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

IN THE MATTER OF APPLICATIONS 80192-T, 80193-T, 80209-T, 80218-T, 80224-T, AND 80225-T FILED TO CHANGE THE POINT OF DIVERSION, PLACE OF USE OR MANNER OF USE OF WATER PREVIOUSLY APPROPRIATED WITHIN THE THOUSAND SPRINGS VALLEY – TOANO - ROCK SPRING AREA (189B), THE THOUSAND SPRINGS VALLEY - HERRILL SIDING BRUSH CREEK AREA (189A), ELKO COUNTY, NEVADA, PARADISE VALLEY (69), HUMBOLDT COUNTY, NEVADA, SWAN LAKE VALLEY (7), WASHOE COUNTY, NEVADA.	**RULING** **#6072**

GENERAL

I.

Application 80192-T was filed on October 12, 2010, by the Ruby Pipeline, LLC to temporarily change the point of diversion of 0.05 cubic feet per second (cfs), not to exceed 5.156 acre-feet annually (afa) of the underground water previously appropriated under Permit 78815.[1] The manner of use is for pipeline construction. The proposed point of diversion is described as being located within the SE¼ NW¼ of Section 35, T.41N., R.65E., M.D.B.&M. The remarks section of this and the other applications indicate the applications are to provide construction water for compaction, dust control and hydrostatic testing.

II.

Application 80193-T was filed on October 12, 2010, by the Ruby Pipeline, LLC to temporarily change the point of diversion of 0.05 cfs, not to exceed 5.156 afa of the underground water previously appropriated under Permit 78816.[2] The manner of use is for pipeline construction. The proposed point of diversion is described as being located within the NE¼ NE¼ of Section 3, T.40N., R.64E., M.D.B.&M.

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[1] File No. 80192-T, official records in the Office of the State Engineer.
[2] File No. 80193-T, official records in the Office of the State Engineer.

III.

Application 80209-T was filed on October 15, 2010, by the Ruby Pipeline, LLC to temporarily change the place and manner of use of 2.0 cfs, not to exceed 46.03 afa of a portion of the underground water previously appropriated under Permit 65825.[3] The proposed manner of use is for pipeline construction. The existing manner of use is irrigation. The proposed point of diversion is described as being located within the SW¼ SW¼ of Section 12, T.37N., R.39E., M.D.B.&M.

IV.

Application 80218-T was filed on October 19, 2010, by the Ruby Pipeline, LLC to temporarily change the place and manner of use of 0.0125 cfs, not to exceed 5.156 afa of the underground water previously appropriated under Permit 78177.[4] The proposed manner of use is for pipeline construction. The existing manner of use is domestic and irrigation. The proposed point of diversion is described as being located within the SW¼ SE¼ of Section 10, T.44N., R.23E., M.D.B.&M.

V.

Application 80224-T was filed on October 20, 2010, by the Ruby Pipeline, LLC to temporarily change the place and manner of use of 2.7 cfs, not to exceed 46.03 afa of the underground water previously appropriated under Permit 65829.[5] The proposed manner of use is for pipeline construction. The existing manner of use is irrigation. The proposed point of diversion is described as being located within the SE¼ SE¼ of Section 12, T.37N., R.39E., M.D.B.&M.

VI.

Application 80225-T was filed on October 20, 2010, by the Ruby Pipeline, LLC to temporarily change the place and manner of use of 1.114 cfs, not to exceed 46.03 afa of the underground water previously appropriated under Permit 65826.[6] The proposed manner of use is for pipeline construction. The existing manner of use is irrigation. The proposed point of diversion is described as being located within the SW¼ SW¼ of Section 12, T.37N., R.39E., M.D.B.&M.

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[3] File No. 80209-T, official records in the Office of the State Engineer.
[4] File No. 80218-T, official records in the Office of the State Engineer.
[5] File No. 80224-T, official records in the Office of the State Engineer.
[6] File No. 80225-T, official records in the Office of the State Engineer.

VII.

Applications 80192-T and 80193-T were timely protested by the Center for Biological Diversity on the grounds that:

> 1. According to the previous permit and application for this allocation, 78815, 2 years are required to put this water to beneficial use (i.e. pipeline completed and operational). This application states that the water will be put to beneficial use within 1 year. Ruby has provided no documentation indicating how this greatly accelerated schedule will be met. If Ruby does not succeed in completing the pipeline within one year, then NRS 533.345(4) applies: "A temporary change may be granted for any period not to exceed 1 year." So the permit must be denied.
> 2. According to NRS 533.345(2), "If an applicant is seeking a temporary change of place of diversion, manner of use or place of use of water already appropriated, the State Engineer shall approve the application if:..(b) The temporary change is in the public interest." The appropriation requested under application 80192T [80193T] is not in the public interest because the Ruby Pipeline project will harm the environment locally, regionally and globally. See attached statement of reasons.

