

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

IN THE MATTER OF APPLICATION 79659 FILED)
TO CHANGE THE PLACE OF USE AND MANNER)
OF USE OF A PORTION OF PERMIT 10105,)
CERTIFICATE 2695, THE PUBLIC WATERS OF)
WARM SPRINGS (AKA SEVEN DEVILS OR SOU)
SPRINGS) WITHIN THE DIXIE VALLEY)
HYDROGRAPHIC BASIN (128), PERSHING)
COUNTY, NEVADA.)

RULING
#6083

GENERAL

I.

Application 79659 was filed on March 3, 2010, by Joe Saval Company, LLC, to change the place of use and manner of use of a portion of water heretofore appropriated under Permit 10105, Certificate 2695, being 10.81 acre-feet annually (afa) from Warm Springs (a.k.a. Seven Devils or Sou Springs), for stockwater purposes within the NW¼ NE¼ of Section 32, T.26N., R.38E., M.D.B.&M. The existing manner of use and place of use are described as being irrigation and domestic purposes on 1.47 acres located within the NW¼ NE¼ of Section 5, T.25N., R.38E., M.D.B.&M. The point of diversion is described as being located within the S½ SE¼ of Section 29, T.26N., R.38E., M.D.B.&M. ¹

II.

Application 79659 was timely protested by Mike and Barb Stremler on the following grounds:¹

We, Mike & Barb Stremler own the deeded land that these springs are on. There is no easement filed to access these waters. The property is fenced with No Trespassing signs. Mike & Barb Stremler have asked to have the Permit #10105 Certificate #2695 be cancelled in accordance with NRS 533.060 part 4. Approval of this permit would contravene the polocy [sic] of NRS 533.495 Also see NRS 533.085 part 1. Also, no water leaves our deeded property. Also see NRS 533.505, 533.510. Granting this application would be considered a taking of our property right.

¹ File No. 79659, official records of the Office of the State Engineer.

FINDINGS OF FACT

I.

Nevada Revised Statute § 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 sufficient evidence exists within the records of the Office of the State Engineer and a hearing is not necessary to consider the merits of the protest.

II.

Application 79659 was filed by the Applicant to change the place and manner of use of a portion of water heretofore appropriated under Permit 10105, Certificate 2695. The existing point of diversion and manner of use is from Warm Springs for the irrigation of 18.68 acres at the Seven Devils Ranch, which is located about a mile south of the springs. Application 79659 proposes to change a portion of the irrigation water to provide water to livestock on public land south of the springs and north of Seven Devils Ranch. Rob and Sallie Lincoln are the owners of record of Permit 10105 and the Seven Devils Ranch. The portion of water under Permit 10105, Certificate 2695, sought for transfer under Application 79659 was transferred to the Applicant, Joe Saval Company, LLC.

Warm Springs is located within an 80 acre parcel of private land owned by the Protestant, Stremler. The Protestant is the owner of two undetermined claims of vested right; V-04741 to water livestock and irrigate about 3 acres of pasture grass, and V-09887 for watering livestock. The source of water claimed is from Warm Springs.

On August 17, 2010, a formal field investigation was conducted with the Applicant, Protestant and Seven Devils Ranch (Lincoln) and their respective representatives.² The purpose was to gain additional information and to possibly resolve the protest to Application 79659. Although a resolution to the protest was not reached during the field investigation, several conclusions were made. Of importance is the conclusion that water flow measurements from the spring complex exceed the amount of water required to serve the manner of use described under the Protestant's claims of vested right. Based on this conclusion, there is water available in priority for Permit 10105, Certificate 2695.

² Report of Field Investigation No. 1135, official records in the Office of the State Engineer.

The State Engineer finds that water is available to allow for the diversion of water under Permit 10105, Certificate 2695, which forms the basis for change Application 79659.

III.

The protest indicates that no easements exist and there is no access allowed to other parties to the water source, which is located on the Protestants land. The field investigation confirmed that Warm Springs is located within an 80 acre parcel of land owned by the Protestant. Research of the records on file in the Office of the State Engineer revealed the existence of a proof of beneficial use map filed under Permit 17890, which describes a 50 foot right of way on each side of a ditch centerline and describes a 10-inch concrete pipeline that was also constructed, apparently within the existing ditch, to deliver water to the reservoir at Seven Devils Ranch. However, the attendees at the field investigation could not come to an agreement as to the existence of the easement.²

Currently, water right permits approved by the Office of the State Engineer are issued with a permit term stating that the issuance of a water right permit does not extend the permittee the right of ingress and egress on public, private or corporate lands.

The State Engineer finds that the disagreement over whether an easement or other right of way exists that would allow the Applicant access to Warm Springs is an issue beyond his authority.

IV.

The protest requests the State Engineer declare Permit 10105, Certificate 2695, abandoned. The abandonment of a surface water right in Nevada is the relinquishment of a right with the intention to forsake it. Within the meaning of the term abandonment an intent to abandon is a necessary element. Nonuse of a water right is only some evidence of an intent to abandon the right and does not create a rebuttable presumption of abandonment under Nevada law. At the field investigation, permittee Lincoln expressed a continued interest in returning the pipeline or other works of diversion to operating condition.²

The State Engineer finds that Permit 10105, Certificate 2695 is in good standing and that the permittee Lincoln has shown no intent to abandon the water right.

V.

