

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

IN THE MATTER OF APPLICATION 85417)
FILED TO CHANGE THE POINT OF DIVERSION)
AND MANNER OF USE OF THE PUBLIC)
WATERS OF CARSON SLOUGH PREVIOUSLY)
APPROPRIATED UNDER V-10092, WITHIN THE)
AMARGOSA VALLEY HYDROGRAPHIC BASIN)
(230), NYE COUNTY, NEVADA.)

RULING
#6348

GENERAL

I.

Application 85417 was filed on August 28, 2015, by Ministerio Roca Solida Iglesia Cristiana to change the point of diversion and manner of use of 0.003 cubic feet per second, not to exceed an annual duty of 2.24 acre-feet, of the waters of Carson Slough previously claimed to be appropriated under claim of vested right under Proof of Appropriation V-10092. The existing manner of use claimed is for stock-watering purposes and the proposed manner of use is for recreation and domestic purposes. The existing point of diversion is described as being located all along the stream as it passes in a SW direction through the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21, T.17S., R.50E., M.D.B.&M. The proposed point of diversion is also described as being located within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 21, being more specifically described as “at a point from which the SW $\frac{1}{4}$ corner of said Section 21 bears S 31° 24’ 21” W, a distance of 1,523.90 feet.” The place of use remains unchanged and is comprised of a 40-acre parcel of land located within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 21.¹

II.

Application 85417 was timely protested by the U.S. Fish and Wildlife Service (USFWS) on the grounds that:¹

1. Proof of Claim No. V10092 is just a claim to a vested water right. That claim has not been adjudicated; therefore, the application to change the point of diversion and manner of use is premature. The relevant evidence does not establish the validity of this applicant’s claim of holding a vested water right

¹ File No. 85417, official records in the Office of the State Engineer.

under Nevada law. It is not in the public interest to approve a change application for a claimed, but invalid, water right.

2. Proof of Claim No. V10092 is based on purported water use for livestock that is alleged to have occurred on 640 acres of land (including the 40-acre parcel now owned by the applicant), which Alice Ober unsuccessfully attempted to purchase and patent in 1887, and the subsequent conveyances of the 40-acre parcel now owned by the applicant. The documentation provided with the Proof of Claim shows the following facts, which defeat the applicant's claim: Ober did not convey any water rights; Ober did not convey the subject 40-acre parcel; Ober defaulted on her contract with the State of Nevada; Ober did not receive patent for the subject 40-acre parcel (or any of the other 600 acres); and it was not until 1930, well after the establishment of Nevada Water Code, that the State of Nevada issued the first land patent for the subject 40-acre parcel now owned by the applicant. For these reasons, the claim to holding vested water rights that originated in, and were conveyed from, Ober is invalid.
3. Furthermore, the documentation provided with the claim fails to show that Ober watered livestock on the subject 40-acre parcel at all, much less that she did so to the exclusion of the other 600 acres in the wetland area. The United States now owns 600 of the 640 acres that Ober unsuccessfully attempted to purchase and patent. Therefore, even if vested water rights passed from Ober, the United States would be entitled to a pro-rata share of such vested water rights.
4. The source of water in the claim and application, Carson Slough, is vague and ambiguous. It appears that the applicant is referring to a historical feature that is now an intermittent stream and appears to be ephemeral at the POD [point of diversion]. It is not in the public interest for the State Engineer to approve a change application for a water right claim that is not valid and for a POD that is mainly dry. Due to the vague, ambiguous nature of the source identified in the claim and application, the Service reserves the right to supplement the grounds for this protest.

III.

On December 9, 2015, the Office of the State Engineer requested the Applicant to provide additional evidence to support its claim of historic use.¹ The Applicant responded with additional information on April 4, 2016.² The Protestant was notified on April 27, 2016, that additional information had been received and that it was available for review or arrangements to copy it could be made.²

² File No. V-10092, official records in the Office of the State Engineer.

IV.

Historically, the State Engineer has not issued many permits to change an un-adjudicated pre-statutory vested water right claim due to the uncertainty associated with a vested claim. However, Nevada Revised Statute § 533.085 provides that the appropriation of water through the statutory process shall not impair a vested water right nor shall the right of any person to take and use water be impaired or affected by any provision of the statutory appropriation process where the appropriations were initiated in accordance with the law prior to March 22, 1913.³ Nevada Revised Statute § 533.325 provides that any person who wishes to change the point of diversion, place or manner of use of water already appropriated shall before performing any work apply for a permit to do so. Thus, the State Engineer is sometimes faced with the statutory mandate to process change applications in the face of the uncertainty of any un-adjudicated pre-statutory vested water right claim.

