

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

IN THE MATTER OF PROTESTED)
APPLICATION 76291 FILED TO CHANGE)
THE POINT OF DIVERSION, MANNER)
AND PLACE OF USE OF A PORTION OF)
THE PUBLIC WATERS OF AN)
UNDERGROUND SOURCE PREVIOUSLY)
APPROPRIATED UNDER PERMIT 59297,)
CERTIFICATE 14171, WITHIN THE)
DAYTON VALLEY HYDROGRAPHIC)
BASIN (103), LYON COUNTY, NEVADA.)

RULING

#5923

GENERAL

I.

Application 76291 was filed on September 17, 2007, by Road and Highway Builders, LLC to change the point of diversion, manner and place of use of 0.03783 cubic feet per second, 9.08 acre-feet annually, a portion of the underground water previously appropriated under Permit 59297, Certificate 14171. The proposed manner of use is for mining and milling purposes. The proposed place of use is described as being located within portions of the NW $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ SW $\frac{1}{4}$, and NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 17, portions of the NE $\frac{1}{4}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ SE $\frac{1}{4}$, of Section 18, all in T.16N., R.21E., M.D.B.&M. The existing place of use is 2.27 acres to be removed from irrigation described as being located within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 17, T.17N., R.23E., M.D.B.&M. The existing point of diversion is located within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 17, T.17N., R.23E., M.D.B.&M. The proposed point of diversion is described as being located within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 18, T.16N., R.21E., M.D.B.&M.¹

II.

Application 76291 was timely protested by the Pyramid Lake Paiute Tribe (PLPT) on the following grounds:

¹ File No. 76291, official records in the Office of the State Engineer.

1. Granting the application would threaten to prove detrimental to the public interest in light of the 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 and groundwater rights.

2. Upon information and belief, the transfer involves water rights that have been forfeited and/or abandoned and the application should therefore be denied.

3. The applicant is requesting to transfer the full water duty from the existing irrigation and domestic use to a mining and milling use which is contrary to previous rulings by the State Engineer and Administrative Provision VII of the Alpine Decree, which states unconditionally that change in manner of use applications from a use for irrigation to any other use are limited only to the net consumptive use of the water right sought to be changed. If granted, the application should be limited to the consumptive use of the water right sought for transfer.

4. Granting the application would threaten to prove detrimental to the Tribe, to the purposes for which the Pyramid Lake Paiute Indian Reservation was created, and to the public interest, by depleting flows in the Carson River and reducing inflows to Lahontan Reservoir, for the reasons stated above, to the detriment of senior surface water right holders in the Newlands Project, which senior right holders are entitled to divert Truckee River water through the Truckee Canal to make up for insufficient Carson River flows which are the primary source to satisfy their rights, and which greater diversions of Truckee River water away from Pyramid Lake would operate to the detriment of the threatened and endangered species inhabiting Pyramid Lake and the lower Truckee River, 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 in this Protest by reference as if fully set forth herein every relevant protest ground set for the in any other Protest filed by any other Protestant regarding this application.

FINDINGS OF FACT

I.

Once a water right application has been timely protested, its progress through the State Engineer's permitting process is delayed until the protest issues are resolved. The Nevada Revised Statutes (NRS) provide the State Engineer with several tools that can be used to resolve the protest issues. These can range from simple informal field investigations to extensive public hearings, all of which are intended to provide the State Engineer with sufficient information to gain a full understanding of the water right application and its associated protest. The NRS also place the decision as to the necessity of a public hearing with the State Engineer, who may forego the hearing process if the existing record of information is sufficient to address the issues at hand.²

The filing of a water right application for use within the Dayton Valley Hydrographic Basin is often followed by a timely protest by the PLPT. The PLPT's protests are not limited to applications that request additional appropriations of underground water, and have been extended to include applications that request changes in existing ground-water rights. The protests that are received by the State Engineer's office typically contain a set of standard points, similar to those being considered in this ruling. A review of the protest finds that it focuses primarily upon the issues of reduction in flow of the Carson River, which the Protestant believes will affect Pyramid Lake and the Pyramid Lake Paiute Indian Reservation.

In an effort to resolve the numerous protest claims filed by the PLPT against nearly all water right applications within Dayton Valley, the State Engineer held a pre-hearing meeting on April 17, 2007. As a result, the PLPT was required to file evidence in support of its protest

² NRS 533.365(3).

claims.³ Subsequently, the applications were resolved and the protests were overruled by State Engineer's Ruling No. 5823.

In the case of Application 76291, the application was filed after April 17, 2007, and therefore, was not to be included in State Engineer's Ruling No. 5823. However, the protest issues addressed and overruled by State Engineer's Ruling No. 5823 are very similar to the protest of Application 76291.

The State Engineer finds that the protest issues have been previously addressed and that there is no need to supplement the existing record. The State Engineer finds the reasoning found in State Engineer's Ruling No. 5823 is applicable here and hereby adopts and incorporates those findings and conclusions into the decision on this application.

II.

Upon review of records on file in the Office of the State Engineer^{4,5} the State Engineer finds Permit 59297, Certificate 14171 is not subject to forfeiture or abandonment at this time.

CONCLUSIONS

I.

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

II.

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

- 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.

³ State Engineer's Ruling No. 5823, p. 16, March 18, 2008, official records in the Office of the State Engineer.

⁴ Nevada Division of Water Resources, Dayton Valley Groundwater Inventories, 2001-2008, official Records in the Office of the State Engineer.

⁵ FileNo.59297, official records in the Office of the State Engineer.

⁶ NRS chapters 533 and 534.

⁷ NRS § 533.370(5).

III.

The State Engineer concludes the protest issue that the basin is over appropriated is not accurate, and therefore, use of water under this application does not threaten to prove detrimental to the public interest. The State Engineer concludes, based on the recharge evidence, that the consumptive use of the water already appropriated is within the range of estimated recharge, that pumping is well within the range of estimated recharge, and that ground water recharged by precipitation in the basin is intended for appropriation by ground-water users within the basin, that the ground water does not "belong to the river," that ground water was not included in the *Alpine Decree* and that ground water is not being withdrawn in excess of the average annual replenishment to the ground-water supply.

IV.

The State Engineer concludes that conclusions reached in State Engineer's Ruling No. 5823 are applicable and are hereby adopted and incorporated herein.

V.

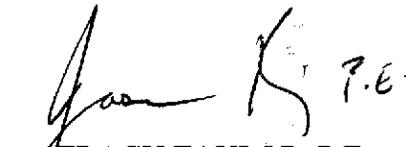
The State Engineer concludes that the granting of Application 76291 will not conflict with existing rights, conflict with protectible interests in domestic wells as set forth in NRS § 533.024 or threaten to prove detrimental to the public interest.

RULING

The protest to Application 76291 is hereby overruled and the application is approved subject to:

1. Existing rights; and
2. The payment of statutory permit fees.

Respectfully submitted,


for TRACY TAYLOR, P.E.
State Engineer

TT/SNC/jm

Dated this 23rd day of

January, 2009.