

STATE OF NEVADA
OFFICE OF THE STATE ENGINEER

IN THE MATTER OF APPLICATIONS 64073,)
64074, 64075, 64076, 64077, 64078, AND 64079)
FILED TO CHANGE THE POINT OF DIVERSION,))
PLACE OF USE, AND MANNER OF USE OF)
WATERS APPROPRIATED FROM A SURFACE)
WATER SOURCE AND APPLICATIONS 64080)
AND 64081 FILED TO APPROPRIATE WATER)
FROM PAIUTE CREEK AND WARM SPRINGS)
CREEK WITHIN THE WARM SPRINGS)
VALLEY HYDROGRAPHIC BASIN (084),)
WASHOE COUNTY, NEVADA.)

RULING

5066

GENERAL

I.

Application 64073 was filed on May 1, 1998, by Robert W. Marshall and Nanette Marshall to change the point of diversion, place of use, and manner of use of 4.612 cubic feet per second (cfs), not to exceed 638.4 acre-feet annually (afa), of water previously appropriated from Warm Springs Valley Creek and tributaries under Proof of Appropriation V-02737. Application 64073 proposes to change the manner of use from irrigation, stockwater, and domestic purposes within portions of Sections 29, 30, 32, and 33, T.24N., R.20E., and Section 4, T.23N., R.20E., M.D.B.&M. to municipal and domestic purposes within all of T.21N., R.19E.; Section 36, T.21N., R.18E.; Sections 1 through 12, inclusive, and Sections 15, 16, and 17, T.20N., R.19E.; and Sections 1 and 12, T.20N., R.18E., M.D.B. & M. The proposed points of diversion are described as being located within the NW¼ NE¼ of Section 30 and the SE¼ SE¼ of Section 19, T.24N., R.20E., M.D.B.&M.¹

II.

Application 64074 was filed on May 1, 1998, by Robert W. Marshall and Nanette Marshall to change the point of diversion, place of use, and manner of use of 0.817 cfs, not to exceed 121.10 afa, of water previously appropriated from Dewey Springs under

¹ File No. 64073, official records in the office of the State Engineer.

Proof of Appropriation V-02738. Application 64074 proposes to change the manner of use from irrigation, stockwater, and domestic purposes within portions of Section 29, T.24N., R.20E., M.D.B.&M. to municipal and domestic purposes. The points of diversion and place of use are the same as described under Application 64073.²

III.

Application 64075 was filed on May 1, 1998, by Robert W. Marshall and Nanette Marshall to change the point of diversion, place of use, and manner of use of 0.476 cfs, not to exceed 73.0 afa, of water previously appropriated from Pradere Springs under Proof of Appropriation V-02739. Application 64075 proposes to change the manner of use from irrigation, stockwater, and domestic purposes within portions of Section 33, T.24N., R.20E., M.D.B.&M. to municipal and domestic purposes. The proposed points of diversion are described as being located within the NW¼ SW¼ of Section 27 and the SE¼ NW¼ of Section 33, T.24N., R.20E., M.D.B.&M. The proposed place of use is the same as described under Application 64073.³

IV.

Application 64076 was filed on May 1, 1998, by Robert W. Marshall and Nanette Marshall to change the point of diversion, place of use, and manner of use of 4.0 cfs of water previously appropriated from Pradere Springs under Permit 28273. Application 64076 proposes to change the manner of use from irrigation and domestic purposes within portions of Section 33, T.24N., R.20E., M.D.B.&M., to municipal and domestic purposes. The proposed point of diversion is described as being located within the SE¼ NW¼ of Section 33, T.24N., R.20E., M.D.B.&M. The proposed place of use is the same as described under Application 64073.⁴

V.

Application 64077 was filed on May 1, 1998, by Robert W. Marshall and Nanette Marshall to change the place of use and manner of use of 2.0 cfs of water previously appropriated from Pradere Springs under Permit 28367. Application 64077 proposes to

² File No. 64074, official records in the office of the State Engineer.

³ File No. 64075, official records in the office of the State Engineer.

⁴ File No. 64076, official records in the office of the State Engineer.

change the manner of use from irrigation and domestic purposes within portions of Sections 27, 28, and 33, T.24N., R.20E., M.D.B.&M. to municipal and domestic purposes. The proposed point of diversion is described as being located within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 27, T.24N., R.20E., M.D.B.&M. The proposed place of use is the same as described under Application 64073.⁵

VI.

Application 64078 was filed on May 1, 1998, by Robert W. Marshall and Nanette Marshall to change the point of diversion, place of use, and manner of use of 8.0 cfs of water previously appropriated from Warm Springs Creek under Permit 28369. Application 64078 proposes to change the manner of use from irrigation and domestic purposes within portions of Section 4, T.23N., R.20E., and portions of Sections 29, 32, and 33, T.24N., R.20E., M.D.B.&M. to municipal and domestic purposes. The proposed point of diversion is described as being located within the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 30, T.24N., R.20E., M.D.B.&M. The proposed place of use is the same as described under Application 64073.⁶

VII.

Application 64079 was filed on May 1, 1998, by Robert W. Marshall and Nanette Marshall to change the point of diversion, place of use, and manner of use of 5.0 cfs of water previously appropriated from Warm Springs Creek under Permit 34960. Application 64079 proposes to change the manner of use from irrigation and domestic purposes within portions of Section 4, T.23N., R.20E., and portions of Section 33, T.24N., R.20E., M.D.B.&M. to municipal and domestic purposes. The proposed point of diversion is described as being located within the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 30, T.24N., R.20E., M.D.B.&M. The proposed place of use is the same as described under Application 64073.⁷

⁵ File No. 64077, official records in the office of the State Engineer.

⁶ File No. 64078, official records in the office of the State Engineer.

⁷ File No. 64079, official records in the office of the State Engineer.

VIII.

