

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

IN THE MATTER OF PROTESTED)
APPLICATION 44203 FILED TO)
APPROPRIATE THE PUBLIC WATERS)
OF AN UNDERGROUND SOURCE)
WITHIN THE FISH LAKE VALLEY)
HYDROGRAPHIC BASIN (117),)
ESMERALDA COUNTY, NEVADA.)

RULING

#5480

GENERAL

I.

Application 44203 was filed on July 29, 1981, by Dr. L.L. Anderson to appropriate 1.0 cubic foot per second of water from an underground source for commercial purposes. The proposed place of use is described as being located within the NW¼ SW¼ Section 28, T.1S., R.35E., M.D.B.&M. The proposed point of diversion is described as being located within the NW¼ SW¼ of said Section 28.¹

II.

Application 44203 was timely protested by B.W. and D.J. Peterson, and B.A. Walker on the following grounds: 1) Removing one second foot of ground water would seriously affect the water level of their existing domestic well in Section 28, T.1S. R.35E. 2) The site of the proposed diversion is near the primary water source serving Fish Lake Valley, which has been declared a ground-water basin by the State Engineer dated February 10, 1978. 3) The removal of water from an underground source so close to existing sources and so close to the primary water supply for the declared ground-water basin would jeopardize the prior appropriative rights of the protestant. See denial of Application 33231 October 5, 1978, for same area.

III.

Application 44203 was timely protested by Sente Associates Four, a California General Partnership on the following grounds:¹

¹ File No. 44203, official records in the Office of the State Engineer.

1. There is no unappropriated water at the proposed source of supply.
2. The proposed use will conflict with existing underground rights of protestant.
3. The proposed use will be detrimental to the public interest.
4. The proposed use will conflict with the surface rights of protestant to the waters of Chiatovich Creek due to the proximity of the proposed diversion works to Chiatovich Creek.

FINDINGS OF FACT

I.

Nevada Revised Statute § 533.365(3) provides that it is within the State Engineer's discretion to determine whether a public administrative hearing is necessary to address the merits of a protest to an application to appropriate the public waters of the State of Nevada. The State Engineer finds that in the case of protested Application 44203 there is sufficient information contained within the records of the Office of the State Engineer to gain a full understanding of the issues and a hearing on this matter is not required.

II.

Application 44203 was filed July 29, 1981, and has been unresolved since March 13, 1982, the "ready-for-action" date. In reading through the application file, the applicant had requested, by phone call on February 25, 1982, that his application be expedited. Shortly after his request, two protests were filed against the issuance of any permit. The applicant was notified by certified mail that his application had been protested; properly notarized certified mail receipts confirmed the applicant received these notices.¹

Over the following years, there was no information from the applicant regarding what steps were being taken by the applicant to resolve the protests nor were there any requests from the applicant to have the matter resolved by an administrative hearing before the State Engineer.¹

However, correspondence in the application file, show there were concerns over the applicant allegedly drilling a commercial or quasi-municipal well without a permit and concerns over the use of surface water from Chiatovich Creek without the benefit of a water right. These concerns culminated with a written complaint against the applicant dated May 11, 1989, filed by Attorney Melvin D. Close, Jr. on behalf of Fish Lake Valley

resident Dan J. Peterson. On May 16, 1989, the Chief of the Surface Water and Adjudication Section of the Nevada Division of Water Resources (Division) issued a response to the complainant. The letter indicated that the diversion out of Chiatovich Creek had been checked on a few occasions and no water was being used. Also, the drilled well has not been pumped and Application 44203 was still pending resolution of the protests. The letter noted that the Division would continue to periodically check the well and creek diversion and take appropriate action if an illegal diversion of water occurred.¹

In August 1997, a field investigation observed that the aforementioned well drilled by the applicant was being used for domestic purposes for three mobile homes. The applicant was contacted and he explained that one mobile home was his, one belonged to his son, and one belonged to a Ms. Shaddock. He went on to say that his son's mobile home was vacant and would soon be moved off the property. Ms. Shaddock purchased property from the applicant for her own mobile home, which included her own domestic well. However the well did not produce enough water, so she was connected to the applicant's well until her well could be deepened. The applicant was given several options for correcting the situation and the matter appeared to be settled for the time being.¹

