

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

IN THE MATTER OF APPLICATIONS)
66638, 66639, 66640, 66641, 66642,)
66643, 66644, AND 66645 FILED TO)
CHANGE THE POINT OF DIVERSION, PLACE)
OF USE AND MANNER OF USE OF A)
PORTION OF THE PUBLIC WATERS OF THE)
WEST FORK OF THE CARSON RIVER)
LOCATED WITHIN THE CARSON VALLEY)
HYDROGRAPHIC BASIN (105), DOUGLAS)
COUNTY, NEVADA.)

RULING

#5031

GENERAL

I.

Application 66638 was filed on August 3, 2000, by the Bentley Family Limited Partnership to change the point of diversion, place of use, and manner of use of the water of the West Fork of the Carson River previously appropriated under Permit 54729 for purposes as decreed. The proposed place of use is described as 91.5 acres within the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 8 and the W $\frac{1}{2}$ SE $\frac{1}{4}$, E $\frac{1}{2}$ SW $\frac{1}{4}$ and the W $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 5, all within T.11N., R.20E., M.D.B.&M. The proposed point of diversion is described as being located within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 8, T.11N., R.20E., M.D.B.&M.¹ Permit 54729 changed the point of diversion, place of use, and manner of use of the water heretofore appropriated under Claim Nos. 520, 521, and 522 of the Carson River Decree for storage purposes.²

II.

Application 66639 was filed on August 3, 2000, by the Bentley Family Limited Partnership to change the point of diversion, place of use, and manner of use of the water of the West Fork of the Carson River previously appropriated under Permit 54730 for purposes as decreed. The proposed place of use is described as

¹ File No. 66638, official records in the office of the State Engineer.

² File No. 54729, official records in the office of the State Engineer.

23.1 acres within the W $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 5, T.11N., R.20E., M.D.B.&M. The proposed point of diversion is described as being located within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 8, T.11N., R.20E., M.D.B.&M.³ Permit 54730 changed the point of diversion, place of use, and manner of use of the water heretofore appropriated under Claim Nos. 523, 524, 525, 526, and 527 of the Carson River Decree for storage purposes.⁴

III.

Application 66640 was filed on August 3, 2000, by the Bentley Family Limited Partnership to change the point of diversion, place of use, and manner of use of a portion of the water of the West Fork of the Carson River previously appropriated under Permit 54733 for purposes as decreed. The proposed place of use is described as 9.7 acres within the W $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 5, T.11N., R.20E., M.D.B.&M. The proposed point of diversion is described as being located within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 8, T.11N., R.20E., M.D.B.&M.⁵ Permit 54733 changed the point of diversion, place of use, and manner of use of the water heretofore appropriated under Claim Nos. 532 and 533 of the Carson River Decree for storage purposes.⁶

IV.

Application 66641 was filed on August 3, 2000, by the Bentley Family Limited Partnership to change the point of diversion, place of use, and manner of use of the water of the West Fork of the Carson River previously appropriated under Permit 54734 for purposes as decreed. The proposed place of use is described as 19.7 acres within the W $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 5, T.11N., R.20E., M.D.B.&M. The proposed point of diversion is described as being located within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 8, T.11N., R.20E.,

³ File No. 66639, official records in the office of the State Engineer.

⁴ File No. 54730, official records in the office of the State Engineer.

⁵ File No. 66640, official records in the office of the State Engineer.

⁶ File No. 54733, official records in the office of the State Engineer.

M.D.B.&M.⁷ Permit 54734 changed the point of diversion, place of use, and manner of use of the water heretofore appropriated under Claim No. 534 of the Carson River Decree for storage purposes.⁸

V.

Application 66642 was filed on August 3, 2000, by the Bentley Family Limited Partnership to change the point of diversion, place of use, and manner of use of the water of the West Fork of the Carson River previously appropriated under Permit 54731 for purposes as decreed. The proposed place of use is described as 36.1 acres within the W $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 8, T.11N., R.20E., M.D.B.&M. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 17, T.11N., R.20E., M.D.B.&M.⁹ Permit 54731 changed the point of diversion, place of use, and manner of use of the water heretofore appropriated under Claim No. 528 of the Carson River Decree for storage purposes.¹⁰

VI.

