of water rights that will have a significant adverse effect on the present or future

development of the area in which the repository is located, nor proposed to mitigate any such adverse effects as required by 42 U.S.C. § 10144, the applications violate the Nuclear Waste Policy Act.

e) Since the applicant has not recommended to the President of the United States that the Yucca Mountain site be developed as a repository as required by 42 U.S.C. § 10134(a)(1), and the applicant is not yet permitted to make such a recommendation because it can only be made upon completion of site characterization activities at the site and after notice to the Governor and Legislature of the State of Nevada, the applications violate the Nuclear Waste Policy Act.

f) Since the President of the United States has not reviewed the applicant's recommendation that the Yucca Mountain site be developed as a high-level nuclear waste repository as required by 42 U.S.C. § 10134(a), the applications violate the Nuclear Waste Policy Act.

g) Since the President of the United States has not recommended to Congress that the Yucca Mountain site be developed as a high-level nuclear waste repository as required by 42 U.S.C. § 10134(a)(2)(A), the applications violate the Nuclear Waste Policy Act.

2. The applicant's legal authority under the law of the United States to apply the water to its intended use is dependent upon the approval or disapproval of the Governor or Legislature of the State of Nevada (42 U.S.C. § 10136(b), 10135), and the date upon which the Governor or Legislature may approve or disapprove has not occurred.

3. Because NRS § 459.910 prohibits the intended use of the water, there is no clear certainty that the Governor or Legislature will approve the development of a high-level nuclear waste repository at Yucca Mountain; thereby creating

the applicant's legal authority to apply the waters to their intended use.

4. The applicant's applications call upon the State Engineer to usurp the statutory powers of the Governor and Legislature under the Nuclear Waste Policy Act; therefore, the applications violate the Nuclear Waste Policy Act, and the applicant's applications call upon the State Engineer to assist the applicant in the violation of NRS § 459.910.

5. The applicant has not withdrawn, and therefore does not control, as required by the law of the United States, the land upon which the water would be applied to its intended beneficial use (Federal Land Policy Management Act, 43 U.S.C. § 1714).

6. The applicant already has sufficient water rights to meet its needs for beneficial use within the foreseeable future.

7. The applications are premature and not ripe for adjudication, beneficial use of the water is not now required; therefore, the necessity for the use of the water does not presently exist violating NRS § 533.045, and the applicant may not file a premature application for the appropriation of the public waters of Nevada for the sole purpose of establishing a priority of filing and a claim for the water.

8. The applicant cannot presently demonstrate the amount of water that is reasonably required for the use it wishes to serve violating NRS § 533.070.

9. The applicant cannot at this time provide satisfactory proof of its intention in good faith to construct the works necessary to apply the water to its intended beneficial use with reasonable diligence violating NRS § 533.370(1)(c)(1).

10. The applicant cannot at this time provide satisfactory proof of its financial ability and reasonable expectation to actually apply the water to the intended beneficial use with

reasonable diligence violating NRS § 533.370(1)(c)(2).

Without repeating all the reasons for so holding, the State Engineer denied the Nevada Agency for Nuclear Projects' Motion to Dismiss pursuant to State Engineer's Interim Ruling No. 4662.⁶

IX.

After all parties of interest were duly noticed by certified mail,⁷ a pre-hearing conference was held on June 15, 1999, in Las Vegas, Nevada, before the State Engineer. The purpose of the pre-hearing conference was to consider procedures and to identify issues to be heard relating to the protested applications.

X.

After all parties of interest were duly noticed by certified mail, a public administrative hearing was held regarding the protests to Applications 63263, 63264, 63265, 63266 and 63267 on November 8th through 10th, and November 15th through 16th, 1999, in Las Vegas and Carson City, Nevada, before the State Engineer.⁸

XI.

Administrative notice was taken of all records and information available in the office of the State Engineer, specifically, those records of the administrative hearing held in September and October 1991 relative to Application 52338 filed by the U.S. Department of Energy.⁹

⁶ State Engineer's Interim Ruling No. 4662, dated August 28, 1998, official records in the office of the State Engineer.

