

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

IN THE MATTER OF APPLICATIONS 72848)
THROUGH 72863, 74408, 74409, 74410, FILED TO)
APPROPRIATE THE UNDERGROUND WATERS)
OF THE KUMIVA VALLEY HYDROGRAPHIC)
BASIN (79) AND APPLICATIONS 76302,)
THROUGH 76308 FILED TO APPROPRIATE THE)
UNDERGROUND WATERS OF THE GRANITE)
SPRINGS VALLEY HYDROGRAPHIC BASIN (78),)
PERSHING AND CHURCHILL COUNTIES,)
NEVADA.)

RULING
#6063

GENERAL

I.

Applications 72848 through 72863, inclusive, were filed on May 26, 2005, by Aqua Trac, LLC to appropriate a total of 45 cubic feet per second (cfs), not to exceed 30,800 acre-feet annually (afa), of the underground water of the Kumiva Valley Hydrographic Basin for quasi-municipal purposes within the hydrographic basins identified as the Fernley Area (76), Tracy Segment (83), Warm Springs Valley (84), Spanish Springs Valley (85), and Truckee Meadows (87).¹ The applications were timely protested by Pershing County, the United States Department of Interior Bureau of Land Management, and C-Punch Ranch, Inc.

II.

Applications 74408, 74409 and 74410 were filed on June 26, 2006, by Aqua Trac, LLC to appropriate a total of 29.7 cfs, not to exceed 30,800 afa, of the underground water of the Kumiva Valley Hydrographic Basin for quasi-municipal purposes within the hydrographic basins identified as the Fernley Area (76), Tracy Segment (83), Warm Springs Valley (84), Spanish Springs Valley (85), and Truckee Meadows (87).² The applications were timely protested by Pershing County, the United States Department of Interior Bureau of Land Management, and C-Punch Ranch, Inc.

¹ File Nos. 72848, 72849, 72850, 72851, 72852, 72853, 72854, 72855, 72856, 72857, 72858, 72859, 72860, 72861, 72862 and 72863, official records in the Office of the State Engineer.

² File Nos. 74408, 74409 and 74410, official records in the Office of the State Engineer.

III.

Applications 76302 through 76308 were filed on September 19, 2007, by Aqua Trac, LLC to appropriate a total of 105 cfs (76,000 afa, expanded) of the underground water of the Granite Springs Valley Hydrographic Basin for quasi-municipal purposes within the hydrographic basins identified as White Plains (74), Brady Hot Springs Area (75), Fernley Area (76), Fireball Valley (77), Granite Springs Valley (78), Kumiva Valley (79), Winnemucca Lake Valley (80), Pyramid Lake Valley (81), Dodge Flat (82), Tracy Segment (83), Warm Springs Valley (84), Spanish Springs Valley (85), Sun Valley (86), Truckee Meadows (87), Pleasant Valley (88), Washoe Valley (89), Lake Tahoe Basin (90), Truckee Canyon Segment (91), Lemmon Valley (92), Antelope Valley (93), Bedell Flat (94), Dry Valley (95), Newcomb Lake Valley (96), Red Rock Valley (99), Cold Spring Valley (100), Carson Desert (101), Churchill Valley (102), Dayton Valley (103), Eagle Valley (104), Carson Valley (105), Antelope Valley (106), Smith Valley (107), and Mason Valley (108).³ The applications were timely protested by Churchill County, Pershing County, the United States Department of Interior Bureau of Land Management, Kumiva Group, LLC and C-Punch Ranch, Inc., and Frank and Karen Lipera.

IV.

Protestant C-Punch Ranch, Inc. and Kumiva Group, LLC (hereinafter collectively referred to as "C-Punch") filed a Motion to Deny Applications or in the Alternative, Motion for Applicant to Define Project and Provide Information on its Ability to Finance and Construct Works to Put Water to Beneficial Use (hereinafter "Motion").^{1,2,3} The Motion pertains to all of the applications filed by Aqua Trac within the Kumiva Valley and Granite Springs Valley Hydrographic Basins and referenced above. Churchill County joined the Motion as it relates to Applications 76302-76308 within Granite Springs Valley Hydrographic Basin (hereinafter "Joinder").