Application 66643 was filed on August 3, 2000, by the Bentley Family Limited Partnership to change the point of diversion, place of use, and manner of use of a portion of the water of the West Fork of the Carson River previously appropriated under Permit 54733 for purposes as decreed. The proposed place of use is described as 0.9 acres within the W $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 8, T.11N., R.20E., M.D.B.&M. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 17, T.11N., R.20E., M.D.B.&M.¹¹ Permit 54733 changed the point of diversion, place of use, and manner of use of the water heretofore appropriated under Claim Nos. 532 and 533 of the Carson River Decree for storage purposes.⁶

⁷ File No. 66641, official records in the office of the State Engineer.

⁸ File No. 54734, official records in the office of the State Engineer.

⁹ File No. 66642, official records in the office of the State Engineer.

¹⁰ File No. 54731, official records in the office of the State Engineer.

¹¹ File No. 66643, official records in the office of the State Engineer.

VII.

Application 66644 was filed on August 3, 2000, by the Bentley Family Limited Partnership to change the point of diversion, place of use, and manner of use of a portion of the water of the West Fork of the Carson River previously appropriated under Permit 54732 for purposes as decreed. The proposed place of use is described as 24.0 acres within the E $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 5, T.11N., R.20E., M.D.B.&M. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 8, T.11N., R.20E., M.D.B.&M.¹² Permit 54732 changed the point of diversion, place of use, and manner of use of the water heretofore appropriated under Claim Nos. 529, 530, and 531 of the Carson River Decree for storage purposes.¹³

VIII.

Application 66645 was filed on August 3, 2000, by the Bentley Family Limited Partnership to change the point of diversion, place of use, and manner of use of a portion of the water of the West Fork of the Carson River previously appropriated under Permit 54733 for purposes as decreed. The proposed place of use is described as 5.5 acres within the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 8 and the E $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 5, T.11N., R.20E., M.D.B.&M. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 8, T.11N., R.20E., M.D.B.&M.¹⁴ Permit 54733 changed the point of diversion, place of use, and manner of use of the water heretofore appropriated under Claim Nos. 532 and 533 of the Carson River Decree for storage purposes.⁶

IX.

Kent R. Neddenriep, timely protested Applications 66638 and 66642 on the following grounds:

The proposed place of use is in Nevada very near the state line. In accordance with custom and the terms of the Alpine Decree, the proposed place of use is in Segment 5 as set

¹² File No. 66644, official records in the office of the State Engineer.

¹³ File No. 54732, official records in the office of the State Engineer.

¹⁴ File No. 66645, official records in the office of the State Engineer.

forth in the Decree. Diversions from the river must be made during the Segment 5 week as set forth in the decree. This is the case even though the diversion is in California within Segment 4. To not consider these Segment 5 water rights and to not require the diversion during Segment 5 week would be a violation of the Alpine Decree.

In addition to violating the Decree, allowing the diversion of water during Segment 4 week would create a hardship on myself and other Segment 4 water users with equal or junior priorities in that we would get lesser amounts of water.

If the priority of the water were made the most junior in Segment 4, it would still create a hardship for myself as a Segment 5 water user. This is because under the decree Segment 5 users that did not get direct flows during Segment 5 week are allowed to use the return flows from Segment 4. This proposed point of diversion is the last on Segment 4 and would use the return flows that I might otherwise use.

The current permit only allows the original consumptive use of 2.5 acre-feet per acre to be stored. However, the applicant wishes to transfer the full duty of 4.5 acre-feet per acre. If the full duty is transferred it could be argued that there would be an insignificant change to the system in that the difference between the duty and consumptive use would remain in the system. However, due to my location in the river system I would see a net loss in available water. The only way around this is to make this use the most junior.

Making the proposed use the most junior is the same result if it is determined that the original transfer from use for irrigation to storage is to be undone. Then the transfer from irrigation in California to irrigation in Nevada is to be made. It is my understanding that past transfers between segments of the river have had to accept the junior priority. The basis of this being the requirement of the Decree that each segment be treated autonomously and if additional water rights are added to a segment they cannot adversely affect other users unless they are the most junior.

I further protest the applicants [sic] request to be allowed 10 years to make improvements and prove beneficial use. I do not see the need for the applicant to prove beneficial use as I understand the place of use has been irrigated for the last several seasons from the proposed point of diversion and there is perennial grasses over most of the proposed places of use. If proof of beneficial use is required, it should be completed in 1 year with extensions of time only allowed for a small percentage of the place of use for good cause.

The last item of protest in this application is the request that the application could be withdrawn at any time in the next ten years and the water revert to the old manner and place of use, storage. This is not reasonable and has the potential of causing unknown future hardship on others and myself. When the owners wish to change either the point of diversion or the place or manner of use they should follow the standard application procedure in place at that time and the change should be considered at that time and under those circumstances.

