

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

IN THE MATTER OF APPLICATIONS 81825)
AND 82572 FILED TO APPROPRIATE THE)
PUBLIC WATERS OF THE DIAMOND)
VALLEY HYDROGRAPHIC BASIN (153,))
EUREKA COUNTY, NEVADA.)

RULING
#6372

GENERAL

I.

Application 81825 was filed on April 26, 2012, by Daniel S. Venturacci to appropriate 8.0 cubic feet per second (cfs) of groundwater for irrigation and domestic purposes. The proposed point of diversion is described as being located within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 3, T.23N., R.54E., M.D.B.&M. The proposed place of use is described as being located within portions of the S $\frac{1}{2}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ and SW $\frac{1}{4}$ of Section 3, T.23N., R.54E., M.D.B.&M., portions of the NE $\frac{1}{4}$ and SE $\frac{1}{4}$ of Section 4, T.23N., R.54E., M.D.B.&M., portions of the NE $\frac{1}{4}$ of Section 9, T.23N., R.54E., M.D.B.&M., and portions of the N $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 10, T.23N., R.54E., M.D.B.&M. (607.93 acres). Item 12 of the application, which describes the proposed works of diversion, indicates that the lands to be irrigated are identical to those described and mapped under amended Proof of Appropriation V-01115 and that the application seeks to restore irrigation by diverting groundwater that formerly discharged at the surface as Taft Springs¹ and applied to the land in a supplemental manner.²

II.

Application 81825 was timely protested by Diamond Cattle Company, Dusty L. Moyle, Eureka County, James L. Moyle, Kenneth Benson and Mark S. Moyle, and a joint protest was filed by Etcheverry Family Ltd. Partnership, Diamond Cattle Company and Kenneth Benson on grounds addressed in State Engineer's Ruling No. 6290 (Ruling No. 6290).³

¹ Taft Springs is also commonly known as Thompson Springs.

² Exhibit No. 15, public administrative hearing before the State Engineer November 18-22, 2013, official records in the Office of the State Engineer. Hereinafter the exhibits and transcript will be referred to solely by the exhibit number or transcript page.

³ Exhibit Nos. 18, 19, 20, 21 and 22.

III.

Application 82572 was filed on February 25, 2013, by Daniel S. Venturacci to appropriate 5.0 cfs of groundwater for irrigation and domestic purposes. The proposed point of diversion is described as being located within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 3, T.23N., R.54E., M.D.B.&M. The proposed place of use is described as being located within Lot 4, S $\frac{1}{2}$ NW $\frac{1}{4}$, portions of the S $\frac{1}{2}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 3, Lots 1–3, S $\frac{1}{2}$ NW $\frac{1}{4}$, S $\frac{1}{2}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$, SE $\frac{1}{4}$ of Section 4, NE $\frac{1}{4}$ of Section 9, NW $\frac{1}{4}$, N $\frac{1}{2}$ NE $\frac{1}{4}$, portions of S $\frac{1}{2}$ NE $\frac{1}{4}$, portions of the NW $\frac{1}{4}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ of Section 10, all within T.23N., R.54E., M.D.B.&M. (1,636.36 acres). Item 12 of the application indicates that the appropriation seeks to replace pre-statutory vested rights, that the application was filed to mitigate impacts to those existing rights on the Thompson Ranch, and that the application seeks to supplement existing rights for mitigation purposes only.⁴

IV.

Application 82572 was timely protested by Diamond Cattle Company, Diamond Natural Resources Protection and Conservation Association, Etcheverry Family Ltd. Partnership, Eureka County, James L. Moyle, Kenneth Benson and Mark Moyle Farms, LLC on grounds addressed in Ruling No. 6290.⁵

V.

On August 15, 2014, the State Engineer issued Ruling No. 6290, in which he overruled the protests to Applications 81825 and 82572 and approved Permits 81825 and 82572 for 1.54 cfs, but not to exceed a total combined duty of 612.9 acre-feet annually (afa). The granting of the applications was to mitigate the loss of spring discharge due to groundwater pumping by junior appropriators.