Application 64080 was filed on May 1, 1998, by Robert W. Marshall and Nanette Marshall to appropriate 1.0 cfs, not to exceed 100.0 afa, of water from Paiute Creek for municipal and domestic purposes. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 26, T.24N., R.20E., M.D.B.&M. The proposed place of use is the same as described under Application 64073.⁸

IX.

Application 64081 was filed May 1, 1998, by Robert W. Marshall and Nanette Marshall to appropriate 20.0 cfs of water from Warm Springs Creek and tributaries for municipal and domestic purposes. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 4, T.23N., R.20E., M.D.B.&M. The proposed place of use is the same as described under Application 64073.⁹

X.

Washoe County, the Warm Springs Property Owners Association, Anthony J. Bator, Greg Dennis and the Nevada Division of Wildlife timely protested Applications 64073 through 64081, inclusive. Applications 64075, 64076, and 64077 were also timely protested by the Pyramid Lake Paiute Tribe of Indians.

XI.

Washoe County protested Applications 64073, 64074, and 64075 on the following grounds:¹⁰

The ground water resources of Warm Springs hydrographic basin are replenished and rely on the flows from Warm Springs Creek and its tributaries.

More specifically the natural recharge that occurs as a result of irrigation of lands in Winnemucca valley and any recharge caused by tail waters are essential and important components of the perennial yield of this basin.

Therefore, in order to protect:

- The existing groundwater rights in the basin and
- any underground flows which may be present in the area of mullen pass which is the source of supply for the community of Sutcliff.

⁸ File No. 64080, official records in the office of the State Engineer.

⁹ File No. 64081, official records in the office of the State Engineer.

¹⁰ File Nos. 64073, 64074, and 64075, official records in the office of the State Engineer.

Washoe County requests the applications be approved on the condition that it is for the consumptive use portion only. The consumptive use is that portion of water applied that is not returned back to the source of the groundwater system.

XII.

Washoe County protested Applications 64076 and 64077 on the following grounds:¹¹

There is no unappropriated water in the proposed source of supply. Pradere Springs, the proposed source of supply, has been previously adjudicated by the State Engineer. The water rights requested by these applications are above and beyond the applicants' adjudicated water rights represented by Proof of Appropriation 02739.

Said adjudication allocates both the diversion rate and annual duty of water to the claimants from this source. Item XI of said adjudication declares that the waters of Warm Springs Creek and its tributaries (Pradere Springs) are fully appropriated.

In addition, Section W.S.3.2.2 of Washoe County Development Code recognizes that the ground water resources of Warm Springs hydrographic basin are replenished and rely on the flows from Warm Springs Creek and its tributaries.

More specifically, the natural recharge that occurs as a result of irrigation of lands in Winnemucca Valley and any recharge caused by tail waters are essential and important components of the perennial yield of this basin. Therefore, granting of this application would be detrimental to:

- The existing groundwater rights in the basin; and
- Any underground flows which may be present in the area of Mullin Pass, which is the source of supply for the community of Sutcliff.

Washoe County requests the State Engineer deny Applications 64076 and 64077.

XIII.

Washoe County protested Application 64078 on the following grounds:⁶

There is no unappropriated water in the proposed source of supply.

Application 64078 is requesting to appropriate 8.0 cfs, with an annual duty of 660.4 acre-feet from Warm Springs Creek. This appropriation is above and beyond the Applicant's water rights represented by Proofs of Appropriation numbers 02737, 02738, and 02739. The requested water is currently appropriated under Permit 28369 for irrigation and domestic use. However, said water has never been put to beneficial use.

Washoe County is the successor in interest to Proof of Appropriation 02844 and Certificate of Appropriation 4967 (Permit 13677) from the

¹¹ File Nos. 64076 and 64077, official records in the office of the State Engineer.

same source. These water rights, together with Proofs 02737, 02738, and 02739, have been adjudicated by the State Engineer with Proofs 02844, 02737, 02738, and 02739 having equal priority and Permit 13677 having the next highest priority.

Washoe County's water rights have a diversion rate of 6.689 cfs together with the right to store the flows from Sugar Cane Springs, a tributary to Warm Springs Creek, and a duty of 981.77 acre-feet together with the right to store 456.4 acre-feet from Sugar Cane Springs. Washoe County's points of diversion and places of use are both upstream from the applicants.

Furthermore, said adjudication allocates both the diversion rate and annual duty of water to the claimants from said source. Item XI of said adjudication declares that the waters of Warm Springs Creek and its tributaries are fully appropriated.

It is the protestant's position that during most years, with full exercise of Washoe County's rights, the diversion rate and duty requested by the Applicants are simply not available. This is also consistent with Item XI of the adjudication referenced above and the gauging data compiled by Washoe County and the State Engineer's office.

In addition, Section W.S.3.2.2, of Washoe County Development Code recognizes that the ground water resources of Warm Springs hydrographic basin are replenished and rely on the flows from Warm Springs Creek and its tributaries.

More specifically, the natural recharge that occurs as a result of irrigation of lands in Winnemucca Valley and any recharge caused by tail waters are essential and important components of the perennial yield of this basin. Therefore, granting of this application would be detrimental to:

- The existing groundwater rights in the basin; and
- Any underground flows which may be present in the area of Mullin Pass which is the source of supply for the community of Sutcliff.

Washoe County requests that the State Engineer deny Application 64078.

XIV.

Washoe County protested Application 64079 on the following grounds:⁷

There is no unappropriated water in the proposed source of supply.

Application 64079 is requesting to appropriate 5.0 cfs, with an undetermined annual duty from Warm Springs Creek. The quantity of water requested is above and beyond the Applicant's water rights represented by Proofs of Appropriation numbers 02737, 02738, and 02739 from the same source, Warm Springs Creek and tributaries. This quantity of water is currently appropriated under Permit 34960 for irrigation and domestic use. However, said water has never been put to beneficial use.

