

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

IN THE MATTER OF APPLICATION)
81063 FILED TO APPROPRIATE THE)
PUBLIC WATERS OF NORTH CREEK)
(AT SUNKIST) WITHIN THE SPRING)
VALLEY HYDROGRAPHIC BASIN (184),)
WHITE PINE COUNTY, NEVADA.)

RULING

#6250

GENERAL

I.

Application 81063 was filed on August 12, 2011, by the Southern Nevada Water Authority (SNWA) to appropriate 1.282 cubic feet per second (cfs), not to exceed 928 acre-feet annually (afa) of water from North Creek (at Sunkist). The proposed point of diversion is described as being located within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 23, T.21N., R.65E., M.D.B.&M. The proposed manner of use is for the irrigation of 232 acres of land from January 1st to December 31st of each year. The proposed place of use is described as being located within the W $\frac{1}{2}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ of Section 29, N $\frac{1}{2}$ NE, SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 32, T.22N. R.66E., M.D.B.&M.¹

II.

Application 81063 was timely protested by Kim G. Bundy on grounds that Bundy's Permit 4951, Certificate 1209, is the senior water right on the stream and there is an insufficient amount of water to satisfy Permit 4951, Certificate 1209, let alone sufficient water to grant Application 81063.

III.

Application 81063 was timely protested by Henry C. Vogler, IV on grounds that approval would be detrimental to existing water rights, existing grazing rights, surface water and native vegetation, native animal species, domestic animals and the ranching industry, the amount of water requested is excessive and it would interfere with the management of federal lands.

IV.

Application 81063 was timely protested by the Ely Shoshone Tribe, the Confederated Tribes of the Goshute Reservation and the Duckwater Shoshone Tribe on numerous protest issues, including but not limited to, the following briefly summarized issues:

¹ File No. 81063, official records in the Office of the State Engineer.

1. The proposed use of the water is uncertain.
2. There is an insufficient amount of water in the proposed source of supply.
3. The application and proposed use would conflict with existing water rights and impermissibly diminish the sources of and protectable interests in domestic wells.
4. The appropriation and proposed use would be detrimental to the public interest on environmental grounds, would be environmentally unsound and unsustainable.
5. The appropriation and proposed use would have unduly negative impacts on cultural, historic, and religious resources, which would harm the public interest.
6. The appropriation and proposed use would violate federal and state laws that protect cultural, religious, and historic resources.
7. The appropriation and proposed use would violate the federal government's trust responsibility to the Tribe[s].
8. The appropriation and proposed use would unduly injure the Tribe's sovereignty and ability to regulate its territory.

FINDINGS OF FACT

I.

Nevada Revised Statutes § 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 sufficient evidence is available in the records of the Office of the State Engineer to evaluate the merits of Application 81063 and the associated protests and a hearing is not necessary.

II.

Before an application to appropriate from a surface water source can be considered for approval, it must be determined that there is sufficient unappropriated water available at the source and that the proposed appropriation will not conflict with existing water rights. One of the initial steps in making this determination is to identify all active water rights on the stream in question. The Office of the State Engineer has created and maintains a searchable water rights database to allow research of existing water rights. A review of the State Engineer's database identified two existing water rights on the stream system as shown below:

App.	Priority	Status	Source	Div. cfs	Duty afa	Use	Owner
4951	3/7/1918	Cer.	Negro Abe Creek	0.083	25.08	Irr.	Bundy
7097	4/24/1924	Cer.	North Creek	0.007	1.32	Stk.	Bews
Totals				0.090	26.40		

III.

Application 81063 proposes to divert 1.282 cfs, but not to exceed 928 afa from North Creek, approximately one-quarter mile west of Sunkist, Nevada. North Creek is a stream that flows easterly out of the Schell Creek Mountain Range into Spring Valley and past the mining ghost town of Sunkist, Nevada.

Less than one mile downstream of Sunkist, Nevada, North Creek converges with tributary streams Snowbank Canyon Creek and Ruby Creek. Then, approximately one additional mile further downstream, North Creek, Ruby Creek and Snowbank Creek converge with Frenchman Creek. Approximately one-mile downstream from where the creeks converge is the point of diversion and place of use of Permit 4951, Certificate 1209, held by Protestant Bundy.

The point of diversion of Permit 4951, Certificate 1209, is known as Negro Abe Creek. Negro Abe Creek is a direct result of the aforementioned convergence of streams. The State Engineer finds that by Permit 4951, Certificate 1209, Bundy is the most senior water right holder on the stream system with a priority date of March 7, 1918. The State Engineer finds that Permit 4951, Certificate 1209, is in good standing in the Office of the State Engineer.²

IV.

The point of diversion of Permit 4951, Certificate 1209, was the same as the proposed point of diversion in Application 81065.³ Application 81065 was denied by the State Engineer on August 28, 2013, due to insufficient unappropriated water at the source.⁴

The State Engineer finds that when a previous application has been rejected on the grounds that there is no unappropriated water; or, when its proposed use would conflict with existing rights or would threaten to prove detrimental to the public interest, any new applications

² File No. 4951, official records in the Office of the State Engineer.

