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

IN THE MATTER OF APPLICATIONS 78777, 78778, 78779 AND 78780 FILED TO APPROPRIATE THE SURFACE WATERS OF SNAKE CREEK, ROWLAND SPRINGS, LEHMAN CREEK, AND BAKER CREEK WITHIN THE SNAKE VALLEY HYDROGRAPHIC BASIN (195), WHITE PINE COUNTY, NEVADA.	)	**RULING** **#6324**

GENERAL

I.

Application 78777 was filed on August 5, 2009, by the United States of America, National Park Service (NPS) to appropriate 1.0 cubic foot per second (cfs) of non-consumptive instream flow during the month of April, then September through November, and also seeks to appropriate 3.5 cfs of non-consumptive instream flow for the months of May through August from the waters of Snake Creek. The proposed point of diversion is described as being located within the NE¼ NE¼ of Section 17, T.12N., R.70E., M.D.B.&M. The proposed place of use is described as lying within the bed and banks of Snake Creek, located within Sections 17 and 18, T.12N., R.70E., M.D.B.&M. The manner of use is described as wildlife, including the maintenance of aquatic habitat and further described in the remarks section of the Application as the support of wildlife, fisheries, recreation and riparian vegetation.[1]

II.

Application 78778 was filed on August 5, 2009, by NPS to appropriate 2.7 cfs of non-consumptive instream flow from Rowland Springs from January 1 through December 31 each year. The proposed point of diversion is described as being located within the SE¼ SE¼ of Section 10, T.13N., R.69E., M.D.B.&M. The proposed place of use is described as being that part of the Rowland Springs streams, stream channels and surrounding seep areas lying within the boundaries of the Great Basin National Park, located within the SE¼ SE¼ of Section 10, T.13N., R.69E., M.D.B.&M. The manner of use is described as wildlife, including the maintenance of aquatic habitat and further described in the Remarks section of the Application as the support of wildlife, fisheries, recreation and riparian vegetation.[2]

---

[1] File No. 78777, official records in the Office of the State Engineer.
[2] File No. 78778, official records in the Office of the State Engineer.

III.

Application 78779 was filed on August 5, 2009, by NPS to appropriate 3.0 cfs of non-consumptive instream flow during the months of September through April, and also seeks to appropriate 9.9 cfs of non-consumptive instream flow for the months of May through August from the waters of Lehman Creek. The proposed point of diversion is described as being within the NW¼ SE¼ of Section 10, T.13N., R.69E., M.D.B.&M. The proposed place of use is described as lying within the bed and banks of Lehman Creek, located within Sections 9 and 10, T.13N., R.69E., M.D.B.& M. The manner of use is described as wildlife, including the maintenance of aquatic habitat and further described in the Remarks section of the Application as the support of wildlife, fisheries, recreation and riparian vegetation.[3]

IV.

Application 78780 was filed on August 5, 2009, by NPS to appropriate 5.1 cfs of non-consumptive instream flow during the months of September through April, and also seeks to appropriate 17.1 cfs of non-consumptive instream flow for the months of May through August from the waters of Baker Creek. The proposed point of diversion is described as being located within the NW¼ NW¼ of Section 23, T.13N., R.69E., M.D.B.&M. The proposed place of use is described as lying within the bed and banks of Baker Creek, located within the N½ of Sections 21 and 22, T.13N., R.69E., M.D.B.&M. The manner of use is described as wildlife, including the maintenance of aquatic habitat and further described in the Remarks section of the Application as the support of wildlife, fisheries, recreation and riparian vegetation.[4]

V.

Applications 78777, 78778, 78779 and 78780 were timely protested by Baker Ranches, Inc. on grounds as summarized below:[1,2,3,4]

1. Granting the applications would conflict with existing rights.
2. There is no unappropriated water available at the source.
3. The applications are in derogation of the public interest.
4. The applications fail to demonstrate any legal basis for the rights claimed.
5. No claim for a federal reserved water right can be sustained for a variety of reasons, because such a priority date would have been much later than the priority date for existing rights.
6. The applications are in violation of a prior agreement between Baker Ranches and NPS.
7. It is not in the public interest for NPS to administer an instream flow in such a manner that the flow does not exist.

---

[3] File No. 78779, official records in the Office of the State Engineer.
[4] File No. 78780, official records in the Office of the State Engineer.

