

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

IN THE MATTER OF APPLICATION 81655 FILED)
TO CHANGE THE POINT OF DIVERSION AND)
PLACE OF USE OF A PORTION OF THE PUBLIC)
WATERS OF AN UNDERGROUND SOURCE)
PREVIOUSLY APPROPRIATED UNDER PERMIT)
44473, CERTIFICATE 15367, WITHIN THE LOWER)
MOAPA VALLEY HYDROGRAPHIC BASIN (220),)
CLARK COUNTY, NEVADA.)

RULING
#6238

GENERAL

I.

Application 81655 was filed on March 12, 2012, by Moapa Valley Dairy Farms to change the point of diversion and place of use of 0.302 cubic feet per second (cfs), not to exceed 186.0 acre-feet annually (afa) from an underground source for irrigation purposes, which is a portion of water previously appropriated under Permit 44473, Certificate 15367. The proposed point of diversion is described as being located in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 1, T.15S., R.66E., M.D.B.&M. The proposed place of use is described as being 37.2 acres located within a portion of the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 1, T.15S., R.66E. M.D.B.&M. The existing point of diversion is located within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 13, T.16S., R.67E., M.D.B.&M. The existing place of use is located within a portion of Section 13, T.16S., R.67E., M.D.B.&M., and a portion of Section 18, T.16S., R.68E., M.D.B.&M.¹

II.

Application 81655 was timely protested by Southern Nevada Water Authority (SNWA) on the following grounds:¹

- 1.) Protestant believes that due to existing decreed surface water rights on the same place of use, there may have been non-use of a portion of the groundwater being changed, because use of such groundwater is prohibited by the combined duty limitation.
- 2.) Portions of the existing groundwater place of use overlap with the place of use for decreed surface water rights, making this groundwater supplemental to surface water and therefore ineligible to be changed without also changing the primary surface water rights.
- 3.) The proposed point of diversion lies adjacent to the Muddy River. The applicant should provide evidence that the proposed well would produce water from groundwater that is separate and distinct from the Muddy River.

¹ File No. 81655, official records in the Office of the State Engineer.

- 4.) If the proposed well would produce Muddy River water, this application should be denied since the Muddy River is fully appropriated and granting this application would conflict with existing rights.

III.

Application 81655 was timely protested by Muddy Valley Irrigation Company (MVIC) on the following grounds:¹

- 1.) The proposed point of diversion lies adjacent to the Muddy River. There is documented evidence on the Muddy River that groundwater pumping near the Muddy River reduces flows in the Muddy River (e.g., NV Energy groundwater pumping). Therefore this application should be denied since the Muddy River is fully appropriated and granting this application would directly conflict with the Muddy Valley Irrigation Company's surface rights.
- 2.) Protestant believes that due to existing decreed surface water rights on the same place of use, there may have been non-use of a portion of the groundwater being changed, because use of such groundwater is prohibited by the combined duty limitation.
- 3.) Portions of the existing groundwater place of use overlap with the place of use for decreed surface water rights, making this groundwater supplemental to surface water and therefore ineligible to be changed without also changing the primary surface water rights.

IV.

Robert C. Lewis provided a response to the protests for the Applicant. According to this response, the property where the subject water rights were used was condemned and taken under eminent domain by Clark County Flood Control, but the water rights were retained by the Applicant. Mr. Lewis states that the Applicant is not requesting that new or additional water be appropriated, but rather to continue use of water already appropriated. Also, the proposed point of diversion is very similar to pumping the water at the existing point of diversion and should not have an effect different than how the water has been diverted. He also states that the new point of diversion is a prudent and logical place for the water to be utilized.

Mr. Lewis states that "Nevada Power is constructed in a completely different hydrographic basin with differing geographic formations" and he would like to see the evidence, if any, that the Applicant is transferring groundwater that is supplemental to surface water. He states he was involved in the construction of the Nevada Power (a.k.a. NV Energy) power plant, which was built on a marshy type area, and one of the biggest challenges was to dewater the land where the construction would take place. He continues, "[i]t seems logical that pumping groundwater in that area would affect the flow of the Muddy River."¹

V.

Phillip Regeski, as agent for the Applicant, provided further answer to the Protestants' protest grounds summarized below:¹

1. No decreed surface water rights were found on the same place of use.
2. The proposed well will be constructed as per NAC § 534.390.
3. The well will be approximately 700 feet from the Muddy River and will not produce Muddy River water.

FINDINGS OF FACT

I.

Nevada Revised Statute § 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 the State of Nevada. The State Engineer finds that sufficient evidence is available in the records of the Office of the State Engineer to evaluate the merits of Application 81655 and its associated protests and a hearing is not necessary.

II.

Both Protestants contend that there are decreed surface water rights appurtenant to the same place of use as the base water right permit; thus, either the base water right permit was not used at least in part due to duty rate limitations or the base water right is supplemental to a surface water source requiring a change in the place of use of both the surface water right and the subject groundwater right.