On December 14, 2000, the Office of the State Engineer, as part of a routine follow-up, contacted Ms. Shaddock. Ms. Shaddock indicated that the Andersons had moved both of their homes off the property and back to California. She also believed that the applicant was attempting to exchange all of his remaining land to the Bureau of Land Management for land near Las Vegas.¹

Based on the lack of any communication from the applicant after 1997 and the information provided by Ms. Shaddock, it appeared that the applicant may have abandoned his plans for 20 motel units, gas station, restaurant and mini-mart, as indicated in the remarks section of Application 44203. As a result, this office attempted to contact the applicant in regard to his intentions for Application 44203. The applicant was notified that before further consideration could be given towards the issuance of any permit, additional information concerning his project was required. A certified letter dated July 12, 2004, requesting additional information was sent to the applicant's on-file

mailing address. The certified letter was returned as “unclaimed”. Accordingly, the letter was re-sent by regular mail. The U.S. Postal Service also returned this letter to the Office of the State Engineer. This time the letter was stamped “Return to Sender No Such Address”.¹

These attempts to contact the applicant appeared to be unsuccessful; however, later in the year the applicant visited the Division of Water Resources’ office in Carson City, Nevada. As a result of information obtained in this meeting, it was determined that the applicant wished to pursue the application for the stated project. As a result, the application was routed to staff for review.

The State Engineer finds that, although a number of years have passed since Application 44203 was filed, the applicant has expressed a continued interest in pursuing the application. The State Engineer finds that Application 44203 can proceed through the review process.

III.

In regards to protectible interests in domestic wells, it is the policy of the state to recognize the importance of domestic wells as appurtenances to private homes and to create a protectible interest in such wells and to protect their supply from unreasonable adverse effects, which are caused by municipal, quasi-municipal or industrial uses.² In consideration of applications, the State Engineer must take into account whether the proposed change conflicts with protectible interests in existing domestic wells as set forth in NRS § 533.024.³ The application before the State Engineer is for commercial purposes not municipal, quasi-municipal or industrial uses; therefore, the State Engineer finds this application is not subject to the specific considerations set forth by statute.⁴

IV.

Application 44203 was filed for commercial purposes to serve 20 motel units, gas station, restaurant and mini-mart. The application did not specify a duty of water, but did request a diversion rate of 1.0 cfs. When evaluating an application to appropriate water a determination must be made as to the actual quantity of water necessary to satisfy the proposed project and a reasonable diversion based on that quantity of water. Estimates of

² NRS § 533.024 (2).

³ NRS § 533.370 (4).

⁴ See, NRS § 533.024, NRS § 534.110, and NRS § 533.370.

water use for typical uses, such as the motel units, gas station, restaurant and mini-mart requested in Application 44203, have been standardized and are available in the Office of the State Engineer.⁵ Using these estimates, the amount of water necessary for the proposed project has been calculated at approximately 4,700 gallons per day (gpd). On an annual basis this equates to 1.7155 million gallons annually (mga) or 5.26 acre-feet annually (afa). Knowing the quantity of water necessary allows for calculation of a reasonable diversion rate to satisfy this duty of water. The diversion rate necessary to pump 4,700 gpd is approximately 0.007272 cfs, however, this would require that the pump be operated 24 hours per day, 365 days per year. A more reasonable run-time for a pump is 2 hours per day. With the necessary conversions this equates to a diversion rate of about 39 gallons per minute or 0.087264 cfs.

The State Engineer finds the amount of water to be appropriated under Application 44203 shall be limited to the amount, which can be applied to beneficial use, and not to exceed 0.0873 cfs, or 1.7155 mga.

V.

Application 44203, if approved and fully utilized, would appropriate about 5.26 afa of ground water. As a comparison, the maximum duty for a domestic well is 2.02 afa. The amount requested in Application 44203 is about two and one-half times the quantity of water allowed for one domestic well for which no permit is required.⁶ Nevada water law does not prevent the granting of permits to applicants later in time on the ground that the diversions under the proposed later appropriations may cause the water level to be lowered at the point of diversion of a prior appropriator, so long as the rights of existing appropriators can be satisfied.

The State Engineer finds that the quantity of water requested in this application is minimal and the approval of such a small quantity would not impair existing groundwater rights within the Fish Lake Valley Hydrographic Basin.

VI.

The proposed point of diversion under Application 44203 is approximately 350 feet from Chiatovich Creek. When a well is located within ¼ mile of surface water

⁵ Permit Terms Book, *Duties*, official records in the Office of the State Engineer, p. 16.

