

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

IN THE MATTER OF APPLICATIONS 76296,)
76297, 76298, 76299 AND 76300 FILED TO)
CHANGE THE POINT OF DIVERSION AND)
PLACE OF USE OF AN UNDERGROUND)
SOURCE PREVIOUSLY APPROPRIATED)
UNDER PERMITS 49416, 49418, 49434,)
49435, AND 50247 WITHIN THE CARSON)
VALLEY HYDROGRAPHIC BASIN (105),)
DOUGLAS COUNTY, NEVADA.)

RULING

#6162

GENERAL

I.

Application 76296 was filed on September 18, 2007, by the Bently Family Limited Partnership to change the point of diversion and place of use of 0.46007 cubic feet per second (cfs), not to exceed 137.39 acre-feet annually (afa), a portion of water previously appropriated under Permit 49416 from an underground source for quasi-municipal and domestic purposes. The proposed place of use is described as being located within portions of Sections 4, 5, 9 and 10, T.12N., R.21E., M.D.B.&M., portions of Sections 2, 3, 4, 7, 8, 10, 11, 13, 14, 19, 20, 24 and 25, T.13N., R.20E., M.D.B.&M., and portions of Section 21, T.14N., R.20E., M.D.B.&M. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 20, T.13N., R.20E., M.D.B.&M. The existing point of diversion is described as being located within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 23, T.13N., R.20E., M.D.B.&M.¹

II.

Application 76297 was filed on September 18, 2007, by the Bently Family Limited Partnership to change the point of diversion and place of use of 1.897 cfs, not to exceed 566.68 afa, of water previously appropriated under Permit 49418 from an underground source for quasi-municipal and domestic purposes. The proposed place of use is the same as described under Application 76296. The proposed point of diversion is described as being located within the

¹ File No. 76296, official records in the Office of the State Engineer.

SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 20, T.13N., R.20E., M.D.B.&M. The existing point of diversion is described as being located within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 23, T.13N., R.20E., M.D.B.&M.²

III.

Application 76298 was filed on September 18, 2007, by the Bently Family Limited Partnership to change the point of diversion and place of use of 1.989 cfs, not to exceed 497.5 afa, a portion of water previously appropriated under Permit 49434 from an underground source for quasi-municipal and domestic purposes. The proposed place of use is the same as described under Application 76296. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 20, T.13N., R.20E., M.D.B.&M. The existing point of diversion is described as being located within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 23, T.13N., R.20E., M.D.B.&M.³

IV.

Application 76299 was filed on September 18, 2007, by the Bently Family Limited Partnership to change the point of diversion and place of use of 1.989 cfs, not to exceed 497.5 afa, a portion of water previously appropriated under Permit 49435 from an underground source for quasi-municipal and domestic purposes. The proposed place of use is the same as described under Application 76296. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 20, T.13N., R.20E., M.D.B.&M. The existing point of diversion is described as being located within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 23, T.13N., R.20E., M.D.B.&M.⁴

V.

Application 76300 was filed on September 18, 2007, by the Bently Family Limited Partnership to change the point of diversion and place of use of 2.065 cfs, not to exceed 616.67 afa, of water previously appropriated under Permit 50247 from an underground source for quasi-municipal and domestic purposes. The proposed place of use is the same as described under Application 76296. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 20, T.13N., R.20E., M.D.B.&M. The existing point of diversion is described as being located within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 23, T.13N., R.20E., M.D.B.&M.⁵

² File No. 76297, official records in the Office of the State Engineer.

³ File No. 76298, official records in the Office of the State Engineer.

⁴ File No. 76299, official records in the Office of the State Engineer.

⁵ File No. 76300, official records in the Office of the State Engineer.

VI.

Applications 76296 through 76300 were protested by the Pyramid Lake Paiute Tribe of Indians (Tribe) on grounds as summarized below:

