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

IN THE MATTER OF APPLICATION 78368 FILED TO APPROPRIATE THE WATERS OF NEVADA HOT SPRINGS AND APPLICATION 78369 FILED TO CHANGE THE POINT OF DIVERSION OF A PORTION OF THE DRAIN AND WASTE WATERS OF AN UNNAMED DRAINAGE HERETOFORE APPROPRIATED UNDER PERMIT 16753, CERTIFICATE 5636 WITHIN THE SMITH VALLEY, HYDROGRAPHIC BASIN (107), LYON COUNTY, NEVADA.	**RULING** **#6061**

GENERAL

I.

Application 78368 was filed on April 23, 2009, by the Honker Ranch, Inc., to appropriate 3.4 cubic feet per second (cfs) of water from Nevada Hot Springs (formerly known as Hind Hot Springs). The proposed point of diversion is described as being located within the SW¼ SE¼ of Section 16, T.12N., R.23E., M.D.B.&M. The proposed manner and place of use is for irrigation and domestic purposes upon 480 acres of land located within portions of the SW¼ SW¼ of Section 1, the S½ SE¼ of Section 2, the N½ of Section 10, the N½ of Section 11, in addition to the NW¼ NW¼ of Section 12, all within T.12N., R.23E., M.D.B.&M.

Item #12 of the application states that historically water from Nevada Hot Spring has reached the proposed place of use through existing drain channels and natural water courses. Flow from the springs is captured in an existing pond in the SW¼ SE¼ of Section 16, T.12N., R.23E., from which it enters into a series of unnamed drain ditches, where it is co-mingled with the "miscellaneous drainage water from the West Walker River, miscellaneous springs, seepage and natural run off."[1]

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[1] File No. 78368, official records in the Office of the State Engineer.

II.

Application 78369 was filed on April 23, 2009, by the Honker Ranch, Inc., to change the point of diversion of 2.0 cfs of the waters of Hinds or Nevada Hot Spring that being a portion of the water perfected under Permit 16753, Certificate 5636. It is the Applicant's intention to transfer the existing point of diversion approximately 2.5 miles from an unnamed drainage, located within the SW¼ NE¼ of Section 10, T.12N., R.23E., M.D.B.&M., to a direct diversion from Nevada Hot Spring. The existing manner and place of use is not being requested for change and remains for irrigation purposes upon 480 acres of land located within portions of the SW¼ SW¼ of Section 1, the S½ SE¼ of Section 2, the N½ of Section 10, the N½ of Section 11, in addition to the NW¼ NW¼ of Section 12, all within T.12N., R.23E., M.D.B.&M.[2]

III.

Application 78369 was timely protested by the Bently Family Limited Partnership on the grounds that there is no unappropriated water at the source and that its approval would have an adverse affect on Permit 28995, Certificate 9379, which is held by the Bently Family Limited Partnership. The Protestant also contends that Permit 16753, Certificate 5636, was issued for drain and waste waters, which are not subject to appropriation under statutory procedures.[2]

IV.

Application 78369 was also timely protested by Jeff Hunewill on behalf of the Hunewill Land and Livestock Company, Inc., based upon the contention that the proposed change of the point of diversion would cause water to run onto and through land owned by the Protestant and the Applicant has neither the right nor permission of the Hunewill Land and Livestock Company to do this.[2]

V.

In response to the protests, a document titled "Answer to Protest" was received from the Applicant's legal counsel on August 31, 2009, and incorporated into the file maintained under Application 78369.[2]

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[2] File No. 78369, official records in the Office of the State Engineer.

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 a water right application. The State Engineer finds that in the case of Application 78369 there is no need to supplement the records of the Office of the State Engineer with testimony and evidence relating to Application 78369 and its associated protests.

II.

It is the Bently Family Limited Partnership's position that there is no unappropriated water available at the source. Unappropriated water may be defined as the amount of water that is available for capture once all active water rights have been fully served, including any customary use of the water by wildlife. The State Engineer finds that if the amount of water committed under existing water rights exceeds the amount of sustained flow produced by Nevada Hot Spring, additional requests for water must be denied.

Permit 28995, Certificate 9379, represents the only direct diversion permit remaining on Nevada Hot Spring. With a priority date of December 4, 1974, Permit 28995 allowed 3.0 cfs of water to be diverted from the spring for the irrigation of 400 acres of adjacent land. When the Proof of Application of Water to a Beneficial Use was filed in support of Permit 28995 it was determined that a reduction in the diversion rate would be made to reflect the actual diversion rate that was measured on May 9, 1979, and stated upon the proof. Accordingly, Certificate of Appropriation 9379, was issued on January 3, 1980, for a reduced diversion rate of 1.6 cfs, with an annual duty of water not to exceed 1,158 afa, for the irrigation of 362 acres of land.[3]

Having determined the committed resource of the spring to be 1.6 cfs, the next value that must be determined is the amount of water that Nevada Hot Spring is currently generating. Both the United States Geological Survey (USGS) and the Nevada Division of Water Resources (NDWR) have for many years collected flow data from numerous springs found within the state. A search of this information found several spring flow measurements that were taken at Nevada Hot Spring, which are presented below:

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[3] File No. 28995, Certificate 9379, official records in the Office of the State Engineer.