Permit 44473, Certificate 15367, the base water right that Application 81665 proposes to change, was issued for 604.50 afa for the irrigation of 120.90 acres. Permit 11632, Certificate 4906, was issued for the irrigation of 143.88 acres from seepage water from the Muddy River flood channel. The place of use of Permit 44473, Certificate 15367, and the place of use of Permit 11632, Certificate 4906, share approximately 4.22 acres in the SW¹/₄ SW¹/₄ of Section 7, T.16S., R.68E., M.D.B.&M.^{2,3}

Application 81655 describes the area to be removed from irrigation under the base water right Permit 44473, Certificate 15367, as being located within a portion of Section 13, T.16S., R.67E., M.D.B.&M., and a portion of Section 18, T.16S., R.68E., M.D.B.&M.¹

² File No. 44473, official records in the Office of the State Engineer.

³ File No. 11632, official records in the Office of the State Engineer.

The records of the State Engineer do not show that any other water rights, including surface waters of the Muddy River, have a place of use in common with the place of use of Permit 44473, Certificate 15367.^{4,5,6}

The State Engineer finds that no other water right is appurtenant to the existing place of use to be removed from irrigation by the approval of Application 81655; therefore, there are no supplemental surface water rights to form a basis of the Protestants' claims that either the base water right permit was not used at least in part due to duty rate limitations or the base water right is supplemental to a surface water source requiring a change in the place of use of both the surface water right and the subject groundwater right.

III.

Protestant SNWA states grounds that the Muddy River is fully appropriated, so the location of the proposed point of diversion adjacent to the Muddy River will produce Muddy River water, which would conflict with existing rights of the Muddy River. Protestant SNWA also states that the Applicant should provide evidence that the well will produce groundwater that is distinct from the Muddy River water.

Protestant MVIC states grounds that the location of the proposed point of diversion is adjacent to the Muddy River, and since there is documented evidence that groundwater pumping near the Muddy River reduces its flows, it will conflict with existing rights of the Muddy River, which is fully appropriated. The Protest gives NV Energy groundwater pumping as an example of this effect. Applicant's answer to protest states that the Nevada Power (a.k.a. NV Energy) power plant is constructed in a completely different hydrographic basin with differing geographic formations. The Division of Water Resources Water Rights Database does not show any groundwater rights held by NV Energy in the Lower Moapa Valley Hydrographic Basin.⁷

The Nevada Water Law provides for the appropriation of groundwater and treats underground water as a separate source from surface water.⁸

⁴ Water Rights Township Plat, Township 16 South, Range 67 East, M.D.B.&M., official records in the Office of the State Engineer.

⁵ Water Rights Township Plat, Township 16 South, Range 68 East, M.D.B.&M., official records in the Office of the State Engineer.

⁶ *In the Matter of the Determination of the Relative Rights in and to the Waters of the Muddy River and Its Tributaries*, Tenth Judicial District Court of the State of Nevada, In and For the County of Clark, 1920.

⁷ Nevada Division of Water Resources' Water Rights Database, August 15, 2013, official records in the Office of the State Engineer.

⁸ NRS Chapters 533 and 534.

When water wells are drilled within a quarter mile from a river, lake, stream, reservoir or canal Nevada Administrative Code (NAC) § 534.390 requires that the well be sealed to a depth of at least 100 feet, and it prohibits perforations in the production casing from ground level to 100 feet. When an application has a proposed point of diversion that is within a quarter mile from a surface water source, a permit term is typically included in the approval of such an application that requires a seal from ground level to 100 feet.

The proposed point of diversion is described as being located in the SW¼ NW¼ of Section 1, T.15S., R.66E., M.D.B.&M., and is further described by bearing and distance to a found monument. From this description, it can be determined that the point of diversion is approximately 650 feet to the nearest point of the Muddy River as depicted on a USGS topographic map.¹

The State Engineer finds that the requirements of NAC § 534.390 apply, and that compliance with NAC § 534.390 and a permit term explicitly requiring a 100-foot seal will prevent the appropriation of surface water from the drilled well. Thus, the State Engineer further finds that it is unnecessary for the Applicant to provide additional evidence as requested by the Protestant.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁹

II.

The State Engineer is prohibited by law from granting a permit under an application to appropriate the public waters where:¹⁰

- 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.

⁹ NRS Chapters 533 and 534.

¹⁰ NRS § 533.370(2).

III.

Since the existing place of use to be removed from irrigation by the approval of Application 81655 has no other water right appurtenant to it, the State Engineer concludes that the approval of Application 81655 will not conflict with existing rights nor does it threaten to prove detrimental to the public interest due to existing supplemental surface water rights.

IV.

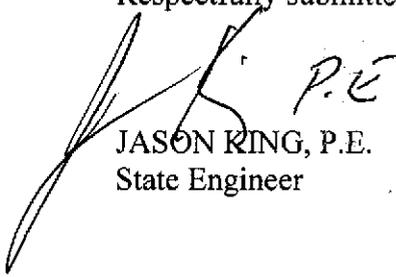
The State Engineer concludes that the proposed point of diversion is within a quarter mile of the Muddy River and therefore subject to NAC § 534.390. The State Engineer further concludes that approval of Application 81655 will not conflict with existing rights.

RULING

The protests to Application 81655 are hereby overruled and Application 81655 is approved subject to:

1. existing rights;
2. payment of the statutory permit fees; and
3. requirement that the water well will be sealed to a depth of at least 100 feet in accordance with NAC§534.390.

Respectfully submitted,


JASON KING, P.E.
State Engineer

Dated this 18th day of
September, 2013