IN THE OFFICE OF STATE ENGINEER
OF THE STATE OF NEVADA

IN THE MATTER OF APPLICATION 69424 FILED TO CHANGE THE POINT OF DIVERSION AND THE PLACE OF USE OF THE PUBLIC WATERS OF WILLOW CREEK, PREVIOUSLY APPROPRIATED UNDER PERMIT 51430 WITHIN THE IMLAY AREA HYDROGRAPHIC BASIN (072), PERSHING COUNTY, NEVADA.	)	**RULING** **#5326**

GENERAL

I.

Application 69424 was filed on December 19, 2002, by James A. and Beverly J. Calder to change the point of diversion and the place of use of 0.25 cubic feet per second (cfs) of water previously permitted for appropriation under Permit 51430. The proposed manner and place of use is described on the application as being for mining and milling purposes within the N½ SE¼ of Section 32, T.32N., R.36E., M.D.B.&M. The changes requested by Application 69424, if approved, would transfer the applicants' existing point of diversion on Willow Creek from the NE¼ SW¼ of Section 34, T.32N., R.36E., M.D.B.&M. to a point which is located approximately 1.5 miles downstream, more specifically, within the NE¼ SE¼ of Section 32, T.32N., R.36E., M.D.B.&M. The existing place of use is described as being within the N½ S½ of Section 34, T.32N., R.36E., M.D.B.&M.[1]

II.

Application 69424 was timely protested by Thacker Properties, Inc., on the following grounds.[1]

> Thacker Properties protests the change of Point of Diversion on the basis it will effect the use of Thacker Properties water right. The change of Point of Diversion will directly effect water being used for

[1] File No. 69424, official records in the Office of the State Engineer.

mining, agricultural irrigation, and watering of livestock in and around Willow Creek Canyon.

FINDINGS OF FACT

I.

When considering a protested water right application, the State Engineer may schedule and conduct a public hearing to acquire additional evidence and testimony regarding the applicant's and protestant's respective positions.[2] The State Engineer finds that in the case of protested Application 69424, 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 in this matter is not required.

II.

Under the provisions established under NRS 533.370, it must be determined that the approval of Application 69424 will not conflict with existing water rights, which currently appropriate water from Willow Creek or its tributaries. The allocation of Willow Creek water is based upon a priority system where first in time equates to first in use. In other words, the most senior water right of a stream system must be fully served before water can be appropriated by a junior user. The seniority of a permit to appropriate a decreed water right is determined either through the adjudication process or by its filing date in the Office of the State Engineer. In the case of a permit, which has been approved to transfer an existing water right, the priority date is based upon the filing date of the permit, which represents the base of the abrogation tree. The records of the Office of the State Engineer contain an accounting of all water rights that have been filed to appropriate water from Willow Creek. An examination of these records identified three active permitted rights and a single claim of historic use, which have been issued for points of diversion on Willow Creek.

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[2] NRS § 533.365.

These rights are described as follows:

1) Permit 13305, Certificate 4461, was assigned a priority date of March 13, 1950. This certificated permit is currently held by Annie N. Thacker and grants her the right to appropriate 2.00 cfs of Willow Creek water for mining purposes, from a point of diversion located within the NE¼ SE¼ of Section 2, T.31N., R.36E., M.D.B.&M.[3]

2) Permit 22902, Certificate 7038, was assigned a priority date of January 4, 1966. This certificated permit is currently held by the Pruitt Revocable Living Trust, and grants the trust the right to appropriate 0.007 cfs of Willow Creek water for stock watering purposes, from a point of diversion located within the NE¼ NW¼ of Section 29, T.32N., R.36E., M.D.B.&M.[4]

3) Permit 51430, was assigned a priority date of October 15, 1987. This permit is currently held by James A. and Beverly J. Calder and grants them the right to appropriate 0.250 cfs of Willow Creek water for mining and milling purposes, from a point of diversion located within the NE¼ SW¼ of Section 34, T.32N., R.36E., M.D.B.&M. This permit represents the water right from which a change in point of diversion and place of use is requested under Application 69424.[5]

4) Application 69424, the specifics of this application have been previously described within this ruling.

5) Proof No. V-04554, claims a priority of about 1890. This claim of historic use has not been adjudicated and is held by Audrey Harmon. This proof states that 2.0 cfs of Willow Creek water was appropriated for irrigation use from a

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[3] File No. 13305, official records in the Office of the State Engineer.
[4] File No. 22902, official records in the Office of the State Engineer.
[5] File No. 51430, official records in the Office of the State Engineer.

point of diversion located within the NE¼ SE¼ of Section 2, T.31N., R.36E., M.D.B.&M.[6]

The State Engineer finds that the protestant currently holds a single certificated permit to appropriate water from Willow Creek and that the approval of Application 69424 must not adversely affect this permit or those held by other senior water right holders.