⁷ Exhibit No. 1 and Transcript, public administrative hearing before the State Engineer, June 15, 1999 (hereinafter "Pre-hearing Conference Transcript").

⁸ Exhibit Nos. 2 and 3; Transcript, public administrative hearing before the State Engineer, November 8-10, 15-16, 1999 (hereinafter "Transcript").

⁹ Transcript, p. 7.

FINDINGS OF FACT

I.

At the beginning of the administrative hearing, the applicant and protestant Nevada Agency for Nuclear Projects entered into evidence a stipulation pursuant to which the Agency agreed that based on prior rulings of the State Engineer there is sufficient water available at the source for the appropriation of 430 acre-feet annually from Basin 227A.¹⁰ Therefore, with respect to protestant Nevada Nuclear Projects Agency's claim that there is no unappropriated water in the source of supply, the State Engineer finds that the protestant and the applicant stipulated that based on prior rulings of the State Engineer the Agency agrees that there is sufficient water at the source to allow for the appropriation of 430 acre-feet annually of underground water from Basin 227A.¹¹ The State Engineer further finds that neither he nor other protestants were parties to said agreement.

II.

The State Engineer finds that by letter received on November 5, 1999, protestant Citizen Alert indicated that its interests during the administrative hearing would be represented by protestant Nevada Agency for Nuclear Projects.¹² The State Engineer finds that Citizen Alert was not a party to the stipulation as to water availability, and further failed to provide any evidence (through its identified representative) to support its protest claims of adverse affects to other water rights, as to the relevance of Congress's and the DOE's denial of oversight funding, or as to the intended use being unconstitutional.

¹⁰ Exhibit No. 16, public administrative hearing before the State Engineer, November 8, 1999.

¹¹ Exhibit No. 16, public administrative hearing before the State Engineer, November 8, 1999.

¹² Exhibit No. 15, public administrative hearing before the State Engineer, November 8, 1999.

III.

At the beginning of the administrative hearing, protestants Southern Nye County Conservation District and Amargosa Water Committee indicated that their protests had been based on the availability of water in the region. However, since they had an opportunity to look at some of the evidence, they might be amending their protests, in total or in part. The protestants indicated that they expected to provide a very brief presentation, but would be asking questions on cross-examination.

The protestants' representative stated that "we will stick to looking at water availability issues, and if that is settled, then we will not be presenting anything beyond that."¹³ The protestant further stated that:

Our concern was and is, although it's been mitigated considerably since we've had a chance to read the materials that have been presented to us, that administratively the books are closed and there's not enough water and it's overappropriated. Thus, our concern on behalf of both entities was that if you pump out additional water, then you're not going to have enough water and you're going to lower the water table. I have modified that position and am not going to be going forward with a defense of that...I want to see the new research and ask questions about it, but my concerns are still on the record.¹⁴

At the time protestants Southern Nye County Conservation District and Amargosa Water Committee were given the opportunity to present their cases in support of their protests, their representative indicated that what these protestants have been attempting to do is come up with a better understanding of "what's going on with the hydrology of the region"¹⁵ and said representative indicated he was looking for an education. He then requested administrative notice of two reports that are records of

¹³ Transcript, p. 14.

¹⁴ Transcript, pp. 322-323.

¹⁵ Transcript, p. 305.

the office of the State Engineer, pointed out a few excerpts from those publications, and indicated he would defer to the applicant's witnesses. As the representative read through the excerpts he indicated repeatedly "another portion I would like to understand" and "I have lots of questions" in reference to statements made in the reports.¹⁶ "In summary, we're anxious to see what comes. It doesn't make any sense to present information in light of the incredible amount of research that's been done in the area. I would like to have an opportunity for that information to be presented and ask any questions in clarification so that I can better understand what's going on."¹⁷

In response to the protestants' statement that they would not be putting on a case and were really just attending the hearing to get an education, the State Engineer directed the protestants to NRS § 533.365 which provides that any interested person may file a protest against the granting of an application setting forth with reasonable certainty the grounds of such protest. Upon questioning, the protestant admitted the protests when filed were "certainly uncertain."¹⁸

When a protestant files a protest to the granting of an application to appropriate water, it is the protestant's burden to produce the evidence and prove said claims. It is not the applicant's job to disprove the protestant's claims. The State Engineer finds that the burden of producing evidence and proving the protestant's claims lies squarely on the protestant. The issues to be considered during a hearing arise from the contents of the application, the protests, or issues that may arise under

¹⁶ Transcript, pp. 305-321.