X.

Application 66644 was timely protested by Chris H. Gansberg, Jr. on the following grounds:

My concern is only that when you transfer points of diversion between segments of the river, the priority of the water be the most senior in the new segment. More specifically, when you change the point of diversion from Segment 4 to Segment 5, the priority becomes the most junior in Segment 5. If the transfer was allowed, under the Bassman-Anderson decree the water should only be allowed to be diverted during Segment 5's week (Nevada week).

XI.

F. Heise Land and Live Stock Company, timely protested Applications 66638, 66639, 66640, 66641, 66642, 66643, 66644, and 66645 on the following grounds:

1. Protestant shares maintenance responsibility with Applicant with respect to the Millich and Snowshoe Thompson #2 ditches, from which the water at issue is being moved. Protestant would be significantly harmed if Applicant were to hereafter claim a reduction in its maintenance responsibilities in light of the changes sought in the Application. Accordingly, Protestant hereby requests that, if the Application is granted, that the State Engineer place the following condition on the permit:

Applicant shall be required to continue with its contractual and historic maintenance responsibilities with respect to the Millich and Snowshoe Thompson #2 ditches and to immediately remedy its maintenance deficiencies and pay damage resulting from those deficiencies within 30 days of receipt of a verified list and demand for payment of those resulting damages.

2. The Nevada State Engineer lacks jurisdiction over this inter-state transfer of water. (See Alpine Decree, Administrative Provisions, Article VII.)
3. The Application fails to provide sufficient information such that one can obtain a "full understanding" of the proposed change (including the precise use to which the water will be placed, the precise place where the water will be used, and what is intended by the statement in the "remarks" portion of the Application).
4. The Application is not accompanied by the necessary maps and drawings as required by NRS 533.350.
5. The requested ten (10) year time period for completing "the application of water to beneficial use" is excessive and should be substantially shortened.
6. The Application impermissibly seeks a "contingent" permit that can be withdrawn at any time which would result in a reversion of water to a prior permit. The State Engineer is not authorized to grant such permits.
7. Protestant is informed and believes that the Applicant has, pursuant to a "lease," already changed the point of diversion and manner of use as sought herein in violation of NRS 533.325.

XII.

By letter dated January 5, 2001, Jim Usher of Bently Agrowdynamics representing Bently Family Limited Partnership responded to the protests. Contained within this letter was the statement that the applicant would accept the conditions that it would divert water for irrigation as the junior appropriator in Segment 5.¹

XIII.

By letter dated February 26, 2001, Chris Gansberg Jr. withdrew his protest.¹²

FINDINGS OF FACT

I.

A review of Applications 66638, 66639, 66640, 66641, 66642, 66643, 66644, and 66645 indicates the applicant proposes to change the point of diversion, place, and manner of use of the waters

under Permits 54729, 54730, 54731, 54734, and a portion of Permits 54732 and 54733 to lands that were previously irrigated under the Carson River Decree. The proposed place of use of the water transferred under these permits are of equal size to lands removed from irrigation by all of Permit 54738 and portions of Permits 54736 and 54737. The proposed changes in the point of diversion are to points on the West Fork of the Carson River that are established in the Alpine Decree. The State Engineer finds the applicants have provided sufficient information to evaluate the applications.

II.

Each of the subject applications states that the water will be used for irrigation and other purposes as decreed. The State Engineer finds that the use as decreed is a valid continuation of the current use as specified in the Alpine Decree and the applications sufficiently identify the proposed use.

III.

The applicant by letter dated January 5, 2001, agreed to irrigate during Nevada week and become the junior appropriator within Segment 5.¹⁵ The State Engineer finds that the applicant has agreed to be the junior appropriator in the new segment and this protest issue is moot.

IV.

The Carson River Decree allocates a volume of water to be diverted at a headgate in a duty of water per acre. The applications propose to use the water as it was originally decreed. The storage permits that have been previously granted removed an area of land from irrigation that is equal to the area proposed to be irrigated by these applications. The State Engineer finds that allowing the applicant to divert the full duty needed to irrigate is in compliance with State law and the Alpine Decree.

¹⁵ File No. 66638, official records in the office of the State Engineer.

V.

NRS § 533.380(1)(b) gives the State Engineer sole discretion on granting a period up to ten years for placing the water to beneficial use under a permit. The State Engineer finds that the request for ten years for placing the water to beneficial use complies with State law.

VI.

The Carson River Decree, Paragraph VII, page 161, provides that applications for changes in the point of diversion, place of use or manner of use as to Nevada shall be directed to the State Engineer. The State Engineer finds that he has authority in this matter, and Federal Court approval is not required.

