

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

IN THE MATTER OF APPLICATIONS)
80468, 80469 AND 80470, FILED TO)
APPROPRIATE THE PUBLIC WATERS)
OF AN UNDERGROUND SOURCE)
WITHIN THE PYRAMID LAKE VALLEY)
HYDROGRAPHIC BASIN (81), WASHOE)
COUNTY, NEVADA.)

RULING

#6245

GENERAL

I.

Application 80468 was filed on January 14, 2011, by the City of Fernley to appropriate 6.0 cubic feet per second (cfs), not to exceed 4,343.82 acre-feet annually (afa), of water from an underground source for municipal and domestic purposes. The proposed point of diversion is described as being located within the SE¼ NW¼ of Section 8, T.21N., R.25E., M.D.B.&M. The proposed place of use is described as being located within portions of Sections 9 and 10, Sections 11, 12, 13, 14 and 15, portions of Sections 16, 17 and 20, Sections 21, 22, 23, 24, 25, 26, 27 and 28, portions of Sections 29, 30 and 31, and Sections 32, 33, 34 35 and 36, T.20N., R.24E., M.D.B.&M.; Sections 1, 2 and 3, portions of Sections 4 and 5, and Sections 7 through 36, T.20N., R.25E., M.D.B.&M.; a portion of Section 5, Sections 6 and 7, portions of Sections 8 and 17, Sections 18 and 19, portions of Sections 20 and 29, Sections 30 and 31, and a portion of Section 32, T.20N., R.26E., M.D.B.&M.; portions of Sections 13, 23 and 24, Section 25, portions of Sections 26, 27, 28 and 33, and Sections 34, 35 and 36, T.21N., R.25E., M.D.B.&M.; portions of Sections 5, 7 and 8, Section 17, a portion of Section 18, and Sections 19, 20, 29, 30, 31 and 32, T.21N., R.26E., M.D.B.&M.; portions of Sections 28, 32 and 33, T.22N., R.26E., M.D.B.&M.; all of Sections 1 through 36, T.19N., R.25E., M.D.B.&M.; Sections 1, 2, 3, 4 and 5, a portion of Section 6, and Sections 7 through 36, T.19N., R.24E., M.D.B.&M.; and portions of Sections 1, 12, 13, 14 and 23, Sections 24 and 25, portions of Sections 26, 27 and 34, and Sections 35 and 36, T.19.N., R.23E., M.D.B.&M.¹

¹ File No. 80468, official records in the Office of the State Engineer.

II.

Application 80469 was filed on January 14, 2011, by the City of Fernley to appropriate 6.0 cfs, not to exceed 4,343.82 afa, of water from an underground source for municipal and domestic purposes. The proposed point of diversion is described as being located within the SE¼ SW¼ of Section 8, T.21N., R.25E., M.D.B.&M. The proposed place of use is described as being the same as identified on application 80468.²

III.

Application 80470 was filed on January 14, 2011, by the City of Fernley to appropriate 6.0 cfs, not to exceed 4,343.82 afa, of water from an underground source for municipal and domestic purposes. The proposed point of diversion is described as being located within the NE¼ SW¼ of Section 8, T.21N., R.25E., M.D.B.&M. The proposed place of use is described as being the same as that identified on application 80468.³

IV.

Applications 80468, 80469 and 80470 were timely protested by the Pyramid Lake Paiute Tribe of Indians (Tribe) on the grounds summarized below:

1. The applications request to appropriate more groundwater than the perennial yield of the Pyramid Lake Valley Basin No. 81;
2. That the applications would be detrimental to the public interest where the Applicant does not own or control the land at the points of diversion, and also that the Applicant would be required to construct its pipeline across lands owned by the United States;
3. That the applications failed to include information required by NRS § 533.340, including the approximate number of persons to be served with the requested municipal and domestic uses;
4. That the Applicant should be required to conduct hydrologic and environmental studies pursuant to NRS § 533.368, prior to the State Engineer taking action on the applications;
5. That the applications involve an interbasin transfer and the Applicant failed to include information required by NRS § 533.370(3); and

² File No. 80469, official records in the Office of the State Engineer.

³ File No. 80470, official records in the Office of the State Engineer.

6. The applications would be detrimental to the Tribe's interests, including depleting water from the Pyramid Lake Basin and from Pyramid Lake, by degrading the water quality of Pyramid Lake and the groundwater resources of the Tribe, by adversely affecting regional groundwater levels and the Tribe's use of groundwater resources and groundwater wells on the Pyramid Lake Reservation, by preventing or interfering with the survival and recovery of threatened and endangered fish in the lower Truckee River and Pyramid Lake, by adversely affecting the recreational value of Pyramid Lake, and by interfering with the purposes for which the Pyramid Lake Reservation was established.

FINDINGS OF FACT

I.

Nevada Revised Statute § 533.365(4) 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 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.

On September 13, 2012, the Applicant filed an Answer to the protest pursuant to NAC § 533.140.⁴ Generally, the Answer responded to the issues raised in the Tribe's protest, asserting that the protest-grounds should be overruled and the applications granted. Within the Answer, the Applicant signaled its willingness to provide additional information upon request of the State Engineer regarding several issues that the Tribe protested as lacking from the application.

