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

IN THE MATTER OF APPLICATIONS 61007 AND 65082 FILED TO APPROPRIATE THE PUBLIC WATERS FROM HIKO SPRING WITHIN THE COLORADO VALLEY HYDROGRAPHIC BASIN (213), CLARK COUNTY, NEVADA.	)	**RULING** **#6004**

GENERAL

I.

Application 61007 was filed on March 10, 1995, by Thomas E. Smigel and Barbara W. Smigel to appropriate 0.25 cubic feet per second (cfs) of water from Hiko Spring within the Colorado Valley Hydrographic Basin for irrigation purposes on 20.0 acres of land located within the SE¼ SW¼, SW¼ SE¼ and the SE¼ SE¼ of Section 12, T.32S., R.65E., and within the SW¼ SW¼ of Section 7, T.32S., R.66.E., M.D.B.&M. The proposed point of diversion is described as being located within SE¼ SE¼ of said Section 12.[1]

II.

Application 65082 was filed on April 26, 1999, by Thomas E. Smigel and Barbara W. Smigel to change the manner of use of the water requested for appropriation under Application 61007. The new manner of use is mining and milling.[2]

FINDINGS OF FACT

I.

An examination of the records of the Office of the State Engineer, show that Hiko Spring has an existing water right under Permit 11405, Certificate 3156 owned by Thomas E. Smigel and Barbara W. Smigel.[3] Certificate 3156 was issued for 0.002 cfs for 153 head of cattle. The State Engineer finds that there is an existing water right at the proposed point of diversion.

II.

The Office of the State Engineer and the United States Geological Survey (USGS) have for many years collected and recorded flow data from numerous sites throughout the state. However, a review of records in the office of the State Engineer did not find any historical flow

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[1] File No. 61007, official records in the Office of the State Engineer.
[2] File No. 65082, official records in the Office of the State Engineer.
[3] File No. 11405, official records in the Office of the State Engineer.

measurements for Hiko Spring. The USGS visited Hiko Spring in 2003, but no flow measurements were recorded due to the minimal flow emanating from the spring. Given the lack of flow data, a decision was made to conduct an informal field investigation of Hiko Spring, the results of which are contained herein.

The investigation was conducted on May 20, 2009, and consisted of a three hour walking and photographic inspection of the spring and surrounding area. Hiko Spring is located in an east-west canyon, approximately five miles due west of Laughlin, Nevada, at a 90 degree bend in state route Nevada 163. Significant run-off from the highway drains into the spring area as evidenced by 2 to 3 foot deep erosion channels. The channels terminate at foliage surrounding the spring and were not observed below the spring. The entire area appeared to be abandoned and heavily overgrown with mesquite, tamarisk, cottonwood and cattails. None of the appurtenances (tank, pipeline, home, garden) described in the Proof of Completion or the Proof of Beneficial Use under Permit 11405, Certificate 3156 were seen. The only evidence of historical habitation was the presences of a large concrete slab (approximately 10 feet x 15 feet) with threaded nuts for securing walls. Fragments of wood and wire fencing were also observed sporadically, but not sufficiently to figure out what had been fenced. The area of the spring, presumed by the heavy plant growth, could not be accessed due the thick and dense growth of brush and trees in the area immediately around the spring. This growth extends east down the canyon, thinning off to the flanks of a very shallow water drainage course. The water course was finally accessed approximately 100 feet east of the spring area and was found to be very shallow, less than ¼ inch deep, the width would vary from 3 feet to 6 inches moving eastward. A free water surface was observed but movement was stagnant and nearly imperceptible. This width rapidly decreased eastward and the course dried up completely approximately 1,000 feet east, where the canyon bent southward and just below a large outcrop of bedrock. Upstream from this bedrock outcrop is 200 feet of impenetrable cattail marsh, downstream the vegetation thins noticeably. Due to the absence of flowing water and the broad shallow overgrown drainage, no flow measurements were attempted. Water seepage from the spring was estimated at 1-2 gallons per minute or 0.002 to 0.004 cfs. This estimate was later confirmed by senior staff given the above conditions. The State Engineer finds that Hiko Spring flow is estimated at 0.002 to 0.004 cfs.

III.

The guidelines governing the appropriation and allocation of surface water are set forth under the provisions of Nevada Revised Statute § 533.370(5), which allows new appropriations only if it is determined that unappropriated water is present at the source. Unappropriated water is defined as the amount of water that is available for capture once all senior water rights have been fully served, including any customary use of the water by wildlife from springs. If the amount of water committed under existing water rights exceeds or equals the amount of sustained flow produced by the source, additional appropriations are generally denied. In the case of Hiko Spring, the existing water right under Permit 11405, Certificate 3156 has appropriated 0.002 cfs and a conservative estimate for the customary use of the water by wildlife is 0.001 cfs. Based on the field investigation flow estimates the State Engineer finds that there is insufficient unappropriated water in Hiko Spring to support Application 61007.

IV.

The point of diversion and the place of use of Application 61007 are on public lands administered by the Bureau of Land Management (BLM). A search of BLM records should indicate if Thomas E. Smigel and Barbara W. Smigel are authorized to use these public lands. The BLM web site was accessed on July 10, 2009, to determine if Thomas E. Smigel and Barbara W. Smigel are authorized to use this public land for irrigation purposes as proposed under Application 61007. It was determined that on March 21, 1995, Thomas and Barbara Smigel made application to the BLM for a Desert Land Entry (DLE) for the S½ SW¼, SW¼ SE¼, E½ SE¼ of Section 12, T.32S., R.65E., M.D.B.&M and Lot 4 of Section 7, T.32S., R.66E., M.D.B.&M under BLM Case File Number NVN-059723.[4] On May 21, 1997, the BLM made the determination that these lands were unsuitable for entry. The determination was appealed. On October 22, 1997, the Smigels filed Application 65082 to change the manner of use of Application 61007 from irrigation to mining and milling. On March 31, 1998, the appeal was dismissed and was sent to the Secretary of the Interior for signature on July 15, 1998. The State Engineer finds that to date, Thomas E. Smigel and Barbara W. Smigel have not been granted entry to these public lands by the authorized governing agency and that said granting is unlikely, and they are in the process of attempting to change the manner of use of this water. The State Engineer finds that to grant a water right prior to the unlikely granting of a Desert

[4] File No. 61007, official records in the Office of the State Engineer.

Land entry and when the proposed manner of use no longer exists, threatens to prove detrimental to the public interest.

V.

Application 65082 was submitted to change the manner of use of the water right granted under Application 61007. Application 65082 can only change whatever right is granted to Application 61007; and should Application 61007 be denied there is no water for Application 65082 to change. The State Engineer finds that to approve the change application of a base right that contains no water threatens to prove detrimental to the public interest; therefore, if Application 61007 is denied, Application 65082 must also be denied.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.[5]

II.

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:[6]

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 Application 61007 conflicts with existing water rights at the proposed points of diversion.

IV.

The State Engineer concludes that there is insufficient unappropriated water at the proposed source to support Application 61007.

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[5] NRS chapter 533.
[6] NRS § 533.370 (5).

V.

The State Engineer concludes that since Application 61007 cannot be approved there is no water to support Application 65082.

VI.

The State Engineer concludes that to grant a water right for a proposed manner of use that no longer exists threatens to prove detrimental to the public interest.

RULING

Applications 61007 and 65082 are hereby denied on the grounds there is insufficient unappropriated water at the proposed source and their approval would conflict with existing rights and threaten to prove detrimental to the public interest.

Respectfully submitted,

TRACY TAYLOR, P.E.
State Engineer

Dated this 31st day of

August, 2009.