

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

IN THE MATTER OF APPLICATION)
70486 FILED TO APPROPRIATE THE)
UNDERGROUND WATERS OF COLD)
SPRING VALLEY – LONG VALLEY)
HYDROGRAPHIC BASIN SIERRA)
COUNTY, CALIFORNIA FOR USE IN)
WASHOE COUNTY, NEVADA.)

**RULING
5612**

GENERAL

I.

Application 70486 was filed on September 30, 2003, by the Lifestyle Homes TND, LLC to appropriate 2.0 cubic feet per second of underground water from the Cold Spring Valley - Long Valley Hydrographic Basin, Sierra County, California for quasi-municipal purposes within Washoe County, Nevada, more specifically described as within the S½ NE¼ of Section 3 and the SE¼ of Section 4, Sections 21, 28, 32, 33 and a portion of Section 31, all within T.21N., R.18E., and Section 5 and a portion of Section 6, T.20N., R.18E., M.D.B.&M. The proposed point of diversion is described as being located within the NW¼ NE¼ of Section 31, T.21N., R.18E., M.D.B.&M.¹

II.

Application 70486 was timely protested by Jerry Zebrack on the grounds that:

1. The project would significantly impact his ranch well in Long Valley, California.
2. The project would be exporting water from California to Nevada.
3. The property of Lifestyle Homes is governed by CC&Rs, which prohibit this use of the property water.²

III.

Application 70486 was timely protested by Janet I. Loverin on the grounds that:

1. The application does not clearly identify the source of water and proposed well site as being in Long Valley, Sierra County, California.

¹ File No. 70486, official records in the Office of the State Engineer. Exhibit No. 1, public administrative hearing before the Office of the State Engineer, May 25, 2005. Hereinafter the transcript and exhibits from the hearing will be referred to solely by exhibit number or transcript page.

² Exhibit No. 3.

2. The application does not identify the proposed project as an interstate water exportation project.
3. The project will have a significant impact on Sierra County agricultural residents and the applicant has not secured any California state, county or regional approvals necessary for the project.
4. The proposed point of diversion is located within the Pine Valley Subdivision and is a violation of the subdivision's Conditions, Covenants and Restrictions, which state that the property is designated for single family residences only and not a quasi-municipal water exportation project.³

IV.

Application 70486 was timely protested by Stonehouse Ranch Properties on the grounds that:

1. The point of diversion is in California and not Nevada.
2. There is no indication the project is an interstate water importation project.
3. The project could have a significant impact on Sierra County agricultural residents.⁴

V.

Application 70486 was timely protested by Washoe County on the grounds that:

1. Granting the application could be detrimental to the public interest and could conflict with existing rights.
2. There are no published reports on the perennial yield of this particular basin, a vast majority of which lies within the State of California. The records of the State Engineer are void of any data relative to the existing appropriations or pumpage with the California portion of the Long Valley Basin and until such information is compiled it is difficult to determine if there is any water available for appropriation. Therefore, the commitment of this particular resource in support of new development in Washoe County without the necessary information on resource availability is not in the public interest.⁵

VI.

Application 70486 was timely protested by Utilities, Inc. of Nevada (UIN) on the grounds that:

1. UIN is an investor-owned public utility providing water to approximately 2,500 customers within its service territory located in Cold Springs Basin (Basins 100 &

³ Exhibit No. 4.

⁴ Exhibit No. 5.

⁵ Exhibit No. 6.

100A) and UIN is required by law to provide reliable and reasonably adequate water service to its existing customers and to fulfill commitments to future customers as demonstrated by will serve letters. UIN is the beneficiary of existing permits and senior priority applications pending in Cold Springs Basin (Basins 100 & 100A). Two of UIN's wells (Well Nos. 6 & 7) are located in the southwest part of its service territory and the proposed point of diversion is adjacent to those wells; therefore, recharge to Well Nos. 6 & 7 could be impaired and the use of water as contemplated by the application could interfere with and adversely affect UIN's existing water rights and negatively affect UIN's ability to fulfill its service obligations.

