

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

IN THE MATTER OF APPLICATION 80668)
FILED TO CHANGE THE POINT OF)
DIVERSION, PLACE AND MANNER OF USE)
OF A PORTION OF THE PUBLIC WATERS OF)
AN UNDERGROUND SOURCE, PREVIOUSLY)
APPROPRIATED UNDER PERMIT 20376,)
CERTIFICATE 6798, WITHIN THE DIAMOND)
VALLEY HYDROGRAPHIC BASIN (153),)
EUREKA COUNTY, NEVADA.)

RULING
#6160

GENERAL

I.

Application 80668 was filed on March 7, 2011, by Ruby Hill Ranch, LLC to change the point of diversion, place and manner of use of a portion of water previously appropriated under Permit 20376, Certificate 6798, being 0.3245 cubic feet per second not to exceed 20.00 acre-feet annually (afa) of water from an underground source. The proposed manner of use is for commercial purposes from January 1 to December 31 of each year, to serve a proposed recreational vehicle park and commercial parcels. The proposed place of use is described as being located within portions of Lots 15 and 16 of Section 21 and portions of Lots 1 and 2 of Section 28, T.20N., R.53E., M.D.B.&M. The proposed point of diversion is described as being located within Lot 15 of Section 21, T.20N., R.53E., M.D.B.&M. The existing manner of use is for irrigation and domestic purposes. The existing place of use is described as 5.0 acres within Lot 15 of Section 21, T.20N., R.53E., M.D.B.&M. The existing point of diversion is located within Lot 14 of Section 21, T.20N., R.53E., M.D.B.&M.^{1,2}

II.

Application 80668 was timely protested by Eureka County. The grounds of the protest are summarized below:¹

1. The Diamond Valley Hydrographic Basin is over appropriated and Application 80668 will conflict with existing rights.

¹ File No. 80668, official records in the Office of the State Engineer.

² File No. 20376, official records in the Office of the State Engineer.

2. The Devil's Gate General Improvement District's service area is adjacent to the place of use of Application 80668 and currently the District has to blend water to meet standards for arsenic. The groundwater considered here in the local area may not meet drinking water standards for arsenic.
3. The estimated cost of works of \$20,000.00 fails to recognize that treatment for arsenic may be needed.
4. Application 80668 is proposing to change water that has not been put to beneficial use for at least 15 years and if approved would exacerbate the over appropriation situation in the Diamond Valley Hydrographic Basin.
5. Upon application and annexation to the Devil's Gate General Improvement District, the District should supply water to the proposed project.
6. The State Engineer should consider consumptive use in considering the total duty of Application 80668 if approved.
7. The proposed project is not served by the Town of Eureka wastewater collection system and would have to be disposed of by a septic and leach field, which would introduce waste loading to the aquifer.
8. The Town of Eureka requests that if a hearing is held by the State Engineer, that it be held in Eureka, Nevada.

FINDINGS OF FACT

I.

Nevada Revised Statutes § 533.365(4) provides that it is within the State Engineer's discretion to determine whether a public administrative hearing is necessary to address the merits of a protest. The State Engineer finds that sufficient evidence is available within the Office of the State Engineer to evaluate the merits of Application 80668 and its associated protest; therefore, a hearing is not necessary.

II.

The protest alleges that the water under Permit 20376, Certificate 6798 has not been put to beneficial use for at least 15 years [1996]. Nevada Revised Statute § 534.090 provides that a certificated water right may be subject to forfeiture for five consecutive years of non-use. In 1995, a notification provision was added to the forfeiture statute requiring that the permittee be notified after four consecutive years of non-use is verified by the records of the State Engineer.

