

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

IN THE MATTER OF APPLICATION 67242)
FILED TO APPROPRIATE THE PUBLIC)
WATERS OF A SURFACE WATER)
SOURCE WITHIN THE WASHOE VALLEY)
HYDROGRAPHIC BASIN (89), CARSON)
CITY, NEVADA.)

RULING
5838

GENERAL

I.

Application 67242 was filed on February 28, 2001, by the Marlette Power Company to appropriate 3.34 cubic foot per second (cfs), of water from the Carson City Conduit of the Marlette Water System for power generation purposes within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12, T.15N., R.19E., M.D.B.&M. The proposed point of diversion was described as being located within the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 3, T.15N., R.19E., M.D.B.&M.¹

II.

Application 67242 was timely protested by the Carson Water Subconservancy District (CWSD) on the following grounds:¹

CWSD, in cooperation with Carson City and the State of Nevada, is in the process of implementing a program to improve the Marlette/Hobart System to enhance the potable water supply for the region. One of the proposed improvements to the system is to replace the current water line from the storage tank in Lakeview to Ash Canyon. It is this current water line on which the applicant is proposing to construct a hydroelectric power plant that may be abandoned in the near future. CWSD is also considering building a power plant on the new water line to generate revenue to help pay for the proposed improvements to the Marlette/Hobart System.

III.

Application 67242 was timely protested by Carson City Utilities as summarized on the following grounds:¹

¹ File No. 67242, official records in the Office of the State Engineer.

- The State of Nevada and Carson City have a Cooperative Agreement between Public Agencies for the supply and delivery of raw water from the Marlette Lake Water System to Carson City for treatment. The agreement allows for the State to supply a minimum of 525,600,000 gallons of water annually. The agreement is crucial to Carson City and must not be jeopardized by Application 67242.
- Carson City is unaware of any agreements that exist between Marlette Power Company and the State of Nevada.
- The State of Nevada and Carson City have formed a good-faith partnership in repairing, replacing and upgrading the delivery system to Carson City.
- The Applicant is asking for more water than can be delivered by the current system.
- Concerns about the quality of water returned after passing through the Applicant's power plant.
- Carson City does not maintain a constant flow; Application 67242 may force operational changes.
- Carson City is billed for all water diverted and the power plant would be located somewhere below the delivery line.
- The delivery line is old and has several breather boxes that overflow with the slightest obstruction.
- Backwash water discharge concern.
- Application 67242 may jeopardize cooperative agreement with the State of Nevada regarding expenditures for upgrades.
- Concern over easements.

FINDINGS OF FACT

I.

Nevada Revised Statutes § 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 sufficient evidence is available in the Office of the State Engineer to evaluate the merits of Application 67242 and a hearing is not necessary.

II.

On February 28, 2001, Application 67242 was filed to appropriate 3.34 cfs of water for hydroelectric power. The application indicates that the intent is to use the water conduit between Marlette Lake and Carson City to generate hydroelectric power from a power house containing a turbine and controls.¹

Nevada Revised Statutes chapter 533.370 supplies guidance in approving or rejecting an application to appropriate water and subsection 1.c. of that chapter states that "The applicant

provides proof satisfactory to the State Engineer of: (1) His intention in good faith to construct any work necessary to apply water to the intended beneficial use with reasonable diligence; and (2) His financial ability and reasonable expectation actually to construct the work and apply the water to the intended beneficial use with reasonable diligence.” In addition, Nevada Revised Statutes chapter 533.375 allows for the State Engineer to require the applicant to submit additional information to enable him to properly guard the public interest.

A review of the application shows minimal information was supplied regarding the Applicant and the proposed project. As such, a certified letter was sent to the Applicant requesting additional information. The Applicant was asked to respond to 14 separate items regarding the proposed project.² A response was received from the Applicant, in the Office of the State Engineer, on April 10, 2007.

The Applicant indicated a continued interest in pursuing the application and further described the proposed power plant as an impulse type (Pelton Wheel concept) that will rotate a shaft tied to a generator. The power will be supplied by water flowing through a new, high-pressure, 10-inch pipe from the “tank” at Marlette to an upper reservoir near Carson City. The “tank” is described as a steel tank near Marlette Lake that is used to distribute water to both Virginia City and Carson City via pipelines. The State of Nevada owns the steel tank, the current pipeline system and the upper reservoir. The current pipeline system is described as a series of short elevation drops and re-collection boxes. It was inferred that the State of Nevada would operate the proposed new pipeline under a 20-year lease agreement with the Applicant at \$1 per year. A lease agreement is not in place but rather is described as “pending.” The Applicant was unable to provide any contracts, agreements or other authorizations that would demonstrate authority to use the existing water distribution facilities for power generation.³

Protestant Carson City Utilities has expressed concern that the approval of Application 67242 would impair its existing agreement, water rights and operation of the existing water distribution facilities. The Protestant has a Cooperative Agreement between Public Agencies for the

² See, Correspondence from the Office of the State Engineer, March 6, 2007, File No. 67242, official record in the Office of the State Engineer.