1. Granting the application would threaten to prove detrimental to the public interest in light of the over-commitment and over-appropriation of the groundwater available in the basin, and the resulting inability of the perennial yield to serve existing permits and commitments with groundwater, and in light of the obligations of the State Engineer pursuant to NRS Chapters 533, 534 and 278 to require that there be adequate plans to protect existing rights, uses and commitments of groundwater and to exercise all appropriate authority and discretion to control over-demand on the source and to protect both the public and other right holders of both surface water and groundwater rights.
2. The current application seeks to change permitted groundwater rights that have their origin in existing permits. The applications should be denied on the basis of forfeiture or the State Engineer should require the filing of the beneficial use prior to granting any further applications to change the base water rights.
3. On information and belief, the water rights sought for transfer have been forfeited and/or abandoned and the applications should therefore be denied.
4. Granting the application would threaten to prove detrimental to the Tribe, to the purposes for which the Pyramid Lake Indian Reservation was created and to the public interest by depleting flows in the Carson River and to Lahontan Reservoir, because of the connection, both legal and physical, between the groundwater and surface water to the detriment of senior water right holders in the Newlands Project who are entitled to divert Truckee River water to make up for insufficient Carson River flows, which are the primary source to satisfy their rights and would impact Pyramid Lake and its fishery and impair instream flows.
5. Granting the application may threaten to prove detrimental to the public interest in ways that are not yet known to this Protestant, but which may arise or first become known to this protestant in the period between the date of filing of the application and the hearing on the protested application – by way of example Fernley's Application #57555 was filed on May 1, 1992, and the hearing was not held until February 6,

2006 – and in light of the position of the State Engineer that a specifically stated protest ground may not be amended regardless of the extensive passage of time between the date the protest is required to be filed, and the date of the hearing on a protested application.

6. Granting the application would threaten to prove detrimental to the public interest.
7. This Protestant incorporates any other protest filed by any other Protestant.

FINDINGS OF FACT

I.

Nevada Revised Statute (NRS) § 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 to an application to appropriate the public waters of Nevada. The State Engineer finds that in the case of protested Applications 76296 through 76300 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 on this matter is not required.

II.

The protest asserts that the permitted and certificated groundwater rights in the Carson Valley Hydrographic Basin far exceed the estimated perennial yield, and as such, the pumping of groundwater is or will be taking Carson River surface water that is claimed by senior water right holders in the Newlands Project; thus, the use of groundwater is impacting existing rights, the Truckee River and Pyramid Lake and its fishery. It should be noted that the Protestant is not a water right holder on the Carson River, does not have any existing decreed right to Carson River surface water, and is not the owner of record of any groundwater within the Carson Valley Hydrographic Basin. Pyramid Lake is the terminus of the Truckee River.

The Division spends a significant amount of time in the Carson Valley area performing fieldwork. Pumpage inventories have been conducted since 1987 to monitor the quantity of water pumped in the Carson Valley Hydrographic Basin. In conjunction with this field work, the Division enforces permit compliance and investigates any improper use of groundwater. Also, water levels are measured at selected sites and field investigations are conducted throughout the year as needed.

When water rights are dedicated for municipal use, the dedication policy of the Division is designed to cover the maximum amount of water anticipated to be used and actual use has been demonstrated to be less than the total amount dedicated. Relinquishments of water rights are also required for domestic well subdivisions even though domestic wells normally are exempt from the permitting provisions of Nevada water law. Finally, the Division has consistently performed its obligation to protect existing rights, and to assure water is available for development, through signatory authority over subdivision maps.

Water level data collected by the Division fail to indicate any significant declining trends that would support the allegation that the basin is over-appropriated.⁶ In addition, annual surface-water discharges as measured at the USGS gauge for the Main Stem of the Carson River near Carson City actually increased over 4% for the 30-year period of 1976 through 2005 when compared to the prior 30-year period.⁷

In State Engineer's Ruling No. 5791, an in-depth analysis of the groundwater resources showed the Carson Valley Hydrographic Basin is not severely over-appropriated and is not over-pumped.⁸ The State Engineer finds that the analyses contained in State Engineer's Ruling No. 5791 is still valid, and hereby adopts the findings and conclusions of State Engineer's Ruling No. 5791.

The State Engineer finds that the Division of Water Resources has and continues to perform its obligations in regards to management of the water resources of the Carson Valley Hydrographic Basin. The State Engineer further finds that the Carson Valley Hydrographic Basin is not over-appropriated and an analysis of the data collected by the Division, such as, pumpage inventories and water levels, support this finding determination. The State Engineer finds that the water sought for change under the applications has already been accounted for in the groundwater basin budget and therefore, will have no additional effect on the groundwater resource.

⁶ Water Level Data for Carson Valley Hydrographic Basin (105), official records in the Office of the State Engineer.

⁷ *Evaluation of Available Stream Flow Data for the Carson River and Review of Random Lithologic Records of Drilled Wells within the Carson Valley, Douglas County, Nevada*, prepared by R.O. Anderson Engineering, Inc. in collaboration with Turnipseed Engineering, Ltd., p. 8.

⁸ State Engineer's Ruling No. 5791, October 23, 2007, official records in the Office of the State Engineer.

III.