On September 23, 2014, Daniel S. Venturacci (Applicant) filed with the Seventh Judicial District Court (Court) a petition for judicial review pursuant to Nevada Revised Statutes (NRS) § 533.450. After briefing and oral argument, on February 24, 2016, the Court issued Findings of Fact Conclusions of Law, Order Partially Granting Petition for Judicial Review, and Order Partially Denying Petition for Judicial Review (Order). The Court ordered with respect to Permits 81825 and 82572 that:

⁴ Exhibit No. 52.

⁵ Exhibit Nos. 53, 54, 55, 56, 57, 58 and 59.

1. The State Engineer's use of contemporary irrigation methods to calculate the Applicant's mitigation permits is rejected.
2. The case is remanded to the State Engineer to establish Applicant's mitigation right to be calculated based on the amount of water Applicant appropriated to beneficial use prior to 1905.
3. The State Engineer immediately initiate the administrative process to establish Applicant's mitigation right consistent with the Order.
4. All evidence entered into the record for Applications 81825 and 82572 be used by the State Engineer to establish Applicant's mitigation right without necessity of further hearings before the State Engineer to have that evidence considered.
5. Any further administrative hearings to comply with the Order be held on or before August 1, 2016.

FINDINGS OF FACT

I.

Bailey's Water Rights and Precedent

In the Order of remand, the Court discussed another mitigation water right granted in Diamond Valley that was issued to Wilfred Bailey and noted that the water right granted Bailey, Permit 63497, was issued at 2 cfs, not to exceed 504 afa, for the irrigation of 126 acres, which is a duty of 4 af/acre. This was the amount of water claimed by Bailey to have been appropriated from Bailey Spring under his claim of pre-statutory vested water right filed under Proof of Appropriation V-01104. The Court saw no difference between this permit and the Venturacci applications and found that the Bailey mitigation permit was a precedent for how to calculate a mitigation water right in Diamond Valley. The Court found that Venturacci is entitled to a mitigation right to be calculated under Nevada's water law and the State Engineer's precedent already established in Diamond Valley in the Wilfred Bailey case. It ordered the State Engineer to determine Venturacci's mitigation right based on the amount of water Venturacci appropriated prior to 1905 based on beneficial use and doctrine of prior appropriation

Wallace Bailey for Marietta Bailey filed Proof of Appropriation V-01104 in 1912, claiming a pre-statutory vested water right for the irrigation of 128.5 acres of land with crops of meadow grass, alfalfa and grain, and a season of use claimed as April 1 through September 30 of each year.⁶ Proof of Appropriation V-01104 notes that the total flow of the spring was about 2 cfs, that all of the water was used every year, and asserted that the claimant was the only user of the water. On November 18, 1912, H.M. Payne from the Office of the State Engineer conducted a field investigation of the site and observed 100 or more acres in cultivation and a small

⁶ File No. V-01104, official records in the Office of the State Engineer.

reservoir to control the flow from the spring, and he stated that it was an old right with no other user.⁷ Based on his recommendation, Certificate 140 was issued by the State Engineer for 105 acres of meadow and Certificate 147 was issued for 21 acres of meadow, alfalfa, and grain, for a total of 126 acres.^{8,9} Both certificates allowed for stockwater and domestic uses and limited the irrigation to a season of April 1 through September 30 of each year.

Similarly, when H.M. Payne visited the Thompson Ranch on October 14, 1912, Proofs of Appropriation V-01114 and V-01115 were on file with the Office of the State Engineer, allowing him to evaluate the veracity of these claims. He reported that the Horse Canyon source was snow water that flows a maximum of 2 cfs from March 15 to June 15 to irrigate the lower end of the meadow, which was also irrigated from Taft Springs, and he reported that the springs did not vary in flow and consisted of two springs, the smaller of which he measured at 0.25 cfs and was used to irrigate about 20 acres of alfalfa and grain and the larger of which he measured at 1.29 cfs and was used to irrigate nearly 200 acres of meadow land. He also noted that the reservoirs and ditches were configured in such a way as to support use of water from the smaller spring onto the meadowland and to recapture water lost from the smaller spring's ditch by the larger spring's ditch.¹⁰

Based on Payne's field report, the State Engineer issued Certificate 38 for Proof of Appropriation V-01114 for the irrigation of 50 acres of land from Horse Canyon with a priority

⁷ Exhibit 145.