Date	Discharge (cfs)	Measured by
August 17, 1972	1.26	USGS[4]
February 8, 1973	1.14	USGS
April 26, 1973	0.93	USGS
July 23, 1973	1.29	USGS
USGS average (rounded)	1.2 = 540 gallons per minute	
May 9, 1979	1.60	Reid[5]
June 21, 2010	0.911	NDWR[6]

The copies of the field notes and maps that describe the exact measuring point used by the USGS were not located but it can be assumed that its measurements were taken immediately downstream from the hot spring, in the main ditch. Reid's measuring point is described in general terms as being in the ditch below springs, east side of road. The NDWR measuring point is represented by the newly installed Cippoletti weir that has been constructed in the main ditch below the spring. The Reid measurement is of particular interest since it was the actual diversion rate measured, recorded, and eventually submitted under the Proof of Application of Water to a Beneficial Use filed for Permit 28995. By committing the first 1.6 cfs of the hot spring under the Permit 28995, Certificate 9379, subsequent appropriations of water can only be considered if the flow of the spring exceeds 1.6 cfs for a substantial period of time.

As indicated by its record of flow, Nevada Hot Spring does not generate sufficient water to fully satisfy its single active permit; therefore, the State Engineer finds that the Bently Family

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[4] F.E. Rush and C.V. Schroer, *Geohydrology of Smith Valley, Nevada, With Special Reference To Water-Use Period, 1953-72*, Water Resource Bulletin No. 43, (Nevada Department of Conservation and Natural Resources, Division of Water Resources and the United States Department of the Interior, United States Geological Survey), p. 15, 1976.

[5] Proof of Application of Water to a Beneficial Use, Permit 28995, Certificate 9379, official records in the Office of the State Engineer.

[6] Report of Field Investigation No. 1129, dated June 21, 2010, official records in the Office of the State Engineer.

Limited Partnership is correct in stating that there is no unappropriated water available from this source.

III.

Permit 16753 was filed to capture a mixture of miscellaneous drainage water from the West Walker River, that being miscellaneous springs, seepage and natural runoff. Similar descriptions are found in other water right applications that were filed in the Artesia Lake sub-area during the same time period. It is significant that most of these applications requested new appropriations of water from drainage canals that collected seepage and waste water originally used upon lands irrigated by the Colony ditch. Several of these applications were protested, with subsequent public hearings held to address the protest issues. The transcripts of these hearings have been preserved in the records of the Office of the State Engineer, and they offer a useful insight regarding the origins and appropriation of drain and waste water in the northern portion of Smith Valley. One of the transcripts reviewed was the one taken in the matter of protested Application 11918, which was held before the State Engineer on August 4, 1948.[7]

Among the exhibits that were identified during the hearing was Exhibit B, which was described as being the Report of E.W. King and J.A. Beemer and Report of John A. Beemer to Board of Directors of the Walker River Irrigation District. The King and Beemer Reports are historic first person accounts of the conditions that existed within Local Improvement District No. 1. Although this district does not include Nevada Hot Spring, it does encompass much of the Artesia Lake sub-area. Testimony related to Exhibit B begins on page 21 of the transcript where it is stated that:

> After careful examination of the lands embraced within the above boundaries, we find: First, - that there are about 19,700 acres of land within said boundaries and that approximately 10,000 acres of this land can be supplied with water for irrigation from the canal of the Simpson Colony Reclamation Canal Company, and, that over 6,000 acres of this land is now under a high state of cultivation and being watered by the above canal.
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> Second: - That the natural topography of the lands within the above contemplated district is such that, while a large portion of the lands are being

[7] Hearing File No. 25, Transcript in the Matter of Protested Application No. 11918, August 4, 1948, pp. 21 and 22, official records in the Office of the State Engineer.

> irrigated, the waste waters from this irrigation have no outlet, either back to the river from which they were diverted or to any other channel.
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> The result of this condition is, that what are locally called the "Beeman Lakes" have been formed and over 700 acres of land have already become submerged and this area is increasing very rapidly.

Mr. King went on to explain that:

> Third: - We find that the greater portion of the land within this proposed district is underlain with one or more strata of hard-pan with coarse sand both above and below the hard-pan and that the strata of hard-pan forms numerous basins which are receptacles for waste water and that as soon as irrigation is started these basins fill up with water and drown out any crops that may have been planted on them.