Washoe County is the successor in interest to Proof of Appropriation 02844 and Certificate of Appropriation 4967 (Permit 13677) from the

same source. These water rights, together with Proofs 02737, 02738, and 02739, have been adjudicated by the State Engineer with Proofs 02844, 02737, 02738, and 02739 having equal priority and Permit 13677 having the next highest priority.

Washoe County's water rights have a diversion rate of 6.689 cfs together with the right to store the flows from the Sugar Cane Springs, a tributary to Warm Springs Creek, and a duty of 981.77 acre-feet together with the right to store 456.4 acre-feet from Sugar Cane Springs. Washoe County's points of diversion and places of use are both upstream from the applicants.

Furthermore, said adjudication allocates both the diversion rate and annual duty of water to the claimants from said source. Item XI of said adjudication declares that the waters of Warm Springs Creek and its tributaries are fully appropriated.

It is the Protestant's position that during most years, with full exercise of Washoe County's rights, the diversion rate and duty requested by the Applicants are simply not available. This is also consistent with Item XI of the adjudication referenced above and stream gauging data compiled by Washoe County and the State Engineer's office.

In addition, Section W.S.3.2.2 of Washoe County Development Code recognizes that the groundwater resources of Warm Springs hydrographic basin are replenished and rely on the flows from Warm Springs Creek and its tributaries.

More specifically, the natural recharge that occurs as a result of irrigation of lands in Winnemucca Valley and any recharge caused by tail waters are essential and important components of the perennial yield of this basin. Therefore, granting of this application would be detrimental to:

- The existing groundwater rights in the basin; and
- Any underground flows which may be present in the area of Mullin Pass which is the source of supply for the community of Sutcliff.

Washoe County requests that the State Engineer deny Application 64079.

XV.

Washoe County protested Application 64080 on the following grounds:⁸

There is no unappropriated water in the proposed source of supply, and proposed appropriation conflicts with existing rights and threatens to prove detrimental to the public interest.

The Applicant is proposing to appropriate the naturally occurring recharge from a streambed by a surface water application. In fact, said application amounts to a new appropriation of ground water resources in the Warm Springs Hydrographic Basin.

The naturally occurring recharge from any surface source is an integral part of the perennial yield of a hydrographic basin. The State Engineer, in approving the ground water appropriations of Warm Springs valley, has already appropriated the resource described in this application.

In fact, recent studies by Washoe County indicate an over-appropriation of the ground water resources of this basin. Therefore, there is no unappropriated water in the true source of Application 64080, the ground water resources of Warm Springs Valley.

Based on the above, approval of said Application would prove detrimental to all existing ground water rights within the basin. Furthermore, Washoe County Department of Comprehensive Planning has completed a Basin Budget for this hydrographic basin. The Basin Budget balances the total development potential, in the form of land use designation, to the available ground water resources of this hydrographic basin. Both the Basin Budget and the land use designations are incorporated into the Washoe County Development Code. Article W.S.3.2.1 of said development code "Strongly discourages transfers of ground water from the Warm Springs Valley Hydrographic Basin."

Therefore, granting this application is contrary to the public interest, since it will reduce the development potential for the residents and land owners of Warm Springs Valley, the basin of origin.

Washoe County requests that the State Engineer deny Application 64080.

XVI.

Washoe County protested Application 64081 on the following grounds:⁹

There is no unappropriated water in the proposed source of supply. This application is requesting to appropriate 20.0 cfs from Warm Springs Creek and its tributaries. The proposed new appropriation is above and beyond the applicant's water rights from the same source represented by Proofs of Appropriation 02737, 02738, and 02739, and Permits 28369 and 34460.

Washoe County is the successor in interest to Proof of Appropriation 02844 and Certificate of Appropriation 4967 (Permit 13677) from the same source. These water rights, together with Proofs 02737, 02738, and 02739, have been adjudicated by the State Engineer with Proofs 02844, 02737, 02738, and 02739 having equal priority and Permit 13677 having the next highest priority.

Washoe County's water rights have a diversion rate of 6.689 cfs together with the right to store the flows from Sugar Cane Springs, a tributary to Warm Springs Creek, and a duty of 981.77 acre-feet together with the right to store 456.4 acre-feet from Sugar Cane Springs. Washoe County's points of diversion and places of use are both upstream from the applicants.

Furthermore, said adjudication allocates both the diversion rate and annual duty of water to the claimants from said source. Item XI of said adjudication declares that the waters of Warm Springs Creek and its tributaries are fully appropriated.

It is the Protestant's position that during most years, with full exercise of Washoe County's rights, the diversion rate and duty requested by the Applicants are simply not available. This is also consistent with Item XI of the adjudication referenced above and stream gauging data compiled by Washoe County and the State Engineer's office.

In addition, Section W.S.3.2.2 of Washoe County Development Code recognizes that the ground water resources of Warm Springs hydrographic basin are replenished and rely on the flows from Warm Springs Creek and its tributaries.

More specifically, the natural recharge that occurs as a result of irrigation of lands in Winnemucca Valley and any recharge caused by tail waters are essential and important components of the perennial yield of this basin. Therefore, granting of this application would be detrimental to:

- The existing groundwater rights in the basin; and
- Any underground flows which may be present in the area of Mullin Pass which is the source of supply for the community of Sutcliff.

Washoe County requests that the State Engineer deny Application 64081.

XVII.

The Warm Springs Property Owners Association protested Applications 64073 through 64081, inclusive, on the following grounds:¹²

Exportation of water will drop water levels in surrounding areas.

Exportation of water will affect our recharge for our aquifers, possibilities of turning Warm Springs Valley into a dust bowl and therefore ruining our property values.

Exportation of water from Warm Springs Valley would greatly reduce the property owners from being able to build for their own expansion projects. Some depths of wells have already dropped.