⁸ The 1903 and 1905 acts relating to the adjudication procedure relevant to determinations of pre-statutory vested water rights was very simple. The Act vested the State Engineer with the authority to collect and prepare for each stream in the state a list of appropriations of water according to priority, based on a hydrographic survey of such stream and cultural survey of the lands irrigated from the stream, and upon the sworn statement of each appropriator of the facts upon which the claim was based. Following the preparation of such a list, it became the duty of the State Engineer to issue certificates of water rights. The acts of 1903 and 1905 were repealed in 1907 and replaced by a new act. In 1909 and 1911, certain amendments were added to the law, but in 1913 that act was repealed and replaced by a new act. In 1921, the Nevada Supreme Court ruled in the case of *Pitt v. Scrugham*, 44 Nev. 418, 195 P. 1101 (1921), that certain sections of the 1913 act relating to the adjudication procedure were unconstitutional, as they gave the State Engineer certain judicial powers. The result of this ruling was that, although it was applied to the 1913 act, it annulled all adjudication proceedings under the older acts insofar as the earlier acts gave the State Engineer judicial powers in determining the magnitude and extent of water rights. The certificates are now used as historical information as to what the State Engineer believed was the water right at the time the certificate was issued.

⁹ File No. V-01104, official records in the Office of the State Engineer.

¹⁰ Exhibit No. 339.

date of 1880.¹¹ Additionally, the State Engineer issued Certificate 39 for Proof of Appropriation V-01115 for the irrigation of 148.30 acres of land from Taft Springs with a priority date of 1880 and Certificate 40 for the same proof and source for 6 acres of land with a priority date of 1901.^{12,13} All three certificates allowed for stockwater and domestic uses.

Permit 63497 was issued to Wilfred Bailey in 1998 as supplemental to Proof of Appropriation V-01104 and for 2.0 cfs, not to exceed 504.0 acre-feet per season (afs), for the irrigation of 126 acres, with the terms of the permit indicating that the express purpose of issuing the permit was to replace water historically placed to beneficial use under Proof of Appropriation V-01104, Certificates 140 and 147. The use of the water was specifically limited to the spring discharge area, and the seasonal duty was limited to 4 af per acre of land irrigated from all sources.

Based on the Proof of Beneficial Use filed under Permit 63497, Certificate 16935 was issued in 2008 subject to the terms of the permit (including the term that the express purpose of issuing the permit was to replace water historically placed to beneficial use under Proof of Appropriation V-01104) and as totally supplemental to Proof of Appropriation V-01104 for 2.0 cfs, not to exceed 408.3 afs, for the irrigation of 120.713 acres, at a seasonal duty rate not to exceed 3.39 acre-feet per acre from all sources, and the period of use was limited to April 1 through September 30 of each year. It is also notable that the priority date of the appropriation was the date the application was filed, October 10, 1997, in accordance with Nevada Water Law.¹⁴

The State Engineer finds that the Bailey mitigation water right, which the Court opined was precedential for the calculation of the Sadler mitigation applications, has a priority date of October 10, 1997; was supplemental to Bailey's Proof of Appropriation V-01104; and was limited by the flow rate of the Bailey Spring, the acres irrigated, a total duty of 3.39 af per acre of land irrigated from any and all sources, and an irrigation season of April 1 through September 30 of each year.

¹¹ Certificate No. 38, Book No.2, Page No. 38, official records in the Office of the State Engineer.

¹² Certificate No. 39, Book No.2, Page No. 39, official records in the Office of the State Engineer.

¹³ Certificate No. 40, Book No.2, Page No. 40, official records in the Office of the State Engineer.

¹⁴ File No. 63497, official records in the Office of the State Engineer.

II.

Thompson Ranch Beneficial Use Prior to 1905

On remand to the State Engineer, the Court found that:

...with respect to the issue of beneficial use that the State Engineer's findings and factual determinations are supported by substantial evidence. Venturacci has not carried his burden of proof on this issue.... Venturacci's challenge to the limitations placed by the State Engineer based on waters from seeps and springs commingled from Horse Canyon in Venturacci's second amended Proof of Appropriation V-01115 filed February 25, 2013, and application 81825 must be denied.

In other words, although the Court disagreed with the State Engineer that a physical diversion was a necessary component for establishing beneficial use under the proof, it did support the State Engineer's finding that there was insufficient evidence of the amount and location of any beneficial use from any water emitting from these other seep and spring sources or that they were pre-statutory in nature.

