

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

IN THE MATTER OF APPLICATION 81727)
FILED TO CHANGE THE MANNER OF)
USE OF THE PUBLIC WATERS OF AN)
UNDERGROUND SOURCE PREVIOUSLY)
APPROPRIATED UNDER PERMIT 67646)
WITHIN THE THREE LAKES VALLEY)
HYDROGRAPHIC BASIN (211), CLARK)
COUNTY, NEVADA.)

RULING
#6280

GENERAL

I.

Application 81727 was filed on April 3, 2012, by Ready Mix Inc. to change the manner of use of 2.0 cubic feet per second (cfs), not to exceed 300 acre-feet annually (afa), of groundwater within the Three Lakes Valley Hydrographic Basin (211). The water proposed to be changed was previously appropriated under Permit 67646¹ for commercial purposes identified as washing sand and gravel, and dust control. The proposed manner of use under Application 81727 is for municipal purposes. The place of use is unchanged and described as being located within Sections 5, 6, 8 and 9, T.17S., R.58E., M.D.B.&M. The point of diversion is unchanged and is described as being located within the SE¼ SE¼ of Section 5, T.17S., R.58E., M.D.B.&M. The remarks section of the application, which requires an applicant to provide a detailed description of the proposed project, indicates a plan to tie to an existing municipal system, not yet completed.²

II.

Application 81727 was timely protested by Col. Steven D. Garland, on behalf of the United States Air Force, on grounds including but not limited to:²

Based on the mandate set forth in 533.370[2], N.R.S., the State Water Engineer should reject this application for the following reasons.

¹ File No. 67646, official records in the Office of the State Engineer.

² File No. 81727, official records in the Office of the State Engineer.

The proposed place of use of this water is on four sections located both north and south of U.S. Interstate 95 where there is no municipal activity, and no privately owned land.

The approval of this application will impair the senior [reserved] water rights of the U.S. because: The application for the change of groundwater use from commercial to municipal by Ready Mix Inc. implies potential future land development to occur adjacent to the NTTR boundary near Basin 211, Three Lakes South. Such development would lead to increased water demand and encroachment issues that would ultimately hinder the mission of the U. S. Air Force.

The public interest would not be served by granting permits to these applications because: The water and water-related resources of the southern portion of the NTTR are of high importance due to national security and would be diminished or impaired as a result of the approval of this application.

III.

Application 81727 was timely protested by Toiyabe Chapter of the Sierra Club on grounds including but not limited to:²

There is no evidence that the amount applied for change of manner of use, 300 afa, has ever or regularly been put to beneficial use, since 2006, for the sand and gravel operation or could have done so with its existing infrastructure - ...

There is no evidence of the impacts of the permanent use of 300 afa for municipal use on other existing water rights and water resources, including but not limited to those in basin #211 and down gradient basin #212; i.e. the Desert National Wildlife Refuge and its Corn Creek station, domestic wells in the community of Corn Creek, and the US Air Force in the southern portion of the Nevada Test and Training Range.

There is no evidence of a contract between the applicant, Ready Mix of Scottsdale, Arizona, with a municipal water supplier. Changing the manner of use from commercial to municipal requires evidence of such a contract or would violate Nevada water law prohibiting speculation.

There is no municipal use in the four sections specified in the application #81727, Sections 5, 6, 8 & 9, Township 17 South, Range 58 East MDB&M. There is no municipality, no human residence, and no place to put water to beneficial use in the four sections or elsewhere in basin #211.... The applicant provides in line #15 a vague statement for the "detailed description of the proposed project and its water usage: "300 afa,

tie to existing municipal system to be completed.” Critical information is missing: What existing municipal system? How long is the “tie?” What is the cost of the pipeline? Will the works, including the pipeline, actually be completed in 3 years and 300 afa put to beneficial use in 5 years?

The amount of \$250,000, the estimated cost of works in line #12 of the application form for #81727, appears unrealistic, as a right-of-way across public lands managed by the Bureau of Land Management would require an Environmental Assessment or Environmental Impact Statement, the costs of either of which would likely exceed this stated amount.