VIII.

Applications 80209-T, 80218-T, 80224-T and 80225-T were timely protested by the Center for Biological Diversity on the grounds that according to NRS § 533.345(2), "If an applicant is seeking a temporary change of place of diversion, manner of use or place of use of water already appropriated, the State Engineer shall approve the application if:..(b) The temporary change is in the public interest." The appropriations requested under applications 80209-T, 80218-T, 80224-T and 80225-T are not in the public interest because the Ruby Pipeline project will harm the environment locally, regionally and globally.

FINDINGS OF FACT

I.

The State Engineer finds the temporary applications under consideration in this ruling all change existing permitted water rights, some of which trace back to earlier irrigation water right permits that have been perfected and certificated for many years.

II.

Nevada Revised Statute § 533.345 provides that:

> 2. If an applicant is seeking a temporary change of place of diversion, manner of use or place of use of water already appropriated, the State Engineer shall approve the application if:

(a) The application is accompanied by the prescribed fees;
(b) The temporary change is in the public interest; and
(c) The temporary change does not impair the water rights held by other persons.
3. If the State Engineer determines that the temporary change may not be in the public interest, or may impair the water rights held by other persons, the State Engineer shall give notice of the application as provided in NRS 533.360 and hold a hearing and render a decision as provided in this chapter.
4. A temporary change may be granted for any period not to exceed 1 year.

The Protestant asserts that the underlying water rights that Applications 80192-T and 80193-T seek to change indicate that two years are required to complete the pipeline and have it operational; thus, placing the water to beneficial use, but that Applications 80192-T and 80193-T indicate the water under the temporary change application will be placed to beneficial use within one year and there is no documentation indicating how this greatly accelerated schedule will be met. The Protestant asserts that if the Applicant does not succeed in completing the pipeline within one year, then NRS § 533.345(4) applies: "A temporary change may be granted for any period not to exceed 1 year." So, the Protestant asserts the permit must be denied.

The State Engineer finds this argument without merit. The temporary changes requested are to provide additional water at a specific site in a timely manner for compaction, dust control and hydrostatic testing. It is apparent just by the filing of the applications that the Applicant does not have sufficient water at the site for these purposes. Just because a temporary application is only granted for one year does not mean that if another year is required to have additional water at this site that another temporary application could not be filed. The applications indicate the water will be used under the temporary applications within the year, but the State Engineer does not believe this is any indication of an accelerated construction schedule. Temporary applications are used to address water needs that require relatively quick resolution and sufficient water for dust control during construction is obviously an important use that the Applicant believes needs to be addressed in a timely fashion.

III.

The Protestant asserts that according to NRS § 533.345(2), if an applicant is seeking a temporary change of place of diversion, manner of use or place of use of water already appropriated, the State Engineer shall approve the application if the temporary change is in the public interest, but that these applications are not in the public interest because the Ruby Pipeline

project will harm the environment locally, regionally and globally. The Protestant's attachment to its protests asserts that the public interest requires protection of environmental values - in particular the public's common heritage of streams, lakes, marshlands and tidelands and cites to a concurring opinion in the case of *Mineral County v. State*, 117 Nev. 235 (2001). The Protestant notes that the State Engineer has previously required an applicant to collect biological and hydrological baseline data and that the State Engineer must consider environmental values as part of the public interest in considering these applications.

The State Engineer finds the case of *Mineral County v. State* addressed an argument about the public trust doctrine in relation to navigable surface waters and non-navigable tributary waters, which is completely unrelated to the use of groundwater under these applications for pipeline construction, dust control and hydrostatic testing. The State Engineer finds the biological and hydrological baseline data ordered pursuant to State Engineer's Ruling No. 5726 was required under a very different set of circumstances, that being the long-term exportation of significant amounts of groundwater and under the statutory provision that addresses interbasin transfers of groundwater, i.e., the export of groundwater from one hydrographic basin to another. *See,* NRS § 533.370(6). The applications under consideration here are for temporary changes of small quantities of groundwater under the provision of NRS § 533.345, which do not have the same potential effects as may be experienced by the exporting of large quantities of groundwater out of basin. The State Engineer finds the use of relatively small quantities of groundwater for pipeline construction, dust control and hydrostatic testing does not at all rise to the level of concern the State Engineer was addressing with the exportation out of basin of large quantities of groundwater that were addressed in Ruling No. 5726 and does not require the collection of data the Protestant has suggested should be part of the public interest consideration under these applications.

