

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

IN THE MATTER OF APPLICATIONS 50087,)
50088, 50089, 50090, 53326, 53888,)
53889, 53890, 53891, AND 53892 FILED TO)
CHANGE THE POINT OF DIVERSION AND PLACE)
OF USE OF THE PUBLIC WATERS OF AN UNDER-)
GROUND SOURCE IN THE HONEY LAKE GROUND-)
WATER BASIN, WASHOE COUNTY, NEVADA)
_____)

SUPPLEMENTAL RULING
ON REMAND

#3786A

GENERAL

I.

This ruling on remand is somewhat abbreviated from Ruling No. 3786 signed by the State Engineer on March 1, 1991. The individual applications and individual protests were enumerated in Ruling No. 3786, therefore, the State Engineer will not enumerate them once again.

II.

Applications 53888 through 53892, inclusive, were not protested. Applications 50087 through 50090, inclusive, were protested only by Lassen County, California (Lassen County), and Application 53326 was protested only by the Sierra Army Depot and the Pyramid Lake Paiute Tribe of Indians (Tribe).

III.

All of the subject applications propose to change the points of diversion and place of use within the Honey Lake Basin. The State Engineer must consider whether the proposed changes (i) conflict with existing rights and (ii) would prove detrimental to the public interest.¹ Therefore, the grounds of the protests dealing with export of water out of the basin, whether the appropriations exceed the perennial yield, whether the season should be 12 months, whether there is unappropriated water in the source and whether the State Engineer should wait until the

¹NRS 533.370(3).

completion of the study by the U.S. Geological Survey² are not the subject of this ruling.

IV.

Upon notification of the subject parties as required under NRS 533.365(3), a series of administrative hearings were held before the State Engineer beginning on June 21, 1990, and continued to July 19, 1990, and September 10, 1990.³ One purpose of the hearings was to receive evidence and testimony relevant to the proposed intra-basin change applications, in addition to numerous applications seeking to change the places of use to areas outside of the Honey Lake Groundwater Basin. Four applications requesting new appropriations of water within the basin were also considered as were the respective protests to the aforementioned applications.⁴ Evidentiary presentations were made by both applicant and protestants and numerous exhibits were received in evidence. The protestants indicated during the initial stages of the hearing that they would not present a separate case to support their protests to the intra-basin change applications, but would pursue that issue during the examination of the inter-basin transfers.⁵

V.

The previous ruling in this matter (Ruling No. 3786 on the intra-basin transfers) was appealed by Lassen County and the Tribe.

²The U.S. Geological Survey completed its study of the hydrology and recharge/discharge relationship in the Honey Lake Basin in April 1990.

³Transcripts of the administrative hearings before the State Engineer are public record in the office of the State Engineer in Carson City, Nevada. Hereinafter referred to as "Transcript, date, volume and page, table or figure."

⁴Exhibit 1 of the administrative hearings before the State Engineer. Hereinafter referred to as "Exhibit and number."

⁵Transcript, June 21, 1990, Vol. I, pp. 88 and 89.

On August 31, 1992, the Second Judicial District Court (Court) entered its Order (Order) remanding the matter to the State Engineer for further findings consistent with the Order. On September 17, 1992, the State Engineer filed with the Court a Motion to Amend Order, requesting that the Court amend its decision on the issue of whether Nevada law allows the change of unperfected water rights.

VI.

After 12 days of testimony from many expert witnesses and 136 exhibits in evidence, the State Engineer can find no reason for further hearings in this matter. The State Engineer makes the following additional findings based on the existing evidence and records in the Office of the State Engineer.

FINDINGS OF FACT

I.

The Tribe protested Application 53326, in part, on the grounds that, under Nevada law, this change application cannot be approved because the original permit had not gone to beneficial use. In its Order, the Court noted the absence in the administrative record of support for the State Engineer's historic practice of granting applications for transfer of unperfected water rights.

During the hearings in 1990, the State Engineer took administrative notice of all of the records in the Office of the State Engineer.⁶ Since the first act in 1905,⁷ which outlined the mandatory procedure for making an appropriation of water by application to the State Engineer, the Nevada Legislature passed several laws which dealt with change applications. In 1907 the procedure for changing the place of diversion (also referred to as

⁶Transcript, July 23, 1990, Vol. VI, p. 998.