Along with this finding, the Court found that the State Engineer has no authority to use the contemporary agricultural method of calculation to establish a mitigation right and ordered that the use of calculations based on contemporary irrigation methods was rejected, that the State Engineer "establish Venturacci's mitigation right in application no. 81825 and no. 82572 to be calculated based on the amount of water Venturacci appropriated to beneficial use prior to 1905," and that "all evidence entered into the record for applications 81825, 82570, 82571, 82572 and 82573, be used by the State Engineer without necessity of further hearings before the State Engineer to have that evidence considered."

Taking these findings together, the State Engineer finds that he must recalculate the amount of water diverted from Taft Springs for beneficial use prior to 1905 without assuming modern irrigation practice.

Proof of Appropriation V-01114 was filed in the Office of the State Engineer June 26, 1912, claiming a pre-statutory vested water right for irrigation by waters from Horse Canyon, and Proof of Appropriation V-01115 was filed in the Office of the State Engineer June 26, 1912, claiming a pre-statutory vested water right for irrigation by waters from Taft Springs. Neither a diversion rate nor duty was provided on the proof forms. The waters of Horse Canyon are described as flowing only during a portion of the season from snow melt, and the waters of Taft Springs are described as being consistent in flow. The waters are described as being

commingled before being used on a total of 206 acres of land, and it is estimated about 50 acres are irrigated under Horse Canyon and the remaining 156 acres by Taft Springs. The supporting map filed by Geo. S. Nickerson includes cultural descriptions of the number of acres and type of crop by legal subdivision. Two types of culture are described: alfalfa, garden and grain (12.36 acres) and meadow (191.94 acres) for a total of 204.30 acres, a bit less than described in the proof forms. Irrigation from Horse Canyon occurred from April 1 through June 15 of each year, and irrigation from Taft Springs occurred from April 1 through October 30 of each year.^{15,16}

As described in greater detail under Finding of Fact I above, on October 14, 1912, H.M. Payne from the Office of the State Engineer conducted a field investigation of Proofs of Appropriation V-01114 and V-01115 and on November 23, 1912, the State Engineer issued Certificate 38 for Proof of Appropriation V-01114 and on November 25, 1912, the State Engineer issued Certificates 39 and 40 for Proof of Appropriation V-01115. These certificates described the appropriations as irrigation of 50 acres of land from Horse Canyon with a priority date of 1880 and as the irrigation of 148.3 acres with an 1880 priority date and 6 acres with a 1901 priority date, respectively, from Taft Springs. The total of these certificates from these two sources is 204.3 acres.^{17,18,19}

Proofs of Appropriation V-01114 and V-01115 were amended on January 30, 1975, to increase the amount of meadow grass by an additional 14.41 acres, to include 405.80 acres of diversified pasture and the watering of 500 head of cattle and 100 head of horses. The ownership of the land changed since the original claim filings in 1912 and included in the expanded place of use was some of this land, up to a fence line as depicted on the supporting map. The amendments also expanded the irrigation season to annual, claimed a duty of 4 acre-feet per acre of land irrigated and a variable flow rate from Horse Canyon and a flow rate of 3.12 cfs from Taft Springs.²⁰ Proofs of Appropriation V-01114 and V-01115 were amended again on February 25, 2013, to expand the claimed acreage to 208.97 acres of alfalfa and grain, 646.52 acres of hay and grasses, and 780.87 acres of diversified pasture for a total of 1,636.36 acres. The acreage

¹⁵ Exhibit No. 418.

¹⁶ Exhibit No. 23.

¹⁷ Certificate No. 38, Book No.2, Page No. 38, official records in the Office of the State Engineer.

¹⁸ Certificate No. 39, Book No.2, Page No. 39, official records in the Office of the State Engineer.

¹⁹ Certificate No. 40, Book No.2, Page No. 40, official records in the Office of the State Engineer.

