

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

IN THE MATTER OF APPLICATION 71580 FILED)
TO CHANGE THE POINT OF DIVERSION AND)
THE PLACE AND THE MANNER OF USE OF THE)
PUBLIC WATERS PREVIOUSLY APPROPRIATED)
UNDER PERMIT 59773, AND APPLICATION)
71581 FILED TO CHANGE THE POINT OF)
DIVERSION AND THE PLACE OF USE AND THE)
MANNER OF USE OF THE PUBLIC WATERS)
PREVIOUSLY APPROPRIATED UNDER PERMIT)
58272, BOTH FROM UNDERGROUND SOURCES)
WITHIN THE PAHRUMP VALLEY HYDROGRAPHIC)
BASIN (162), NYE COUNTY, NEVADA.)

RULING

#5473

GENERAL

I.

Application 71580 was filed on August 18, 2004, by Tom and Maria Lioubas to change the point of diversion, and the place and the manner of use of 0.17 cubic feet per second (cfs), not to exceed 16.0 acre-feet annually (afa), of the underground water previously permitted for appropriation under Permit 59773. The proposed place of use is described as being located within the NE $\frac{1}{4}$ of Section 19, T.21S., R.54E., M.D.B.&M. The existing place of use issued under Permit 59773 is located upon 3.2 acres within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 12, T.21S., R.53E., M.D.B.&M. If a permit was issued under this application, it would transfer the existing point of diversion, which is described as being within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 12, T.21S., R.53E., M.D.B.&M. to a new well site located within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 19, T.21S., R.54E., M.D.B.&M.¹

II.

Application 71581 was filed on August 18, 2004, by Tom and Maria Lioubas to change the point of diversion, the place of use and the manner of use of 1.30 cfs, not to exceed 122.0 afa, of the

¹ File No. 71580, official records in the Office of the State Engineer.

underground water previously permitted for appropriation under Permit 58272. The proposed manner and place of use described on the application is for commercial and domestic purposes within the NE¼ of Section 19, T.21S., R.54E., M.D.B.&M. The existing place of use issued under Permit 58272 is located upon 24.4 acres of land located within the SE¼ SE¼ of Section 12, T.21S., R.53E., M.D.B.&M. If a permit was issued under this application, it would transfer the existing point of diversion, which is described as being within the SE¼ SE¼ of Section 12, T.21S., R.53E., M.D.B.&M. to a new well site located within the NE¼ NE¼ of Section 19, T.21S., R.54E., M.D.B.&M.²

FINDINGS OF FACT

I.

Nevada Revised Statute § 534.120(1) provides that within an area that has been designated by the State Engineer where, in his judgment, the groundwater basin is being depleted, the State Engineer in his administrative capacity is empowered to make such rules, regulations and orders as are deemed essential for the welfare of the area involved. The application of this provision of the NRS to the Pahrump Valley Hydrographic Basin is evidenced in a series of orders handed down by the State Engineer beginning with Order No. 176, which was issued on March 11, 1941.³ This initial order described and designated a portion of the Pahrump Valley Hydrographic Basin as a groundwater basin in need of additional administration. The boundaries of the designated portion of the Pahrump Valley Hydrographic Basin were expanded by the issuance of State Engineer's Order Nos. 193 and 205 on January 15, 1948, and January 23, 1953, respectively.^{4,5} By designating

² File No. 71581, official records in the Office of the State Engineer.

³ State Engineer's Order No. 176, official records in the Office of the State Engineer.

⁴ State Engineer's Order No. 193, official records in the Office of the State Engineer.

⁵ State Engineer's Order No. 205, official records in the Office of the State Engineer.

the Pahrump Valley Hydrographic Basin, the State Engineer set the stage for further restrictions relating to the appropriation of underground water from the basin. State Engineer's Order No. 381, issued on June 1, 1970, gave notice that no further appropriations of underground water would be approved for irrigation purposes.⁶ State Engineer's Order No. 955, signed on October 26, 1987, denied new appropriations on the Pahrump and Manse alluvial fans and declared new appropriations of water for commercial purposes, which were located outside of the alluvial fans and requiring 5,000 gallons a day or less, preferred uses.⁷ This trend towards further restriction of groundwater pumping in the Pahrump Valley Hydrographic Basin was continued with the issuance of State Engineer's Order No. 1107, on November 8, 1994. Under the guidelines set forth under this order, all applications that requested new appropriations of underground water from the designated portion of the Pahrump Valley Hydrographic Basin would be denied with the following exceptions: those applications filed for commercial (non-living units) or for industrial purposes off the alluvial fan, which seek to appropriate 1,800 gallons per day or less and where the property is zoned for such purposes and those applications filed for environmental purposes pursuant to NRS chapter 533.⁸ The State Engineer finds that the approval of the subject applications is dependent upon their compliance with the conditions governing the appropriation of water from the Pahrump Valley Hydrographic Basin established by the State Engineer's orders.

⁶ State Engineer's Order No. 381, official records in the Office of the State Engineer.