³ See, Correspondence from Marlette Power Company, March 22, 2007, File No. 67242, official record in the Office of the State Engineer.

supply and delivery of raw water from the Marlette Lake Water System to Carson City with the State of Nevada. The Applicant, by its own admission, does not have any similar agreement with Carson City Utilities or the State of Nevada. In addition, the Applicant does not have any contracts, permits, leases, deeds, easements, rights-of-way, or any other authorizations to either construct the proposed project, utilize existing facilities or access the property.³

The State Engineer finds that the Applicant has not demonstrated the authority to construct the works necessary to apply the water to the intended beneficial use with reasonable diligence, in the absence of any contracts, permits or other authorizations with parties that currently own or control the land, water rights and water distribution facilities. The State Engineer further finds that the approval of Application 67242, in the absence of any contracts, permits or other authorizations with parties that currently own or control the land, water rights and water distribution facilities, would interfere with the Protestant's Cooperative Agreement between Public Agencies for the supply and delivery of raw water from the Marlette Lake Water System to Carson City.

III.

The Applicant indicated that any power produced by the proposed project would be added to the existing grid connection of Sierra Pacific Power Company. The Applicant was asked to provide any contracts or agreements with any potential user of the power generated by this project. In response, it was indicated that:

All agreements are verbal with State Administration staff – i.e. Pat McInnis & Cindy Fozard of B&G who operate and maintain the system, State Lands, PUCN, State Office of Energy, Sierra Pacific Power Company and several other Conservation and Natural Resources staff (past employee of DWR and BAQ). Since so much time has past [sic] some of these people and other Legislative staff and legislators have changed but the interest can be re-established to accomplish this project.³

No further evidence was provided by the Applicant to confirm the substance, the validity or even the existence of these verbal agreements.

The State Engineer finds that the vague reference to verbal agreements is insufficient to establish a reasonable expectation that a potential user for the power generated by this project exists or that the Sierra Pacific Power Company has agreed to add any power generated by this project to its existing power grid.

IV.

Under NRS § 533.370 (2), the Applicant must provide proof satisfactory to the State Engineer of his financial ability to construct the project. In this regard, the Applicant was asked to provide an estimate of the project cost and evidence of its financial ability to construct the project. The cost of the project was estimated at \$2,500,000. In response to the question of financial ability, the Applicant responded as follows.³

There [sic] recent tax advantages approved by the State for hydroelectric plants for low cost loans even some grants for "green" power generation that apply. Beyond this the owners are long time citizens of Nevada, Registered Professional Engineer in Nevada, past Water Rights Surveyor, with business concerns in Sustainable Energy Development Associates, Waste-to-Energy projects, even various horse related enterprises in Western Nevada. A complete set of personal resumes are available upon request.

It is unclear how the personal resumes of the owners of the Marlette Power Company relate to the company's financial capabilities; therefore, the Applicant's offer to submit personal resumes is declined. No evidence was submitted to indicate that the Applicant has applied for, obtained or been pre-approved for any low-cost loans or grants for green power generation. No evidence was provided regarding the Marlette Power Company's authorized or paid-up capital. In addition, information obtained from the Nevada Secretary of State failed to show any business entity under the Applicant's name, "Marlette Power Company."⁴

The State Engineer finds the Applicant has failed to provide proof satisfactory to the State Engineer of its financial ability to construct the project.

V.

Protestant Carson City Utilities has expressed concerns that the Applicants project requests a greater quantity of water than is available, that the project could affect the quality of the water, that the project could force operational changes to maintain a constant flow, and that the project could jeopardize or conflict with the Protestant's agreement with the state of Nevada in regards, in part, to the cost of water (billing), expenditures for upgrades, repairs, replacements, and easements.

⁴ Business Entity Search, Nevada Secretary of State Web Site, April 11, 2007, File No. 67242, official record in the Office of the State Engineer.

Over six years have passed since Application 67242 was filed, however, a review of the application and additional information submitted by the Applicant show that there are no agreements, contracts, permits, or other authorizations in place that would address the concerns of the Protestant. The Applicant has indicated that once this application has been approved, then it will seek the necessary authorizations.³

Approval of this application would allow the Applicant to construct a new pipeline from Marlette to Carson City, divert the water through a hydroelectric power plant, and return the water for municipal use by Carson City. The water in question is already appropriated under existing water right permits and provides for municipal water to Carson City.⁵ The facilities are owned by the State of Nevada and are used by Carson City under a cooperative agreement.