²⁰ Exhibit Nos. 24 and 420.

claimed in this amended proof included areas beyond the fenced land to the full extent of all the land owned by the Applicant including the full area of almost every sixteenth section, and even some area beyond the parcel boundary was included. The claimed priority for Proof of Appropriation V-01115 was also changed from “1880” to “pre 1879,” and the source was expanded from “Taft Springs” to “springs and seeps.”²¹ There were also third amended proofs filed for each, but this was only to correct offset lines in the cultural table filed with the second amended proofs.²²

In the remarks section of the original proof filings, the only uncertainty expressed regarding where the water was placed to use was with respect to how much to attribute to Horse Canyon snow melt and how much to attribute to the Taft Springs water in those portions of Sections 9 and 10 supplied by the Horse Canyon Ditch, which joins with the ditch from the reservoir at Taft Springs.²³ This is also reflected in the map filed supporting Proofs V-01114 and V-01115. The State Engineer finds that since the area irrigated by Horse Canyon snow melt was also irrigated from Taft Springs, the acreage irrigated from the springs was 204.3 acres, with a portion irrigated by the water flowing from Horse Canyon when available.

The State Engineer finds that the field investigation by Payne and the resulting certificates are the best evidence of beneficial use prior to 1905 and establish the priority dates for these pre-statutory appropriations. They are contemporaneous documentation to the actual pre-statutory beneficial use, the proof is a sworn statement by the person claiming to have continued placing the water to beneficial use since George Taft, and the veracity of the proof was confirmed by field investigation and certification by the State Engineer in the same year. The State Engineer finds that there is insufficient evidence to support changing the original claim filing that the claimant Nels Toft swore was true in 1912.²⁴

²¹ Exhibit Nos. 25 and 421.

²² Exhibit No. 422.

²³ Exhibit Nos. 23 and 418.

²⁴ Subsequent to the filing of the proofs in 1912, the proofs were amended in 1974 and again by the Applicant in 2013, enlarging the claims under the proofs. *See* Exhibits 24, 25, 420, 421 and 422. While the Applicant proffered testimony in support of his expanded claims, the State Engineer assigns great weight to the investigation by the State Engineer and the certificates that were issued by him in 1912 just months after the original proofs were filed. This evidence is highly probative of the claim by the original claimant as confirmed by the State Engineer at the time, vis-à-vis the expanded claims made over 100 years later. *See generally, e.g.,* 29A Am. Jur. 2d Evidence § 1357, *Assessing weight and sufficiency, generally* (The weight of the evidence is its weight in probative value, not the quantity or amount of evidence. It is not determined by mathematics, but depends on its effect in inducing belief).

III.

Quantification of Duty for Thompson Ranch Mitigation Right

One approach to determine the plausible beneficial use of water is to consider the growing season for crops in Diamond Valley. In *Evapotranspiration and Net Irrigation Water Requirements for Nevada*, growing seasons were determined using weather station data; the values used here are the mean of the growing seasons for the 27 years of record from 1980 to 2006, inclusive. As discussed above, a vested water right was established under Proofs of Appropriation V-01114 and V-01115. There were 12.36 acres in production as alfalfa, garden and grain. Of these types, alfalfa hay has the longest growing season at 163 days (various grains range from 104 to 125 days and garden vegetables are at 101 days). There were 191.94 acres in production as meadow for hay and pasture. Of these types, pasture grass has the longest season at 158 days (grass hay is at 144 days).²⁵ The vast majority of the water was applied to the meadows for pasture grass and grass hay, so the growing season for pasture grass, 158 days, is used.

As indicated in Payne's field investigation report, the two measurements he took in 1912 of the springs were 0.25 cfs and 1.29 cfs, which total 1.54 cfs.²⁶ Three other measurements were made prior to major groundwater development in Diamond Valley. The USGS measured 2.33 cfs, 2.11 cfs, and 2.06 cfs in the years 1965 and 1966.²⁷ The arithmetic mean of these four measurements is 2.01 cfs. In Ruling No. 6290, based on the limited evidence available, the State Engineer found that prior to groundwater development flow from Taft Springs likely did vary in response to annual changes in precipitation, and found that the average pre-development discharge from Taft Springs was probably in the range of 1.5 to 3 cfs.²⁸ The flow rate of 2.01 cfs falls within this range.

The amount of water that could be diverted over the length of time in the growing season would be the limit of the water that could be placed to beneficial use. The diversion rate (in cfs)

²⁵ *Evapotranspiration and Net Irrigation Water Requirements for Nevada*, Huntington and Allen, 2010, available online at http://water.nv.gov/mapping/et/et_general.cfm.

²⁶ Exhibit No. 339.