IV.

By way of response to the protest by the U.S. Air Force, the agent for the Applicant, via letter dated July 10, 2012, indicates that Application 67646 is in good standing and does not conflict with existing rights and does not threaten to prove detrimental to the public interest as stated in the protest. He indicates that Ready Mix, Inc. does not intend nor has it implied that it will develop land adjacent to the NTTR boundary and asserts that there will be no increased water demand other than the permitted use. The agent states that the U.S. Air Force, NTTR, has never had a problem, to date, that they are aware of, and approval of Application 81727 will not impair or diminish the water and water related resources of the U.S. Air Force at NTTR, that there is no evidence submitted to support this protest other than innuendoes and assumptions that have no merit and that their protest is without merit and should be withdrawn.²

In the same letter, as response to the protest of the Toiyabe Chapter of the Sierra Club, the agent asserts that it is obvious that the Protestant does not understand the process of permitting for water projects of any kind. He indicates that the Applicant has the right to use the permitted water right for the permitted use and for the Protestant to speculate what the Applicant may or may not do is without merit.²

He asserts that the Applicant is currently in compliance with their BLM contract and that there has been no evidence of any impacts to other existing water rights and water resources in Basin 211, Basin 212, the Desert National Wildlife Refuge or Corn Creek Station, to domestic wells in the community, or the NTTR. He states that there have been no complaints by any of the adjacent water right holders.²

However, he also indicates that the Applicant does not have a contract with a municipal water supplier at this time, but alleges that there is no requirement, to their

knowledge, to have a contract in place prior to approval of an application. The Applicant's agent asserts that the Applicant has supplied the required information to questions 13, 14 and 15 in the application and that critical information is not missing. He alleges that the Protestant is just fishing and the additional information is not required.²

Finally, the agent asserts that the estimated costs of works is just that, an estimate and states that it is the intent of the Applicant to develop the resource to the fullest extent possible.²

FINDINGS OF FACT

I.

Nevada Revised Statute § 533.340 provides that an application for municipal supply shall contain information approximating the number of persons to be served and the approximate future requirement. The State Engineer finds the application lacks this required information.

II.

The proposed manner of use under Application 81727 is for municipal purposes to tie into a non-existent municipal system. Protestants assert that there is no municipal use in the four sections specified in the place of use and that there is no place to put water to beneficial use in the four sections. The Applicant provides a vague statement for the detailed description of the proposed project and its water usage: "300 afa, tie to existing municipal system to be completed." Protestants also assert that the water had been previously used for the commercial application at a borrow pit located near the Lee Canyon turn-off, just north of US Interstate 95. The gravel operation is now shut down and the land is being restored. The State Engineer finds that in a letter, dated June 11, 2012, the Bureau of Land Management has informed the State Engineer that this lease will not be renewed.²

In the case of *Bacher v. State Engineer*, 122 Nev. 1110 (2006), the Nevada Supreme Court specifically adopted the anti-speculation doctrine. The Court noted that NRS Chapter 533 provides that it is a fundamental requirement, as articulated in NRS § 533.030(1), that water may only be appropriated for beneficial use. The right to use water for a beneficial use depends on the party actually using the water. While the Court in the *Bacher* case was addressing an interbasin transfer and the beneficial use