⁶ NRS § 534.180.

source such as Chiatovich Creek (i.e. a perennial stream), well drilling regulations require that an annular seal be placed to a depth of at least 100 feet.⁷ One aspect of this requirement is to force any pumping from this well to occur at a depth that minimizes the connectivity to the surface source.

If the water table is not connected to the stream, that is, if the water table lies 30 to 50 feet below the streambed, then pumping will not impact the stream flow because the stream is already losing at its maximum rate. In the case of Application 44203, there may still be some connectivity between the aquifer and the stream, but in the absence of any detailed water level and aquifer data, the magnitude of impact is difficult to determine. If there were complete connectivity between the pumping of the subject well and the stream, the ultimate effect would be a reduction in stream flow by an amount equal to the average pumping rate.⁸

The average flow rate of Chiatovich Creek from 1961 to 1981 was 8.9 cfs or 6,400 afa. The maximum potential water that could be pumped under Application 44203 is 5.26 afa or less than one-hundredth of one percent (about 0.08218%) of the total average flow in Chiatovich Creek. This illustrates the maximum possible impact on the stream assuming 100 percent connectivity and demonstrates that the maximum possible impact would be minor. As indicated above, the actual magnitude of the impact cannot be fully determined with the data available. Therefore, the impact on Chiatovich Creek can be summarized as ranging from 'no impact' to 'minor impact'.

The State Engineer finds the projected impact of pumping the proposed well would be minor if any and will not conflict with existing water rights on Chiatovich Creek.

VII.

A review of records in the Office of the State Engineer shows that the committed groundwater resources in the Fish Lake Valley Basin total approximately 70,390 acre-feet. Of these amounts, approximately 5,200 acre-feet are from the geothermal aquifer. In addition, 11,000 acre-feet is supplemental irrigation and there are approximately 21,000 acre-feet contributing to secondary recharge from irrigation.¹ Based on this

⁷ NAC § 534.390.

⁸ See, Memorandum from Staff Hydrogeologist, 44203 – *Impact of Well Pumping on Surface Water Rights*, December 14, 2004, File No. 44203 official record in the Office of the State Engineer.

information, the State Engineer finds that there is unappropriated water at the proposed source to satisfy a small commercial water right as proposed under Application 44203.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁹

II.

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:¹⁰

- 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.

The State Engineer concludes that the water necessary for the proposed project under Application 44203 equates to a diversion rate of 0.0873 cubic feet per second, not to exceed 1.7155 million gallons annually.

IV.

The State Engineer concludes that the amount of water necessary for the proposed project is minimal and will not cause an unreasonable drawdown in any nearby permitted or domestic wells.

V.

There is no protectible interest of existing domestic wells as set forth by statute because the beneficial use is for commercial purposes, not municipal, quasi-municipal or industrial; and the diversion rate is less than 0.5 cfs. The State Engineer concludes Application 44203 will not conflict with protectible interests in existing domestic wells as set forth in NRS § 533.024, NRS § 534.110, or NRS § 533.370.

⁹ NRS chapters 533 and 534.

¹⁰ NRS § 533.370 (4).

VI.

The State Engineer concludes that the potential impact to Chiatovich Creek is minimal, if any, and therefore, approval of Application 44203 will not impair existing rights on the creek.

VII.

The State Engineer concludes there is unappropriated water at the proposed source sufficient to satisfy the diminutive requirements of Application 44203.

VIII.

Based on the record of evidence available, the State Engineer concludes that approval of Application 44203 will not threaten to prove detrimental to the public interest.

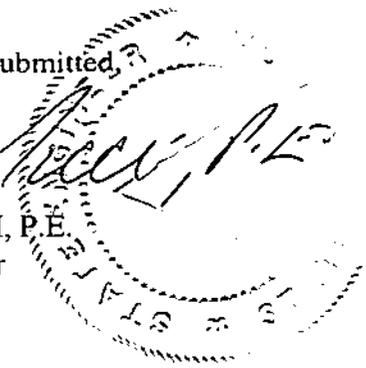
RULING

The protests to Application 44203 are hereby overruled and the application is approved subject to existing rights and payment of the statutory permit fees.

Respectfully submitted,



HUGH RICCI, P.E.
State Engineer



HR/TW/jm

Dated this 10th day of

March, 2005.