⁷Act of March 1, 1905, ch. 46, 1905 Nev. Stat. 66.

point of diversion) or manner of use was enacted.⁸ In 1913 the law was amended to allow changes in the place of use.⁹ The 1939 Legislature enacted the comprehensive groundwater law which specifically made groundwater subject to the provisions of NRS Chapter 533.¹⁰

The following are a few examples of applications to change which were granted shortly after each of the above mentioned amendments or additions to the law. In each case, the underlying water right had not yet been beneficially used.

The State Engineer in 1907 approved Application 558 to change the point of diversion of Permit 132 on Duck Creek. It is clear from the file that the water had never gone to beneficial use under Permit 132.¹¹

On October 1, 1917, the State Engineer approved Permit 4418 which changed the place of use of a portion of the water under Permit 812. The purpose of this change application was to irrigate other land "... of better quality and better susceptible of irrigation than the eighty acre tract sought to be excluded from said description."¹²

On January 31, 1944, the State Engineer granted Permit 10825 which changed the manner of use of Permit 8830 from irrigation to quasi-municipal use.¹³ The proof of beneficial use was filed

⁸Act of February 26, 1907, ch. 18, § 24, 1907 Nev. Stat. 35.

⁹Act of March 22, 1913, ch. 140, § 59, 1913 Nev. Stat. 208.

¹⁰Act of March 25, 1939, ch. 178, 1939 Nev. Stat. 274.

¹¹Public records in the Office of the State Engineer under Permits 132 and 558.

¹²Public records in the Office of the State Engineer under Permits 812 and 4418.

¹³Public records in the Office of the State Engineer under Permits 8830 and 10825.

showing irrigation of 1 acre of land, however, water rights for irrigation of 40 acres of land were allowed to be changed.

Virtually every State Engineer since the law was enacted in 1907 has approved changes of permits that had not gone to beneficial use. Since each application must be considered on its own merits, past State Engineers must have determined that granting permits to change unperfected rights was consistent with the statutes and legislative intent. During the past 85 years, approximately 5,000 applications to change unperfected water rights have been approved. A few examples are warranted and are attached to this ruling as Appendix 1.

The State Engineer must show great deference to his predecessors' interpretation of Nevada water law. None of the permits previously granted were appealed on the basis that an unperfected right could not be changed. In fact, case law supports the long standing interpretation that a permit is "water already appropriated."¹⁴

The State Engineer finds that being able to change unperfected rights is the only practicable way that the water law can function. This can best be demonstrated by discussion and example. If the State Engineer grants a permit to drill a well at a particular location for irrigation and the farmer, after considerable investment, drills a dry hole, he cannot prove beneficial use. With the passage of time there may be subsequent filings, and there could be subsequent permits that allocated the perennial yield.¹⁵ It would not be in the public interest to foreclose a permit holder

¹⁴Application of Filippini, 66 Nev. 17, 202 P.2d 535 (1949); Town of Eureka v. Office of State Engineer of State of Nevada, 108 Nev. ___, 826 P.2d 948 (1992).

¹⁵Perennial yield is defined as the amount of water that is naturally recharged by precipitation that can be extracted each year over the long term from a groundwater basin without depleting water from storage.

who has demonstrated good faith and reasonable diligence¹⁶ from changing the point of diversion in an effort to develop a well at a new location in an attempt to put the water to beneficial use in compliance with the statute and maintain his priority.

The State Engineer must consider a permit as an appropriation if he is to effectively administer the provisions of NRS 533.370(3). As an example, when permits are granted to a municipality for specific points of diversion and place of use, it would be inconceivable that in the future there would be no necessity to change the point of diversion of any well or to expand the municipal boundaries. As a matter of course, municipal boundaries and refinements to distribution systems are constantly being modified. The inability of the municipality to change the point of diversion of water, not put to beneficial use, would limit the development of an efficient distribution system and result in the poor management of the limited water resource. Without the ability to change the place of use, the municipal boundaries could never expand. If the only way to obtain water for additional service areas was through new applications, any permits issued would be subject to prior rights. Therefore, the municipality would have permits junior to all other rights in the basin and could be subject to curtailment if the State Engineer was required to regulate the source based on priority.¹⁷ The State Engineer finds that this would not be in the public interest since the municipality would be proceeding to show good faith and due diligence in putting the water to beneficial use under the permits earlier in time, but may have a necessity to expand its service area.

¹⁶NRS 533.395(1).