III.

The applicants are the junior appropriator on the Willow Creek system. Under the priority system, an appropriation of surface water under a junior right can only occur after all senior rights on the source have been satisfied. An exception to this rule occurs during extended periods of low stream flow, when an upstream junior appropriator is allowed to divert water out of priority, if the stream flow is insufficient to reach the senior water right. In the case of Application 69424, the protestant holds a senior right, Permit 13305, which is positioned above the existing point of diversion held by the applicants. This upstream position favors an uninterrupted flow of water to the protestant, since the flow of Willow Creek must pass the protestant's point of diversion before passing to the applicants. The proposed point of diversion requested by the subject application is located 1.5 miles downstream of the present existing diversion established under Permit 51430, and the approval of this transfer would add an additional 1.5 miles between the protestant's and applicants' respective points of diversion.[7,8] The State Engineer finds that the applicants' appropriation of water under any permit derived from Application 69424 would be limited to whatever water is available from Willow Creek after all senior water rights on this

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[6] File No. V-04554, official records in the Office of the State Engineer.
[7] Water right map filed in support of Permit 69424, official records in the Office of the State Engineer.
[8] Water right map filed in support of Permit 51430, official records in the Office of the State Engineer.

stream system have been serviced. In addition, the State Engineer finds that the transfers proposed by Application 69424, if approved, would maintain the status quo, in that the applicants' new point of diversion would still be located downstream of the protestant's diversion on Willow Creek.

IV.

Application 69424 was protested on issues, which must be resolved before the application can proceed through the formal review process.[1] The resolution of a protest can often be accomplished through an onsite inspection of the proposed point of diversion and place of use. This is particularly true in regard to surface water applications, where information acquired in the field can assist in a determination regarding the availability of unappropriated water from the targeted source. An evaluation of the application's potential for conflict with existing water rights can also be made through field observations. The State Engineer finds that an informal field investigation in the matter of protested Application 69424 was warranted and that the information generated by this investigation will assist in the decision to approve or deny said application.

V.

Accordingly, an informal field investigation, in the matter of the subject application was performed by representatives of the Office of the State Engineer on June 24, 2003. The findings and conclusions of this on-site visit are contained within a Report of Field Investigation, which has been incorporated into the file maintained under Application 69424. This field investigation addressed the protestant's contention that the approval of Application 69424 would adversely impact its existing water right on Willow Creek. This report reinforces the position that the approval of Application 69424 would not conflict with existing water rights, which are currently permitted to appropriate the waters of Willow Creek. It was also determined through a stream flow measurement taken at the applicants' proposed point of diversion that the amount of water requested for change under

Application 69424 is available at the proposed diversion site.[9] The State Engineer finds that on-site observations support the finding that the approval of Application 69424 would not adversely affect the protestant's ability to utilize the waters of Willow Creek as provided under Permit 51430.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.[10]

II.

The State Engineer is prohibited by law from granting a change application to appropriate the public waters where:[11]

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.

Application 69424, if approved, would add an additional 1.5 miles to the downstream distance, which currently separates the applicants' and protestant's points of diversion on Willow Creek. An analysis of this proposed transfer failed to identify any potential negative impact on the protestant's single permitted water right. In addition, any permit derived from Application 69424 would be issued subject to existing water rights and its appropriation of water would be limited to whatever amount of flow remained in Willow Creek after all senior rights had been satisfied. The State Engineer concludes that the approval of Application 69424 would not have an adverse effect upon existing

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[9] Report of Field Investigation No. 1047, official records in the Office of the State Engineer.
[10] NRS chapters 533 and 534.
[11] NRS § 533.370(3).

water rights that are currently permitted for appropriation of water from Willow Creek.

IV.

The State Engineer concludes that the transfer of an existing point of diversion and place of use established under a junior priority date, to a location further downstream from the protestant's point of diversion would not threaten to prove detrimental to the public interest.

RULING

The protest to Application 69424 is overruled and Application 69424 is hereby approved subject to existing water rights, which appropriate water from the Willow Creek system and payment of the statutory permit fee.

Respectfully Submitted,

HUGH RICCI, P.E.
State Engineer

HR/MDB/jm

Dated this 20th day
of February, 2004.