In the rare cases where a change application has been granted on a vested water right claim, any such permit/certificate that is issued is subject to any future adjudication of that claim, which could result in the original vested right claim being found to be different than what was filed for under any proof of appropriation or may even be found to be an invalid vested right claim.

In reviewing a change of a vested claim, the State Engineer looks at the strength of that vested claim in terms of its likelihood of being found to be valid through the adjudication/deed process. The State Engineer reviews, among other statutory and possible factors, the evidence that supports the claim, the volume of water proposed by the change, the proposed manner of use, the specific circumstances associated with the vested claim and new use, and potential conflicts with other existing rights should a permit be granted. Generally, the State Engineer will only issue a permit on a vested claim if he feels that the volume of water claimed is real (and remember, vested claims are for beneficial uses of water that occurred decades to over 100 years ago), and for temporary manners of use. As an example, a change in manner of use of a vested claim for irrigation to municipal use to supply water to homes will be severely scrutinized and

³ A pre-statutory vested water for surface water must pre-date March 1, 1905, which is the date of the act that provides that "Any person, association or corporation desiring to appropriate any of the public waters shall before performing any work in connection with such appropriation make an application to the State Engineer for permission to make the same." Nevada Act of March 1, 1905, ch. 46 § 23.

may be denied because should that vested claim not come to fruition through the adjudication process, those homes will not have a firm water supply.

Understandably, prior State Engineers may have approached such a change differently, but the State Engineer believes caution should be exercised in deciding whether to grant a change of a vested claim to a manner of use that would experience dire consequences should the underlying vested claim be determined to be invalid through an adjudication process. That is not the case here.

There is a very unique set of facts and circumstances associated with every vested claim and any change of those vested claims. As such, any decision regarding this change application and previously approved change applications are not to be construed as precedent setting. The facts presented by this application and the issues raised by the protest are unique and only applicable to the matter at issue in this ruling.

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 an application to appropriate the public waters of the state of Nevada. After receiving information in support of Proof of Appropriation V-10092, 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 in this matter is not necessary.

II.

The State Engineer finds great irony in the USFWS' first protest claim that Proof of Appropriation No. V-10092 is just a claim to a vested water right, and that claim has not been adjudicated; therefore, the application to change the point of diversion and manner of use is premature. The USFWS further asserts that relevant evidence does not establish the validity of the Applicant's claim of holding a vested water right under Nevada law; therefore, it is not in the public interest to approve a change application for a claimed, but invalid, water right. This is exactly what Protestant USFWS did when it filed three applications to change un-adjudicated pre-statutory vested water right claims in almost the exact same area in 1989.⁴ The then-State Engineer

⁴ Applications 53636, 53637 and 54250.

approved those changes for the USFWS, yet here, the USFWS argues that the same opportunity should not be afforded Ministerio Roca Solida Iglesia Cristiana. The State Engineer reviews the record of those change applications in order to make a record to support the decision made here. Although those previous decisions are not binding, they are instructive of how previous State Engineer decisions were made under similar circumstances in this area.

Just like Application 85417, Applications 53636 and 54250 were filed by the USFWS (the protestant to Application 85417) in June and December of 1989, respectively, requesting to change the point of diversion, place and manner of use of un-adjudicated Proof of Appropriation V-01256. Just like Application 85417, Applications 53636 and 54250⁵ were filed to change a surface-water source, and just like Application 85417, Applications 53636 and 54250, were not only located in the same hydrographic basin, but in an area in close proximity to the application under consideration here, being another part of the Ash Meadows National Wildlife Refuge region. As permits were subsequently issued under those applications, the State Engineer can only surmise that the former State Engineer felt that the underlying Proof of Appropriation was supported by sufficient evidence to support the change applications in those instances. It is of note that the only supporting documentation for Proof of Appropriation V-01256 is a series of deeds that convey fee simple land from an owner who held the relevant land on May 21, 1913, to the claimant who filed the proof of appropriation on July 2, 1913.⁶ The only discussion of water use is found in a statement on the proof of appropriation claiming that water was used on the property in 1886.