¹⁷NRS 534.080(3) and 534.110(6).

II.

The Tribe in Petitioners' Opening Brief stated that "allowing changes in unused permit rights rewards speculation in water rights" and "entertaining applications to change the place of diversion, or place or manner of use of water prior to beneficial use encourages speculation."

The change application procedure set out in the Nevada water law¹⁸ does not specifically address speculation. However, the State Engineer relies on NRS 533.395 in considering any change application since the permit to be changed must be in good standing at the time action is taken on the change application. Therefore, the State Engineer must find that the permittee exercised due diligence under the permit being changed or he must cancel the original permit, leaving no right to change. Permits or portions of permits have been cancelled for failure to show due diligence resulting in the denial of change applications.

The State Engineer finds that the requirements of good faith and reasonable diligence under NRS 533.395 provide adequate safeguards against speculation. Therefore, the State Engineer rejects the Tribe's contention that fear of speculation is a reason for disallowing changes of unperfected water rights.

III.

The Sierra Army Depot protested Application 53326, in part, on the grounds that their potable wells are 8.5 miles from the proposed municipal well field. There was no evidence offered by the Sierra Army Depot as to how much water they pump or from what depth water is pumped. Application 53326 is not for municipal use, rather the manner of use remains irrigation and domestic. The characterization of municipal well field is, therefore, without merit. The application attempts to move the point of diversion in excess of 2 miles south and further away from the Sierra Army Depot

¹⁸NRS 533.325, 533.345.

potable wells.¹⁹ Nevada law allows for a reasonable lowering of the water table in allowing appropriation and changes of groundwater.²⁰ The State Engineer finds that the proposed point of diversion under Application 53326 will have no greater impact on the potable wells, rather it can only have a lesser impact and, therefore, will not result in an unreasonable lowering of the water table.²¹

IV.

The Sierra Army Depot protested Application 53326, in part, on the grounds that:

(T)he mission at Sierra Army Depot is of a strategic nature and disruption of depot activities could seriously impair the ability of the U.S. Army to support the defense of the United States of America.²²

As stated in Findings of Fact III, the proposed point of diversion under Application 53326 is farther from the Sierra Army Depot potable wells. The State Engineer finds that the proposed pumping would have no greater impact than the existing permits, and therefore, the mission of the Sierra Army Depot will not be impaired.

V.

Lassen County protested 50087 through 50090, inclusive, in part, on the grounds that it would "increase the potential for impairment of existing rights in California by increasing extractions in Nevada." The State Engineer finds that there was no evidence or testimony offered by Lassen County as to how much water

¹⁹Public record in the office of the State Engineer.

²⁰NRS 534.110(4).

²¹The U.S. Geological Survey computerized simulation of pumping 15,000 acre feet out of the basin determined that less than 10 feet of drawdown would occur at the Sierra Army Depot. Exhibit 9, Figure 30.

²²Public record in the office of the State Engineer.

is pumped in California, where the rights are located or from what depths water is pumped. The State Engineer is unaware of any attempt by California or Lassen County to regulate pumping in the California portion of Honey Lake Valley. Applications 50087 through 50090, inclusive, seek to change the points of diversion 4 to 5 miles south, east or southeast and further away from the California stateline. The proposed points of diversion will have a lesser opportunity for drawdown of the water table in California than where the points of diversion presently exist.²³ This will substantially reduce the potential for interference with any rights in California. The State Engineer finds no evidence that there will be an unreasonable lowering of the water table.

VI.

The Tribe protested Application 53326, in part, on the grounds that it would "conflict with the prior and paramount reserved water rights of the Pyramid Lake Paiute Tribe to the groundwater underlying the Smoke Creek Desert portion of the Pyramid Lake Indian Reservation." A search of the State Engineer's records indicates that the Tribe has never filed any claims of reserved water rights in Smoke Creek Desert Groundwater Basin. The State Engineer has no knowledge as to whether any groundwater has been developed in the Smoke Creek Desert Groundwater Basin by the Tribe. Nevertheless, the purposes of this ruling and the prior ruling, on the intra-basin changes, is not intended to adjudicate the reserved rights of the Tribe. The State Engineer finds that if, in fact, the Tribe has reserved rights to groundwater in the Smoke Creek Desert Groundwater Basin, any appropriative rights granted by the State Engineer would be subject to and junior in priority to those

²³The U.S. Geological Survey computerized simulation of pumping 15,000 acre feet out of the basin determined that a few square miles in California near the playa could experience between 10 and 49 feet of drawdown and the remainder would experience less than 10 feet of drawdown. Exhibit 9, Figure 30.

reserved rights. Conversely, if the Tribe is found not to have reserved rights to groundwater, the appropriative rights addressed in this ruling would only be subject to other rights that may exist at the time of approval.