A review of Permit 20376, Certificate 6798 and annual pumpage inventories conducted by the Office of the State Engineer show that Permit 20376, Certificate 6798 has a documented four consecutive years of non-use and a Notification of Four Years of Non-use is pending. The permittee will have one year from the date of the notification to file for a one year extension of time to prevent forfeiture or a proof of resumption of water to beneficial use. Failure to file either form prior to the deadline will result in forfeiture of Permit 20376, Certificate 6798. However, if Application 80668 is approved prior to the forfeiture, a portion of the existing right will be abrogated and the issue of the pending forfeiture on that portion will be rendered moot. A review of records on file in the Office of the State Engineer show that Permit 20376, Certificate 6798, the base right to Application 80668, is currently in good standing. Application 80668 proposes to change a portion of existing Permit 20376, Certificate 6798; therefore, approval of Application 80668 will not create an additional appropriation of underground water from the Diamond Valley Hydrographic Basin as the existing water rights are already accounted for in the groundwater basin budget. The State Engineer finds that Permit 20376, Certificate 6798 is currently in good standing under Nevada Revised Statute § 534.090; therefore, it can be used to support the transfer proposed by Application 80668.

III.

The protest states that the Devil's Gate General Improvement District should supply water to the proposed project and implies the Applicant should apply for annexation. The State Engineer finds that from maps available in the Office of the State Engineer that the proposed place of use described in Application 80668 is adjacent to but not included within the current place of use of Devil's Gate General Improvement District. The State Engineer finds no authority within Nevada water law to compel annexation into the general improvement district and further finds the protest issue is without merit.

IV.

The protest states that the groundwater at the proposed point of diversion may not meet drinking water standards for arsenic. In general, the Office of the State Engineer has no authority over drinking water standards. If approved by the State Engineer, Application 80668 will include in the conditions of the permit that "The issuance of this permit does not waive the requirements that the permit holder obtain other permits from State, Federal and local agencies."

The State Engineer finds the Applicant is required to comply with water quality standards from the proper State, Federal and/or local authority.

V.

The State Engineer finds the Applicant has reasonably estimated the cost of constructing the proposed works of diversion at approximately \$20,000. In the case of Application 80668 the works of diversion are comprised of the well, pump, motor and meter. It does not include water treatment equipment, such as for arsenic or other water quality concerns. The State Engineer finds the Applicant had adequately answered Item 12 on the application.

VI.

Item 6 of the protest deals with consumptive use and that the water is being changed from irrigation and domestic to commercial use. If Application 80668 is approved, the State Engineer finds that he may consider the consumptive use of this water right.³ The current consumptive use factor in Diamond Valley is 2.5 acre-feet per acre regarding Application 80668.⁴

VII.

The Protestant is concerned with the possible contamination of the local aquifer by the wastewater that would be produced by this project. The Office of the State Engineer does not regulate the disposal of waste water by septic or other means; that regulatory authority falls to other agencies. The State Engineer finds that the Applicant is required to obtain permits regarding septic tank and leach field construction from the proper State, Federal and/or local agency.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁵

II.

The State Engineer is prohibited by law from granting a permit under a change application that requests to appropriate public waters where:⁶

³ NRS § 533.3703 and NRS § 533.3705.

⁴ *Evapotranspiration and Net Irrigation water Requirements for Nevada*, Huntington and Allen, 2010, available online at http://water.nv.gov/mapping/et/et_general.cfm

⁵ NRS Chapters 533 and 534.

⁶ NRS § 533.370(2).

- 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 protest is without merit and Application 80668 meets the statutory criterion for approval.

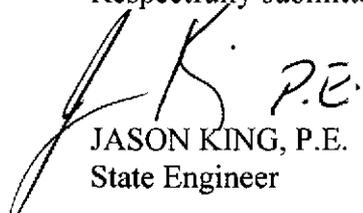
IV.

Based on the findings contained herein, the State Engineer concludes that the approval of change Application 80668 will not conflict with existing rights or threaten to prove detrimental to the public interest.

RULING

The protest to Application 80668 is hereby overruled and Application 80668 is granted subject to existing rights, consumptive use consideration and payment of the statutory permit fees.

Respectfully submitted,


JASON KING, P.E.
State Engineer

Dated this 2nd day of
February, 2012.