²⁷ Exhibit No. 206

²⁸ State Engineer's Ruling No. 6290, dated August 15, 2014, official records in the Office of the State Engineer, p. 30.

is multiplied by 1.98348 af/day/cfs²⁹ multiplied by 158 days to result in the seasonal duty as summarized in this table:

| Description of Flow Rate Value | Diversion Rate /cfs | Growing Season Duty /afs |
|--|---------------------|--------------------------|
| Lower Estimate of Flow Rate Range | 1.5 | 470 |
| 1912 Flow Measurement | 1.54 | 483 |
| Mean of 1912, 1965 and 1966 Measurements | 2.01 | 630 |
| Upper Estimate of Flow Rate Range | 3 | 940 |

Using various methods of calculation of the duty rate of water for irrigation, most of which were based on data from modern irrigation methods, the State Engineer found in Ruling No. 6290 that the duty rate of water for alfalfa was 3 af/acre of land irrigated through modern irrigation practices.³⁰ The State Engineer then applied this value to the Thompson Ranch irrigated acres.³¹ However, the court ordered on remand that “the State Engineer’s use of contemporary irrigation methods to calculate Venturacci’s mitigation right in application no. 81825 and no. 82572 is rejected.”

Section 1, Chapter XXXXI, Statutes of 1909 applies to certificates under applications filed between February 20, 1909, and March 22, 1913. If the season was fewer than 9 months, then the duty rate was 3.0 af/acre, but if the season is 9 months or more, then the duty rate was 3.0 af/acre for first 5 months from May 15 to October 15, plus 1/2 acre-foot for each additional month. Section 11, Chapter 140, Statutes of 1913 applies to certificates under applications filed between March 22, 1913, and March 9, 1945. No duty was established, but the maximum diversion rate was 1.0 cfs per 100 acres. Even though a duty requirement was not placed on those certificates after 1913, a review of the official records of the State Engineer found that the duty rate for early certificated irrigation rights in Diamond Valley were consistently 3 af/acre.

²⁹ The diversion rate of 1 cfs is equal to 723.97 acre-feet per year (afa). To get the diversion rate per day, 723.97 afa is divided by 365 days per year for 1.98348 af/day per cfs.

³⁰ State Engineer’s Ruling No. 6290, dated August 15, 2014, official records in the Office of the State Engineer, pp. 42-43

³¹ State Engineer’s Ruling No. 6290, dated August 15, 2014, official records in the Office of the State Engineer, p. 52.

There are two small exceptions, but the arithmetic mean of all of those certificates for irrigation rights issued from 1917 to 1931 is 3.05 af/acre.³²

If 3 af/acre is accepted as not only the contemporary duty for irrigation in Diamond Valley, but also as the historical duty, then the beneficial use amount for 204.3 acres is 612.9 afs.

The State Engineer finds that the average flow rate from all measurements of record taken prior to major groundwater development (2.01 cfs), expanded over a 158 day growing season (ultimately based on weather station data), is the most scientifically sound basis for determining the amount of water possibly placed to beneficial use prior to 1905; therefore, the appropriation for a mitigation groundwater right is limited to 2.01 cfs, not to exceed 629.9 afs for the irrigation portion. With this approach, the limit is by the flow rate of the springs and the time when beneficial use was possible regardless of the number of acres irrigated.

The standard duty of water for cattle is 20 gallons per day per head. Based on the 1887 Eureka County assessment rolls, there was also the possibility of watering up to 60 horses, 15 milk cows, and 20 stead cattle,³³ for a total of 95 horses and cattle. Watered at a rate of 20 gallons per day per head, 95 head would require 693,500 gallons per year, or 2.1 afa. The State Engineer finds that the total amount of water placed to beneficial use prior to 1905 is 632 afa.

This quantification of vested claims on Taft Springs does not constitute an adjudication of the claims that would be found in any matter of determination of the relative rights of the Taft Springs source as provided under NRS §§ 533.090, et seq., but only serves to best estimate the historical use for the purpose of determining the amount of mitigation water to be considered in deciding Applications 81825 and 82572.

IV.