¹⁷ Transcript, p. 320.

¹⁸ Transcript, p. 325.

NRS chapters 533 or 534,¹⁹ and it is generally the protestant that is required to present its case first.²⁰

The State Engineer finds that, while these protestants listed at least 18 issues in their protests, at the administrative hearing they did not present any evidence as to any of their protest claims and in fact failed to present cases at all. The State Engineer finds the statutory process for filing protests is not to be taken lightly and is not merely a method by which protestants can throw out lots of ideas as to why an application should be denied expecting the applicant to disprove the statements in their protests. The filing of a protest is a serious matter and any protestant is expected to have reasonable grounds as a basis for their protest and is expected to provide whatever evidence and testimony it has in support of its protest. The State Engineer finds protestants the Amargosa Water Committee and the Southern Nye County Conservation District failed in this respect as their protests, as filed, were uncertain and they did not present one shred of evidence to support their protest claims at the administrative hearing.

The State Engineer considered the protests of the Amargosa Water Committee and the Southern Nye County Conservation District as required under NRS § 533.365, and the protests were not based upon reasonably certain grounds. The protestants came to the hearing with no intention of putting on a case to defend the position they took in their protests, but rather intended to use the public administrative hearing process "to learn" and perhaps dismiss many of the grounds of their protests. In their opening statement, these protestants did not address many of the issues listed in their protests. The State Engineer finds that dismissal

¹⁹ NAC § 533.210.

²⁰ NAC § 533.350.

of the protests at the administrative hearing²¹ was the appropriate course of action.

IV.

Some protest claims attempted to focus on the fact that the intended use of the water is not limited to site characterization, but rather is for the establishment of a repository, which is prohibited by State statute. The applicant attempted to focus on the fact that the intended use of the water is similar to any other facility being built in the state of Nevada.

At the pre-hearing conference, counsel for the applicant indicated that the DOE is not asking for water to inject anything into the ground, that the use of the water is only for construction of the facility and normal processes that go along with that construction, and agreed that if water was going to be used beyond that, the DOE would have to file another application with the Division of Water Resources.²² At the administrative hearing, counsel for the DOE indicated in his opening remarks that while the water may be used in the construction of a high-level nuclear waste storage facility, the only use of the water under these applications would be in conjunction with the tunneling operations to make the place ready for the emplacement of canisters containing nuclear waste, and only if the facility is ultimately licensed for that purpose. "There is no water in essence going to be used other than for dust suppression during the construction phase in those facilities."²³

Yet, in closing argument at the evidentiary hearing, counsel for the DOE asked the State Engineer to reconsider whether the DOE would have to file new applications for uses of water beyond the dust control, etc. mentioned in its applications,²⁴ and in that

²¹ Transcript, pp. 324-327.

²² Pre-hearing Conference Transcript, pp. 38-39, 52.

²³ Transcript, pp. 17-18.

²⁴ Transcript, pp. 689-690.

same closing argument admitted the DOE was asking for the applications to construct and eventually operate a high-level nuclear waste facility.²⁵ While counsel argues that water is not to be used to store any nuclear waste²⁶ this appears to be a question of semantics, which contradicts the testimony presented.