⁷ State Engineer's Order No. 955, official records in the Office of the State Engineer.

⁸ State Engineer's Order No. 1107, official records in the Office of the State Engineer.

II.

With one notable exception, the practice of approving water right applications requesting new appropriations of underground water from the Pahrump Valley Hydrographic Basin for irrigation purposes was discontinued with the issuance of Order No. 381. An exception to this policy occurred on October 26, 1987, when Order No. 381 was modified to allow consideration of a very select group of irrigation applications. State Engineer's Order No. 955, allowed the holder of a forfeited irrigation permit to file for a new appropriation of underground water for irrigation purposes, if the forfeiture had occurred prior to January 1, 1988. Also included within this order was a provision that all replacement applications must be filed within sixty days of the forfeiture.⁷ Accordingly, Application 58272 was filed on October 28, 1992, to restore the right to appropriate water for irrigation purposes that had been forfeited for the place of use issued under Permit 24689, Certificate 8143.⁹ Eventually this application was permitted, with a partial abrogation of this right occurring with the approval of Permit 59773 on August 10, 1994.¹⁰ Since Applications 71580 and 71581 request changes in Permits 58272 and 59773, respectively, the State Engineer finds that all four of these water right filings share a common lineage and originated from water rights established under Order No. 955.

III.

Every water right permit that is issued by the Office of the State Engineer comes with a set of conditions that must be adhered to by the permittee or any successor in interest. The permit terms, under which Permit 58272 operates, contain the statement that the issuance of the permit was for those lands, which previously had the water right forfeited under Permit 24689, Certificate 8143.⁹ It was not the intention of the State Engineer

⁹ File No. 58272, official records in the Office of the State Engineer.

¹⁰ File No. 59773, official records in the Office of the State Engineer.

to reestablish an irrigation permit upon ground for which the water right was forfeited to create a water right that could eventually be transferred to a new place of use within the groundwater basin. This fact is underscored in correspondences, which are contained within the file maintained under Permit 58272. By letter dated February 18, 1999, the recipient was advised by the Office of the State Engineer that pursuant to State Engineer's Order No. 955 neither Permit 58272 nor Permit 59773 would be considered for place of use transfers. A more detailed explanation of this limitation is provided by the State Engineer's letter of June 21, 1999, which offers a brief history of the events related to the Pahrump Valley Hydrographic Basin and the approval of Permits 58272 and 59773. Here, the State Engineer clearly states that any irrigation right created under Order No. 955 is intended to remain appurtenant to the original place of use that was forfeited.⁹ The State Engineer finds that, under the policy created by Order No. 955, the place of use transfer requested under Applications 71580 and 71581 cannot be approved.

IV.

Regarding the transfer of Order No. 955 based irrigation permits, only four attempts have been made to transfer this type of water right. Application 59773 requested a transfer of only the manner of use of a portion of the water right granted under Permit 58272. A permit granting this request was approved by the State Engineer on August 10, 1994, thereby allowing a commercial use to occur within a portion of the existing place of use issued under Permit 58272.¹⁰ A more recent change, such as requested under the applications at issue here, was proposed under Application 62136, which requested a change in the point of diversion, manner of use and place of use of a portion of Permit 56909. This application was denied by State Engineer's Ruling No. 4541, which was signed on June 18, 1997.¹¹ Of particular interest

¹¹ File No. 62136, official records in the Office of the State Engineer.

are Application 69125 and 69126, which were filed to change Permits 58272 and 59773, respectively, which are the same permits being requested for change here and were filed by the same persons that are applicants here. These applications are identical to those denied by State Engineer's Ruling No. 4541.^{12,13} By State Engineer's Ruling No. 5269, issued on August 21, 2003, both these applications were denied primarily on the grounds that their approval would violate Order No. 955. The State Engineer finds that all previous attempts to transfer the place of use of an Order No. 955 based irrigation right have been denied.

V.

By restricting the place of use of Permit 58272 to the lands encompassing the area upon which a water right was previously forfeited, the State Engineer avoids problems, which may occur if this right was to be transferred to a new place of use, while retaining its junior priority date. All water right applications, which are accepted for filing within the Office of the State Engineer, are assigned a specific priority date. The priority date for a permit that requests a new appropriation of water is established by the date that it was filed in the Office of the State Engineer. If a water right permit is abrogated through the approval of a subsequent change permit, the priority date set under the permit being changed is carried over with the approval of the change permit. In the case of multiple generations of changes, the initial water right permit determines the priority date for all of the changes emanating from it. This applies to Application 71580 and Application 71581, in that the original water right permit is represented by Permit 58272, a portion of which was transferred to a new manner of use under 59773. The priority date of this permit is October 28, 1992, a date, which is also shared by Permit 59773 and any subsequent change permits.

¹² File No. 69125 official records in the Office of the State Engineer.

¹³ File No. 69126 official records in the Office of the State Engineer.