The State Engineer finds the Protestant's objection to the construction of the pipeline itself is not part of the public interest considerations within the State Engineer's jurisdiction. The State Engineer's authority looks to the water law and not all the other environmental issues the Protestant is asserting the State Engineer should address.

IV.

One of the statutory criteria the State Engineer considers when an application is filed for a permanent use of water is whether the use of the water threatens to prove detrimental to the public interest. NRS § 533.370(5). If the use does threaten to prove detrimental to the public interest, the water law requires the State Engineer to reject the application and refuse to issue the requested permit. However, under the statute that provides for temporary changes of water already appropriated, the water law provides that the State Engineer shall approve the application if the temporary change is in the public interest. NRS § 533.345.

In Ruling No. 5726, the State Engineer conducted an in depth review of former State Engineers' interpretations of the criterion found in NRS § 533.370(5), that being whether the use of the water threatens to prove detrimental to the public interest. The State Engineer noted that only one Nevada Supreme Court case has addressed "the public interest" criterion. In what is commonly known as the Honey Lake case,[7] the State Engineer found that the Nevada Legislature has provided substantial guidance as to what it determines to be in the public interest and identified thirteen policy considerations contained in Nevada water statutes (NRS chapters 533, 534 and 540) and also indicated that Nevada water law identified other principles that should also serve as guidelines in the determination of what constitutes "the public interest" within the meaning of NRS § 533.370(5). The Nevada Supreme Court held that it could find no indication that Nevada's Legislature intended the State Engineer to determine public policy in Nevada by incorporating another state's [by implication then another agency's] statutes or to vest the State Engineer with the authority to re-evaluate the political and economic decisions made by local government.

Only two other courts have specifically considered the meaning of Nevada's public interest criterion found under NRS § 533.370(5). The first case addressed State Engineer's Ruling No. 4848, pursuant to which the State Engineer was considering water right applications filed for the use of water at a nuclear waste storage facility. In the ruling, the State Engineer found that the Nevada Legislature had determined the public interest through its determination of policy in the enactment of NRS § 459.910, which provides that it is unlawful for any person or governmental entity to store high-level radioactive waste in Nevada. The State Engineer held pursuant to that statutory provision that the Nevada Legislature had already determined that the use of the water

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[7] *Pyramid Lake Paiute Tribe v. Washoe County*, 112 Nev. 743 (1996).

applied for threatened to prove detrimental to the public interest and denied the applications. However, the Federal District Court for the District of Nevada overturned the State Engineer's decision focusing its reasoning on the grounds that NRS § 459.910 is not a Nevada water law statute, either substantive or procedural.[8]

The second opinion addressing the criterion was from the Ninth Circuit Court of Appeals in *United States v. Alpine Land & Reservoir Co. (County of Churchill v. Ricci)*, 341 F.3d 1172 (9th Cir. 2003). In that case, the United States Fish and Wildlife Service (Service) had filed eight applications to transfer 2,855 acre-feet of water from irrigation use to the Stillwater National Wildlife Refuge to maintain wetland habitat. The transfers were in furtherance of a water rights acquisition program that instructed the Service to acquire 75,000 acre-feet of water to fulfill the congressional directive set forth in Section 206(a) of Public Law 101-618, 104 Stat 3289. Churchill County and the City of Fallon had protested the applications on the grounds that the State Engineer should study the cumulative effect on the public interest of the entire acquisition program and not just the eight applications that were currently before him for decision. The Ninth Circuit Court of Appeals held that the State Engineer has broad discretion under Nevada law to determine whether the use of water as proposed under an application will threaten to prove detrimental to the public interest. The Court noted that the Nevada Legislature has not provided an explicit definition of what constitutes a threat to the public interest under NRS § 533.370(3) [now 533.370(5)], but held that the State Engineer's authority is limited to considerations identified in Nevada's water policy statutes.

In State Engineer's Ruling No. 5726, the State Engineer addressed in depth the history of State Engineers' interpretation of the public interest under NRS § 533.70(5) and found that the historical review pointed to a consistent thread throughout the decisions, that being, violating specific statutory provisions of Nevada's water law threatens to prove detrimental to the public interest. The State Engineers' expressions of the public interest were that it was important for the highest and best use of waters to be made and development of important industries should be encouraged. The State Engineer found that it is important to encourage the development of the resources to their reasonable and economic use as is demonstrated in the legislative policy found in NRS § 540.011(1), which provides that besides protecting existing rights it is also the policy of the

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[8] *See, United States v. Nevada*, CV-S-00-268-RLH (LRL) (D. Nev. 2003).

state to encourage efficient and non-wasteful use of the state's limited supplies of water resources. The State Engineer found that the analysis of whether the use of water for a proposed project threatens to prove detrimental to the public interest under NRS § 533.370(5) must be addressed on a case-by-case basis and that Nevada's water law and policy are the concepts to be addressed in that analysis.