VII.

Applications 66638, 66639, 66640, 66641, 66642, 66643, 66644, and 66645 propose to transfer the points of diversion from the Millich ditch and the Snowshoe Thompson #2 ditch to existing points of diversion downstream. The records of State Engineer indicate that Permits 54729, 54730, 54731, 54732, 54733, and 54734 had been transferred into the Millich ditch and the Snowshoe Thompson #2 ditch. The records also indicate that the applicant still has active storage rights under Claims 814 and 814a of the Alpine Decree. The State Engineer finds that his records indicate all rights historically diverted through the Millich and the Snowshoe Thompson #2 ditches are still in place and that the granting of Applications 66638, 66639, 66640, 66641, 66642, 66643, 66644, and 66645 would not harm the existing users of these ditches.

VIII.

Applications 66638, 66639, 66640, 66641, 66642, 66643, 66644, and 66645 all request that if they are withdrawn prior to the filing of the Proof of Beneficial Use that the water will revert back to their respective base permit. Permits 54729, 54730, 54731, 54732, 54733, and 54734 are permitted for storage purposes.

These permits are in good standing. It has been long standing policy of this office that if a permit is withdrawn the water will revert back to the base right if this prior right is in good standing and no permit term restricts the act. The State Engineer finds that the request of the applicant is allowable as long as the base permits are in good standing.

IX.

The land that had been stripped by Permits 54736, 54737, and 54738 are alleged to have been irrigated. Applications 66638, 66639, 66640, 66641, 66642, 66643, 66644, and 66645 were filed to place a water right on these lands to comply with NRS § 533.460. The State Engineer finds that the applicant is attempting to comply with State Statutes and the Alpine Decree.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.¹⁶

II.

The State Engineer is prohibited by law from granting a change application to appropriate the public waters where:¹⁷

- A. the proposed use conflicts with existing rights; or
- B. the proposed use threatens to prove detrimental to the public interest.

III.

The State Engineer concludes the applicant has provided sufficient information to evaluate the applications.

¹⁶ NRS chapter 533 and Article VII of the Carson River Decree.

¹⁷ NRS § 533.370(3).

IV.

Applications 66638, 66639, 66640, 66641, 66642, 66643, 66644, and 66645 request a change in the manner of use to as decreed. The State Engineer concludes that the manner of use will be as decreed in the Alpine Decree.

V.

Applications 66638, 66639, 66640, 66641, 66642, 66643, 66644, and 66645 propose to use the water right as it was originally decreed. The applications request to return the volume of water to the amount that was decreed for each acre irrigated. The State Engineer concludes that allowing the applicant to divert the full duty needed to irrigate is in compliance with State law and the Alpine Decree.

VI.

The Nevada Revised Statutes grant the State Engineer authority to set the due date for the filing of the Proof of Beneficial Use of a period of up to 10 years. The State Engineer concludes that the request for ten years for placing the water to beneficial use complies with State law.

VII.

Applications 66638, 66639, 66640, 66641, 66642, 66643, 66644, and 66645 propose to remove water rights from a ditch system that the rights were transferred into by Permits 54729, 54730, 54731, 54732, 54733, and 54734. The water rights allocated under the Alpine Decree still remain in the existing ditch system. The State Engineer concludes that the granting of Applications 66638, 66639, 66640, 66641, 66642, 66643, 66644, and 66645 would not harm the existing users of these ditches.

VIII.

Applications 66638, 66639, 66640, 66641, 66642, 66643, 66644, and 66645 request that if they are withdrawn prior to the filing of the Proof of Beneficial Use that the water will revert to their respective base right. It has been long standing policy that if a

permit is withdrawn then the water will revert to the base right, if the latter is in good standing. The State Engineer concludes that the applicant may withdraw a permit and have the water revert to it's base right.

IX.

Applications 66638, 66639, 66640, 66641, 66642, 66643, 66644, and 66645 have been made to transfer water to lands that have been stripped from irrigation by previous permits. The State Engineer concludes that it does not threaten to prove detrimental to the public interest to grant permits to bring a user in compliance with NRS § 533.460.

RULING

The protests to Applications 66638, 66639, 66640, 66641, 66642, 66643, 66644, and 66645 are hereby overruled and said applications are approved subject to the Carson River Decree and the payment of the statutory permit fees.

Respectfully submitted,


HUGH RICCI, P.E.
State Engineer

HR/MJR/hf

Dated this 5th day of
June, 2001.