VII.

The Sierra Army Depot protested Application 53326, in part, on the grounds that soils in the southern portion of the depot are described as "blow sand" and the northern part are silts from the old lake bottom. They claim that under a scenario of exportation of 15,000 acre feet, very little groundwater would remain to support evapotranspiration by native plants. The Sierra Army Depot presented no evidence that the playa, or alkalai flat, would be substantially enlarged by the intra-basin changes or that a dust hazard presently exists on the base.

There exists a small playa (less than 10 square miles) directly north of the proposed well field.²⁴ There presently exists Honey Lake, which is often dry, directly west and adjacent to the Sierra Army Depot that consists of over 100 square miles.²⁴ This situation existed prior to any pumping in either state. The State Engineer finds no evidence that the approval of the intra-basin changes will aggravate whatever natural dust hazard now exists nor is there any evidence that this hazard will prove detrimental to the public interest.

VIII.

The Tribe protested Application 53326, in part, on the grounds that it "would threaten to prove detrimental to the public interest if the implementation of the Honey Lake Water Importation Project is not coordinated and integrated with the outcome of the Truckee River settlement negotiations..." Application 53326 does not propose the export of water, rather it proposes to change the point of diversion and place of use of an existing water right within the

²⁴Exhibit 9, Plate 1.

Honey Lake Basin. The Tribe failed to provide any evidence that the negotiated settlement on the Truckee River would be affected by an intra-basin change application in Honey Lake Valley. Therefore, the State Engineer finds no evidence that the approval of the intra-basin changes affects the Truckee River settlement negotiations.

IX.

Nevada water law provides for the appurtenance of water to the land on which it is beneficially used.²⁵ The statute provides "That if for any reason it should at any time become impracticable to use water beneficially or economically at the place to which it is appurtenant, the right may be severed from such place and simultaneously transferred and become appurtenant to other place or places of use, in the manner provided in this chapter, and not otherwise, without losing priority of right heretofore established."

The applicant acquired the water rights at issue from several different persons who had several different permits and several different parcels of land scattered throughout the Nevada portion of Honey Lake Valley.²² The State Engineer finds, in this case, that it is in the public interest to allow the culmination and consolidation of all of these water rights now existing under one ownership into more economical farming units.

X.

Except for those enumerated in Findings of Fact IV, VII and VIII, there were no public interest values identified in the protests of Applications 50087 through 50090, inclusive, and 53326. Most of the public interest concerns and all of the testimony and evidence dealt with the export of water out of the Honey Lake Basin. The State Engineer finds that a large cone of depression will develop in the vicinity of the well field whether the water is

²⁵NRS 533.040.

used within the basin or exported. The water table will drop below the root depth of some of the greasewood. This is a condition that has occurred in many groundwater basins throughout the state as groundwater resources have been developed and placed to beneficial use. However, the area is surrounded by sagebrush and rabbitbrush which survive on rainfall alone and whose roots cannot reach the water table. When the greasewood dies, sagebrush and rabbitbrush will invade the area. There is evidence that there will be some wetland loss in the near vicinity of Fish Springs,²⁶ but the evidence further shows that no loss of wetlands will occur further north at High Rock Springs and Amedee Springs since these are fed from thermal sources and are not part of the hydrologic system near the proposed well field.

There is substantial evidence to show that the proposed pumping will be from recharge that occurs only in the Nevada portion of Honey Lake Valley.²⁷ Therefore, nothing in this record demonstrates that the intra-basin change applications, if approved, would prove detrimental to the public interest.

CONCLUSIONS

I.

The State Engineer has jurisdiction of the parties and the subject matter of this action.²⁸

II.

The State Engineer is prohibited by law from granting a permit under an application to change when:

²⁶Exhibit 9, Plate 4, depicts a small wetlands at the location of the proposed well field, and Exhibit 9, Fig. 30 depicts a large drop in the water table at the location of the well field.

²⁷See boundary of U.S.G.S. computerized model area. Exhibit 9.

