

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

IN THE MATTER OF APPLICATIONS )  
69306 AND 69307 FILED TO CHANGE )  
THE POINT OF DIVERSION AND )  
PLACE OF USE OF A PORTION OF THE )  
WATERS OF DRY CREEK, A BRANCH )  
OF SEITZ CREEK, PREVIOUSLY )  
APPROPRIATED UNDER PERMIT 1115, )  
CERTIFICATE 78, LOCATED WITHIN )  
LAMOILLE VALLEY HYDROGRAPHIC )  
BASIN (45), ELKO COUNTY, NEVADA. )

**RULING**  
**#5339**

**GENERAL**

**I.**

Application 69306 was filed on November 6, 2002, by Elko Partnership to change the point of diversion and place of use of 0.23 cubic feet per second (cfs), a portion of the water heretofore appropriated under Permit 1115, Certificate 78, from Dry Creek, a branch of Seitz Creek for irrigation, stockwater and domestic purposes on 23.33 acres within a portion of the SE $\frac{1}{4}$  of Section 23, T.33N., R.57E., M.D.B.&M. The proposed point of diversion is described as being located within the SE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 23, T.33N., R.57E., M.D.B.&M.<sup>1</sup>

**II.**

Application 69307 was filed on November 6, 2002, by Elko Partnership to change the point of diversion and place of use of 0.10 cfs, a portion of the water heretofore appropriated under Permit 1115, Certificate 78, from Dry Creek, a branch of Seitz Creek for irrigation, stockwater and domestic purposes on 10.0 acres within a portion of the E $\frac{1}{2}$  NE $\frac{1}{4}$  of Section 23, T.33N., R.57E., M.D.B.&M. The proposed point of diversion is described as being located within the SE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 23, T.33N., R.57E., M.D.B.&M.<sup>2</sup>

**III.**

Permit 1115, Certificate 78, was filed on September 1, 1908, by C.W. Griswold and was certificated on December 2, 1912, for 0.55 cfs from Dry Creek, a branch of Sites Creek, also known as "Seitz Creek", for the irrigation of 55.01 acres of land located within the NE $\frac{1}{4}$  of Section 34,

<sup>1</sup> File No. 69306, official records in the Office of the State Engineer.

<sup>2</sup> File No. 69307, official records in the Office of the State Engineer.

T.33N., R.57E., M.D.B.&M. The point of diversion is described as being located within the SE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 35, T.33N., R.57E., M.D.B.&M. Title to this water right certificate was transferred to Elko Partnership on July 16, 2001.<sup>3</sup>

**IV.**

Proof of Appropriation No. V-00370 for the waters of Stoffer Creek through the Ernest Hodges Ditches was decreed under the Humboldt River Adjudication with a priority date of 1903 for the irrigation of 99.00 acres of land located within the S $\frac{1}{2}$  NW $\frac{1}{4}$  and SW $\frac{1}{4}$  of Section 30, T.33N., R.57E., M.D.B.&M. The second part of the claim is for the waters of Dry Creek and springs with priority dates of 1904, 1902 and 1905 for the irrigation of 48.00 acres, 18.00 acres and 21.00 acres of land, respectively, located within the SW $\frac{1}{4}$  of Section 30, T.33N., R.57E., M.D.B.&M.<sup>4</sup>

**V.**

Applications 69306 and 69307 were timely protested by Otis and Marilyn W. Tipton III on the grounds that as the registered owners of Proof No. 00370, dated 1903 and Permit No. 55827, Certificate No. 14765, they object, because the applications will change the use of the water into a new watershed, from 10 Mile Creek to Rabbit Creek. The common diversion ditch that runs along the Pleasant Valley Road is used for both Permit No. 1115 and Proof No. 00370. It allows them to divert water as needed to fulfill the allocation to Stoffer Creek. Changing the point of diversion to another place will deprive them of being able to exercise their priority in the diversion ditch. Proof No. 00370, dated 1903, has priority over Permit No. 1115, dated 1908.<sup>1,2</sup>

**FINDINGS OF FACT**

**I.**

Nevada Revised Statutes § 533.365 (3) 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 the State of Nevada. The State Engineer finds that a hearing is not necessary to consider the merits of the protest filed by Otis and Marilyn W. Tipton III.

---

<sup>3</sup> File No. 1115, official records in the Office of the State Engineer.