The Warm Springs Property Owners Association requests that the State Engineer deny Applications 64073 through 64081, inclusive.

XVIII.

Anthony J. Bator protested Applications 64073 through 64081, inclusive, on the following grounds:¹²

1. My first objection is that the water Mr. Marshall proposes pumping will remove from the zone which feeds my wells.
2. My second objection is that in Mr. Marshall proposal he attempts to imply he will be creating addition water. An ridiculous proposal. No one knows

¹² File Nos. 64073 through 64081, inclusive, official records in the office of the State Engineer.

- what underground channels will be affected by his "increased efficiency" to bring the water to the recharge area. And no one will be willing to accept responsibility for it.
3. By recharging additional water, he will be affecting the water temperature of the geothermal resource and probably lower the temperature and thus putting me out of business.
 4. His proposal would have devastating affects upon the environment as he kills off all the vegetation of the area creating a dust bowl.
 5. This proposal creates a dangerous new manner of "creating" water rights. Shut other people's water off upstream, state your taking it away from a few plants (environmental havoc) and then sell what has been taken from them to the highest bidder. Even if its outside of Palomino Valley water basin. I like the right to do this type of subterfuge in Reno metropolitan area. I'd fare financially very well.
 6. Washoe County Commissioners promised that no water exportation project would be attempted if we the local property owners accepted the proposal for the "specific plan area" dropping the minimum parcel sizes, to allow for use of all of the natural resources of water in this entire water basin for residential use located in the central part of Warm Springs Valley.
 7. It creates a new class of water rights that are politically value enhanced.
- Mr. Bator requests that the State Engineer deny Applications 64073 through 64081, inclusive.

XIX.

Greg Dennis protested Applications 64073 through 64081, inclusive, on the following grounds:¹²

New use and purpose will negatively impact basin yield and recharge.

Washoe County area plan states Washoe County "shall strongly discourage transfers of groundwater" from Warm Springs.

Valley floor vegetation will be seriously impacted and air quality will degrade.

Water quality of existing basin groundwater may be seriously impacted.

Proposed facilities will dewater Warm Springs Creek and tributaries.

Funding requirements are under estimated.

Violates Truckee Meadows Regional Plan.

Will impact existing use of right and well.

Violates public interest.

Mr. Dennis requests that the State Engineer deny Applications 64073 through 64081, inclusive.

XX.

Terry R. Crawforth, Administrator of the Nevada Division of Wildlife protested Applications 64073 through 64081, inclusive, on the following grounds:¹²

The removal of water will have serious negative impacts on the wildlife in Warm Springs Valley.

The Nevada Division of Wildlife requests that the State Engineer deny Applications 64073 through 64081, inclusive.

XXI.

The Pyramid Lake Paiute Tribe of Indians protested Applications 64075, 64076, and 64077 on the following grounds:¹³

1. On the information and belief the alleged water right has not been diligently put to beneficial use or has been forfeited and therefore cannot be changed to a different point of diversion, place of use or manner of use.
2. Pradere Springs is tributary to Mullen Creek which flows into Pyramid Lake. Granting or approving Applications 64075, 64076, and 64077 would be detrimental to the public interest in that it would:
 - i. be likely to jeopardize the continued existence of Pyramid Lake's two principal fish, the endangered cui-ui and the threatened Lahontan cutthroat trout;
 - ii. prevent or interfere with the conservation of those endangered and threatened species in violation of both federal and state law;
 - iii. take or harm those threatened and endangered species;
 - iv. adversely affect the recreational value of Pyramid Lake; and
 - v. interfere with the purpose for which the Pyramid Lake Indian Reservation was established.
3. Granting or approving Applications 64075, 64076, and 64077 will threaten existing and future groundwater supply from Mullen Creek for municipal use in the town of Sutcliff on the Pyramid Lake Indian Reservation and will conflict with the Pyramid Lake Paiute Tribe's reserved water right for this purpose.
4. There is not sufficient unappropriated surface and ground water in the Warm Springs-Winnemucca Valleys in Nevada to provide the water sought in Applications 64075, 64076, and 64077 involving the utilization of surface and ground water from the basin.
5. Granting or approving Applications 64075, 64076, and 64077 would conflict with the prior and paramount reserved water rights of the Pyramid Lake Paiute Tribe.
6. The Pyramid Lake Paiute Tribe of Indians will be adversely affected if Applications 64075, 64076, and 64077 are granted because:
 - i. the endangered and threatened species inhabiting Pyramid Lake and the recreational value of Pyramid Lake would be adversely affected;

¹³ File Nos. 64075, 64076, and 64077, official records in the office of the State Engineer.

- ii. the municipal water supply of the town of Sutcliff would be adversely affected; and
- iii. the tribe's prior and paramount reserved water right would be impaired or violated.

The Pyramid Lake Paiute Tribe of Indians requests that the State Engineer deny Applications 64075, 64076, and 64077.

XXII.

After all parties of interest were duly noticed by certified mail,¹⁴ a public administrative hearing was held on April 3, 4, and 5, 2001, regarding the protests to Applications 64073, 64074, 64075, 64076, 64077, 64078, 64079, 64080, and 64081 in Carson City, Nevada, before representatives of the office of the State Engineer.

FINDINGS OF FACT

I.

The State Engineer finds that Warm Springs Creek and its tributaries were subject to an adjudication proceeding before the Second Judicial District Court of the State of Nevada in and for the County of Washoe. A decree was issued on March 30, 1988, as to the relative rights in and to the waters of Warm Springs Creek and its tributaries. Proof of Appropriations V-02737, V-02738, and V-02739 are subject to the decree. Proof of Appropriation V-02737 was granted 4.612 cfs, not to exceed 638.4 afa from Warm Springs Valley Creek and its tributaries. Proof of Appropriation V-02738 was granted 0.817 cfs, not to exceed 121.10 afa from Dewey Springs and is supplemental to V-02737. Proof of Appropriation V-02739 was granted 0.476 cfs, not to exceed 73.0 afa from Pradere Springs and is supplemental to Proof V-02737. The State Engineer further finds that the final decree recognized the proofs of appropriation and permits issued by the State Engineer in declaring the waters of Warm Springs Creek and its tributaries fully appropriated.