8. It is not in the public interest for NPS to draw waters out of decreed streams without a permit.

VI.

Applications 78777, 78778, 78779 and 78780 were timely protested by the Southern Nevada Water Authority (SNWA) on the grounds that there is either insufficient, or no unappropriated water at the source, the proposed use may conflict with existing rights, the applications re-published in 2014 are not consistent with the Applicant's intent and should therefore be withdrawn, and that over-appropriation of the stream would threaten to prove detrimental to the public interest.[1,2,3,4]

VII.

Application 78777 was timely protested by Owen Gonder on the grounds that there is no water available at the source, the waters have already been appropriated by decree, that approval of the application would interfere with existing senior water rights and would threaten to prove detrimental to the public interest.[1]

VIII.

Applications 78779 and 78780 were timely protested by Judee Schaley and Zane Jordan on the grounds that there is no water available at the source, that the water has been appropriated and decreed under Proof of Appropriation V01066, that approval of the applications would interfere with senior water rights and that it is not in the public interest to approve the applications.[3,4]

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 in the case of Applications 78777, 78778, 78779 and 78780, 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.

All protestants assert that there is no unappropriated water available at the proposed sources. On or about October 16, 1934, the Baker and Lehman Creek stream system was declared fully appropriated by an adjudication of the stream system pursuant to NRS § 533.090,

et seq.[5] NPS filed a response to the protests, which asserted that the applications requested a right to non-consumptive instream flow for wildlife purposes.[1]

The State Engineer finds that water requested by the applications is non-consumptive; accordingly, this protest ground is overruled.

III.

All protestants allege that the applications, if approved, would conflict with existing rights. NPS responded to the protests that because the requested use was non-consumptive, there would be no conflict with existing senior rights.[1]

The headwaters of Snake Creek, Rowland Springs, Lehman Creek and Baker Creek originate from within the Wheeler Peak Scenic Area, which lies wholly within the Great Basin National Park. Snake Creek and Baker Creek originate near Pyramid Peak. Rowland Springs is tributary to Lehman Creek and lies within the national park. The headwaters of Lehman Creek originate on Bald Mountain, which is also within the Park.

The point of diversion of Permit 20794, Certificate 7573 is described as being located in the SW¼ NE¼ of Section 9, T.13N., R.69E., M.D.B.&M., and the source is Cave Spring, which is tributary to Baker-Lehman Creek. This right is upstream from Applications 78778 and 78779; however, Permit 20794, Certificate 7573 is owned by NPS.

The point of diversion of vested claim V01064 is described as being located within the SE¼ SE¼ of Section 10, T.13N., R.69E., M.D.B.&M., and the source is described as being Lehman Spring. The point of diversion of Permit 45518 is described as being located in the SW¼ SW¼ of Section 11, T.13N., R.69E., M.D.B.&M., and the source is described as being Rowland Springs. Lehman Spring and Rowland Springs appear to be one-and-the-same spring system. Vested claim V01064 and Permit 45518 are owned by Baker Ranches, Inc. The point of diversion of Permit 45974, also owned by Baker Ranches, Inc., is described as being located in the SW¼ SW¼ of Section 11, T.13N., R.69E., M.D.B.&M., and is described as being Lehman Creek and tributaries and is located nearby, but downstream to vested claim V01064 and Applications 78778 and 78779. The point of diversion and place of use of Application 78777 is located at an upstream location on the creek and no other water user has access above this point.

---

[5] Findings of Fact, Conclusions of Law and Decree, *In the Matter of the Determination of the Relative Rights in and to the Waters of Baker and Lehman Creeks and Tributaries in the County of White Pine, Nevada,* Seventh Judicial District Court of the State of Nevada, In and For the County of White Pine, October 16, 1935 (as amended *nunc pro tunc* February 3, 1950).

The State Engineer concurs with the response of NPS and finds that the beneficial use described in the applications is non-consumptive, and with no depletion of water, existing rights will not be impaired.

IV.

Baker Ranches alleges that it is not in the public interest for NPS to draw waters out of decreed streams without a permit. The State Engineer finds this issue is not properly before him where the pending applications are requests for new appropriations. A separate statutory process exists for alleged violations of Nevada water law where such allegations may be properly asserted. Accordingly, this protest ground is dismissed.