Mitigation Right Priority Dates

On remand to the State Engineer, the Court stated that if the Applicant effectively loses its priority date, then it would result in an impairment of the vested rights in violation of NRS 533.085(1). The State Engineer finds he will continue to take exception to this portion of the Court's decision as it is not in accordance with the law. While a permit issued under the mitigation application can reflect the priority date of the original appropriation, the Court's instruction to give the permit the original priority is in conflict with the law.

³² Nevada Division of Water Resources' Water Rights Database, April 20, 2016, official records in the Office of the State Engineer.

³³ Exhibit Nos. 241 and 242.

Applications 81825 and 82572 are seeking to appropriate groundwater to mitigate the loss of spring water due to impacts from junior rights; therefore, the State Engineer finds that Permit 82572 is totally supplemental to Permit 81825 and will serve as an alternate point of diversion for Permit 81825, and that both permits are totally supplemental to Proof of Appropriation V-01115 (the same relationship shared between Bailey's Permit 63497, Certificate 16935 and V-01104). The State Engineer finds that although Permits 81825 and 82572 have priority dates established as their filing dates as required by Nevada water law, they act as mitigation rights for Proof of Appropriation V-01115; therefore, the holder of Permits 81825 and 82572 will be permitted to divert water whenever Proof of Appropriation V-01115 is in priority, but not to exceed the total combined duty of all rights on the source. This unique circumstance of being able to divert water under a complementary water right's priority date will be reflected in the terms of Permits 81825 and 82572.

The State Engineer finds that the total combined duty of water for Permits 81825 and 82572 and Proof of Appropriation V-01115 shall not exceed 632 afs, and that the priority date for Permit 81825 is April 26, 2012, and the priority date for Permit 82572 is February 25, 2013, but that permit terms will allow them to be exercised when Proof of Appropriation V-01115 is in priority.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.³⁴

II.

The State Engineer is prohibited by law from granting a permit under an application to appropriate the public waters where:³⁵

- 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.

³⁴ NRS Chapters 533 and 534.

³⁵ NRS § 533.370(2).

III.

Nevada water law provides that nothing contained in Chapter 533 shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.³⁶

IV.

The State Engineer concludes that the water the Applicant seeks under Applications 81825 and 82572 is water that the Applicant is entitled to under his senior water right, which has been diminished by groundwater pumping under junior water rights, and that the approval of Applications 81825 and 82572 will not conflict with existing rights.

V.

The State Engineer concludes that since the State Engineer must act in accordance with NRS §§ 533.355 and 534.080(3), the priority date for Permits 81825 and 82572 must be the dates of filing, being April 26, 2012, and February 25, 2013, respectively.

The State Engineer concludes that since Permit 82572 is totally supplemental to Permit 81825 and will serve as an alternate point of diversion for Permit 81825, and both permits are totally supplemental to Proof of Appropriation V-01115, a permit term reflecting that water may be diverted under Permits 81825 and 82572 when Proof of Appropriation V-01115 is in priority will function to mitigate any loss of flow to Taft Springs caused by junior appropriators.

RULING

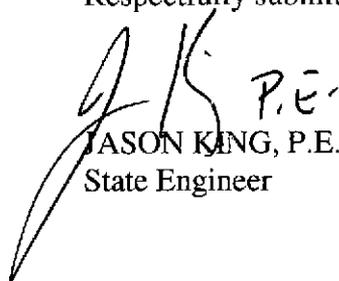
Applications 81825 and 82572 are approved with the following conditions:

1. Subject to the final determination of the relative rights of Taft Springs and Horse Canyon sources as provided under NRS §§ 533.090, et seq.
2. The priority dates for Permits 81825 and 82572, must be the dates of filing, being April 26, 2012 and February 25, 2013, respectively, but may be exercised whenever Proof of Appropriation V-01115 is in priority due to their nature as a mitigation rights.
3. Permits 81825 and 82572 are each issued as mitigation rights for 2.01 cfs, but not to exceed 632 afs, and with the understanding that the points of diversion cannot be moved outside of the spring discharge area as determined by the State Engineer.

³⁶ NRS § 533.085(1).

4. The total combined duty of water under Permits 81825 and 82572 and Proof of Appropriation V-01115 shall not to exceed 632 afs, and the total combined rate of diversion is not to exceed 2.01 cfs.
5. Subject to existing rights and payment of the statutory permit fees.

Respectfully submitted,



JASON KING, P.E.
State Engineer

Dated this 1st day of
November, 2016.