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

IN THE MATTER OF APPLICATION 79092) FILED TO CHANGE THE POINT OF) DIVERSION, THE PLACE OF USE AND) THE MANNER OF USE OF THE PUBLIC) WATERS OF AN UNDERGROUND) SOURCE PREVIOUSLY APPROPRIATED) UNDER PERMIT 69728 WITHIN THE) AMARGOSA VALLEY HYDROGRAPHIC) BASIN (230), NYE COUNTY, NEVADA.)	**RULING** **#6088**

GENERAL

I.

Application 79092 was filed on December 17, 2009, by Amargosa Land Investors, LLC, to change the point of diversion, the place of use and the manner of use of 0.6739 cubic feet per second, not to exceed 60.0 acre-feet annually, of the underground water previously appropriated under Permit 69728.

The proposed manner and place of use is for quasi-municipal purposes within the SE¼ NE¼ of Section 15, T.16S., R.48E., M.D.B.&M. The proposed point of diversion is described as being located within the SE¼ NE¼ of said Section 15. The existing manner and place of use is for commercial (nursery) and domestic purposes upon 80.0 acres of land located in the E½ SW¼ of Section 28, T.16S., R.49E., M.D.B.&M. The existing point of diversion is located within the SE¼ SW¼ of said Section 28.[1]

II.

Application 79092 was timely protested by the United States Department of the Interior, National Park Service (NPS) on the following grounds:[1]

A. Since no water was put to beneficial use under the base permit, the proposed use under the change application will have a greater impact on Devils Hole than the historic use under the base permit and will therefore conflict with existing senior water right at Devils Hole.

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[1] File No. 79092, official records in the Office of the State Engineer.

B. Since no water was put to beneficial use and no well exists under the base permit, the 60 acre-ft per year proposed under this change application will not be balanced by a reduction elsewhere, and will therefore contribute to the imbalance between the amount of water available for appropriation and the amount of groundwater that is being pumped and will prove detrimental to the public interest.

C. Since no water was put to beneficial use under the base permit, the proposed use will contribute to the withdrawal of groundwater in excess of the perennial yield and will therefore prove detrimental to the public interest.

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 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 on this matter is not required.

The Amargosa Valley Hydrographic Basin, is perhaps one of the most contentious groundwater basins in Nevada, this fact is reflected in the numerous protests that have been filed in opposition to new water right applications. Initially, most of the protests that were received expressed concerns relating to additional appropriations of groundwater from the Amargosa groundwater basin. As new appropriations of underground water became more difficult to obtain, a greater reliance was placed on the acquisition and transfer of existing water rights to support development of the Amargosa Valley. Those applications that proposed to move existing water rights closer to Devils Hole were routinely protested by the NPS on grounds similar to those found in its protest to Application 79092.

To address these protests, the State Engineer has held several public hearings. A large percentage of the evidence and testimony received at these hearings has been dedicated to understanding the relationship between the development of the valley's groundwater resources and its possible affect on federal water right holdings within the Death Valley Flow System.

Based in part from these records, the Office of the State Engineer has issued rulings that have defined the manner in which underground water can be appropriated within the Amargosa Valley. Of particular note is State Engineer's Ruling No. 5902, which addressed the issue of water

right transfers within the groundwater basin as they relate to Devils Hole.[2] The State Engineer finds that several of the findings of fact and conclusions of law, found within this ruling can be applied to the subject application and protest issues.

II.

The State Engineer approves a water right permit with the expectation that its water will be placed to its intended beneficial use within a reasonable time period. To assure that this happens deadlines are set for the construction of the works of diversion and establishing a beneficial use of the water. Under the Nevada Revised Statute § 533.380, the initial deadline for filing the proof of completion of works for diversion cannot exceed five years from the date that the permit was approved. This same provision of the Nevada water law limits the deadline for filing the proof of application of water to a beneficial use to ten years or less. In most instances, new water right permits are issued with shorter deadlines. In the case of Permit 69728, the permittee was allowed four years to complete and equip the well to a point where it was capable of operation, with beneficial use to be achieved within four years after the completion of the works of diversion.[3] Permit 69728 changed the point of diversion, place and manner of use of a portion of Permit 18764, a perfected water right.