II.

Applications 64073, 64074, and 64075 request a change in the point of diversion, place of use, and manner of use of existing decreed water rights that appropriate water from Warm Springs Creek, Dewey Springs, and Pradere Springs, respectively.

¹⁴ Exhibit No. 1 and Transcript, public administrative hearing before the State Engineer, April 3-5, 2001 (hereafter "Transcript").

Applications 64076, 64078, and 64079 request a change in the point of diversion, place of use, and manner of use of existing permitted water rights from Pradere Springs and Warm Springs Creek. Application 64077 requests a change in place of use and manner of use of existing permitted water rights from Pradere Springs. Applications 64080 and 64081 request to appropriate tail and flood waters from Paiute Creek and Warm Springs Creek, respectively. Conceptually, Applications 64073, 64074, 64075, 64076, 64077, 64078, 64079, 64080, and 64081, propose to recharge the Warm Springs Valley groundwater basin with surface waters from Warm Springs Creek and its tributaries, then recover a portion of the waters for export to Lemmon Valley and surrounding areas for municipal and domestic purposes. The amount of water removed from irrigation and recharged into the Warm Springs Valley groundwater basin by the applicants would be measured by continuous recording gages.¹⁵ The resulting amount of water recharged minus the amount of water that is presently returned to the hydrologic system (non-consumptive use portion) would be the amount recovered and available for export. Recharge, Storage, and Recovery Application R-014 has been filed with the State Engineer for the purposes of recharging, storing, and recovering the waters of Warm Springs Creek and its tributaries, which include Dewey Springs, Pradere Springs, and Paiute Creek. Recharge, Storage, and Recovery Application R-014 will be reviewed by the State Engineer and a determination will be made independently from the applications under consideration in this action, and based on its own merits.

It is the consumptive use portion of these water rights that the applicants propose to recover from extraction wells and deliver via a pipeline to Lemmon Valley and surrounding areas. The applicants contend that 75% of the water applied to irrigation and used by phreatophytes is lost through evaporation and transpiration (ET), which represents the consumptive use portion. Washoe County believes that the ET is 62.5%, which it contends to be the consumptive use factor used in the Alpine Decree. The consumptive use of water by vegetation is dependent on many factors, such as soil type, method of application, elevation, and nighttime temperatures. The value for consumptive

¹⁵ Exhibit No. 72, Terry Katzer and Dwight Smith Exhibits in Support of Applications 64073 through 64081, inclusive, Section 3, p. 27.

use is difficult to quantify. Knowing this, the State Engineer finds that the value as set forth in the Alpine Decree,¹⁶ which uses a consumptive rate of 2.5 acre-feet per acre for lands above Lahontan Reservoir, regardless of the rate of application is a conservative, but reasonable, value that protects the public interest and the water resources of Warm Springs Valley.

III.

Application 64076 proposes to change the point of diversion, place of use, and manner of use of water appropriated under Permit 28273. The source of the water is Pradere Springs, which is a tributary to Warm Springs Creek. Permit 28273 was issued on June 25, 1976, for 4.0 cfs, for irrigation of 200 acres and domestic purposes. Portions of the place of use of Permit 28273 are supplemental to Proof of Appropriation Nos. V-02737 and V-02739 totaling 35.1 acres. The remaining 164.9 acres are supplemental to Permits 28369 and 34960. The State Engineer finds that the degree to which this water right has been placed to its intended use has never been quantified through the filing of a Proof of Beneficial Use and that 20 years of extensions have been requested and approved on an annual basis, up to December 15, 2001.

IV.

Application 64077 proposes to change the place of use and manner of use of water appropriated under Permit 28367. Permit 28367 was issued June 25, 1976, in the amount of 2.0 cfs, for the irrigation of 80.0 acres and domestic purposes from Pradere Springs, of which 20.0 acres are totally supplemental to Permits 28369 and 28273. There are 60 acres under Permit 28367 that are not supplemental to any other water right. Proof of Application of Water to Beneficial Use was filed December 12, 1980, for the irrigation of 15.10 acres, with a diversion rate of 0.75 cfs. The State Engineer finds that the applicants subsequently withdrew the Proof of Application of Water to Beneficial Use and that 20 years of extensions have been granted in order to allow the permittees time to place the waters to beneficial use up to December 15, 2001.

¹⁶ Final Decree, U.S. v. Alpine Land and Reservoir Co., Civil No. D-183 BRT (D.Nev. 1980).

V.

The total amount of water under appropriation from Pradere Springs under Proof of Appropriation V-02739 (0.476 cfs) and Permits 28273 (4.0 cfs) and 28367 (2.0 cfs) is 6.476 cfs. The greatest stream flow rate measured by staff of the office of the State Engineer was 0.324 cfs, which was recorded on March 9, 1989. The State Engineer finds that there is insufficient data on the flow rates of Pradere Springs to make a final determination on the amount of water available under Applications 64076 and 64077.

VI.

The Pyramid Lake Paiute Tribe contends that Change Application 64076 and 64077 cannot be granted because they propose to change Permits 28273 and 28367, which have not yet been perfected. The State Engineer finds that permitted water rights are not subject to the forfeiture provisions of NRS § § 533.060 and 534.090. Permitted rights that have not yet been perfected are subject to the provisions of NRS § § 533.395, and 533.410. The permittee did comply with these provisions by providing the State Engineer with a yearly report on the progress of putting the water granted to beneficial use and the reasons for requesting additional time in which to do so. The State Engineer approved the requests for extension of time to file the Proof of Beneficial Use, extending the time until December 15, 2001. The State Engineer finds that the permits requested to be changed are in good standing.