Likewise, just like Application 85417, Application 53637⁷ was filed by the USFWS in June of 1989 to change the point of diversion, place and manner of use of un-adjudicated Proof of Appropriation V-02491.⁸ Just like Application 85417, Application 53637 was filed to change a surface-water source, and just like Application 85417, Application 53637 was located in the same hydrographic basin, in very close proximity to the other changes and is a part of the Ash Meadows National Wildlife Refuge region. A permit was subsequently issued under Application 53637 and the State Engineer can again only surmise that the former State Engineer felt that the underlying Proof of Appropriation was supported by sufficient evidence to support the change application in that instance.

⁵ File Nos. 53636 and 54250, official records in the Office of the State Engineer.

⁶ File No. V-01256, official records in the Office of the State Engineer.

⁷ File No. 53637, official record in the Office of the State Engineer.

⁸ File No. V-02491, official record in the Office of the State Engineer.

Again, the State Engineer finds irony in the Protestant's argument that Application 85417 should be denied due to the fact that the land in question for which the Applicant seeks a change was not patented until March 24, 1930. The abstract of title for land under Proof of Appropriation V-02491, described as the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 22, T.17S., R.50E., M.D.B.&M., which is the section directly east of the section of land in question under this application, was not patented until April 6, 1906, also after the March 1, 1905, timeframe. The Abstract of Title in the file for Proof of Appropriation V-02491 indicates that in 1894 it appears that the possessory claim for land entry passed to Nye County, which then conveyed the property in 1895 to A.J. Longstreet who obtained the patent for the land on April 6, 1906. It is also interesting to note that the abstract indicates that L.O. Ray, who is in the chain of title, filed a water right application on January 22, 1907; however, the records of the Office of the State Engineer indicate that Application 223 was filed on October 6, 1906, by L.O. Ray for the use of a spring for irrigation, domestic, mining and milling purposes on land that includes the N $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 22, T.17S., R.50E., M.D.B.&M.

The State Engineer finds that a review of previous State Engineer decisions based on an almost identical set of facts in the same region of the same basin for water right filings by the Protestant to Application 85417 provides guidance and instruction in the review of Application 85417.

In this case, the trail demonstrating the passing of the land from public to private ownership is found in the information provided by the Applicant, which correctly identified the land as originating from a "state select." State select land was acreage that was transferred from federal to state ownership during the later part of the nineteenth century. After its acquisition, much of this land was sold by the State of Nevada to the private sector. It is extremely unfair to the citizens of Nevada that the USFWS had almost identical applications granted to it, but now asserts that the Applicant should not be afforded similar consideration.

In this instance, it appears that Alice J. Ober filed a state land application for 640 acres of land that included the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21, T.17S., R.50E., M.D.B.&M. This land application was assigned the serial number 7904. In concert with this application, a contract was made on May 19, 1891, which required Ober to make full payment for the land by May 19, 1916.

Payments were made from 1892 – 1896, but the application/contract was forfeited for non-payment on January 27, 1900, with the land remaining in the name of the State of Nevada.⁹

While the initial attempt to acquire the land by Ober failed, a second land application was filed in the name of Key Pittman for 40 acres in the SW¹/₄ SW¹/₄ of said Section 21, on January 31, 1905. As was the case in Ober, a contract (#11925) was made with Pittman that required full payment by April 11, 1930.¹⁰ The records of the Nevada Division of State Lands indicate that payments were received in full, with State Land Patent issued to Pittman on March 24, 1930.¹¹

The Protestant claims that the Applicant's claim can be defeated based upon its contention that:¹

1. Ober did not convey any water rights; Ober did not convey the subject 40-acre parcel;
2. Ober defaulted on her contract with the State of Nevada; Ober did not receive patent for the 40-acre parcel (or any of the other 600 acres);
3. And it was not until 1930, well after the establishment of the Nevada Water Code, that the State of Nevada issued the first land patent for the subject 40-acre parcel now owned by the Applicant.

All three of these contentions are correct; however, the Protestant failed to acknowledge the second attempt by Pittman that was initiated in January 1905 and fails to acknowledge that the Applicant is almost identically situated as was the USFWS under its change applications.

The State Engineer finds that the Applicant has provided sufficient evidence that the pre-statutory appropriation of water claimed in Proof V-10092 is plausible.

III.