<sup>4</sup> In the matter of the Determination of the Relative Rights of the Waters of the Humboldt River Stream System and Tributaries, Case No. 2804, Sixth Judicial District Court of Nevada, In and for the County of Humboldt, 1923-1938. See Claim No. 00370, Ernest Hodges, Bartlett Decree, p.168 (Humboldt Decree).

An informal field investigation conducted by representatives of the Office of the State Engineer on July 22, 2003, assessed the feasibility of moving the water rights under Permit 1115, Certificate 78, and examined the grounds of the protest to the granting of Applications 69306 and 69307.<sup>1,2</sup> It was found that Dry Creek water originates in Seitz Canyon, which is the same water source as Rabbit Creek. Water is taken from the Rabbit Creek drainage that ultimately drains into the Humboldt River near Halleck, Nevada, and is transferred into the Dry Creek channel. Water is diverted from the Dry Creek channel into the Griswold Ditch that provides water to irrigate land described under Permit 1115, Certificate 78. Any wastewater runoff from this acreage could continue below the irrigated acreage and into the Stoffer Creek drainage.

The field investigation finds that Applications 69306 and 69307 propose to move Rabbit Creek water that is currently transmitted through the Dry Creek channel and utilize it to irrigate lands adjacent to the Rabbit Creek channel downstream of the Dry Creek diversion from Rabbit Creek.

## II.

Wastewater is stated by the Nevada Supreme Court to consist of surplus water running off from irrigated ground, not consumed by the process of irrigation, or which the irrigated land would not take up. Wastewater is subject to capture and use but the user cannot require continuance of waste. The issuance of these permits does not place any obligation on the upstream water right holder to maintain his irrigation to satisfy a downstream use derived from wastewater. The right that a claimant does have to the use of wastewater was summarized by the Nevada Supreme Court:<sup>5</sup>

These authorities are all to the effect that a claimant to wastewater acquires a temporary right to whatever water escapes from the works or lands of others, and which cannot find its way back to its source of supply; that such use of the water does not carry with it the right to any specific quantity of water; nor the right to interfere with the water flowing in the ditches or works of others lawfully appropriating it.

In no instance, would the Tipton's be prevented from continued diversion of water from Dry Creek and associated ditches. The State Engineer finds that the removal of one of the water

---

<sup>5</sup> Gallio v. Ryan. 52 Nev. 330, 344, 286 Pac. 963 (1930).

rights carried by the Dry Creek ditch does not preclude the continued use of the ditch for any other water rights that are associated with said ditch.

**III.**

The State Engineer does not find any reference in the Humboldt River Decree that specifies Dry Creek water originating in Sites Canyon, also known as Seitz Canyon or Rabbit Creek.

**IV.**

The State Engineer finds that the portion of water from Dry Creek used to irrigate land under Humboldt River Claim No. 00370 originates in Rabbit Creek. Therefore, moving the point of diversion of Permit 1115, Certificate 78, which is the same point of diversion as Humboldt River Claim No. 00370, does not affect water delivery through the Dry Creek channel.

**CONCLUSIONS**

**I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>6</sup>

**II.**

The State Engineer is prohibited by law from granting a permit under a change application that requests to appropriate the public waters where:<sup>7</sup>

- 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.**

The approval of Applications 69306 and 69307 would not have an adverse affect on existing rights within the Stoffer Creek drainage and would not preclude the protestants continued diversion of existing water rights through the Dry Creek channel. The State Engineer concludes that the approval of Applications 69306 and 69307 would not conflict with existing water rights.

---

<sup>6</sup> NRS § chapter 533.

<sup>7</sup> NRS § 533.370(3).

IV.

The State Engineer determines that drain and wastewater originating from Permit 1115, Certificate 78, is available for use by downstream users holding a valid water right, but there is no necessity to continue providing this water after the issuance of permits under Applications 69306 and 69307.

**RULING**

The protests to the Applications 69306 and 69307 are overruled and Applications 69306 and 69307 are approved with the following conditions:

- A. the payment of the statutory permit fee;
- B. they are issued subject to any existing water rights that appropriate water from the Rabbit Creek, also known as Seitz or Sites Canyon, stream system.

Respectfully Submitted,



HUGH RICCI, P.E.  
State Engineer

HR/SW/jm

Dated this 17th day of

March, 2004.