The State Engineer finds that Application 67242 would allow a third party, the Applicant, to substantially change the existing delivery of municipal water to Carson City. The State Engineer further finds that to approve the Applicant's request to use water already appropriated and not owned by the Applicant and to use facilities and land owned or controlled by either Carson City or the State of Nevada, without the permission of the owners of the water rights and water delivery facilities, would be inappropriate under these circumstances. The State Engineer further finds that the Applicant has been given an extraordinary amount of time, over six years, to seek any necessary authorizations to effectuate its plan and has failed to do so.

VI.

The protest by CWSD indicates that they are working with Carson City and the State of Nevada to improve the current water delivery system by replacing the existing pipeline with a new pipeline. It is indicated that the Protestant's may wish to install a similar power plant in the future.

The State Engineer finds that the Protestant CWSD's possible desire to install a similar power plant at some unspecified point in the future is irrelevant to the statutory criteria that must be considered by the State Engineer.

⁵ Water Rights Database, Nevada Division of Water Resources, April 16, 2007, official records in the Office of the State Engineer.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁶

II.

Before either approving or rejecting an application, the State Engineer may require such additional information as will enable him to properly guard the public interest.⁷

III.

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:⁸

- 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.

IV.

Nevada Revised Statutes chapter 533.370 supplies guidance in approving or rejecting an application to appropriate water and subsection 1.c. of that chapter states that “The applicant provides proof satisfactory to the State Engineer of: (1) His intention in good faith to construct any work necessary to apply water to the intended beneficial use with reasonable diligence; and (2) His financial ability and reasonable expectation actually to construct the work and apply the water to the intended beneficial use with reasonable diligence.” The Applicant was asked to supply additional information regarding the proposed hydroelectric power plant. Based on the Applicant’s response, it has been found that the Applicant has failed to provide proof satisfactory to the State Engineer of its financial ability to construct the project and has not demonstrated the authority to construct the works necessary to apply the water to the intended beneficial use.

⁶ NRS chapter 533.

⁷ NRS § 533.375.

⁸ NRS § 533.370(5).

The State Engineer concludes that to approve any application where the Applicant has failed to meet the statutory requirements would threaten to prove detrimental to the public interest.

V.

The State Engineer concludes that to allow a third party to substantially change the existing delivery of municipal water to Carson City, to use water already appropriated and not owned by the Applicant, and to use facilities and land owned or controlled by either Carson City or the State of Nevada, without the permission of the owners of the water rights and water delivery facilities, would threaten to prove detrimental to the public interest and conflict with existing water rights.

VI.

The Applicant has had over six years since Application 67242 was filed to address issues such as securing any necessary permits, contracts, agreements, rights-of-way, leases, financing or authorizations and has failed to demonstrate any significant progress in this regard. The State Engineer concludes that to delay action on this application any longer would be fruitless and would threaten to prove detrimental to the public interest.

VII.

Carson City Utilities filed a protest to Application 67242 and requested the application be denied. The grounds of the protest covered a wide variety of issues. The Applicants project requests a greater quantity of water than is available, that the project could affect the quality of the water, that the project could force operational changes to maintain a constant flow, and that the project could jeopardize or conflict with the Protestant's agreement with the State of Nevada in regards, in part, to the cost of water (billing), expenditures for upgrades, repairs, replacements, and easements. In general, the protest grounds are encompassed under the criteria found in NRS § 553.370(5), which provides for guidance to the State Engineer in approving applications to appropriate water. No evidence was provided by the Applicant regarding the resolution of any of the protest issues raised by this protestant.³ It is clear that any approval of Application 67242 would interject a third party into an existing agreement between the Protestant and the State of Nevada. In addition, the Office of the State Engineer has similar concerns as to those raised by the Protestant and these concerns have not been addressed by the Applicant.

The State Engineer concludes that the issues raised by the Protestant are genuine and have not been adequately addressed by the Applicant; therefore, the protest must be upheld.

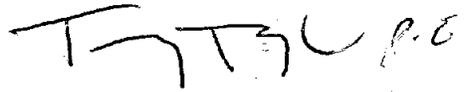
VIII.

The State Engineer concludes the grounds for the protest by CWSD are unsupported by Nevada water law; therefore, the protest claim is dismissed.

RULING

The protests are upheld in part and Application 67242 is hereby denied on the grounds that the proposed appropriation would conflict with existing rights and threaten to prove detrimental to the public interest.

Respectfully submitted,



TRACY TAYLOR, P.E.
State Engineer

TT/TW/jm

Dated this 11th day of

April, 2008.