Once the priority date of a water right filing has been identified, it is possible to determine its seniority within the groundwater basin. If the October 28, 1992, date is used as a benchmark to divide the senior and junior active underground water rights of the Pahrump Valley Hydrographic Basin, it can be found through a query of the State Engineer's water right database that approximately 90% of the active applications, permits and certificates have priority dates that are senior to the Permit 58272 and its associated abrogations.¹⁴ Simply stated, any right to appropriate underground water granted by the approval of Applications 71580 and 71581, as well as that already existing under Permit 58272 would occupy a position in the basin wide priority that is within the junior 10% of active rights. Based upon this determination, the State Engineer finds that Permits 58272, 59773 and Applications 71580 and 71851 all share a common priority date, which is junior to most of the active underground filings in the basin.

VI.

Nevada Revised Statute § 534.120 provides that within an area that has been designated by the State Engineer if, in the judgment of the State Engineer, the groundwater basin is being depleted, the State Engineer may make rules and regulations to control the withdrawal of the ground water as is deemed essential for the public welfare. Nevada is a prior appropriation state where first in time is considered first in right. If the State Engineer were to regulate the Pahrump Valley Hydrographic Basin to the extent that the use of ground water would be reduced on a priority basis, the first water right to be curtailed would be the junior filing. The State Engineer finds that since any permits issued under Applications 71580 and 71581 would be assigned a priority date, which is junior to almost 90% of the existing groundwater permits

¹⁴ Nevada Division of Water Resources Water Right Permit Database, underground active Water Rights Basin 162 official records in the Office of the State Engineer.

and certificates contained within the Pahrump Valley Hydrographic Basin, they would be among the first permits to have their pumpage curtailed.

VII.

For an appropriation of water to legally occur, a water right permit must be approved and maintained in good standing. This does not apply to strictly domestic use of underground water, which does not require a permit. All commercial and irrigation activities found within the Pahrump Valley Hydrographic Basin are supported and dependent upon an underlying water right permit. Should the State Engineer initiate a curtailment program, within the valley, the higher uses of water, such as municipal and commercial would be the most severely affected. This can be illustrated by the existing and proposed manners of use found on the subject applications. If an irrigation permit was lost through curtailment, further irrigation would not be sanctioned and the land comprising the permitted place of use would become fallow. The curtailment of a commercial water right is more complex, since it would be difficult to terminate water service to a citizen's business, which in the case of the subject applications would be a tavern, convenience store and a bottled-water facility. The State Engineer finds that there is no justification to allow a new business to become dependent upon a commercial water right permit that, due to its junior priority date, is vulnerable to curtailment. The State Engineer finds the original order, which allowed for re-filing for a water right on those lands where the water right had been forfeited was to provide value solely to the land for which it was granted, but came with the recognition that some day the use of the water under that water right might be cut off due to regulation of the groundwater basin. It was never intended to be allowed to be marketed for use on another land.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.¹⁵

II.

The State Engineer is prohibited by law from granting a change application to appropriate the public waters where:¹⁶

- A. there is no unappropriated water at the proposed source;
- B. the proposed use or change conflicts with existing rights;
- C. the proposed use or change conflicts with protectible interests in existing domestic wells as set forth in NRS § 533.024; or
- D. the proposed use or change threatens to prove detrimental to the public interest.

III.

Permit 58272 belongs to a select group of irrigation permits that were approved under State Engineer's Order No. 955. Its approval reestablished the right to irrigate land under a new priority date, which had been previously lost through forfeiture. This new water right was intended to remain appurtenant to its permitted place of use, as was Permit 59773. Applications 71580 and 71581 seek to transfer these water right permits to new places of use contrary to the policy set under State Engineer's Order No. 955. The State Engineer concludes that any violation of a policy established to protect the underground water resources of the Pahump Valley Hydrographic Basin would threaten to prove detrimental to the public interest and would conflict with existing groundwater rights.

IV.

The State Engineer concludes that the creation of commercial water right permits under junior priority dates would

¹⁵ NRS chapters 533 and 534.

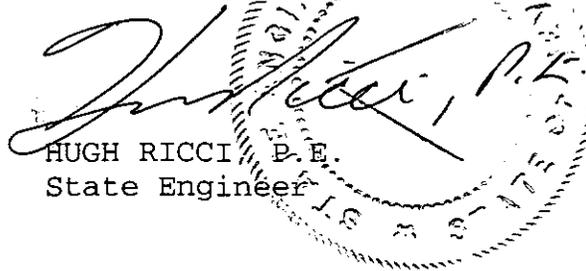
¹⁶ NRS § 533.370(4).

leave any subsequent water users vulnerable to curtailment, which would also threaten to prove detrimental to the public interest.

RULING

Applications 71580 and 71581 are hereby denied on the grounds that their approval would conflict with existing water rights and would threaten to prove detrimental to the public interest.

Respectfully Submitted,



HUGH RICCI, P.E.
State Engineer

HR/MB/jm

Dated this 26th day
of January, 2005.