It was Mr. King's opinion:

> Fourth: - That the only method by which the lands in this proposed district can be saved from becoming waterlogged and ruined is by proper drainage. Not only the drainage of the present submerged portions, but the providing of proper channels or canals through which the waste waters from irrigation can be immediately carried back to the West Walker River or the Alkali Lake in the north end of the valley.[8]

After the creation of Local Improvement District No. 1, sufficient capital was generated to construct a series of drains and ditches to remove the menace of excessive sub-irrigation within the district. As the amount of drain and waste water that was collected and conveyed north to Artesia Lake increased, its value as a source of irrigation water was recognized by several ranches. Ranches close to the main drain ditches were particularly interested in applying this water to previously drained land or high spots that had remained dry. The fact that the drain and waste water were an unreliable source of poor quality water did not deter them from filing, as evidenced by Permit 16753, Certificate 5636.

The filing of such applications, created concerns among the adjacent ranches that the approval of the applications would obligate them to provide drain and waste water to downstream users. The Nevada Supreme Court has made it clear that this obligation does not exist when it ruled that a claimant to waste water acquires a temporary right only to whatever water escapes from the works or lands of others and which cannot find its way back to its source of supply; such use of water does not carry with it the right to interfere with the water flowing in the ditches or works of

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[8] Exhibit B, Report of E.W. King to J.A. Beemer and Transcript, pages 21 through 22.

others lawfully appropriating it. Hence the waste water claimant has no valid appropriation of the waters of the watercourse from which the original flow has been diverted regardless of the fact that he has obtained from the State Engineer a certificate of appropriation. In view of the fact that his claim related only to the waste water, the certificate of appropriation availed him nothing.[9]

The Nevada Supreme Court held in the case of *Bidleman v. Short*, 38 Nev. 467, 470, 150 Pac. 834 (1915) that "Waste waters are not subject to appropriation so as to establish a permanent right therein, as in the case of an appropriation of the waters of a natural stream."

In *Gallio v. Ryan*, 52 Nev. 330, 286 Pac. 963 (1930) the court held that Waste water is subject to capture and use, but that is the limit and extent of the right.

The spirit of these decisions is found within the text of a stipulation that was enacted between the Honker Gun Club and Hunnewill Land and Livestock Company in 1957.[10] This agreement, which was signed by representatives of both parties, stated that if Application 16753 was approved by the State Engineer, the Hunnewill Land and Livestock Company, Inc., who was the adjoining land owner, "shall not be at any time now or in the future, be called upon by the applicant to furnish any water to applicant," in addition, the adjoining land owner reserved the right to change its irrigation and/or drainage system at any time. To underscore the importance of this stipulation, the State Engineer included it in the permit terms that govern the manner in which water can be appropriated under Permit 16753, Certificate 5636. The State Engineer finds that the intent of issuing Permit 16753 was to salvage some degree of beneficial use from drain and water that would otherwise be lost through seepage or evaporation at Artesia Lake. It was not to create a direct diversion water right that would be given equal or superior standing over Permit 28995, Certificate 9379.

IV.

Before a water right application that seeks a change in point of diversion can be considered for approval it must be determined that the existing and proposed points of diversion appropriate water from a common source. If the transfer involves different sources, it has the same effect as requesting a new appropriation of water at the proposed point of diversion. In this case, the State

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[9] Wells A. Hutchins, LL.B., *The Nevada Law of Water Rights*, Nevada State Engineer and the United States Department of Agriculture, Carson City, Nevada 1955, reprinted 1965, page 57.
[10] File No. 16753, official records in the Office of the State Engineer.

Engineer finds that the replacement of a drain and waste water right with a direct diversion permit from Nevada Hot Spring would be tantamount to seeking an additional diversion of water from a fully committed source.

V.

Given the negative balance that currently exists between the amount of water generated by Nevada Hot Spring and its committed resource, the State Engineer finds that any additional appropriations of water from the spring would adversely impact its single existing water right, that being Permit 28995, Certificate 9379.

CONCLUSIONS

I.

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

II.

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

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 amount of water that Nevada Hot Spring currently produces is fully committed under Permit 28995, Certificate 9379. The State Engineer concludes that there is no unappropriated water at the proposed source to support the manner of use requested under Application 78368.

IV.

The State Engineer agrees with Bently Limited Family Partnership and concludes that the approval of Application 78368 and/or Application 78369 would create a conflict with the appropriation of water under Permit 28995, Certificate 9379.

V.

Application 78369 seeks to exchange a drain and waste water right presently located near Artesia Lake for a direct diversion of water from Nevada Hot Springs, which is found several miles to the southwest. The State Engineer concludes that an application to change the point of diversion from one source of surface water to a different source cannot be granted.

RULING

The Bently Limited Family Partnership's protests to Applications 78368 and 78369 are upheld in part and Application 78368 is denied on the grounds that there is no unappropriated water available at the source and, in addition, Applications 78368 and 78369 are denied on the grounds that their approval would adversely impact existing water rights and would threaten to prove detrimental to the public interest. No ruling is made on the merits of the Hunewill Land and Cattle Co., Inc.'s protest.

Respectfully submitted,

P.E.

JASON KING, P.E.
State Engineer

Dated this 29th day of September, 2010.