Initially, the Applicant did not file a response to the motion. However, on July 9, 2010, the State Engineer ordered the Applicant to file a response to the Motion and on August 9, 2010, the Applicant filed a Response to Motion to Deny Applications (hereinafter "Response").⁴ On

³ File Nos. 76302, 76303, 76304, 76305, 76306, 76307 and 76308, official records in the Office of the State Engineer.

⁴ See, Interim Order, July 9, 2010, File No. 72848, official records in the Office of the State Engineer.

August 17, 2010, the Protestant filed a Reply of C-Punch Ranch to Response to Motion to Deny Applications (hereinafter "Reply").¹

FINDINGS OF FACT

I.

In the Motion to Deny, the Protestant requests that the applications be denied or alternatively that the Applicant be required to submit additional information regarding the specifics of the project. In support of the Motion, C-Punch quotes from the transcript of a pre-hearing conference held on January 12, 2010, in the matter of Applications 72848 through 72863 and 74408 through 74410,⁵ citing to statements from the Applicant and its legal counsel that appear to indicate a lack of specificity as to a project. The statements also indicate that given the current economic situation that the Applicant has concerns about moving forward with a project at this time.⁶ By Interim Order,⁴ which instructed the Applicant to file a response to the Motion, the State Engineer found based on the Applicant's statements at the pre-hearing conference that sufficient concerns were raised to necessitate the submittal of additional information in support of the applications. The State Engineer found that the various applications have been on file anywhere from 2½ years to over 5 years, which should be adequate time to formulate specific plans to provide the State Engineer with a full and complete understanding of the applications.

The Applicant's response to the Motion does not provide information on the ultimate beneficial use of the water and does not identify any specific project for which the water would be used or the quantity of water that would be necessary for any such project. The Response states that until such time as a study of the basins can be completed and findings made regarding the amount of water that may be available for appropriation, the additional resources necessary to pursue these applications, i.e., expenditures of money beyond the study costs and obtaining commitments from end users, would be futile. The Response also indicates that the current economic situations have caused the Applicant to reassess some specifics of the project and until those economic conditions change, the ultimate plan for putting water to use must, of necessity, remain somewhat in flux. It is the Applicant's belief that determining the quantity of water available is a prerequisite and only then will the Applicant be able to fully advise the State

⁵ Transcript, public administrative pre-hearing conference before the State Engineer, January 12, 2010, official records in the Office of the State Engineer (hereafter, "Transcript").

⁶ Transcript, pp. 5, 7, 11, 18, 29 and 30.

Engineer as to all the particulars of the heretofore undisclosed project. The Response reiterates that given the uncertainties of the resource and the uncertainty of current economic conditions, detailed plans for placing the water to beneficial use cannot be supplied at this time. The Applicant requests that the State Engineer deny the Motion and allow the Applicant to complete the hydrologic study ordered by the State Engineer before it is required to proceed further with its applications. While the Applications were filed for quasi-municipal purposes, the Applicant stated:

The way the world is today, there may be a more beneficial use of the water by the time we get the studies done. We are currently working on other projects, making biomass or bio fuel from algae which we are having a great deal of success with right now. We're not printing ourselves in the newspapers and we were not going to, but there's a lot of different uses that may be alternative uses in the future still of a commercial nature that would be more beneficial than what we are talking about right now. Nevada may never grow again.⁷

Nevada Revised Statute (NRS) § 533.030 provides that water may only be appropriated for a beneficial use and not otherwise. Nevada Revised Statute § 533.370(1)(c) provides that when approving or rejecting an application the applicant must provide proof satisfactory of his intention in good faith to construct any work necessary to apply water to the intended beneficial use with reasonable diligence and his financial ability and reasonable expectation actually to construct the work and apply the water to the intended beneficial use with reasonable diligence. Additionally, NRS § 533.375 allows for the State Engineer to require the applicant to submit additional information to enable him to properly guard the public interest.

The State Engineer finds that the beneficial use requirement provides that the Applicant must demonstrate an actual beneficial use for the water applied for and does not allow for an applicant to tie up water for some project it might find in the future. The State Engineer finds the Nevada legislature has demonstrated its concern with speculating in water rights by enacting NRS § 533.370(1)(c), which requires that an Applicant provide proof satisfactory of a good faith intention to actually construct the project with reasonable diligence and that it has the financial ability and reasonable expectation actually to construct the project.