2. In addition, UIN anticipates that it will need to drill an additional well or wells in the same area as the proposed point of diversion in order to accommodate projected growth; therefore, the proposed project would unreasonably inhibit UIN's ability to accommodate projected growth and expansion. Moreover, in light of the over-appropriated status of the basins in general, the proposed appropriation could adversely impact UIN's ability to utilize the resource to serve its customers.

UIN requested the application be denied on the grounds that the use of water as proposed would impair the use of water rights UIN currently uses to serve existing customers, and that the public interest would not be served because it would unreasonably inhibit UIN's ability to accommodate projected growth and expansion.⁶

VII.

After all parties were duly noticed, a public administrative hearing was held before the Office of the State Engineer on May 25, 2005.⁷

FINDINGS OF FACT

I.

By information provided at the administrative hearing and by letter dated June 28, 2005, the Applicant reduced the amount requested for appropriation to 75 gallons per minute and a total duty of 120 acre-feet annually.⁸

⁶ Exhibit No. 7.

⁷ Transcript and Exhibits, public administrative hearing May 25, 2005, official records of the Office of the State Engineer.

⁸ File No. 70486, official records of the Office of the State Engineer and Transcript, pp. 16-17.

II.

The State Engineer finds that Protestant Jerry Zebrack did not appear at the public administrative hearing; therefore, no testimony or evidence was provided in support of his protest claim that the project would significantly impact his ranch well in Long Valley, California. An unsigned copy of Declaration of Protective Covenants Pine Valley Ranch⁹ was introduced into evidence at the hearing. Under Section II – Land Use – it indicates that “[p]arcels in the Supplemental Declaration shall be designated therein as to their permissible uses and shall thereupon become subject to the restrictive or other provisions of this Declaration relating to such uses.” “Only activities connected with the designated uses may be carried out on any parcel.” The Supplemental Declaration was not put into evidence and there is no evidence as to the designation for the parcel where the proposed point of diversion is located. Further, the Declaration of Protective Covenants provides that its enforcement is by the Pine Valley Ranch Architectural Committee. The State Engineer finds there is not substantial evidence to support the protest claim that use of water as proposed under the application violates the Declaration of Protective Covenants and it is not within the State Engineer’s jurisdictional authority to enforce covenants, codes and restrictions of a subdivision in California. The State Engineer finds Nevada Revised Statute (NRS) § 533.515 provides for the importation of water into Nevada.

III.

Application 70486 clearly identifies the proposed point of diversion by legal description; therefore, the State Engineer finds it does clearly identify the source of water and proposed well site as being in California.

IV.

The State Engineer finds that while the application does not use the words “proposed interstate water exportation project,” by the legal descriptions provided, it adequately informs that the proposed point of diversion is in California and the proposed place of use is in Nevada.

⁹ Exhibit No. 14.

V.

The State Engineer finds no substantial evidence was provided to support the protest claim that the use of water as proposed would have a significant impact on Sierra County agricultural residents.

VI.

The point of diversion proposed under Application 70486 is located in Sierra County, California. Protestant UIN argues that this application seeks to appropriate the water of California over which the State Engineer has no jurisdiction notwithstanding the provisions of NRS § 533.515. UIN argues that the application form indicates that the application is a request to appropriate the public waters of the State of Nevada, which is the only water over which the State Engineer has any jurisdiction and as such the form cannot be used to appropriate the waters of California.

Nevada Revised Statute § 533.515 provides that:

1. No permit for the appropriation of water or application to change the point of diversion under an existing water right may be denied because of the fact that the point of diversion described in the application for the permit, or any portion of the works in the application described and to be constructed for the purpose of storing, conserving, diverting or distributing the water are situated in any other state; but in all such cases where the place of intended use, or the lands, or part of the lands to be irrigated by means of the water, are situated within this state, the permit must be issued as in other cases, pursuant to the provisions of NRS 533.324 to 533.450, inclusive, and chapter 534 of NRS.
2. The permit must not purport to authorize the doing or refraining from any act or thing, in connection with the system of appropriation, not properly within the scope of the jurisdiction of this state and the State Engineer to grant.

