

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

IN THE MATTER OF APPLICATION 81728)
FILED TO APPROPRIATE THE PUBLIC)
WATERS OF AN UNDERGROUND)
SOURCE WITHIN THE DODGE FLAT)
HYDROGRAPHIC BASIN (82), WASHOE)
COUNTY, NEVADA.)

RULING

#6212

GENERAL

I.

Application 81728 was filed on April 3, 2012, by Lake Mountain Mining, LLC to appropriate 0.05 cubic feet per second (cfs), not to exceed 15.0 acre-feet annually (afa), of underground water from the Dodge Flat Hydrographic Basin for mining and milling purposes. The proposed place of use is described as being located within the W½ and the W½ E½ of Section 29, T.21N., R.23E., M.D.B.&M. The proposed point of diversion is described as being located within the SW¼ NW¼ of Section 29, T.21N., R.23E., M.D.B.&M.¹ The remarks section of the application indicates the application was filed for a 10-year term and is to replace water previously appropriated under expired Permits 67945² and 70975.

II.

Application 81728 was protested by the Pyramid Lake Paiute Tribe of Indians (PLPT) on the following grounds:

1. Application No. 81728 requests to appropriate groundwater from the Dodge Flat Hydrographic Basin which is a fully-appropriated basin. Granting the application would result in the withdrawal of groundwater in excess of the perennial yield of the Dodge Flat Hydrographic Basin and therefore would adversely affect existing rights and would threaten to prove detrimental to the public interest.
2. The miscellaneous remarks section of Application No.81728 states: "This application is for a 10 year term. This water will replace water previously appropriated under Permits 67949 (sic) and 70975, which recently expired." According to the Nevada State Engineer's Website, Permit Nos. 67949 and 70975 have in fact expired, and those permits expired on March 27, 2012 -- prior to the filing date of Application No. 81728 (April 3, 2012). Application

¹ File No. 81728, official records in the Office of the State Engineer.

² Permit 67945 is misidentified, it is believed the Applicant meant Permit 67949.

No. 81728 cannot simply “replace” water rights or permits that have expired. Application No. 81728 is a new appropriation for groundwater from the fully appropriated Dodge Flat Basin and should be denied for reasons stated in this protest, without consideration of expired Permit Nos. 67949 and 70975.

3. The Protestant Pyramid Lake Paiute Tribe asserts federally reserved groundwater rights in the Dodge Flat Hydrographic Basin, which is partially within the boundaries of the Pyramid Lake Indian Reservation. The Tribe’s federally reserved groundwater rights in the Dodge Flat basin will be harmed by the granting of Application No. 81728 for the reasons, among others, stated in Protest Grounds 1 and 4 herein.
4. 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.
5. Granting the application would threaten to prove detrimental to the Tribe, to the purposes for which the Pyramid Lake Indian Reservation was created, and to the public interest, by depleting flows in the Truckee River and reducing inflows to Pyramid Lake, for the reasons stated above and because of the connection, both legal and physical, between groundwater and surface water in the basin, and which depleted Truckee River flows would operate to the detriment of the threatened and endangered species inhabiting Pyramid Lake and the lower Truckee River, and impair instream flows.
6. Granting the application would:
 - A. deplete flows in the lower Truckee River and impair instream flows;
 - B. degrade or impair water quality in the lower Truckee River;
 - C. adversely affect regional groundwater levels and productivity of the Tribe’s existing and planned wells in the Dodge Flat Basin and Wadsworth Area;
 - D. have a detrimental effect on groundwater quality in the Dodge Flat Basin and Wadsworth Area;
 - E. prevent or interfere with the conservation or recovery of the two principle fish in the lower Truckee River and Pyramid Lake, the endangered cui-ui and the threatened Lahontan cutthroat trout, in violation of (i) the Endangered Species Act, 16 U.S.C. §1531 et seq., and (ii) Nevada law protecting the cui-ui;
 - F. adversely affect the recreational value of Pyramid Lake;
 - G. interfere with the purposes for which the Pyramid Lake Indian Reservation was established; and
 - H. adversely affect the interests of the Tribe
7. 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.

8. Granting the application would threaten to prove detrimental to the public interest.
9. This Protestant incorporates in this Protest by reference as if fully set forth herein every relevant protest ground set forth in any other Protest filed by any other Protestant regarding this application.

FINDINGS OF FACT

I.

Nevada Revised Statute (NRS) § 533.365(4) 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 Nevada. The State Engineer finds that in the case of protested Application 81728 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.

II.

The Protestant asserts that Application 81728 requests an additional appropriation of groundwater from the Dodge Flat Hydrographic Basin, which is a fully-appropriated basin. Therefore, granting the application would result in the withdrawal of groundwater in excess of the perennial yield of the basin adversely affecting existing rights and threatening to prove detrimental to the public interest.