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.⁵

In February of 2013, the State Engineer ordered the Applicant to provide additional information pursuant to NRS § 533.375, including:

⁴ The State Engineer notes that NAC § 533.140 allows for the filing of an Answer within 45-days of the filing of a protest. Here, the Answer was filed 18 months after the protests were filed; therefore, while declining to strike the Answer, the State Engineer will only afford the Answer the weight it deserves in light of its lateness.

⁵ NRS § 533.375.

1. Reliable scientific evidence of a greater perennial yield than that used by the State Engineer;⁶
2. Information regarding the approximate number of people to be served and the approximate future requirement as required for these applications by NRS § 533.340(3);⁷
3. Information concerning the additional statutory considerations required for an interbasin transfer pursuant to NRS § 533.070(6);⁸ and,
4. Information regarding the financial ability and reasonable expectation of Fernley to construct the works and apply the water to beneficial use with reasonable diligence.⁹

III.

On June 7, 2013, Fernley filed its Response to the State Engineer's request. Fernley acknowledged that there was currently no evidence that the perennial yield was higher, as Fernley had originally asserted. Fernley suggested it would be willing to fund a basin study, but conceded that the study had not been conducted yet. Fernley suggested that the State Engineer approve the applications, but limit them to staged development as provided for under NRS § 533.3705, until it could provide proof based on data gathered from the staged development that would support allowing the pumpage of the full duty applied for under the applications. Next, Fernley did provide a future population estimate, but did not include an estimate of the future requirements for the population, as estimated. Finally, in response to the request concerning Fernley's good faith and financial ability to construct the necessary works, Fernley's response gave no real indication of Fernley's intention or ability to construct the necessary works.

⁶ See Answer, p. 2. ("Fernley believes that the perennial yield of the basin is greater than previously estimated, and will present reliable scientific evidence of a greater perennial yield to the State Engineer.")

⁷ See Answer, p. 6. ("When the State Engineer desires more explicit information concerning population it is readily available. Upon request, Fernley will promptly file a letter in support of the Applications to provide such up-to-date information.")

⁸ See Answer, p. 8. ("Should the State Engineer have questions or concerns regarding any of the considerations enumerated in NRS 533.070(6), he may request any information he deems necessary.")

⁹ See Answer, p. 10. ("Based on the information provided on the Applications, should the State Engineer have concerns under NRS 533.370(1)(c) with Fernley's good faith ability to apply the water to beneficial use, Fernley will provide such additional information as the State Engineer deems necessary.")

The Tribe was granted permission to respond to the information Fernley provided, and argued that Fernley's Response was inadequate or incomplete. The State Engineer finds that Fernley's Response, although purporting to respond to the State Engineer, was largely unresponsive to the requests for additional information. Additionally, the State Engineer finds that Fernley did not respond at all to the State Engineer's request for information addressing the statutory criteria for an interbasin transfer pursuant to NRS § 533.070(6). The State Engineer finds that Fernley provided either insufficient or no information in response to the State Engineer's order for additional information.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and of the subject matter of this action and determination.¹⁰

II.

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:¹¹

- 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 protectable 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.

Nevada Revised Statute § 533.370(3) requires the State Engineer to consider the following points when an interbasin transfer of water is proposed by an application to appropriate water:¹²

- A. Whether the applicant has justified the need to import water from another basin;
- B. If the State Engineer determines that a plan for conservation of water is advisable for the basin into which the water is to be imported, whether the applicant has demonstrated that such a plan has been adopted and is being effectively carried out;

¹⁰ NRS Chapters 533 and 534.

¹¹ NRS § 533.370(2).

¹² NRS § 533.370(3).

- C. Whether the proposed action is environmentally sound as it relates to the basin from which the water is exported;
- D. Whether the proposed action is an appropriate long-term use which will not unduly limit the future growth and development in the basin from which the water is exported; and
- E. Any other factor the State Engineer determines to be relevant.

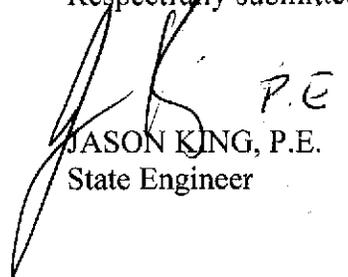
IV.

The State Engineer concludes that despite Fernley's assent to provide additional information upon request of the State Engineer, when requested to do so, Fernley's Response was largely unresponsive, and was completely non-responsive regarding information concerning the proposed interbasin transfer. Where NRS § 533.375 allows the State Engineer to request additional information to properly guard the public interest, the State Engineer concludes that granting applications in the face of incomplete and missing responses to a request for additional information would defeat the purpose of NRS § 533.375. Therefore, the State Engineer concludes that granting the applications in light of the current response would threaten to prove detrimental to the public interest.

RULING

The protests to Applications 80468, 80469 and 80470 are upheld in part, and the applications are hereby denied on the ground that the Applicant's inadequate responses to a request for additional information would threaten to prove detrimental to the public interest.

Respectfully submitted,


P.E.
JASON KING, P.E.
State Engineer

Dated this 10th day of
December, 2013.