Nevada Revised Statute § 533.515 does not provide the State Engineer with jurisdiction over the waters in another state, but rather is recognition that water from another state may be used in Nevada, and if it comes into Nevada, the State Engineer has jurisdiction over its use. A permit issued under this statutory provision does not purport to authorize the doing of an act not properly within the scope of the jurisdiction of the State Engineer. The permit issued under this statutory provision is not authorizing the appropriation of water in California, but rather is authorizing the use of that water in Nevada.

The State Engineer finds that perhaps a different form could have been created that indicates it is a permit for use of water in Nevada; however, based on the statutory language which provides that a permit must be issued as in other cases, pursuant to the provisions of NRS §§ 533.324 to 533.450, inclusive, and chapter 534 of NRS, the form used by the applicant was the standard form for appropriating water provided by the Office of the State Engineer. Not many of these types of applications have been requested over the history of the agency, and obviously no separate form was created. The State Engineer finds the argument about the water right application is merely form over substance. The State Engineer finds that NRS § 533.515 does not preclude an applicant from the requirements of any other regulatory authority having jurisdiction over the appropriation of water in California. The State Engineer finds that NRS § 533.515 does not give him jurisdiction over the appropriation of water in California, but rather gives him jurisdiction to regulate its use in Nevada and determine if his authority whether there is water available for appropriation whether the proposed use will conflict with existing rights or protectible interests in domestic wells or threaten to prove detrimental to the public interest.

VII.

The State Engineer finds the records of the Office of the State Engineer do not indicate that UIN has any pending senior applications in Cold Spring – Long Valley Hydrographic Basin; therefore, this ground of protest is dismissed.

VIII.

UIN protested the Application on the grounds that it anticipates that it will need to drill additional wells in the same area as the proposed point of diversion in order to accommodate projected growth; therefore, the proposed project would unreasonably inhibit UIN's ability to accommodate projected growth and expansion and the public interest would not be served if UIN was unreasonably inhibited in its ability to accommodate projected growth and expansion. Additionally, UIN argues that, moreover, in light of the over-appropriated status of the basins in general, the proposed appropriation could adversely impact UIN's ability to utilize the resource to serve its customers.

The State Engineer has already found that UIN does not have any pending senior applications in the Cold Spring – Long Valley Hydrographic Basin. The State Engineer finds that

Nevada is a prior appropriation state, meaning first in time, first in right. There are no statutory provisions that provide that a water right should be denied to one person because someone else might want to utilize the resource in the future. The State Engineer finds, in the light of UIN's argument that the basins are over-appropriated, its argument lacks merit, because if the basins are over-appropriated for this applicant, they are also over-appropriated if UIN requested to utilize the resource.

IX.

Washoe County protested the application on the grounds that granting it could be detrimental to the public interest and could conflict with existing rights. It argues there are no published reports on the perennial yield of this particular basin, a vast majority of which lies within the State of California. It alleged that the records of the State Engineer are void of any data relative to the existing appropriations or pumpage within the California portion of the Long Valley Basin and until such information is compiled it is difficult to determine if there is any water available for appropriation. Therefore, the commitment of this particular resource in support of new development in Washoe County without the necessary information on resource availability is not in the public interest.

The magnitude of the Long Valley Hydrographic Basin's groundwater resource is not well understood, but the State Engineer previously found in State Engineer's Ruling No. 4673 that information contained within the Washoe County Regional Resource Plan, Final Report¹⁰ suggests that the perennial yield of the Long Valley Hydrographic Basin is approximately 500 to 900 acre-feet. The Applicant's witness indicated that the point of diversion under Application 70486 is located within the drainage of the East Branch of Long Valley Creek. The witness indicated that using the Maxey-Eakin method to estimate recharge potentially available to the point of diversion it yielded an estimate of 1,545 acre-feet annually.¹¹ The Applicant is requesting the State Engineer reject the historical way water has been managed in Nevada, which is on an entire hydrographic

¹⁰ State Engineer's Ruling No. 4673, dated October 28, 1998, official records in the Office of the State Engineer.