The applications are not requesting a new appropriation of water. Rather, the applications are seeking to change only the point of diversion and place of use of existing water rights. The remarks on the applications state that a new well at the proposed point of diversion will better serve the lands owned or controlled by the Applicant and will improve the water quality to meet the new arsenic standard.⁹

The State Engineer finds that the applications before him are changes of existing water rights and the applications do not seek a new appropriation of water. The State Engineer finds the proposed changes will have no additional impact on the Carson Valley Hydrographic Basin and no effect upon the Protestant.

IV.

Nevada water law provides that any person who wishes to change the place of diversion, manner of use or place of use of water already appropriated shall apply to the State Engineer for a permit to do so.¹⁰ The protest states that the State Engineer should require the filing of the beneficial use on the existing rights prior to granting the change applications. The Applicant is required to file a change application to change its existing rights and the statute allows for changing "water already appropriated." Water already appropriated is defined by statute as including water for whose appropriation the State Engineer has issued a permit but which has not been applied to the intended use before an application to change the place of diversion, manner of use or place of use is made.¹¹ The State Engineer finds that this protest issue is without merit.

V.

The applications were protested on the grounds that the water rights have been forfeited and/or abandoned. A review of Permit Nos. 49416, 49418, 49434, 49435 and 50247, show that the water rights are in good standing at this time.¹² Nevada Revised Statute § 533.030 provides that water may be appropriated for a beneficial use and not otherwise. Nevada Revised Statute § 533.035 provides that beneficial use is the basis, the measure and the limit of the right to the use of

⁹ File Nos. 76296, 76297, 76298, 76299 and 76300, official records in the Office of the State Engineer.

¹⁰ NRS § 533.325.

¹¹ NRS § 533.324.

¹² File Nos. 49416, 49418, 49434, 49435 and 50247, official records in the Office of the State Engineer.

water. Abandonment is a question of fact to be determined from all the surrounding circumstances and an intent to forsake the water right is a necessary element. In the case of Permit Nos. 49416, 49418, 49434, 49435 and 50247, the Applicant has filed change applications to move the point of diversion to a well with better water quality. This is evidence that the Applicant does not intend to abandon the water rights and seeks to ensure that the water can be placed to beneficial use as needed. Nevada Revised Statute § 534.090 provides in part that the holder of any right for which a certificate has been issued may be subject to forfeiture. No such certificates have been issued for Permits 49416, 49418, 49434, 49435, and 50247; therefore, by statute, they are not subject to forfeiture.

The State Engineer finds that the water sought for change under Permit Nos. 49416, 49418, 49434, 49435, and 50247, are currently in good standing and not subject to cancellation, abandonment or forfeiture.

VI.

The protestant alleges that granting the applications would threaten to prove detrimental to the public interest in ways that are not yet known to it, but which may arise before the applications are actually considered by the State Engineer. The State Engineer finds that NRS § 533.365 provides that a protest must set forth with reasonable certainty the ground of the protest, which shall be verified by the affidavit of the protestant, his agent or attorney and this protest ground does not set forth its ground with reasonable certainty and is thereby overruled.

VII.

The protestant alleges that granting the applications would threaten to prove detrimental to the public interest and the protestant seeks to incorporate any other issues raised by any other protestant. The State Engineer finds that NRS § 533.365 provides that a protest must set forth with reasonable certainty the ground of the protest, which shall be verified by the affidavit of the protestant, his agent or attorney, and this protest ground does not set forth its ground with reasonable certainty and is thereby overruled. It is noted that there are no other protests to the applications.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.¹³

II.

The State Engineer is prohibited by law from granting a permit under a change application that requests to appropriate the public waters where:¹⁴

- 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 protectible 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.

Applications 76296 through 76300 seek to move the points of diversion a short distance to a new well that will better serve the proposed project and with better water quality to meet new arsenic standards. The existing water rights are permitted underground water rights in good standing that have already been accounted for in the basin's groundwater budget. The State Engineer concludes that the protest issues raised are without merit and may be overruled.

IV.

The State Engineer concludes that change Applications 76296 through 76300 will not conflict with existing rights and protectible interests in existing domestic wells, and will not threaten to prove detrimental to the public interest.

V.

The State Engineer concludes that the water sought for change is in good standing, is not subject to forfeiture or abandonment, and the filing of a change application on this existing water right is allowed by Nevada water law.¹⁵

¹³ NRS Chapters 533 and 534.

¹⁴ NRS § 533.370(2).

¹⁵ NRS § 533.040(2).

RULING

The protests are overruled and Applications 76296 through 76300 are hereby approved subject to:

1. Existing water rights; and
2. Payment of the statutory permit fee.

Respectfully submitted,



JASON KING, P.E.
State Engineer

Dated this 3rd day of
February, 2012.