³ File No. 81065, official records in the Office of the State Engineer.

⁴ State Engineer's Ruling No. 6234, dated August 28, 2013, official records in the Office of the State Engineer.

for a similar use on the source may be denied without publication.⁵ Although Application 81063 went to publication, the prior denial of Application 81065 on the grounds that there was insufficient unappropriated water at the source compels a similar result regarding Application 81063. The State Engineer finds that there is insufficient unappropriated water at the source to grant Application 81063.

V.

Records of the Office of the State Engineer show stream flow measurements collected and recorded on North Creek near Sunkist, Nevada from 1964 to the present.⁶ One reading of 2.23 cfs was recorded on July 14, 1964, and one reading in July 1998 of 1.13 cfs was recorded. More regular readings exist from July 1998 to the present that show an average of 1.9 cfs. The State Engineer finds that the higher flow rates occur during the spring freshet between April and July of each year and are relatively short in duration. The measurements show the average stream flow being exceeded usually in June or July during the freshet.

Additional stream flow analysis is available from *The Spring Valley Hydrographic Basin Inventory* (Inventory),⁷ which estimates average annual stream flow for North Creek at Sunkist to be 1.29 cfs, which when expanded equates to an annual stream flow duty of 928.99 acre-feet. Stream flow analysis from Frenchman's Canyon Creek was estimated at 0.19 cfs, which expands to 137.55 acre-feet, and demonstrates that the contribution as a tributary stream is small, at best. The Inventory is considered a snapshot in time as an estimate and makes no guarantee as to future water availability. The State Engineer finds that water infrequently does reach the point of diversion and place of use of Permit 4951, Certificate 1209, during the spring freshet. However, due to the proximity of the point of diversion and place of use of Permit 4951, Certificate 1209, delivery of a duty of water to fully satisfy cannot be reasonably expected each year.

Letters and memoranda included in the file for Permit 4951, Certificate 1209, describe past onsite conditions at the point of diversion and place of use of Permit 4951, Certificate 1209. For example, in 1919, there were at least four field investigations conducted by the Division of Water Resources in an attempt to verify that the flow in Negro Abe Creek was sufficient to grant Permit 4951, Certificate 1209. One investigation found the water reached the place of use for

⁵ NRS 533.370(2).

⁶ Nevada Division of Water Resources' Spring and Stream Flow Database, September 17, 2013, official records in the Office of the State Engineer, available on-line at <http://water.nv.gov/data/streamflow>.

⁷ Spring Valley Hydrographic Basin Inventory, 2011, pg. 107, official records in the Office of the State Engineer.

several days during the year; one investigation in April 1919 found there was insufficient flow; and the last investigation in July 1919 found the creek dry but a small stack of hay present, indicating the flow had been sufficient at an earlier point in time. Protestant Bundy asserts that in the 33 years they have held the right, there has only been sufficient drainage in four of those years to reach their point of diversion.

The State Engineer finds from evidence shown, Permit 4951, Certificate 1209, is rarely fully satisfied and additional water appropriations on this stream upstream of the Bundy's right would conflict with existing rights.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁸

II.

The State Engineer is prohibited by law from granting a permit to appropriate public waters where:⁹

- 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.

The State Engineer concludes that the senior water right on the North Creek stream system is Permit 4951, Certificate 1209, (Negro Abe Creek) with a priority of March 7, 1918. The State Engineer concludes that the proposed point of diversion of Application 81063 is over three miles upstream of the point of diversion of Permit 4951, Certificate 1209. The State Engineer concludes that Permit 4951, Certificate 1209, is rarely satisfied with a full duty.

The State Engineer concludes that it would not be reasonable to deliver the proposed 1.282 cfs to the proposed place of use in a ditch or pipeline without adverse affects on the senior water right Permit 4951, Certificate 1209. The State Engineer concludes that approval of Application 81063 would conflict with existing rights and would threaten to prove to be detrimental to the public interest.

⁸ NRS Chapter 533.

⁹ NRS § 533.370(2).

IV.

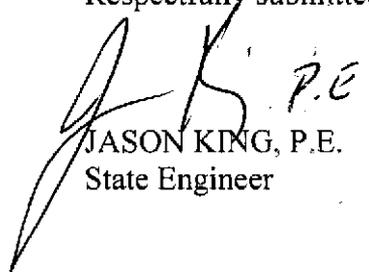
The State Engineer has previously denied an application for appropriation of water on this stream system. This denial was based on the grounds that approval would conflict with existing rights and that there is no unappropriated water at the source.³

The State Engineer concludes that the North Creek (Negro Abe) stream system is considered fully appropriated and no additional water remains for appropriation.

RULING

Application 81063 is hereby denied on the grounds that there is no unappropriated water at the proposed source and its approval would conflict with existing rights and threaten to prove detrimental to the public interest. No ruling is made on the merits of the remaining protest issues.

Respectfully submitted,



JASON KING, P.E.
State Engineer

Dated this 3rd day of
January, 2014.