

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

IN THE MATTER OF APPLICATIONS)
80079 AND 80080 FILED TO CHANGE THE)
POINT OF DIVERSION AND PLACE OF)
USE OF A PORTION OF THE PUBLIC)
WATERS OF AN UNDERGROUND)
SOURCE PREVIOUSLY APPROPRIATED)
UNDER PERMIT 74434 WITHIN THE)
DAYTON VALLEY HYDROGRAPHIC)
BASIN (103) LYON COUNTY, NEVADA.)

RULING

#6094

GENERAL

I.

Application 80079 was filed on August 6, 2010, by Retirement, LLC, to change the point of diversion and place of use of 0.0499 cubic feet per second (cfs), not to exceed 7.4815 acre-feet annually (afa), a portion of water previously appropriated under Permit 74434 from an underground source for municipal purposes. The proposed place of use is described as being located within the municipal water service area of Lyon County/Dayton Utilities. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 34, T.17N., R.22E., M.D.B.&M.¹

II.

Application 80080 was filed on August 6, 2010, by Jack White, to change the point of diversion and place of use of 0.6231 cfs, not to exceed 93.5185 afa, a portion of water previously appropriated under Permit 74434 from an underground source for municipal purposes. The proposed place of use is described as being located within the municipal water service area of Lyon County/Dayton Utilities. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 34, T.17N., R.22E., M.D.B.&M.²

¹ File No. 80079, official records in the Office of the State Engineer.

² File No. 80080, official records in the Office of the State Engineer.

III.

Applications 80079 and 80080 were timely protested by the Pyramid Lake Paiute Tribe of Indians (PLPT) and Churchill County on the following summarized grounds:^{1,2}

- The Applications seek to change Permit 74434, which was approved by State Engineer's Ruling No. 5823; Ruling 5823 is under appeal.
- The Applicant doesn't own or control the existing or proposed place of use. The place of use is the Lyon County Utilities service area.
- The groundwater basin is over-appropriated.
- The proposed transfer of original agricultural rights to year-round municipal should be denied.
- Transfer should be limited to consumptive use.
- Transfer may cause Newlands Project water users to divert more water from the Truckee River through the Truckee canal to make up for Carson River flows. The Applications will cause less water flowing to Lahontan Reservoir.
- Granting the Applications may be detrimental in ways that are not yet known but may arise between the filing of the protest and an administrative hearing.
- The Applications would threaten to prove detrimental to the public interest.
- The Applicant is seeking to move the point of diversion closer to the Carson River. (from ~1.25 miles to ~0.5 miles)
- There is no unappropriated water in the source, granting the Applications would conflict with existing rights, and could threaten to prove detrimental to the public interest.

FINDINGS OF FACT

I.

Nevada Revised Statute (NRS) § 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 Nevada. The State Engineer finds that in the case of protested Applications 80079 and 80080 there is sufficient information contained within the records of the Office of the State Engineer to gain a full understanding of the issues and a hearing on this matter is not required.

II.

Applications 80079 and 80080 were filed to change water already appropriated under Permit 74434. Permit 74434 was approved on June 19, 2008, and a review of the permit file shows that it is currently in good standing. Permit 74434 was also protested by the same Protestants to Applications 80079 and 80080; the PLPT and Churchill County. The grounds of the protests to Permit 74434 are similar to the protests of Applications 80079 and 80080. The protests to Permit 74434 were overruled on March 18, 2008, by State Engineer's Ruling No.

5823.³ State Engineer's Ruling No. 5823 was appealed within the required 30-day statutory time-frame to the appropriate District Court and the case is pending. Because a stay was not issued by the Court, the Office of the State Engineer proceeded with the permitting process and Permit 74434 was approved on June 19, 2008.

The State Engineer finds that Permit 74434 is in good standing and the appeal of State Engineer's Ruling No. 5823 is not cause for withholding action on Applications 80079 and 80080. The State Engineer hereby adopts the findings and conclusions of State Engineer's Ruling No. 5823, which pertain to the similar protest issues in this matter.

III.

The protests request that the applications be denied on the grounds that the Applicant does not own or control either the existing or proposed places of use. Applicants Jack White and Retirement, LLC, filed Report of Conveyances and associated documentation to obtain an ownership right to portions of Permit 74434. The conveyances were confirmed by letter from the Office of the State Engineer on August 19, 2010. Applications 80079 and 80080 were filed on August 6, 2010, to transfer the water from the existing point of diversion and place of use to a new proposed point of diversion and place of use. The new proposed point of diversion and place of use is within the Lyon County/Dayton Utilities municipal service area. The purpose of the applications is to provide municipal water rights to support future development within the service area. Existing water rights within a municipal purveyor's service area are typically committed to serve the existing customers and additional water rights are therefore necessary to add new customers to the water system. For example, a developer will often transfer water rights from the appurtenant land being developed or will obtain ownership of existing water rights to support a project. The water is transferred via change applications to the purveyor's water system; the proposed point of diversion and place of use. In exchange, the water purveyor will at some point issue a "will-serve" letter committing the transferred water to the proposed project. The will-serve letter is presented to the Office of the State Engineer, usually in conjunction with a subdivision map, for approval as to the quantity of water necessary to serve the development.

By letter dated November 29, 2010, the Lyon County Utilities Department (LCUD) provided additional information regarding the applications and associated well (a.k.a. Rolling A #5 well). The LCUD has signed and recorded easement documents for a municipal well and

³ State Engineer's Ruling No. 5823, March 18, 2008, official records in the Office of the State Engineer.

associated pipelines at the proposed point of diversion. At this time, the proposed point of diversion of Applications 80079 and 80080 is planned as the next municipal groundwater well to come on-line to serve future development within the service area. The LCUD will work with developers and water right owners to put together a plan to get the well constructed and the LCUD does not have any objection to moving water that will be used for future municipal and industrial uses within the LCUD service area as proposed under the change applications.⁴

The State Engineer finds that there is a reasonable expectation that a municipal well will be constructed and that the water will be placed to beneficial use within the LCUD service area.