The State Engineer finds while it is useful to have new studies of water availability for Nevada's future growth, it threatens to prove detrimental to the public interest to allow an

⁷ Transcript, p. 18.

applicant to hold on to a water right application when it is unable to demonstrate an actual project for which the water will be used or to fail to provide information required under Nevada water law. The State Engineer finds that the Applicant did not provide any evidence of the actual beneficial use to be made, and did not provide any evidence that specifically supports the quantity of water applied for under these applications. The State Engineer finds that the Applicant asserts that economic conditions must change before a plan to put water to beneficial use is made and this indicates that the Applicant does not have the financial ability to proceed with a project at this time and there is not a reasonable expectation to place water to the intended beneficial use with reasonable diligence. The State Engineer finds that the Applicant has no discernable project at this time and the applications are filed for speculative purposes.

II.

The Response indicates that the Applicant believes the Motion is premature, specifically, because the State Engineer has entered an order requiring a study of the subject basins be conducted pursuant to NRS § 533.368. Prior to the filing of the Motion, pursuant to the authority set forth in NRS § 533.368, on May 3, 2010, the State Engineer ordered a hydrologic study of the Kumiva Valley and Granite Springs Valley Hydrographic Basins. At this time, the study is only in the scoping stages. However, since that time the Motion has been filed and the State Engineer must consider the merits of the Motion. At the pre-hearing conference of January 12, 2010, the Applicant was specifically informed that the study is crucial to the hydrological knowledge needed, but the Applicant would still have to address all other statutory criteria required for an application to appropriate water.⁸

The State Engineer finds that the provisions of NRS § 533.368 do not preclude the State Engineer from considering the other statutory criteria, particularly in light of the pending Motion. The State Engineer further finds that to proceed with the time and expense of a hydrologic study, where the Applicant is unable or unwilling to specify a beneficial use for the water, would threaten to prove detrimental to the public interest.

⁸ Transcript, p. 17.

III.

In the broadest terms, the Motion, Joinder, and Reply allege that the applications are filed for speculative purposes. The issue of speculating in water rights has been previously addressed in numerous State Engineer Rulings.⁹

In State Engineer's Ruling No. 4192, the State Engineer addressed the filing by a private entity of 39 applications for municipal purposes that each requested a diversion rate of 10.0 cfs. The total quantity of water based on diversion rate expanded was over 280,000 afa of underground water from Elko, Eureka, Humboldt, Lander and Pershing Counties. Because the Applicant was not a municipality, the State Engineer requested, among other things, the Applicant submit information as to contracts, agreements or options with municipalities that would be able to place water to beneficial use for municipal purposes. No adequate response was received and nothing was contained in the records that indicated that the Applicant had the ability itself to develop the water and place it to beneficial use. The State Engineer concluded, in part, that the applications were filed for possible resale and speculation and it was not in the public interest to approve applications where the Applicant could not demonstrate the ability to place the water to beneficial use.

In State Engineer's Ruling No. 4548, the State Engineer addressed the filing by a private entity of five applications each for a diversion rate of 8.0 cfs totaling over 25,000 afa of underground water from the Amargosa Valley Hydrographic Basin within Nye County, Nevada. These applications were also filed for municipal purposes with a place of use described in general terms as the Amargosa Valley and Clark County. After the Clark County Commission voted to reject any plans for taking any of the developed water, the Applicant filed change applications to change the manner of use to wildlife purposes with an ultimate goal of leaving the water in the ground and selling the rights to the Federal Government for the protection of endangered and indigenous species. Within State Engineer's Ruling No. 4548, it was noted that the Nevada Legislature had become increasingly concerned over applications filed for speculative purposes where the sole intent of the applicant is not to place the water to beneficial use, but merely to provide a profit from the sale of water to interested parties. In 1993, the Nevada Legislature amended the provisions of Nevada water law to address the issue by adding

⁹ State Engineer Ruling Nos. 4192, 4307, 4548, 5612, 5782 and 5997, official records in the Office of the State Engineer.

the language now found in NRS § 533.370(1)(c), which provides that the Applicant must provide proof satisfactory to the state engineer of: (1) his intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence; and (2) his financial ability and reasonable expectation to actually construct the work and apply the water to the intended beneficial use with reasonable diligence. In State Engineer's Ruling No. 4548, the State Engineer found that the Applicant was trying to find a project to support its applications and justify their continuance, and that the Applicant went after the water merely in hopes of selling it to someone else for a profit upon finding a project in which the water could be used; and thus, denied the applications on the ground they were speculative.