requirement, the anti-speculation doctrine was made part of Nevada water law. This is also reflected in NRS § 533.370(1)(c), which provides that an applicant must provide proof satisfactory to the State Engineer of the applicant's intent in good faith to construct any works necessary to apply the water to the intended beneficial use with reasonable diligence and the financial ability and reasonable expectation to actually construct the work and apply the water to the intended beneficial use with reasonable diligence. In *Bacher*, the Court found that in order for an applicant to satisfy the "need to import water" requirement under NRS § 533.370, the applicant must provide evidence of a third-party need. He who applies the water for a beneficial purpose is in fact the actual appropriator,³ although the application may be made through the agency of another. The Court found that it was reasonable to assume that the Legislature intended to allow water right permit applicants to rely on a third-party's need to establish beneficial use; however, the ability to satisfy this third-party need is limited by the anti-speculation doctrine. The anti-speculation doctrine addresses the situation in which the purported appropriator does not intend to put the water to beneficial use and has no contractual or agency relationship with the one who does. The doctrine precludes speculative water right applications without a showing of beneficial use and precludes applications by persons who would only speculate on need. The Nevada Supreme Court specifically adopted the anti-speculation doctrine's formal relationship requirement for Nevada and that this doctrine specifically comports with the language and goals of NRS § 533.370(1)(c).

The State Engineer finds the facts of this application show there is no information on the persons to be actually served. The State Engineer finds there is no municipality within the proposed place of use. There is no water system in existence or evidence of a water system to be completed in the near future. The State Engineer finds there is no evidence of a third-party need in the proposed place of use. The State Engineer finds the application violates the anti-speculation doctrine adopted by the Nevada Supreme Court. The State Engineer finds that the Applicant has not provided proof satisfactory of the Applicant's intent in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence and the financial ability and reasonable expectation to actually construct the work and apply the water to the intended beneficial

³ *Prosole v. Steamboat Canal Co.*, 37 Nev. 254, 258-259 (1914).

use with reasonable diligence. The State Engineer finds the Applicant stated that it does not intend, nor has it implied an intent, to develop the land identified as the proposed place of use.

III.

Nevada Revised Statute § 533.030 provides that water may be appropriated for beneficial use and not otherwise. Nevada Revised Statute § 533.035 provides that beneficial use shall be the basis, the measure and the limit of the right to the use of water. The right to use water must be limited and restricted to as much as may be necessary when reasonably and economically used for a beneficial purpose. NRS § 533.060. The quantity of water that may be appropriated is limited to such water as shall be reasonably required for the beneficial use to be served. NRS § 533.070. The State Engineer finds no information supports a demonstration of potential actual beneficial use of the water and it would threaten to prove detrimental to the public interest to grant the application under those circumstances.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁴

II.

The State Engineer concludes that Application 81727 does not include the statutorily required information under NRS § 533.335, which provides that an application for municipal supply shall contain information approximating the number of persons to be served and the approximate future requirement

III.

The State Engineer concludes that the Applicant has not provided an adequate demonstration of potential actual beneficial use of the water or a contractual or agency relationship with the actual beneficial user of the water.

⁴ NRS Chapters 533 and 534.

IV.

The State Engineer is prohibited by law from granting a permit under a change application that requests to appropriate the public waters where:⁵

- 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.

V.

The State Engineer concludes that Ready Mix, Inc. is not a municipality and provided information that it has no intent to actually place the water to beneficial use itself. The State Engineer concludes the Applicant has not demonstrated a municipal need in the place of use as describe in the application. The State Engineer concludes the Applicant has not adequately demonstrated an agency or contractual relationship with the entity it indicates it will tie into for a non-existent water system. The State Engineer concludes the application violates Nevada Revised Statute § 533.370 and the anti-speculation doctrine and does not demonstrate a legitimate actual beneficial use of the water.

VI.

The Applicant has not been able to demonstrate a beneficial use as applied for under this change application, has not demonstrated the amount of water that may be necessary, has not demonstrated the approximate number of persons to be served or the approximate future requirement, has not provided satisfactory proof of a good faith intention to construct the works and to apply the water to the intended beneficial use with reasonable diligence and has not demonstrated an agency or contractual relationship with the entity that would actually place the water to beneficial use. Based on the findings and the statutory authority, the State Engineer concludes it would threaten to prove detrimental to the public interest to grant the application.

⁵ NRS § 533.370(2).

RULING

The protests to Application 81727 are upheld in part and Application 81727 is hereby denied on the grounds the Applicant has not met many statutory criteria and to issue a permit under these circumstances would 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 12th day of
June, 2014.