

IN THE MATTER OF APPLICATIONS 26906, )  
26907, AND 26908 FILED BY THE STATE )  
OF NEVADA, DEPARTMENT OF FISH AND GAME) )  
TO APPROPRIATE THE WATERS OF TOULON )  
DRAIN, HUMBOLDT RIVER AND ARMY DRAIN )  
IN PERSHING COUNTY, NEVADA. )

R U L I N G

13

GENERAL:

Application 26906 was filed on August 24, 1972, by the State of Nevada, Department of Fish and Game, for permission to appropriate 250 c.f.s. of water from Toulon or Graveyard Drain for fish, wildlife and recreation purposes. The point of diversion is within the SW $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 19, T.26N., R.31E., M.D.B.&M. The place of use is Humboldt and Toulon Lakes.

Application 26907 was filed on August 24, 1972, by the State of Nevada, Department of Fish and Game, for permission to appropriate 5,000 c.f.s. of water from the Humboldt River for fish, wildlife and recreation purposes. The point of diversion is within the NW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 11, T.25N., R.31E., M.D.B.&M. The place of use is Humboldt Lake.

Application 26908 was filed on August 24, 1972, by State of Nevada, Department of Fish and Game, for permission to appropriate 500 c.f.s. of water from Army Drain for fish, wildlife and recreation purposes. The point of diversion is located in the SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 7, T.25N., R.31E., M.D.B.&M.

Protests to the granting of Applications 26906, 26907, and 26908 were filed by Rattlesnake Land and Livestock Co., Inc. on February 20 and 22, 1973, by Pershing County Water Conservation District on March 12 and 14, 1973, and by Leon Anderson and John Froelich on April 6, 1973. Protests to the granting of Application 26907 were filed by Herman Dennler on March 23, 1973, and by Robert and Maria Belzarena on April 3, 1973.

The Rattlesnake Land and Livestock Company protests are based on the following points:

I

"Upon information and belief, applications under permit number 26906 and 26908 should be denied by reason

that the applications set forth no natural point of diversion for the water of Toulon and Humboldt Lakes but propose to divert the water from drainage ditches which are privately owned and maintained by the Protestant.

II

"Upon information and belief the granting of the applications on file will directly interfere with the value of lands owned by your Protestant and the value of existing water rights of your protestant":

The Pershing County Water Conservation District protests are based on the following grounds:

I

"Upon information and belief, the proper drainage of waters from lands located within the district will be jeopardized by the storage of waters in the Toulon and Humboldt Lakes at surface elevation of 3,894.8 and 3,888.9 feet."

II

"Upon information and belief, the maintenance of the storage of water in the Toulon and Humboldt Lake surfaces at an elevation of 3,894.8 and 3,888.9 feet respectively will interfere with the continued maintenance and upkeep of said drains and will increase costs thereof."

III

"Upon information and belief, applications under permits 26906 and 26908 should be denied by reason that the applications set forth no natural point of diversion for the water of Toulon and Humboldt Lakes but propose to divert the water from drainage ditches which are privately owned and maintained by the Protestant."

IV

"Upon information and belief, the granting of the applications on file will directly interfere with the value of lands located within the district and the value of existing water rights located therein."

The protests of Leon Anderson and John Froelich are based on the following grounds:

"1. The waters of the Humboldt River, the Toulon or Graveyard Drain and Army Drain are fully appropriated.

(a) The said waters are subject to vested rights.

(b) Said waters are also the subject of existing certificate and permit rights obtained on application to appropriate waters made to the State Engineer of Nevada. The total amount of water subject to vested rights and to pending adjudicated and permit rights exceeds the reasonably anticipated maximum flow of the stream.

(c) The waters of Humboldt River, the Toulon or Graveyard Drain and Army Drain are subject to the Humboldt Decree.

2. The granting of the subject applications would permit the diversion of water for which valid prior and senior rights exist.

3. Protestants are the owners and holders of both vested and application and decreed water rights which divert from the same source and said water rights will be impaired and lost if the subject applications are granted.

4. There are no waters available for appropriation from said source.

5. Upon information and belief, the Applications Nos. 26906, 26907, and 26908 relate all or in part to waste water and under Nevada law waste water is not subject to appropriation. In the alternative, said applications relate to return flow, said waters having become a part of the respective streams and as set forth hereinabove and already fully appropriated. In the event it is held that waste water can be appropriated, said waste water is also subject to existing certificates and permit rights.

6. Upon information and belief, applications under Permits Nos 26906 and 26908 should be denied by reason that the applications set forth no known natural and physical point of diversion for the waters of Toulon and Humboldt Lakes, but propose to divert the water from drain ditches which are privately owned and maintained by the protestants.

7. Upon information and belief, the maintenance of storage water in the Toulon and Humboldt Lake, at surface elevation 3894.8 and 3888.9, will interfere and jeopardize the proper drain of waters from lands of protestants and will interfere with the continued maintenance and upkeep of the said drains and will increase costs thereof.