¹¹ Exhibit No. 11.

basin analysis, and adopt a sub-basin within a hydrographic basin approach to water availability in its request that the State Engineer only look at the particular drainage as to water availability or use.

The State Engineer finds that in Nevada the groundwater resources have been managed on a perennial yield basis of the entire hydrographic basin. Nevada has never managed groundwater basins where the perennial yield available is only that water actually recharged on a smaller portion of the hydrographic basin. The point of assessing a perennial yield number is management of the system as a whole. Each groundwater basin in Nevada was defined and a perennial yield figure calculated based on a recharge/discharge relationship of the entire basin, which keeps the basin in balance. The State Engineer finds the long-standing policy of the Office of the State Engineer has been to manage hydrographic basins on the basis of the entire basin and management of basins on this basis also allows for the regional consideration of available pumping sites. The State Engineer finds the Maxey-Eakin method to estimate recharge is not appropriately used on a drainage-by-drainage basis, the methodology was made to estimate recharge on an entire hydrologic basin and therefore, was misused by the Applicant in this instance.

The State Engineer finds little to no data was demonstrated to support the Applicant's estimate that recharge potentially available to the point of diversion yielded an estimate of 1,545 acre-feet annually. The State Engineer finds that recharge does not necessarily equate with water available for appropriation. The State Engineer finds the evidence indicated that the Applicant has not secured any California, state, county or regional approvals necessary for any project to export water.

X.

The Applicant provided evidence only as to groundwater pumping on the California side of the border and only as to the upper Long Valley area on the California side of the border and indicated that 102 acre-feet annually are pumped from the upper Long Valley groundwater resource and no information was provided as to any additional groundwater pumping in the California portion of the lower Long Valley.¹² The Applicant did not address any of the relevant information

¹² Exhibit No. 11.

as to groundwater pumping on the Nevada side of the border. The committed groundwater resource in the form of permits and certificates issued by the Office of the State Engineer to appropriate water from the Cold Spring – Long Valley Hydrographic Basin currently exceeds 1,906 acre-feet annually.¹³ The State Engineer finds currently an imbalance exists between the perennial yield of the Long Valley Hydrographic Basin and its committed groundwater resource. The State Engineer finds that previous applications to appropriate water within the Cold Spring – Long Valley Hydrographic Basin have been denied.¹⁴

XI.

Nevada Revised Statute § 533.335 provides that an applicant must provide a description of the proposed works of diversion, the estimated costs of such works, the estimated time required to construct the works and the estimated time required to complete the application of the water to beneficial use. Nevada Revised Statute § 533.370 requires that an applicant provide proof satisfactory to the State Engineer of his intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence, and his financial ability and reasonable expectation to actually construct the work and apply the water to the intended beneficial use with reasonable diligence. These statutory provisions are an indication that an applicant must satisfactorily demonstrate to the State Engineer the specific project where the water will be beneficially used and how the water is to be provided for the specific project.

The Applicant provided a witness, Mr. Robert Lissner, in an attempt to demonstrate what the beneficial use would be of the water applied for under Application 70486. Mr. Lissner indicated that the Applicant owns a couple thousand acres of land in Cold Spring Valley that is suitable for residential, commercial and industrial development, but the witness never made any demonstration as to where the 120 acre-feet of water rights being applied for would specifically be used or for what project it would be used, but only indicated a desire to use the water anywhere in the Nevada part of the Cold Spring Hydrographic Basin.¹⁵ The witness indicated that the Applicant

¹³ Special Hydrologic basin abstract, Water Rights Database, September 5, 2005, official records in the Office of the State Engineer.

¹⁴ State Engineer's Ruling No. 4673, dated October 28, 1998, official records in the Office of the State Engineer.