VII.

Application 64078 proposes to change the point of diversion, place of use, and manner of use of water already appropriated under Permit 28369. Permit 28369 was issued June 25, 1976, to appropriate 8.0 cfs from Warm Springs Creek for the irrigation of 500.0 acres and domestic purposes of which 249.7 acres are partially supplemental to Permits 28367, 28369, and 34960 and Proof of Appropriation Nos. V-02737, V-02738, and V-02739. The remaining 250.3 acres are not supplemental to any other water right. Permit 28367 has been granted 20 years of extensions of time in order to allow the permittees time to place the waters to beneficial use up to December 15, 2001.

VIII.

Application 64079 proposes to change the point of diversion, place of use, and manner of use of water appropriated under Permit 34960 from Warm Springs Creek. Permit 34960 was issued for 5.0 cfs for the irrigation of 220.0 acres and domestic purposes and is totally supplemental to Permits 28273 and 28369. Permit 34960 has been granted 15 years of extensions in order to allow the permittees time to place the waters to beneficial use up to December 15, 2001.

IX.

The State Engineer finds that there are 475.2 acres under Permits 28273, 28267, 28369, and 34960 that are not supplemental to the decreed lands under Proof of Appropriation Nos. V-02737, V-02738, and V-02739. Permits 28273, 28367, and 28369 are partially supplemental for 475.2 acres and Permit 34960 is totally supplemental to Permits 28273 and 28369.

X.

Spring and stream flow data has been collected within the Warm Springs Creek drainage area since the late 1980's. The cycle of data collection has varied greatly. In the early stages of data collection by the office of the State Engineer flow rates were collected on a weekly basis during the irrigation season, after two or three seasons the frequency of data collection changed to early spring and late summer measurements. At best, these measurements are only a reflection of the conditions at the time of the measurement. A review of the available records indicate that the flow rates of the springs tend to be more consistent and less variable over time than the flows in Warm Springs Creek. At times, over the period of record there have been observations of no flow at the 3-foot parshall flume located on Warm Springs Creek, which is the upstream diversion for the Marshall Ranch. The State Engineer finds that there is insufficient stream flow data to make a final determination on the amount of water available under Applications 64076, 64077, 64078, and 64079. The State Engineer further finds that a minimum of one year, of monitoring by the utilization of a continuous recording device at a location on Warm Springs Creek approved by the State Engineer will be needed in order to make

a determination of the amount of water available for recharge, on a yearly basis. Based on the monitoring results, additional monitoring may be needed in order for the State Engineer to make an initial determination of the water available for recharge.

XI.

Application 64080 was filed to appropriate 1.0 cfs, not to exceed 100 acre-feet annually, from Paiute Creek. In the remarks section of the application, it is stated that the applicants propose to take the tail waters and flood flows from the irrigated meadows along Paiute Creek and allow them to recharge the groundwater basin. Proof of Appropriation V-02736 is the only other filing for water rights on Paiute Creek. Robert W. Marshall and Nanette Marshall, d.b.a. Intermountain Land and Cattle Co., filed an Amended Proof of Appropriation V-02736, dated June 6, 1989.¹⁷ The original proof was filed April 4, 1972. The proof and the amended proof claim a diversion rate of 3.0 cfs for the irrigation of 54.0 acres of meadow grass and timothy, harvested as hay, with a priority date of 1881. Washoe County contends that Application 64080 as filed constitutes a groundwater appropriation and that because Warm Springs Valley has been designated by the State Engineer, this application would put an additional stress on the basin's groundwater resource. The State Engineer agrees that the groundwater resource in the Warm Springs Valley is being pumped in excess of the perennial yield of 3,000 acre-feet.¹⁸ The perennial yield is defined as the maximum amount of ground water that can be salvaged each year over the long term without depleting the groundwater reservoir.¹⁹ The State Engineer finds that the issue involving Application 64080 is not whether it is a surface or groundwater appropriation, but rather is there unappropriated water available from Paiute Creek to support Application 64080. Exhibit No. 72, titled Terry Katzer and Dwight Smith Exhibits In Support of Applications 64073 through 64081, determined that the annual base flow of Paiute Creek is 55.0 acre-feet with an additional peak flow

¹⁷ File No. V-02736, official records in the office of the State Engineer.

¹⁸ Rush, F.E. and Glancy, P.A., Water Resources-Reconnaissance Series Report, *Water-Resources Appraisal of the Warm Springs-Lemmon Valley Area, Washoe County, Nevada*, Table 20, p. 43, November 1967.

¹⁹ *Water for Nevada, State of Nevada Water Planning Report No. 3*, p. 13, October, 1971.

component of 50.0 acre-feet.²⁰ The State Engineer finds that Proof of Appropriation V-02736 if determined to be valid as filed would equate to 216 acre-feet if four acre-feet per acre was determined to be appropriated, which is greater than the combination of the base flow and flood flow of Paiute Creek, as was presented by the applicant. The State Engineer further finds that until a determination is made as to the validity of Proof of Appropriation V-02736 and until more flow data is collected on Paiute Creek, there is no unappropriated water to support Application 64080.

XII.