The testimony indicated that as to the surface facility, the DOE expects to use water for construction and operation of the facility, including dust control, concrete production, washdown of the facilities and equipment during construction, as it would be used in many other kinds of industries during the construction of their facilities. However, further testimony indicated that during operation of the facility water would be used for the decontamination of equipment contaminated with radiation, and to cool the transportation casks prior to removing either non-disposable canisters or bare assemblies.²⁷ As to the subsurface repository design, testimony was provided as to the use of water in the drilling of tunnels, including emplacement tunnels, however, once into the overlapping construction and operation phases the only use of water on the emplacement side would be for potable water for employees, fire lines and washdown facilities (in the case of a contamination event there would probably be a couple of alcoves on the emplacement side) with the main use of water on the development side of the repository being for the concrete batch plant and dust suppression.²⁸

²⁵ Transcript, p. 687.

²⁶ Transcript, p. 688.

²⁷ See, testimony of Dr. Matthew Gomez, project engineer for the surface facility at the Yucca Mountain project, Transcript, pp. 237-241. See, testimony of Michael Ruben, lead civil structural design engineer for the repository surface facility design department, Transcript, pp. 468-474. See also, Wendy Dixon testimony, Transcript, pp. 375-376.

²⁸ See, testimony of Dan McKenzie, project manager for the repository sub-surface design, Transcript, pp. 452-455.

Wendy Dixon, environmental impact statement project manager, testified as to the many steps that have to be taken before a high-level nuclear waste repository becomes a reality at Yucca Mountain²⁹, however, to date the draft environmental impact statement does not identify any impacts that the DOE believes would preclude recommending the site to the President of the United States.³⁰ Ms. Dixon testified that, if the Yucca Mountain repository is authorized at the federal level, the water will be used for the construction and operation of a high-level nuclear waste repository at Yucca Mountain.³¹ Ms. Dixon testified that the DOE has requested the 430 acre-feet annually to meet its Nuclear Waste Policy Act responsibilities and that the water would be used for all repository program phases, such as confirmation, construction, operation, possible retrieval and closure.³² Ms. Dixon testified that through the Nuclear Waste Policy Act, as amended in 1987, Congress has determined that geologic disposal is in the public interest,³³ and that site characterization has been directed to only the Yucca Mountain site.³⁴ She further testified that the environmental impact statement process does not have to consider either the need for repository alternatives to geologic disposal or alternatives to the Yucca Mountain site.³⁵

While counsel attempted to argue this is like any other water right application for mining in Nevada, that is not the case. These applications are for use of water in a facility to store

²⁹ Transcript, pp. 350-364.

³⁰ Transcript, p. 360.

³¹ Transcript, pp. 20-21.

³² Transcript, p. 364.

³³ Transcript, p. 350.

³⁴ Transcript, p. 351.

³⁵ Transcript, p. 356.

high-level nuclear waste. The State Engineer has reconsidered his decision whether the DOE would have to file new applications for uses of water beyond the dust control, etc. mentioned in its applications, and finds that at the administrative hearing it was flushed out that the applications were filed for more uses than just construction and finds the applicant is requesting the use of water for actual use in the receiving, transfer, and processes for the storage of high-level nuclear waste in Nevada and those uses are encompassed under these applications.

The State Engineer finds the testimony presented by the DOE leads to the conclusion that the water applied for is not merely for the normal industrial purposes identified in the applications as to road construction, facility construction, drilling, dust suppression, tunnel and pad construction, testing, culinary, domestic and other related site uses as in any other industry that is building a facility. But rather, the intent of the DOE is to move forward toward using the waters in a facility that upon approval will be operated for the storage of high-level nuclear waste in Yucca Mountain with those uses including the possible handling of nuclear waste, washdown facilities, decontamination and other uses associated with the operation of a facility to store high-level nuclear waste, if such facility becomes licensed.

V.