The State Engineer finds a similar analysis would apply in addressing whether the use of water under a temporary change is in the public interest; the State Engineer should look to Nevada's water law and water policy for the analysis. The State Engineer finds in this case that the Applicant has merely applied to temporarily use water already appropriated for compaction, dust control and hydrostatic testing. The water sought to be changed is water already appropriated, there is no evidence that use of the relatively small quantities of water will interfere with existing rights, the legislature has expressed a policy to encourage the efficient and non-wasteful use of water resources, and the uses applied for are beneficial uses; therefore, the State Engineer finds the temporary changes are in the public interest.

V.

The Protestant asserts that the pipeline will run through extremely dry areas resulting in significant deleterious impacts to the environment, wildlife, cultural resources and thus the public interest. It objects that environmental documents do not disclose where the water required for the pipeline will come from and asserts that the State Engineer should consider impacts of water withdrawal and use along the pipeline. The Protestant objects that the State Engineer considers applications individually and asserts that disposal of waste water will cause erosion and pollution of ground and surface water, because biocides might be used in hydrostatic test water.

The State Engineer again notes that the Protestant is attempting to use the water law to address issues far beyond his purview and under the jurisdiction of other agencies. The State Engineer is not authorized by statute to conduct the comparative environmental impact process the Protestant asserts he should consider. The State Engineer's jurisdiction is to consider whether the use of the water under a temporary change application is in the public interest or impairs existing water rights and finds that the issue of items such as cultural resources and whether the pipeline will cross streams are far outside the provisions of Nevada water law. The State Engineer recognizes that existing water rights must be protected as well as a concern for the wildlife and maintenance of wetlands and fisheries, if the use of the groundwater implicated those resources from a hydrological

impact, but finds the use of the minimal quantities of water applied for under these temporary change applications will not threaten those resources. The State Engineer recognizes that the Nevada Legislature has expressed its intention to prevent the pollution and contamination of groundwater (NRS § 534.020); however, at this stage what the Applicant "might" do or "might" use, as asserted by the Protestant, is insufficient to raise any concern for the State Engineer. The State Engineer finds the disposal of waste water is under the jurisdiction of another agency of Nevada government and the use of roads during pipeline construction is far afield from anything the State Engineer need consider under Nevada water law.

VI.

The Protestant has an issue with the quantity of water that may be required for dust control and hydrostatic testing asserting that there is an unresolved discrepancy regarding the amount of water needed between the Fish and Wildlife Service's Biological Opinion (which estimates that 64,268,784 gallons of water will be required from surface water sources) and the Bureau of Land Management's Environmental Impact Statement (which estimates that 402 million gallons of water will be used for the pipeline, which includes 141,985,656 gallons (436 acre-feet) of groundwater for hydrostatic testing in Nevada and 65,520,000 gallons (201 acre-feet) of groundwater for dust control and alternate hydrostatic testing in Nevada. It asserts that if these discrepancies are not resolved there is no way the State Engineer can possibly know whether the appropriation of water will be for a beneficial use in the public interest. The Protestant's issues also address assertions as to impacts of water use from surface water sources.

The State Engineer again finds that the Protestant is attempting to use temporary change applications of minor amounts of water to address issues far beyond those presented by the applications under consideration in this ruling. It is not the State Engineer's jurisdiction to decide where or whether the pipeline should be built, the State Engineer is not concerned with the numbers presented in the Federal documents as those are only estimates, there are no applications for use of surface water under consideration in this ruling and the amounts applied for under these temporary change applications are relatively minimal and demonstrate a beneficial use of water.

CONCLUSIONS OF LAW

I.

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

II.

The State Engineer concludes that the Applicant is seeking a temporary change of water already appropriated, that the Applications were accompanied by the prescribed fees; that the temporary changes are in the public interest and does not impair the water rights held by other persons; thus, Nevada Revised Statute § 533.345 mandates that the State Engineer shall approve the applications.

RULING

The protests to Applications 80192-T, 80193-T, 80209-T, 80218-T, 80224-T and 80225-T are hereby overruled and the applications granted subject to:

1. the payment of the statutory permit fees; and
2. all other existing rights.