Application 64081 was filed to appropriate 20.0 cfs of water from Warm Springs Creek. Peak spring flows are dependent on the amount of snowfall received during the winter months. Like all of western Nevada, Warm Springs Valley is in the rain shadow of the Sierra Nevada Mountain Range; generally, where snow accumulations are not very great. Based on the stream flow data collected by Washoe County and the Nevada Division of Water Resources from 1989 through 2001, there is not enough evidence to substantiate the claim that there is an additional 20.0 cfs flowing in Warm Springs Creek during times of peak runoff. Applications 64073, 64078, and 64079 propose to change a total of 17.612 cfs, which is the total diversion rate under Proof of Appropriation V-02737 and Permits 28369 and 34960, of water from Warm Springs Creek. The data collected by the office of the State Engineer does not support these kinds of diversion rates anywhere along Warm Springs Creek and its tributaries. Also, the decree declared that Warm Springs Creek and its tributaries are fully appropriated. The State Engineer finds that to issue a permit for additional waters on Warm Springs Creek would be in violation of the court issued decree and would threaten to prove detrimental to the public interest.

XIII.

The Pyramid Lake Paiute Tribe of Indians contends that the approval of Applications 64075, 64076, and 64077 will impair existing rights, jeopardize endangered species, and impact Pyramid Lake. Applications 64075, 64076, and 64077 request to

²⁰ Exhibit No.72, 'Terry Katzer and Dwight Smith Exhibits in Support of Applications 64073 through 64081' Section 3, Table 3. " *Summary of Estimated Average Annual Marshall Ranch Stream/Spring Yield*", p. 13.

change the point of diversion, place of use, and the manner of use of existing, valid, decreed, and permitted water rights. Nevada Revised Statute § 533.325 provides that a person may change the point of diversion, place of use, and manner of use of water already appropriated, which is statutorily defined to include 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 point of diversion, place of use, and manner of use is made.²¹ The State Engineer finds that the applications propose to change the consumptive use portion of existing water rights, thus no additional impacts on existing water rights should result. The State Engineer finds the Pyramid Lake Paiute Tribe provided no testimony or evidence to support its protest claims; therefore, no record was developed to support any of the Tribe's contentions. The State Engineer finds no reserved rights have been adjudicated to the Tribe from any of the sources sought under these applications, but a water right has been adjudicated to the Tribe from the Truckee River pursuant to the Orr Ditch Decree.²²

XIV.

The Nevada Division of Wildlife, through its administrator Terry R. Crawforth, filed protests to Applications 64073 through 64081, inclusive. The protests contend that the removal of the water would have a serious impact on the wildlife of Warm Springs Valley. By letter dated March 15, 2001, from the Division of Wildlife to Dwight Smith and Terry Katzer, (consultants to the applicants), the Division agreed to withdraw its protest if certain stipulated conditions were met. The State Engineer finds that there was no letter withdrawing the protest or executed stipulation agreement between the parties filed with the State Engineer. By personal communications by staff of the State Engineer and the Division of Wildlife, the State Engineer finds that a stipulated agreement between the parties has been executed.²³ However, the State Engineer finds that by virtue of NRS

²¹ NRS § 533.324.

²² Final Decree, U.S. v. Orr Water Ditch Co., In Equity A-3 (D.Nov. 1944).

²³ Personal communication August 22, 2001, with Doug Hunt, Nevada Division of Wildlife.

§ 533.367, wildlife will continue to have access to the seeps and springs of Warm Springs Creek and its tributaries, eliminating the necessity of incorporating the stipulated agreement in this ruling as requested.²⁴

XV.

Warm Springs Property Owners Association, Anthony J. Bator and Greg Dennis protested Applications 64073 through 64081, inclusive, on a number of issues. Their main contention was that the approval of the above mentioned applications would result in lower water levels in Warm Springs Valley. The State Engineer finds that only the consumptive use portion of the decreed and permitted water rights will be available for export, and this amount will be determined on a yearly basis, and that issue and the other concerns of the protestants have been addressed in other findings.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.²⁵

II.

The State Engineer is prohibited by law from granting a change application to appropriate the public waters where:²⁶

- A. the proposed use or change conflicts with existing rights;
- B. the proposed use or change conflicts with protectible interests in domestic wells as set forth in NRS § 533.024; or
- C. the proposed use or change threatens to prove detrimental to the public interest.

III.

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

- A. there is no unappropriated water at the proposed source;
- B. the proposed use conflicts with existing rights;

²⁴ NRS § 533.367.

²⁵ NRS chapter 533.

²⁶ NRS § 533.370(3).

- C. the proposed use conflicts with protectible interests in existing domestic wells as set forth in NRS § 533.024; or
- D. the proposed use threatens to prove detrimental to the public interest.

IV.

Applications 64073, 64074, and 64075 were filed to change the point of diversion, place of use, and manner of use of Proof of Appropriation Nos. V-02737, V-02738, and V-02739, respectively. Proof of Appropriation Nos. V-02737, V-02738, and V-02739 have been adjudicated and are subject to the Warm Springs Creek Decree. These applications propose to take the consumptive use portion of the water rights and recharge the ground water through the Warm Springs Creek streambed. Recharge, Storage, and Recovery Application R-014 proposes to recover the stored water by groundwater wells and export it to Lemmon Valley and surrounding areas via a pipeline for municipal and domestic uses.²⁷ The waters infiltrated would be monitored using continuous recording devices on the stream system located upstream of the Marshall Ranch and at a location downstream of the major tributaries to Warm Springs Creek. The applicants would provide for the installation of the monitoring devices, collection of stream flow data, and reporting to the office of the State Engineer. The amount of water credited for recovery would be determined from flow records of the downstream continuous recording stream flow gage, which would include the waters of Dewey Springs and Pradere Springs, less the non-consumptive use portion of all flows.

The State Engineer concludes the Second Judicial District Court of the State of Nevada in and for the County of Washoe entered a Final Order of Determination in and to the Relative Rights of Warm Springs Creek and its tributaries on March 30, 1988, of which the Marshalls were granted up to, but not to exceed, 688.2 afa.

The State Engineer concludes that until the applicants provide sufficient evidence that Warm Springs Creek, Dewey Springs, and Pradere Springs can produce enough water to meet the annual duties under Permits 28273, 28367, 28369, and 34960, only 468.3 afa, which represents the consumptive use portion of the decreed 688.2 afa, is the water which can be recovered from the ground water system.