In addition, the USFWS asserts that the Applicant has failed to establish that livestock watering occurred on the Ober property prior to 1905. The Applicant supports its claim with more evidence than provided by the USFWS under its applications by using the Nye County tax assessment rolls beginning with documentation demonstrating that taxes were paid on livestock in 1887.¹² It also supports its claim using the Nye County tax assessment rolls beginning in 1913 where Key Pittman is identified as being assessed for a property located within the SW¹/₄ SW¹/₄ of Section

⁹ Supplemental information submitted for Proof V-10092, Tabs # 3 and 4, official records in the Office of the State Engineer.

¹⁰ Supplemental information submitted for Proof V-10092, Tab #6, official records in the Office of the State Engineer.

¹¹ Supplemental information submitted for Proof V-10092, Tabs #4, 6 and 7, official records in the Office of the State Engineer.

¹² File No. V-10092, official records in the Office of the State Engineer.

21, T.17S., R.50E., M.D.B.&M. These assessments show that the land was taxed at a rate for *grazing*. The assessment continues under the name of Pittman on an annual basis until 1942 at which time the property is listed under Connor Lue J. and Carver from 1943 through 1945.¹³ The acquisition of the property by the Carver interests continued until 1997, when it was transferred to Ronald D. Matheny, who grazed assorted livestock, until he “completely moved off the property” in 2008.¹⁴ Documentation in the Proof of Appropriation V-10092 appears to show the Ministerio Roca Solida Iglesia Cristiana acquired the land around 2006. Throughout its history from Pittman to Carver to Matheny and beyond, title to the subject property has existed in some form. Based upon the fact that the land patent applied for by Key Pittman was filed on January 31, 1905, and the fact that tax records indicate a tax rate for “grazed” lands, the State Engineer finds a well documented history of annual tax payments verifies that over a period spanning many years, a variety of owners have retained an active interest in the subject parcel of land. The State Engineer finds that there is sufficient evidence to support a finding that a use of Carson Slough water as described by the Applicant under Proof of Appropriation V-10092 was plausible prior to March 1905.

IV.

The final protest issue centers around the theory that Carson Slough is an intermittent source of water that experiences periods of low or no flow. To address this point, the Nevada Division of Lands 1888 land plat was reviewed, which clearly depicts Carson Slough as a marsh area that includes the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 21. This agrees with the Ash Meadows 1952 U.S. Geological Survey (USGS) 15 minute topographic map that depicts a similar land form. Later depictions of the slough are found on the more recent Devils Hole 1987 7.5 minute topographic map. The USGS has depicted intermittent and ephemeral streams on its topographic maps for many years, by using different map legends. Ephemeral streams are defined by a solid blue line with intermittent stream having a broken blue line. On both the 15 minute and 7.5 minute USGS topographic maps, Carson Slough is depicted as an ephemeral stream, and the State Engineer makes a finding that Carson Slough may be classified as an ephemeral stream. The State Engineer finds

¹³ Supplemental information submitted in support of Proof V-10092, Tabs #4 and 8 through 13, official records in the Office of the State Engineer.

¹⁴ Supplemental information submitted in support of Proof V-10092, Tab #14, official records in the Office of the State Engineer.

that just because a water source may be intermittent does not automatically exclude it from consideration for appropriation.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.¹⁵

II.

The State Engineer is prohibited by law from granting a permit under a change application that requests to appropriate the public waters where:¹⁶

- 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 Applicant has provided evidence sufficient to establish that the claim of vested right under Proof of Appropriation V-10092 is plausible, and the USFWS protest to Application 85417 may be overruled.

IV.

The State Engineer concludes that the approval of Application 85417 is not intended to constitute an adjudication of claim of vested right under Proof V-10092 and, as such, the permit issued under Application 85417 shall be subject to adjudication on this source of water in the future.

V.

The State Engineer concludes that nothing in this ruling shall be taken as establishing precedent in any other case, but rather this ruling is based on the unique set of facts and circumstances of this case.

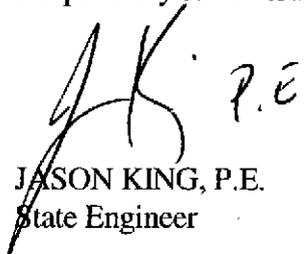
¹⁵ NRS Chapter 533.

¹⁶ NRS 533.370(2).

RULING

The protest to Application 85417 is hereby overruled and Application 85417 is approved subject to existing water rights and the payment of the statutory permit fee.

Respectfully submitted,


JASON KING, P.E.
State Engineer

Dated this 14th day of
June, 2016.