Protestant Nevada Agency for Nuclear Projects presented testimony that the siting could: (1) cause people to consider moving out of the area; (2) cause people to reconsider investing in Southern Nevada; (3) cause people to be concerned over the quality of life in the area; and (4) cause people to be concerned over the risk associated with the transportation of materials to the site.³⁶ The protestant also presented testimony indicating there is strong public opposition to locating a nuclear waste repository in Nevada and that opinion is united year after year

³⁶ See generally, testimony of Dr. Alvin Mushkatel, Transcript, pp. 79-140.

and is across the board as to regions of the state, age groups, political affiliations, education, or socioeconomic levels.³⁷ The State Engineer finds that testimony was presented indicating that it may not be in the economic interests of Nevada to have a high-level nuclear waste repository at Yucca Mountain,³⁸ and that the siting of a nuclear waste repository at Yucca Mountain causes considerable public concern.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.³⁹

II.

The State Engineer is prohibited by law from granting a permit under an application to appropriate the public waters where:⁴⁰

- A. There is no unappropriated water at the proposed source, or
- B. The proposed use conflicts with existing rights, or
- C. The proposed use threatens to prove detrimental to the public interest.

III.

As to protestants the Amargosa Water Committee and the Southern Nye County Conservation District, the State Engineer concludes these protestants did not provide testimony or evidence in support of their protest claims, therefore, their protests were subject to dismissal. The State Engineer concludes as to protestant Citizen Alert that testimony or evidence was not

³⁷ Transcript, pp. 230-232.

³⁸ See generally, testimony of Dr. James Chalmers, Transcript, pp. 22-78; testimony of Dr. James Flynn, Transcript, pp. 140-169.

³⁹ NRS chapters 533 and 534.

⁴⁰ NRS § 533.370(3).

presented as to most of its protest claims, therefore, those claims are subject to being overruled.

IV.

The State Engineer concludes that in light of State Engineer's Interim Ruling No. 4662 protestant Nevada Agency for Nuclear Projects focused its entire case on its claims that the appropriation threatens to prove detrimental to the public interest and did not provide any evidence or testimony to support its protest claim that the proposed use conflicts with existing water rights, therefore, that claim is subject to being overruled.

V.

Nevada Revised Statute § 533.370 provides that the State Engineer shall deny a permit where the proposed use threatens to prove detrimental to the public interest. The protestant alleges that the proposed use threatens to prove detrimental to the public interest because to the extent it facilitates the storage of high-level radioactive waste it is prohibited by NRS § 459.910.⁴¹

To date, the only decision of the Nevada Supreme Court that addresses the provision of NRS § 533.370 as to the meaning of "threatens to prove detrimental to the public interest" is a case commonly known as the "Honey Lake Case."⁴² In the "Honey Lake Case" one of the appellant's contentions was that the applicant's proposal was not economically feasible or desirable in light of certain other factors. After the hearings, the State Engineer issued a ruling and on appeal the district court concluded that the State Engineer did not specifically determine whether the applications were detrimental to the public interest and remanded the matter to the State Engineer for further consideration of that criterion. Upon remand, the State Engineer identified 13 policy

⁴¹ NRS § 459.910(1) provides that it is unlawful for any person or governmental entity to store high-level radioactive waste in Nevada.

⁴² Pyramid Lake Paiute Tribe of Indians v. Washoe County, 112 Nev. 743, 918 P.2d 697 (1996).

considerations contained in Nevada water statutes to help define the public interest.

On further appeal, the Nevada Supreme Court specifically addressed whether the State Engineer had properly defined the meaning of the "public interest" and found that he had done so.⁴³ The State Engineer rejects any idea or perception that "public interest" means how the public views a project in a public opinion poll.

It became clear to the State Engineer during the administrative hearing process that this facility is not like any other industrial complex for which an appropriation of water is requested. This facility, if approved, is for the operation of a complex facility, which will ultimately result in the storage of high-level nuclear waste at Yucca Mountain, but other processes are involved before the waste is actually stored. There are processes for shipment of nuclear materials into the facility, for the transfer of those materials from its transporters to begin the "storage" process, for the transfer of nuclear materials from various containers to storage containers, and these operations take place prior to emplacement of casks underground. Most of these processes will require some use of water for decontamination or transfer of materials.