In the event that a permittee is unable to file the required proof prior to its deadline, an application for extension of time may be filed in its place. The intent of the extension of time is to provide a permittee with additional time to file the required proof. If approved, the amount of time granted cannot exceed one year, except for certain municipal permits. When the proof of completion was due under Permit 69728, the permittee was unable to meet the December 19, 2006, deadline and elected instead to submit a request for additional time. This request was approved, as were subsequent filings, which extended the proof of completion and beneficial use deadlines to December 19, 2010.[3] Having followed the correct path in maintaining its water right, the State Engineer finds that Permit 69728 is considered by the Nevada Division of Water Resources to be in good standing.

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[2] State Engineer's Ruling No. 5902, dated November 9, 2008, official records in the Office of the State Engineer.

[3] File No. 69728, official records in the Office of the State Engineer.

III.

Application 79092 was protested, in part, on the grounds that the annual duty of water to be transferred is not offset by a reduction of the committed groundwater resource elsewhere in the Amargosa Valley Hydrographic Basin. The State Engineer finds that there is currently no provision in the Nevada water law that requires the approval of a change application within the Amargosa Valley to be counter balanced by the withdrawal, cancellation or forfeiture of an existing underground water right elsewhere in the groundwater basin.

IV.

It is the contention of the NPS that since its approval in 2004, no water has been used under Permit 69728 and a review of the records of the Office of the State Engineer confirms this to be true.[4] Based upon this record of non-use, the NPS has concerns regarding the renewed use of water that might occur should Application 79092 be approved. More specifically, it views the proposed use under the change application as having a greater impact on Devils Hole than the historic use under the base right permit.

While the effects that a groundwater appropriation may have on a spring source is not solely a function of distance, it is useful to compare the locations of the proposed and existing points of diversion as they relate to Devils Hole. At its current location, the well-site described under Permit 69728 is approximately 12 miles from Devils Hole. The approval of Application 79092 would increase this distance to approximately 17 miles. The State Engineer finds that this net gain in distance would appear to be a desirable transfer in regard to the alleged negative effect on Devils Hole.

V.

The NPS also claims that the proposed use will contribute to the withdrawal of groundwater in excess of the perennial yield. It is clear, based upon the Applicant's failure to file the proof of completion of work, that the well allowed under Permit 69728 has never been drilled. The lack of a completed well does not remove the 60.0 acre-feet annual duty from the groundwater basin committed resource. As such, the State Engineer finds that the water sought for change has already been accounted for in the groundwater basin budget and will have no additional effect on the groundwater resource.

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[4] 2008 Amargosa Valley Inventory Field Notes, official records in the Office of the State Engineer.

IV.

The State Engineer finds that the issue of unappropriated water does not apply to the subject change application.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.[5]

II.

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:[6]

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 Application 79092 will increase the distance that previously existed between the NPS' areas of concern and the point of diversion issued under the base right, Permit 69728. Additionally, as part of the application review process, a more localized analysis was made regarding those existing water rights in the immediate area of the proposed point of diversion. This examination supports the conclusion that the approval of Application 79092 will not have an adverse effect upon existing water rights.

IV.

The State Engineer concludes that the approval of the changes proposed under Application 79092 will not threaten to prove detrimental to the public interest.

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[5] NRS chapters 533 and 534.
[6] NRS § 533.370(5).

RULING

The protest to Application 79092 is overruled and Application 79092 is hereby approved subject to existing water rights and the timely payment of the statutory permit fee.

Respectfully submitted,

JASON KING, P.E.
State Engineer

Dated this 14th day of

February, 2011.