The protest references several statutes within Nevada water law; NRS 533.495, NRS 533.085(1), NRS 533.505, and NRS 533.510. Nevada Revised Statute 533.085(1) states that nothing contained in this chapter [NRS Chapter 533] shall impair the vested right of any person to

the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913. Nevada Revised Statute 533.495, 533.505, and 533.510, in general, relate to stockwater rights. An examination of the records of the Office of the State Engineer, show that there are no additional water right permits, proofs or claims filed at the proposed point of diversion beyond the Protestant's claims V-04741 and V-09887, and Permit 10105, Certificate 2695 sought for change by the Applicant.³ Although the claims are not adjudicated, the filings notify the State Engineer that pre-statutory claims may exist on the water source. The flow of water from the Warm Springs exceeds the amount of water required to serve the beneficial uses described under the Protestant's claims of historic use.² In other words, there is sufficient water to fully satisfy the Protestant's claims and to satisfy the water requirements under Permit 10105, Certificate 2695. Application 79659 seeks to change a portion of Permit 10105, Certificate 2695, to stockwater use, whereby the place of use of the stockwatering will be on public land where the Applicant is the authorized range user. The Applicant is not seeking a change in point of diversion, only the manner of use and place of use of a portion of the water previously appropriated under Permit 10105, Certificate 2695.

The State Engineer finds that there are no additional existing water rights or claims at the proposed point of diversion beyond V-04741, V-09887 and Permit 10105 Certificate 2695. The State Engineer finds that change Application 79659 will not conflict with the Protestant's claims of vested right.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁴

³ Nevada Division of Water Resources' Water Rights Database, Special Hydrographic Abstract, September 23, 2010, official records in the Office of the State Engineer.

⁴ NRS Chapters 533 and 534.

II.

The State Engineer is prohibited by law from granting a permit under an application to appropriate the public waters where:⁵

- 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 State Engineer concludes that the permittee Lincoln has indicated that he has no intention of abandoning his water right; therefore, the request to declare Permit 10105, Certificate 2695, abandoned is denied.

IV.

If the historic use of Permit 10105, Certificate 2695 is now continued, as desired by permittee Lincoln, water will be diverted from the Warm Springs complex to the Seven Devils Ranch for irrigation purposes. Application 79659 is seeking to use a portion of this water for stockwatering purposes where the water will cross the Applicant's grazing allotment. Change Application 79659 is not seeking a new appropriation of water from Warm Springs and will only result in authorized use by livestock from any restored ditch or pipeline under Permit 10105, Certificate 2695, on public land within the Applicant's grazing allotment. The protest references several statutes within Nevada water law, NRS 533.495, NRS 533.085(1), NRS 533.505, and NRS 533.510, indicating water use under Permit 10105, Certificate 2695 and change Application 79659 will conflict with the Protestant's water rights. The issuance of Permit 10105 and later Certificate 2695, were made over 65 years ago and the appeal periods for these actions have long passed. In addition, the State Engineer has found that the flow of the springs exceeds the quantity of water needed to satisfy the Protestants claims of vested right; therefore, there is no conflict with existing water rights or claims.

⁵ NRS § 533.370(5).

The State Engineer concludes that the matter before him is the determination of whether change Application 79659 can be approved and any part of the protest related to the issuance of Permit 10105, Certificate 2695, is dismissed. The State Engineer concludes that the Protestant failed to substantiate its protest claims.

V.

Application 79659 seeks to change the manner of use and place of use a portion of the surface waters previously appropriated under Permit 10105, Certificate 2695. The manner of use is being changed from irrigation purposes to stockwater purposes and the place of use is being changed from 1.47 acres of land within the existing place of use to stockwater use from the historical ditch used to convey this water to the existing place of use at Seven Devils Ranch. From the field investigation, it is clear that at one time water was conveyed from the spring mound to the Seven Devils Ranch via either a ditch or pipeline. Due to neglect and the passage of many years this pipeline no longer transports water. The path of the pipeline is easily identified on current aerial imagery, and it was located in the field. The pipeline was traced in the field south towards the Seven Devils Ranch and a valve was located. It appears that the valve was in the open position, but no water was visible and it is believed that the pipeline is dry at this time. The permittee under Permit 10105, Certificate 2695 (Lincoln) maintains the position that he has the equipment to clean out the pipeline and has expressed a continued interest in returning the pipeline or other works of diversion to operating condition. The pipeline and historical ditch that conveyed the water previously appropriated under Permit 10105, Certificate 2695, crosses Applicant Joe Saval Co., LLC's grazing allotment. The proposed change would use a portion of the water being conveyed to the Seven Devils Ranch for stockwatering purposes along the path of the ditch/pipeline.²

The State Engineer concludes that the proposed change in manner of use and place of use of a portion of water previously appropriated from Warm Springs under Permit 10105, Certificate 2695, will not conflict with existing rights, protectible interests in domestic wells or threaten to prove detrimental to the public interest.

VI.

On June 23, 1943, a proof of beneficial use was filed under Permit 10105 and a certificate of appropriation was issued on July 15, 1943.⁶ This signifies that a works of diversion were

⁶ File No. 10105, official records in the Office of the State Engineer.

constructed to convey the water from the Warm Springs complex to the place of use, where beneficial use of the water occurred for irrigation purposes. At some later date, a 10-inch concrete pipeline was built within the ditch.² No agreement on the issue of the existence of an easement could be reached between the parties at the field investigation, despite the existence of the historic works of diversion under Permit 10105, Certificate 2695.² The State Engineer concludes that the issue of whether an easement exists to the Warm Springs complex is not within his statutory authority.

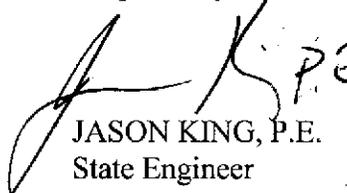
VII.

Based on the findings, the State Engineer concludes that the protest claims are without merit; therefore, Application 79659 may be considered for approval.

RULING

The protest to Application 79659 is overruled and Application 79659 is hereby approved subject to existing rights and payment of the statutory permit fees.

Respectfully submitted,



JASON KING, P.E.
State Engineer

Dated this 7th day of
December, 2010.