The Office of the State Engineer estimates that the perennial yield of the Dodge Flat Hydrographic Basin is approximately 2,100 acre-feet.³ This 2,100 acre-feet is comprised of 1,400 acre-feet of recharge and 700 acre-feet of inflow from the Tracy Segment Hydrographic Area.⁴ An analysis of the existing permitted and certificated groundwater rights in the Dodge Flat Hydrographic Basin, along with consideration of the supplemental nature of some of those

³ Office of the State Engineer, *Water for Nevada, State of Nevada Water Planning Report No. 3*, p. 44, Oct. 1971.

⁴ Nowlin, Jon, *Groundwater Quality in Nevada – A Proposed Monitoring Program*, Open File Report 78-768, U.S. Geological Survey, p. 195.

groundwater rights and the temporary nature of some of those groundwater rights, shows that the committed duty of groundwater rights in the Dodge Flat Hydrographic Basin is approximately 2,100 acre-feet.⁵

The remarks on the application indicate that the application is to replace water previously appropriated under Permits 67949 and 70975, which expired on March 27, 2012. The State Engineer finds that the fact that the previous applications expired is not relevant to the consideration of water availability under Application 81728. The State Engineer finds each application is addressed individually at the time it is reviewed with full consideration of all the relevant statutory factors such as water availability in light of existing committed water rights. The State Engineer finds that Application 81728 is for a new appropriation of water from the Dodge Flat Hydrographic Basin.

III.

Nevada Revised Statute § 533.371 provides that the State Engineer shall reject the application and refuse to issue a permit to appropriate water for a specified period if the State Engineer determines that:

1. The application is incomplete;
2. The prescribed fees have not been paid;
3. The proposed use is not temporary;
4. There is no water available from the proposed source of supply without exceeding the perennial yield or safe yield of that source;
5. The proposed use conflicts with existing rights; or
6. The proposed use threatens to prove detrimental to the public interest.

This statute provides the State Engineer with the authority to issue temporary water rights to use groundwater in a basin that is fully appropriated but not fully pumped. The purpose of the statute was to allow the use of water on a temporary basis when those holding water rights were not putting them to beneficial use at that time. Nevada Land and Resource Company holds 1,428 afa of water under Permits 66555, 66556 and 66557 that were permitted for industrial power general use in 2002 but, which to date, have not been placed to beneficial use. An analysis of the amount of water that is currently being pumped from the underground source of the Dodge Flat Hydrographic Basin was conducted and it has been determined that of the 2,100 afa of

⁵ Nevada Division of Water Resources' Water Rights Database, Hydrographic Abstract, Dodge Flat Hydrographic Basin (82), January 2, 2013, official records in the Office of the State Engineer.

committed water rights in the basin, approximately 630 acre-feet is currently being pumped.⁶ The State Engineer finds the Dodge Flat Hydrographic Basin, while fully appropriated, is under pumped under existing permitted and certificated water rights; therefore, water may be permitted for use for a temporary period of time, particularly in the small amount of water applied for under Application 81728.

IV.

Protestant PLPT asserts a claim to implied federal reserved rights to groundwater in the Dodge Flat Hydrographic Basin. A portion of the groundwater basin is within the boundaries of the Pyramid Lake Indian Reservation. The Nevada Supreme Court has already spoken to this protest claim and held that the *Orr Ditch* Decree fully adjudicated the PLPT's implied federal reserved water rights for the reservation.⁷ The Nevada Supreme Court held that the Tribe has no implied rights to the water it is currently pumping from the Dodge Flat Hydrographic Basin and that the State Engineer appropriately excluded the Tribe's unauthorized use to determine if the basin contained unappropriated water. The State Engineer finds since the Protestant does not have an implied federal reserved right to use groundwater in the Dodge Flat Hydrographic Basin, use of the water under Application 81728 cannot harm any groundwater right claimed to be held by the Tribe.

V.

The Protestant asserts that 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.

The State Engineer finds that since this application is for a 10-year term, making it temporary in nature, the quantity requested for appropriation is minimal, and the groundwater basin is not over-pumped under existing permitted and certificated water rights, and the

⁶ Dodge Flat (82) Groundwater Basin Budget dated January 3, 2013, File No. 81728, official records in the Office of the State Engineer.

⁷ *Pyramid Lake Paiute Tribe of Indians v. State Engineer*, 245 P.3rd 1145 (2010).

Protestant's use of water is not authorized; therefore, the Protestant's argument lacks merit. The State Engineer finds that due to the fact that the Dodge Flat Hydrographic Basin is not currently being pumped up to the perennial yield of the basin under legally acquired water rights, sufficient groundwater is available for appropriation under Application 81728 for a specified period of time without exceeding the perennial yield of the basin.

Nevada Revised Statute § 278.461 provides that when a person who proposes to divide any land for transfer or development into four lots or less, shall prepare a parcel map and shall provide a copy of the parcel map to the Division of Water Resources of the State Department of Conservation and Natural Resources and obtain a certificate from the Division indicating that the parcel map is approved as to the quantity of water available for use. In addition, NRS § 278.377(1)(b) requires that a final subdivision map must include a certificate by the Division of Water Resources showing it is approved concerning water quantity. The State Engineer finds that no information has been presented by the Protestant to show any failure to comply with this provision of the law and he is fulfilling the statutory responsibility set out under these provisions of the law.