IV.

Many of the protest claims are based on or derive from the allegation that the Dayton Valley Hydrographic Basin is over-appropriated. In State Engineer's Ruling No. 5823, Finding XI, the State Engineer found that an in-depth analysis of the Dayton Valley Hydrographic Basin shows that the basin is not over-appropriated.⁵

Applications 80079 and 80080 are not requesting new appropriations of water. Rather, the applications are seeking to change existing water rights. The original water right appropriation sought for change in this instance was permitted on July 27, 1964.⁶ The State Engineer notes that the PLPT is not a senior water right holder on the Carson River and does not have any existing decreed right to Carson River surface water. The State Engineer finds that protesting the change of an existing water right is not the proper vehicle in which to address concerns of over-appropriation. The State Engineer finds that if the Protestants had any issue with the initial granting of these groundwater rights, they should have protested said rights when the notice of the original, new appropriation was made and appealed that granting of the original base right permit at that time.

V.

The existing point of diversion is located approximately 1.25 miles from the Carson River and the proposed point of diversion is located approximately 0.5 miles from the Carson River. The proposed point of diversion is an existing water well formerly used for agricultural

⁴ See, letter from Lyon County Utilities Department to the State Engineer, November 29, 2010, File No. 80079, official record in the Office of the State Engineer.

⁵ State Engineer's Ruling No. 5823, March 18, 2008, Finding XI., p. 30, official records in the Office of the State Engineer.

⁶ Permit 20928, July 27, 1964, official records in the Office of the State Engineer.

purposes. The well must be rehabilitated or re-drilled prior to use as a municipal supply well. Any permit approved for this point of diversion will require a 100 foot annular seal due to its proximity to the Cardelli Ditch (NAC 534.390), ensuring no water will be pumped from the shallow aquifer. The State Engineer finds that the difference in distance between the existing and proposed points of diversion from the Carson River is insignificant and water can only be developed from a depth of greater than 100 feet below ground surface.

The State Engineer finds that the water that is recharged to the groundwater basin from precipitation is available for appropriation within the Dayton Valley Groundwater Basin and that its groundwater does not belong to those claiming rights to the Carson River surface waters.⁷

VI.

The PLPT protest issue #5 and #6 refer to the transfer of irrigation or agricultural water rights to municipal use and that such transfer should be limited to consumptive use and limited to within the irrigation season. Applications 80079 and 80080 seek to change Permit 74434. The existing manner of use under Permit 74434 is municipal use and the proposed use under Applications 80079 and 80080 is unchanged. The change applications only seek to change the point of diversion and place of use not the manner of use of Permit 74434. Permit 74434 changed a portion of Permit 20928, which was an irrigation permit. However, the concerns regarding the change in manner of use from Permit 20928 to Permit 74434, irrigation to municipal, was previously addressed by State Engineer's Ruling No. 5823, and is not at issue in this ruling. The State Engineer finds protest issues #5 and #6 are without merit.

VII.

The protests allege that the change applications will cause less flow in the Carson River thereby reducing inflow to Lahontan Reservoir. This protest issue was addressed in State Engineer's Ruling No. 5823, and the State Engineer hereby adopts the same findings. The State Engineer finds the PLPT or Churchill County have not made the legal connection between water rights claimed by the PLPT in the Truckee River and any existing groundwater rights in the Dayton Valley.⁸

⁷ State Engineer's Ruling No. 5823, March 18, 2008, Finding V., p. 22, official records in the Office of the State Engineer.

⁸ State Engineer's Ruling No. 5823, March 18, 2008, Finding XX., pp. 41 and 42, 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.⁹

II.

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:¹⁰

- 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 these are change applications of an existing water right, which relate back to the original water appropriation under Permit 20928 that has already been through the permitting process and was not protested or appealed when initially granted as a new appropriation. The changes requested here do not increase the consumptive use of water in the groundwater basin and the water has already been accounted for in the groundwater basin budget. The State Engineer concludes that the granting of these change applications will not conflict with existing rights or threaten to prove detrimental to the public interest.

IV.

The State Engineer has found that the Dayton Valley Hydrographic Basin is not over-appropriated. The State Engineer concludes that groundwater recharged by precipitation in the basin is intended for appropriation by groundwater users within the basin, that groundwater does not belong to the Carson River, that groundwater was not included in the Alpine Decree and that groundwater is not being withdrawn in excess of the average annual replenishment to the groundwater supply. The State Engineer concludes that he is fulfilling his responsibility to insure the availability of water for subdivisions under NRS 278.377(1)(b).¹¹

⁹ NRS Chapters 533 and 534.

¹⁰ NRS § 533.370(5).

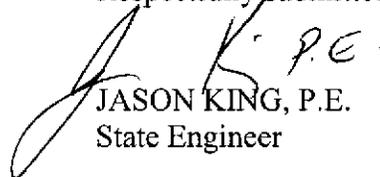
¹¹ State Engineer's Ruling No. 5823, March 18, 2008, Conclusions IV., pp. 43 and 44, official records in the Office of the State Engineer.

RULING

The protests to Applications 80079 and 80080 are hereby overruled and the applications are approved subject to:

1. Existing rights; and
2. Payment of the statutory permit fees.

Respectfully submitted,



JASON KING, P.E.
State Engineer

Dated this 16th day of
February, 2011.