In State Engineer's Ruling No. 5612, the Applicant requested 2.0 cfs of underground water for quasi-municipal purposes within Washoe County. Citing to NRS §§ 533.335 and 533.370, it was determined that the Applicant must satisfactorily demonstrate to the State Engineer the specific project where the water will be beneficially used and how the water is to be provided for the specific project. The Applicant was unable to demonstrate where the 120 afa of water being applied for would be specifically used or for what project it would be used, but only indicated a desire to use the water anywhere in the Nevada part of the Cold Spring Hydrographic Basin. The State Engineer found that the place of use was over 4,000 acres of land and the Applicant intended to build something residential, commercial, or industrial using the 120 afa somewhere within the acreage. The State Engineer found that the Applicant did not demonstrate who would provide water to whatever the project would be, but rather indicated the project was to be served water by someone to be determined in the future. The State Engineer found that the Applicant did not provide anything specific as to what would be built and where. The State Engineer found that the Applicant needed to identify a specific project on which the quantity of water requested for appropriation would be used. The State Engineer concluded that to grant a permit where the Applicant has not adequately demonstrated a specific project as required under NRS § 533.335 would threaten to prove detrimental to the public interest and not meet the requirements of NRS § 533.370.

In State Engineer's Ruling No. 5782, Aqua Trac, the same Applicant as in this matter, had filed applications in Granite Springs Valley to appropriate large quantities of groundwater for quasi-municipal purposes. The State Engineer concluded that the Applicant did not provide sufficient evidence of the amount of water reasonably required for any specific beneficial use

and to grant water rights under these conditions would violate the anti-speculation doctrine and threaten to prove detrimental to the public interest. The applications were denied, in part, on the grounds that no demonstration was made of the actual project to be constructed; therefore, no beneficial use of the water was identified and no evidence was provided as to the amount of water reasonably required for any specific project.

Applications 72848 through 72863, 74408, 74409, 74410, 76302 through 76308 were filed for 30,800 afa of groundwater from Kumiva Valley and 105 cfs (approximately 76,000 afa expanded) from Granite Springs Valley. The proposed place of use is extensive and for Applications 72848 through 72863, 74408, 74409 and 74410 covers approximately 600,000 acres and for Applications 76302 through 76308, covers approximately 6,160,000 acres.

Speculation is the act of acquiring a resource for the purpose of subsequent use or resale, in hopes of profiting from future price fluctuations.¹⁰ The law of all western states prohibits speculation, either explicitly or through requirements such that water be applied continuously to actual, beneficial use. The act of speculation would allow a person or entity to lock up scarce and essential water resources from use by individuals and communities who have a need to provide water for crops or municipal uses, for example, in Nevada, the waters of all sources of water supply within the boundaries of the state whether above or beneath the surface of the ground, belongs to the public.¹¹

The State Engineer finds that similar applications were denied wholly or in part on the grounds the applications were speculative where there was no definitive project or use of water specified and the amount of water required for any identifiable project could not be justified. The State Engineer finds that the Applicant has made no demonstration of the actual project to be constructed; therefore, no beneficial use of the water is identified and no evidence can be provided as to the amount of water reasonably required for any specific project. The State Engineer finds that the Applicant did not provide any evidence on where water would be used within the place of use and in what quantities; thus, there is no evidence of the actual beneficial use. The State Engineer finds that the proposed use of water for a project only described as quasi-municipal use somewhere within the vast place of use of approximately 600,000 acres and 6,160,000 acres, is too vague to properly evaluate potential conflicts with existing rights,

¹⁰ Black's Law Dictionary 1435 (8th ed. 2004).

¹¹ NRS § 533.025.

protectible interests in domestic wells, and whether the use would threaten to prove detrimental to the public interest.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.¹²

II.

Nevada Revised Statute § 533.035 provides that beneficial use shall be the basis, the measure and the limit of the right to the use of water. Nevada Revised Statute § 533.060 provides that the right to use water must be limited and restricted to as much as may be necessary when reasonably and economically used for a beneficial purpose. Nevada Revised Statute § 533.070 provides that the quantity of water that may be appropriated is limited to such water as shall be reasonably required for the beneficial use to be served. Nevada Revised Statute § 533.335(4) provides that each application for a permit to appropriate water state the purpose for which the application is made. Nevada Revised Statute § 533.370(1) requires that an applicant provide the State Engineer with proof satisfactory of his intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence and the financial ability and reasonable expectation to actually construct the work and apply the water to the intended beneficial use with reasonable diligence.