VI.

The Protestant asserts that granting the application would threaten to prove detrimental to the Tribe and to the purposes for which the Pyramid Lake Indian Reservation was created by depleting flows in the Truckee River, reducing inflows to Pyramid Lake, impairing water quality, interfering with fish conservation and recovery, adversely affecting the recreational value of Pyramid Lake because of the connection, both legal and physical, between groundwater and surface water in the basin, and impair instream flows.

A large portion of the protest issues center around the idea that there is a connection between groundwater and surface water in the Dodge Flat Hydrographic Basin and any groundwater pumping will intercept water that otherwise flows to the Truckee River and thereby will reduce the flow of the Truckee River and cause numerous problems as detailed in the PLPT's protest.

The subject application is for a total of 15.0 afa. The proposed point of diversion is more than five miles from the Truckee River and no evidence exists that would demonstrate a measurable impact on the natural flows of the Truckee River would occur as a result of pumping this minimal amount of groundwater, being 15.0 afa, requested under this application. The State Engineer finds

that any approval of the subject application will be limited to the groundwater available within the Dodge Flat Hydrographic Basin.

VII.

The Protestant alleges that granting the application would threaten to prove detrimental to the public interest in ways that are not yet known to it, but which may arise before the application is actually considered by the State Engineer. The State Engineer finds that NRS § 533.365 provides that a protest must set forth with reasonable certainty the grounds of the protest, which shall be verified by the affidavit of the protestant, his agent or attorney and this protest issue does not set forth its grounds with reasonable certainty. The State Engineer finds a protestant is not allowed to amend its protest after the original filing and dismisses this protest ground.

VIII.

The Protestant alleges that granting the application would threaten to prove detrimental to the public interest. The State Engineer finds that NRS § 533.365 provides that a protest must set forth with reasonable certainty the grounds of the protest, which shall be verified by the affidavit of the protestant, his agent or attorney and this protest issue does not set forth its grounds with reasonable certainty and is thereby dismissed.

IX.

The Protestant asserts that it incorporates by reference, as if fully set forth therein, every relevant protest ground set forth in any other protest filed by any other protestant regarding this application. Nevada Revised Statute § 533.365 provides that any interested person may file a written protest setting forth with reasonable certainty the grounds of such protest, which must be verified by affidavit of the protestant, agent or attorney thereof. An affidavit is a written declaration or statement of facts confirmed by oath or affirmation of the party making it, before a person having authority to administer such oath or affirmation. A protestant cannot make an oath or affirmation that facts stated are true to someone else's statement when they do not even know the content of the other's statement. The State Engineer finds this protest ground to be without merit and dismisses this ground.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁸

II.

The State Engineer is prohibited by law from an application to appropriate the public waters where:⁹

- 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 protectable 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.

Application 81728 seeks to appropriate 15.0 afa of water from the groundwater source for a specified period of time being ten years. The State Engineer concludes that as provided under NRS § 533.371 that the State Engineer can consider Application 81728 for approval and the protest issues may be overruled.

IV.

The State Engineer concludes, based on the fact that the existing legally held groundwater rights in the basin are not currently pumped up to the permitted duty, that the approval of Application 81728 for a finite period of time not to exceed ten years will not conflict with existing rights and will not threaten to prove detrimental to the public interest.

V.

The State Engineer concludes that the Nevada Supreme Court has held that the Tribe has no implied rights to the water it is currently pumping from the Dodge Flat Hydrographic Basin and that the State Engineer appropriately excluded the Tribe's unauthorized use to determine if the basin contained unappropriated water. The State Engineer concludes that since the Protestant does not have an implied federal reserved right to use groundwater in the Dodge Flat

⁸ NRS Chapters 533 and 534.

⁹ NRS § 533.370(2).

Hydrographic Basin, use of the water under Application 81728 cannot be held to harm any groundwater right claimed by the Tribe.

VI.

The State Engineer is prohibited by law from granting a permit under a change application if the proposed use or change conflicts with protectable interests in existing domestic wells as set forth in NRS § 533.024.¹⁰ The State Engineer finds that NRS § 533.024 applies only to uses of water for municipal, quasi-municipal or industrial uses. Application 81728 is a new appropriation of water for mining and milling purposes; therefore, this statute does not apply to Application 81728. The State Engineer concludes that the approval of Application 81728 will not conflict with protectable interests in existing domestic wells as set forth in NRS § 533.024.

VII.

The State Engineer concludes that the appropriation of this minimal 15.0 acre-feet of water annually for a ten-year period of time having a point of diversion five miles from the Truckee River will not threaten to prove detrimental to the interest in any manner asserted by the Protestant.

RULING

The protest to Application 81728 is overruled and Application 81728 is hereby approved subject to:

1. Existing rights;
2. Payment of the statutory permit fees;
3. Expiration within ten years from the date of approval of the permit.

Respectfully submitted,

 P.E.
JASON KING, P.E.
State Engineer

Dated this 14th day of
February, 2013.

¹⁰ NRS § 533.024(1)(b).