8. Upon information and belief, the said proposed points of diversion are not natural points of diversion. Applicant does not propose to construct any ditches or other structures which would enable applicant to obtain dominion over said water and, therefore, no valid appropriation can be made.

9. Applicant does not own property in the area of the proposed points of diversion, nor does applicant have right of access to the point of diversion set forth in Permit No. 26908, but would be only a trespasser.

10. Applicant will pay no taxes and no water master fees which are being paid by protestants and/or other land owners and water users in the area.

11. Diversion of water from stated points of diversion would raise the water table with adverse affects on surrounding lands and would directly interfere with the value of lands of protestants and the value of existing water rights located thereon."

The protest to the granting of Application 26907 by Herman Dennler is based on the following:

"Water is used for livestock different times of year and used for emergency irrigation when Rye Patch Water is not available."

The protest to the granting of Application 26907 by Robert and Maria Belzarena is based on the following grounds:

"The place of appropriation, NW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 11, T.25N., R.31E., M.D.B.&M. is on land belonging to the Southern Pacific Land Company under lease to the Protestant. Continued use will be made of this quarter section for the pasture of protestant's cattle. The point of diversion should be down stream from this quarter section so that any work done by applicant will not adversely affect the ranching operations of the protestant. That further,

protestant is the owner of vested rights in and to the waters of the Humboldt River and no excess water is available for applicant's requirements, as set forth in the application that was filed."

A meeting concerning Applications 26906, 26907, 26908, filed by the Department of Fish and Game, and Application 28451, filed by Pershing Development Co. was held in Lovelock, on November 8, 1974.

On December 19, 1974, a copy of a letter from the Department of Fish and Game to the attorney for Pershing County Water Conservation District was received in this office. The letter listed several stipulations which the Department of Fish and Game agreed to regarding the use of the Army and Toulon Drains under Applications 26906 and 26908.

On December 23, 1974, a letter was received in this office from Bruce Bowen, attorney for protestants Leon Anderson and John Froelich. In the letter, he concurred with the above mentioned stipulations regarding Applications 26906 and 26908. He also stated that the protestants would have no further objections to Application 26907 on the Humboldt River if the point of diversion would be moved downstream to a point below the last existing diversion on the river.

#### RULING

The protests to the granting of Applications 26906 and 26908 are herewith overruled and permits will be issued upon receipt of permit fees, subject to existing rights and the following terms and conditions:

1. With the exception of existing structures, the permittee shall at no time place any structures of any nature in the drainage ditches or in any manner interfere with Pershing County Water Conservation Districts maintenance of said drains and the use of said drainage ditches for agricultural purposes.
2. The permittee shall not attempt to restrict the Pershing County Water Conservation District from modifying, abandoning, moving, realigning or reconstructing said drainage ditches.

3. As the source of water is drainage water, its use is subject to availability and the permits shall not constitute a demand on any other parties to supply water to the points of diversion.
4. The permittee shall not, through the use of structures or other means, intentionally raise the water levels of the Toulon or Humboldt Lakes without consent of the Pershing County Water Conservation District.

The protests to the granting of Application 26907 are herewith overruled and a permit will be issued upon receipt of permit fees, subject to existing rights and the following terms and conditions:

1. Permittee shall file an application to move the point of diversion downstream to a point below the last existing diversion on the Humboldt River within 60 days of the date of issue of Permit 26907.
2. The permit shall also be subject to condition 4 listed above under Applications 26906 and 26908.

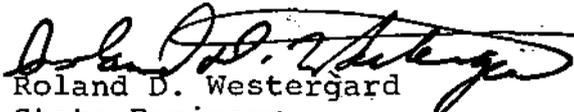
The diversion rates and annual duties of water under Permits 26906, 26907, and 26908 shall be subject to the following limitations:

1. The diversion rate under Permit 26906 shall be limited to 100 c.f.s. of water, unless actual measurements demonstrate that larger flows have been placed to beneficial use.
2. The diversion rate under Permit 26908 shall be limited to 200 c.f.s. of water, unless actual measurements demonstrate that larger flows have been placed to beneficial use.
3. The diversion rate under Permit 26907 shall be limited to 2000 c.f.s. of water, unless actual measurements demonstrate that larger flows have been placed to beneficial use.
4. The combined total diversion under Permits 26906, 26907 and 26908 shall be limited to 31,773 ac.-ft. annually.

5. The combined total diversion under Permits 26907 and 26908 shall be limited to 21,573 ac.-ft. annually.

In order to insure adherence to the above conditions, suitable measuring devices must be installed and accurate measurements of water placed to beneficial use kept.

Respectfully submitted,

  
Roland D. Westergard  
State Engineer

RDW:PGM:jw

Dated this 17th day of

January, 1975.