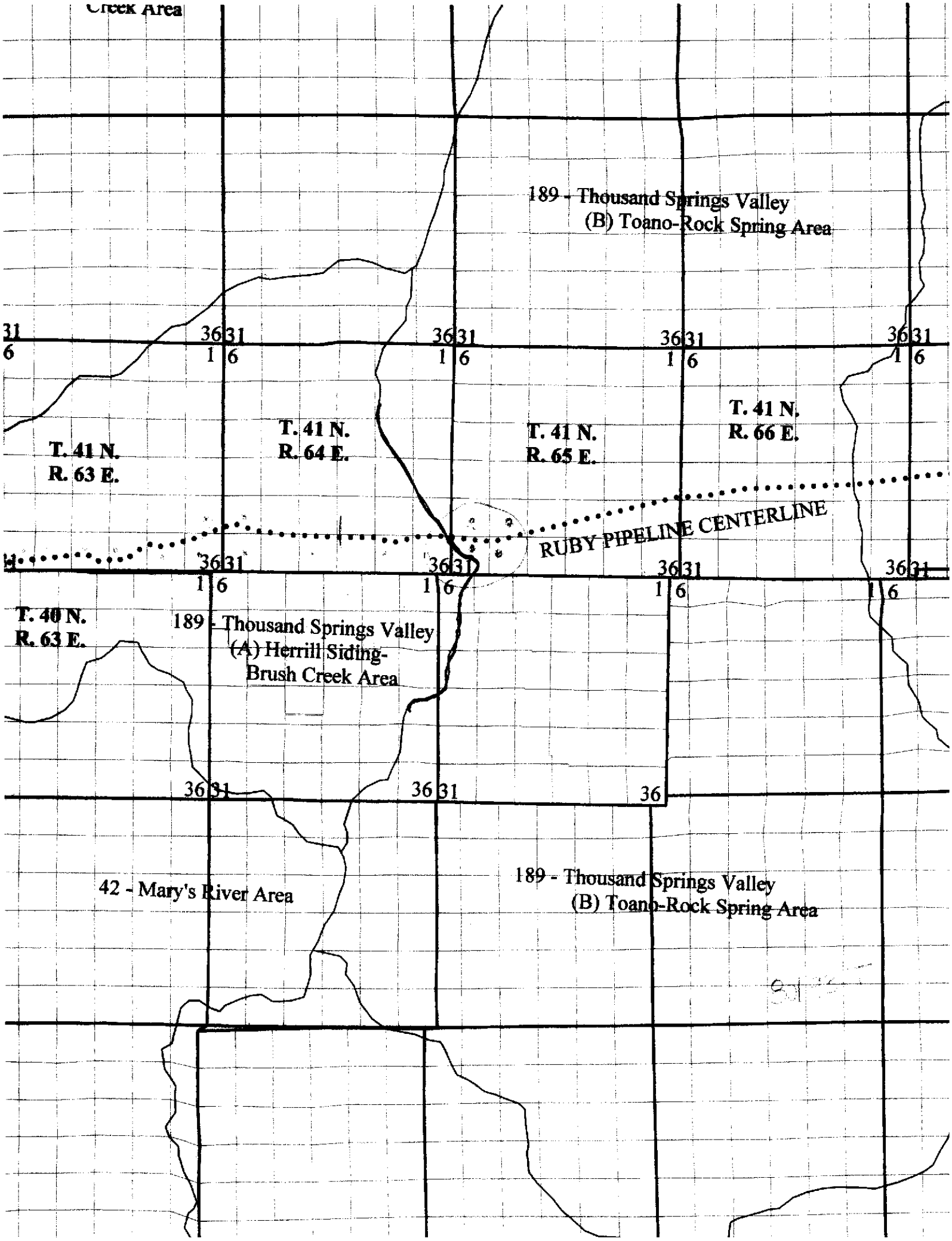
Respectfully submitted,

JASON KING, P.E.
State Engineer

Dated this 1st day of

December, 2010

[9] NRS Chapters 533 and 534.


Creek Area
189 - Thousand Springs Valley
(B) Toano-Rock Spring Area
T. 41 N.
R. 63 E.
T. 41 N.
R. 64 E.
T. 41 N.
R. 65 E.
T. 41 N.
R. 66 E.
RUBY PIPELINE CENTERLINE
T. 40 N.
R. 63 E.
189 - Thousand Springs Valley
(A) Herrill Siding-
Brush Creek Area
42 - Mary's River Area
189 - Thousand Springs Valley
(B) Toano-Rock Spring Area