Nevada Revised Statute § 533.370(6) provides that in determining whether an application for an interbasin transfer of groundwater must be rejected, the State Engineer shall consider: (a) Whether the applicant has justified the need to import the water from another basin; (b) If the State Engineer determines that a plan for conservation of water is advisable for the basin into which the water is imported, whether the applicant has demonstrated that such a plan has been adopted and is being effectively carried out; (c) Whether the proposed action is environmentally sound as it relates to the basin from which the water is exported; (d) Whether the proposed action is an appropriate long-term use which will not unduly limit the future growth and development in the basin from which the water is exported; and (e) Any other factor the State Engineer determines to be relevant.

¹² NRS chapters 533 and 534.

The Nevada Supreme Court in *Bacher v. State Engineer*, 122 Nev. Adv. Op. No. 95, 146 P.2d 793 (November 22, 2006) held that an applicant can satisfy the “need to import water” requirement of NRS § 533.370(6)(a) by providing evidence of third-party need. The court concluded that an agent may request a water right permit based on the ultimate user’s need for water, but also adopted the anti-speculation doctrine, which requires the agent to have a contractual or agency relationship with the water’s appropriator. The court concluded nearly 100 years ago “that he who applies the water to the soil, for a beneficial purpose, is in fact the actual appropriator.”¹³ In the *Bacher* opinion, the court addressed absolute fundamentals of Nevada water law such as, the right to use water for a beneficial use depends on a party actually using the water, and once beneficial use is established, the quantity of water appropriated shall be limited to the amount reasonably required for the beneficial use to be served, and the court found that an applicant’s ability to satisfy NRS § 533.370(6)(a)’s requirement by demonstrating third-party need is limited by the “anti-speculation doctrine.”

This doctrine precludes speculative water right acquisitions without a showing of beneficial use. Precluding applications by persons who would only speculate on need ensures satisfaction of the beneficial use requirement that is so fundamental to our State’s water law jurisprudence. Thus, we agree with this limit on an applicant’s showing of third-party need and adopt the anti-speculation doctrine’s formal relationship requirement for Nevada. Further, we note that our adoption of this doctrine comports with the language and goals of NRS 533.370(1)(c)(2), which, to protect against speculation, requires the applicant to show both financial ability and a reasonable expectation with respect not only to constructing any work needed to apply the water, but also to “apply the water to the intended beneficial use with reasonable diligence.”

The State Engineer concludes that to consider applications where the Applicant has not adequately demonstrated a specific project as required under NRS § 533.335 would threaten to prove detrimental to the public interest and not meet the requirements of NRS § 533.370. The State Engineer concludes that the Applicant did not provide any evidence of the amount of water reasonably required for the beneficial use to be served per NRS § 533.070(1). The State Engineer concludes that since Aqua Trac did not provide evidence of where the water would actually be used or in what quantities, there is not sufficient evidence to overcome a conclusion that the applications are filed for speculative purposes.

¹³ *Prosole v. Steamboat Canal Co.*, 37 Nev. 254, 258-259, 140 P. 720, 722 (1914).

III.

The State Engineer concludes the Applicant did not provide sufficient evidence of the beneficial use of the water applied for under these applications. Under NRS § 533.070 the quantity of water which may be appropriated in this state shall be limited to such water as shall reasonably be required for the beneficial use to be served. The State Engineer concludes the Applicant did not provide sufficient evidence of the amount of water reasonably required for any specific beneficial use and to allow the applications to proceed under these conditions would violate the anti-speculation doctrine and threaten to prove detrimental to the public interest.

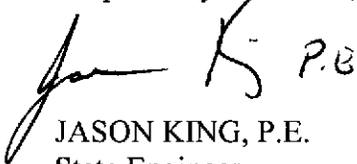
IV.

Based on the findings, the statutory authorities cited in the above conclusions, and the merits of the Motion, the State Engineer concludes that the Motion to deny the applications is meritorious and the Motion may be granted.

RULING

The Motion to deny Applications 72848 through 72863, 74408, 74409, 74410, 76302 through 76308 is granted on the grounds that the applications were filed for speculative purposes and violate the provisions of Nevada water law.

Respectfully submitted,


JASON KING, P.E.
State Engineer

Dated this 18th day of

October, 2010.