Further, where the State Engineer finds that these applications are requests for new appropriative rights, the applications are not for federal reserved rights and Baker's protest related to federal reserved rights is dismissed as being inapplicable to these applications.

V.

Baker Ranches asserts the applications are in breach of a former agreement reached with NPS; and, the applications fail to demonstrate any legal basis for the rights claimed where there is no rational connection between the proposed manner of use for recreation and water that will be sent into the ground. SNWA alleges that the applications re-published in 2014 are not consistent with the Applicant's intent and the applications should be withdrawn; and, all protestants assert that the subject applications would threaten to prove detrimental to the public interest.

When originally filed, the proposed manner of use of the applications was recreation, to include support of wildlife, fisheries, recreation and riparian vegetation. The applications were protested on grounds similar to those discussed hereinabove, which protests were overruled and the applications were granted by State Engineer's Ruling No. 6269.[6,7] Subsequently, the State Engineer followed its ordinary practice of requesting NPS remit permit fees for the issuance of the permits, which resulted in a dispute over the amount in fees owed. The resolution reached was that NPS was permitted to amend the applications to reflect the manner of use of wildlife, and the applications were re-published and the protest period was re-opened. SNWA alleges that the applications re-published in 2014 are not consistent with the Applicant's intent and the applications should be withdrawn. The State Engineer disagrees: the proposed manner of use of

---

[6] State Engineer's Ruling No. 6269 is hereafter withdrawn and replaced by this Ruling.

[7] As part of Ruling 6269, NPS and Baker Ranches reached a stipulation which previously resulted in Baker withdrawing its protests.

wildlife is consistent with supporting wildlife, fisheries, recreation and riparian vegetation. *See, e.g.,* NRS § 533.023. This protest ground is overruled.

The State Engineer likewise overrules Baker Ranches' protest that NPS is in breach of their former agreement. This Ruling still conditions approval of the applications on terms previously agreed to among NPS and Baker Ranches and adopted by the State Engineer; therefore, the State Engineer finds this protest ground is without merit. In addition, as stated above, the State Engineer finds that these applications are consistent with the Applicant's intent; therefore, Baker's protest that the applications fail to demonstrate any legal basis for the rights claimed is overruled. The State Engineer finds that water is to be put to beneficial use by instream flow and no water will be consumed consumptively other than that which occurs during the normal course of water passing through a natural channel.

Finally, the points of diversion and places of use of the subject applications are entirely within the Great Basin National Park, which is under the jurisdiction of the Applicant. The State Engineer finds that NPS's requested appropriations for non-consumptive instream flow rights by the federal agency charged with the management of Nevada's only national park for wildlife, to be a beneficial use, and that the applications do not threaten to prove detrimental to the public interest. *See generally, e.g, State v. Morros*, 104 Nev. 709, 715, 766 P.2d 263, 267 (1988) (no threat to the public interest in the granting of a non-consumptive water right to a federal agency managing the land surrounding the water source that will not reduce the amount of water presently available for other uses).

CONCLUSIONS OF LAW

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 under an application to appropriate the public water 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

[8] NRS chapter 533.
[9] NRS § 533.370(2).

D. the proposed use or change threatens to prove detrimental to the public interest.

III.

The State Engineer concludes that the applications request non-consumptive instream water rights, which do not require a finding that there is unappropriated water at the source.

IV.

The State Engineer concludes that the granting of Applications 78777, 78778, 78779 and 78780 will not conflict with existing rights on Snake Creek, Rowland Springs, Lehman Creek, or Baker Creek.

V.

The State Engineer concludes that the applications are consistent with wildlife purposes, and the use of water for wildlife purposes in the Great Basin National Park will not threaten to prove detrimental to the public interest.

VI.

The State Engineer concludes the remaining protest grounds lack merit and are dismissed as set forth above.

RULING

Applications 78777, 78778, 78779 and 78780 are granted subject to the following:

1. Payment of statutory fees;
2. Existing rights on Snake Creek, Rowland Springs, Lehman Creek, or Baker Creek;
3. The non-consumptive use of water appropriated;
4. The entire natural flow appropriated, other than natural existing losses from evapotranspiration from vegetation and recharge to groundwater, exiting the place of use undiverted; and
5. The amount, point of diversion, place and manner of use of water as described in the terms of the permit may not be changed.

Respectfully submitted,

P.E.

JASON KING, P.E.
State Engineer

Dated this 13th day of November, 2015.