Going back to the "Honey Lake Case", while the Nevada Supreme Court held that in that case the State Engineer had properly defined the meaning of the public interest, it also held that the "Legislature has the power to decide what the policy of law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed."⁴⁴ The State Engineer places great deference in pronouncements made by the Nevada Legislature. The legislature is presumed to be the voice of the

⁴³ Pyramid Lake Paiute Tribe of Indians v. Washoe County, 112 Nev. 743, 918 P.2d 697 (1996).

⁴⁴ Pyramid Lake Paiute Tribe of Indians v. Washoe County, 112 Nev. 743, 918 P.2d 697 (1996).

people through the democratic process of government, and if it has spoken to a certain area relative to a water right application indicating the public interest, the State Engineer will and must take that pronouncement into consideration.

In this case, the Nevada Legislature has determined what the public interest is through its determination of the policy of law, and it has intimated that will through the enactment of NRS § 459.910, which provides that it is unlawful for any person or governmental entity to store high-level radioactive waste in Nevada. Therefore, the Nevada Legislature has already determined that the use applied for (the construction and operation of a high-level nuclear waste repository) threatens to prove detrimental to the public interest. The State Engineer concludes he is not required by statute to conduct the political and economic decision-making as to whether a repository should be located in Nevada and he does not have the duty or authority to independently review the decision of the Nevada Legislature that high-level nuclear waste is not to be stored in Nevada. Therefore, the State Engineer further concludes that since NRS § 459.910 prohibits the operation of a high-level nuclear waste repository to be sited in Nevada, the use of water in conjunction with said facility threatens to prove detrimental to the public interest.

VI.

The use of the area for the storage of high-level nuclear waste was previously challenged by the State of Nevada as to the Department of Energy's activities related to site characterization at Yucca Mountain. In 1990, the Ninth Circuit Court of Appeals decided the case of State of Nevada v. Watkins⁴⁵ pursuant to which the State of Nevada challenged the Secretary of Energy's decision under the Nuclear Waste Policy Act ("NWPA") to continue investigation of Yucca Mountain, Nevada, as a potential site for

⁴⁵ 914 F.2d 1545 (9th Cir. 1990).

the location of a national high-level radioactive waste repository. Nevada asserted that pursuant to NRS § 459.910 it had affected a valid legislative veto of the selection of Yucca Mountain. The Secretary of Energy maintained that the NWPA preempts NRS § 459.910 to the extent it is inconsistent with the NWPA.

The focus of the Watkins case was site characterization, and the Court noted that neither party had contended that Congress had expressly preempted the field of nuclear waste disposal. In Watkins, the Ninth Circuit Court of Appeals held that under the Supreme Court's preemption analysis, when Congress does not define explicitly the extent to which its enactments preempt state law that:

[S]tate law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted.... If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law...or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.⁴⁶

The Ninth Circuit Court of Appeals held that Nevada's attempted legislative veto of the Secretary's site characterization activities was preempted by the NWPA, but the Court did not determine whether Nevada's legislative veto of the storage of high-level radioactive waste was preempted. Therefore, whether Nevada's legislative veto extends past site characterization to nuclear waste disposal has not been ruled upon by a court of law. While neither the Secretary of Energy nor the President of the United States has actually recommended the site to Congress, it was very clear from the administrative proceeding that water was being applied for use at the Yucca Mountain site in the operation of a high-level nuclear waste repository. The State Engineer

⁴⁶ Id. at 1560-1561.

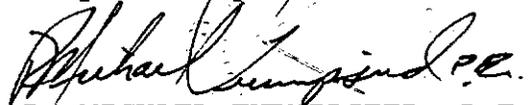
Ruling
Page 24

concludes that Nevada's legislative veto of the use of water for the purposes applied for under these applications is not preempted by the NWPA.

RULING

The State Engineer finds the protests of Citizens Alert and the Nevada Agency for Nuclear Projects to Applications 63263, 63264, 63265, 63266 and 63267 are hereby upheld on the grounds that the requested use threatens to prove detrimental to the public interest. No ruling is made as to the merits of the other protest claims.

Respectfully submitted,


R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/SJT/cl

Dated this 2nd day of
February, 2000.