¹⁵ Transcript, pp. 58 – 99.

would not be providing the water to whatever project would be developed, but rather indicated the water provider would be determined as the result of a lawsuit instigated by an entity related to the Applicant and involving UIN and Washoe County. The State Engineer finds the proposed place of use under Application 70486 is more than 4,000 acres of land and the Applicant indicated an intent to build something either residential, commercial or industrial using 120 acre-feet annually somewhere within that more than 4,000 acres. The State Engineer finds the Applicant did not demonstrate who would provide water to whatever the project would be, but rather indicated the project was to be served water by someone to be determined in the future. The State Engineer finds the Applicant did not provide anything specific as to what would be built and where. The State Engineer finds this is not the kind of specificity required under a water right application. The Applicant needs to identify a specific project on which the quantity of water requested for appropriation would be used. The State Engineer finds this Applicant is not like a municipality that proposes water use somewhere within its service area, but rather it is like a quasi-municipal application, which must demonstrate the project to be served with more specificity than provided here.

XII.

Testimony and evidence provided indicates that if water is to be exported out of Sierra County, California it is subject to a permit from the Long Valley Groundwater Management District.¹⁶ At the time of the administrative hearing, the Applicant had not complied with the Sierra County ordinances regarding the exportation of water. The testimony indicated that there are strong policies of the groundwater management district that are fairly negative about water exportation projects.¹⁷ Additionally, that even if an exportation project was approved, if a condition of overdraft of the groundwater basin or some other issues arises that causes the Long Valley Groundwater Management District to believe it is necessary to reduce groundwater pumping in the hydrographic basin, water exportation projects are the first to be cut off.¹⁸ The State Engineer finds the project proposed under Application 70486 is for the exportation of water from California to

¹⁶ Transcript, pp. 207 - 224, Exhibit No. 9.

¹⁷ Transcript, p. 208.

¹⁸ Exhibit No. 9.

Nevada to support residential, commercial and industrial development. The State Engineer finds Nevada has already determined that existing permits and certificates exceed the perennial yield of the hydrographic basin. The State Engineer finds that if the Long Valley Groundwater Management District determines a condition of over-draft exists in the groundwater basin or if some other issue arises that causes the groundwater management district to reduce groundwater pumping, the exportation project proposed under this application would be the first to be cut off from pumping.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.¹⁹

II.

The State Engineer is prohibited by law from granting a permit to appropriate the public waters where:²⁰

- 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 this Applicant did not adequately demonstrate a specifically identifiable project. The State Engineer concludes to grant a permit where the Applicant has not adequately demonstrated a specific project as required under NRS § 533.335 would threaten to prove detrimental to the public interest. The State Engineer concludes this Applicant did not provide satisfactory proof of his intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence, and a reasonable expectation to actually construct the work and apply the water to the intended beneficial use with reasonable

¹⁹ NRS chapters 533 and 534.

²⁰ NRS § 533.370(5).

diligence as required under NRS § 533.370. The State Engineer concludes the Applicant has failed to demonstrate a specific project where the water will be beneficially used or how water would be provided to the specific project and granting a permit under those circumstances is in contradiction to the water law and would threaten to prove detrimental to the public interest.

IV.

The State Engineer concludes that the Office of the State Engineer has already determined that the existing permits and certificates exceed the perennial yield of the hydrographic basin. The State Engineer concludes to allow additional development in Nevada under a water right that would be the first water right cut off from pumping if there is a determination of overdraft by the Long Valley Groundwater Management District in Sierra County, California, when no other source of water is identified that would be used to serve those homes and businesses built under the Nevada permit would threaten to prove detrimental to the public interest.

RULING

Application 70486 is hereby denied on the grounds that its issuance would threaten to prove detrimental to the public interest. No ruling is made on the merits of other grounds of protest.

Respectfully submitted,



HUGH RICCI, P.E.
State Engineer

HR/SJT/jm

Dated this 21st day of

April, 2006.