²⁷ File No. R-014, official records in the office of the State Engineer.

V.

Applications 64076, 64078, and 64079 propose to change the point of diversion, place of use, and manner of use, and Application 64077 proposes to change the place of use and manner of use of waters previously appropriated under Permits 28273, 28369, 34960, and 28367, respectively. Washoe County contends that there is not enough water available from the individual sources to satisfy the duties under each permit and the decreed waters. Applications 64073, 64078, and 64079 propose to change a total of 17.612 cfs of water from Warm Springs Creek. The State Engineer concludes that based on the data collected by his office and Washoe County on flows of Warm Springs Creek, Dewey Springs, Pradere Springs, and the Unnamed Spring, there may not be sufficient water to meet all of the demands under the proofs of appropriation and the permitted water rights; however, until there is an adequate long term, continuous record of data collected from all the sources under consideration, the applicants still have the ability to file a change application on water already appropriated.

Applications 64076, 64077, 64078, and 64079, which are changing the permitted water rights, are being granted; however, no water can be withdrawn from the ground water system for at least one year. The actual amount allowed to be recovered under Change Applications 64076, 64077, 64078, and 64079 will be limited to 62.5% of the flows, upstream of the proposed recharge area, above the decreed amount of 688.2 afa. If it is proven that the stream and springs can produce sufficient water to meet the permitted duties, then the maximum amount recoverable from the ground water system, under Change Applications 64076, 64077, 64078, and 64079 will be limited to 1,188.0 afa determined at a consumptive use of 2.5 acre-feet per acre.

VI.

Application 64080 proposes to appropriate the tail water and flood flows from the irrigated meadows along Paiute Creek and allow them to infiltrate through the natural stream channel, and then recover the water by means of a recovery well. The State Engineer concludes until a determination is made as to the waters of Paiute Creek under Proof of Appropriation V-02736, there is no unappropriated water and any additional appropriations based on the limited data would be detrimental to the public interest.

VII.

The Second Judicial District Court of the State of Nevada in and for the County of Washoe, issued a decree dated March 30, 1988, as to the relative rights in and to the waters of Warm Springs Creek and its tributaries. From the records of the adjudication proceedings and the permits issued by the State Engineer, the court declared that the waters of Warm Springs Creek and its tributaries are fully appropriated. Application 64081 proposes to appropriate waters from Warm Springs Creek and recharge to the Warm Springs Valley groundwater basin. The State Engineer concludes that there is no unappropriated water available from Warm Springs Creek. To allow an additional appropriation would threaten to prove detrimental to the public interest and would impair existing rights.

VIII.

The State Engineer concludes the granting of change applications on water already appropriated from decreed and permitted sources will not conflict with any existing rights, will not conflict with protectible interests in domestic wells as set forth in NRS § 533.024, or will not threaten to prove detrimental to the public interest as these applications seek to change only the consumptive use portion of water already appropriated.

IX.

The Nevada Division of Wildlife filed protests on Applications 64073 through 64081, inclusive, concerning the impacts on the wildlife of Warm Springs Valley. The State Engineer concludes that NRS § 533.367 provides that wildlife that have had customary use to springs and seeps shall continue to have access to it. The State Engineer further concludes that the waters of Dewey Springs and Pradere Springs will continue to flow in their natural channels until their waters are commingled with that of Warm Springs Creek.

RULING

Applications 64073, 64074, 64075, 64076, 64077, 64078, and 64079 will be approved upon the submittal of statutory fees. However, these applications will be limited to the conditions set forth in the ruling and subject to existing rights. The

applicants are required to submit stream and spring flow data on a quarterly basis to the office of the State Engineer. This data must include measurements collected from continuous recording devices on Warm Springs Creek and weekly measurement of flows from Pradere and Dewey Springs and Paiute Creek from the existing weir locations. The location of the measuring device upstream of the proposed recharge area must be approved by the State Engineer. During any reporting period where the continuous recording gages are inoperable for more than 7 days, there will be no credit given for the amount of water available for recovery.

The amount of water allowable for recovery under Change Applications 64073, 64074, and 64075 will be limited to 468.3 afa, or 68% of the decreed water of Warm Springs Creek, Dewey Springs, and Pradere Springs that has been recharged into the Warm Springs Creek Groundwater Basin.

The amount of water allowable for recovery under Change Applications 64076, 64077, 64078, and 64079 will be limited to 62.5% (which equates to a consumptive use of 2.5 acre-feet per acre) of the water in excess of 688.2 afa, which represents the consumptive and non-consumptive use portions of the decreed water rights, but not to exceed 1,188.0 afa.

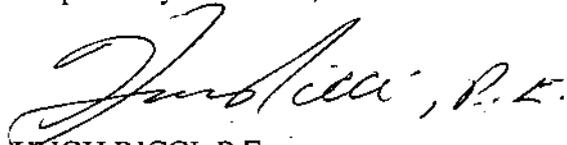
The maximum water allowable for recovery under Change Applications 64073, 64074, 64075, 64076, 64077, 64078, and 64079 will be limited to 1,656.3 afa, which represents the consumptive use portion of the decreed and permitted water rights.

Credit for the amount of water recoverable will be determined on an annual basis, from the data collected from the stream and springs.

Application 64080 is hereby denied on the grounds that until a determination is made on Proof of Appropriation V-02736, there is no unappropriated water at the source, and to approve this application would threaten to prove detrimental to the public interest.

Application 64081 is hereby denied on the grounds that there is no unappropriated water at the source and to approve this application would be in violation of the Warm Springs Creek Decree issued by the Second Judicial District Court of the State of Nevada in and for the County of Washoe.

Respectfully submitted,


HUGH RICCI, P.E.
State Engineer

HR/KWH/hf

Dated this 11th day of
September, 2001.