²⁸NRS Chapters 533 and 534 and Remand Order from Second Judicial District Court, dated August 31, 1992.

1. The proposed change conflicts with existing rights, or
2. The proposed change threatens to prove detrimental to the public interest.²⁹

III.

Based on the forgoing findings of fact, the State Engineer concludes that the proposed intra-basin changes will not impair any existing rights, including those of the Sierra Army Depot, any rights in California, or any rights of the Tribe in Smoke Creek Desert if, in fact, any exist.

IV.

The State Engineer concludes that there has never been a quantification or adjudication of the reserved rights to groundwater by the Tribe. Only after a general adjudication of all rights by a court having jurisdiction, would there be a determination made as to the limit and extent of any other vested claims and the validity of any claimed or unclaimed reserved rights. If a later adjudication confirms that the Tribe has reserved rights to groundwater and quantifies those reserved rights, they will be recognized as such and any appropriative rights herein changed will be subject to those reserved rights.

V.

Although the State Engineer recognizes the Court will ultimately rule on this legal issue, the State Engineer concludes that Nevada law allows for changes of unperfected rights and has always done so. The definition of "appropriated" is quite different from the pre-statutory definition since the Legislature outlined the method by which an appropriation is made when it enacted the water law in 1905. Conversely, the term "unappropriated" found in NRS 533.370(3) means water that has never been spoken for. Thus, "water already appropriated" includes all inchoate water rights, such as permits.

²⁹NRS 533.370(3).

VI.

The State Engineer concludes that although there may be minimal wetlands lost, there is an overriding public interest value in allowing the consolidation of several fragmented water rights into economic farming units to facilitate beneficial use of the water.

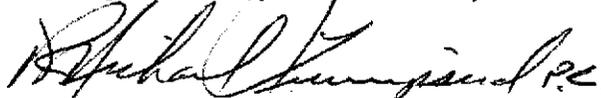
RULING

All of the findings and conclusions of Ruling No. 3786 are incorporated into this ruling with the exception that nothing herein shall be construed to be an adjudication of the reserved rights of the Pyramid Lake Paiute Tribe of Indians. Based on the above findings and conclusions the protests to Applications 50087 through 50090, inclusive, and 53326 are hereby overruled; and Applications 50087, 50088, 50089, 50090, 53326, 53888, 53889, 53890, 53891 and 53892 are hereby approved subject to:

- a. Payment of the statutory fees.
- b. Reserved rights of the Pyramid Lake Paiute Tribe of Indians, if they are found by the appropriate court to exist.
- c. Any other prior rights in the Honey Lake Valley.
- d. A judicial determination as to whether Nevada law allows the transfer of water rights not yet placed to beneficial use.

Ruling No. 3786 is hereby affirmed with the one exception.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/bk

Dated this 9th day of
October, 1992.

APPENDIX 1

PERMITS ISSUED CHANGING APPROPRIATED WATER
IN WHICH BENEFICIAL USE HAD NOT BEEN MADE

APPLICATION TO CHANGE NUMBER	PERMIT DATE	PERMIT # BEING CHANGED	CHANGE OF	STATE ENGINEER
558	10/02/07	132	POD	FRANK NICHOLAS
1787	11/15/10	1475	POD	EMMET BOYLE
4418	10/30/17	812	POU	J.G. SCRUGHAM
7142	11/28/24	7066	POD	ROBERT ALLEN
8488	08/23/28	7776	POU	GEORGE W. MALONE
9843	10/30/35	5719	POD,POU	ALFRED MERRITT SMITH
10825	01/31/44	8830	POD,POU,MOU	ALFRED MERRITT SMITH
14105	01/07/53	10999	POD,POU	HUGH A. SHAMBERGER
19425	02/13/63	18557	POU	ELMO J. DERICCO
21930	02/03/65	19254	POD,POU	GEORGE W. HENNEN
24185	03/19/69	22948	POD	ROLAND D. WESTERGARD
27133	03/16/73	25639	POD,MOU	ROLAND D. WESTERGARD
29421	02/26/76	27383	MOU	ROLAND D. WESTERGARD
40505	08/15/80	29242	POD	WILLIAM NEWMAN
44651	09/19/86	42575	MOU	PETER G. MORROS
53834	07/02/90	36361	POD,POU,MOU	R. MICHAEL TURNIPSEED

MOU = MANNER OF USE, POU = PLACE OF USE, POD = POINT OF DIVERSION