

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

IN THE MATTER OF APPLICATIONS 62431, 62432)
AND 62433, FILED TO APPROPRIATE THE)
WATERS OF COTTONWOOD SPRING AND)
ASSOCIATED SEEPS, SOUTH MAYNARD SPRING)
AND NORTH MAYNARD SPRING WITHIN THE)
PAHRANAGAT VALLEY HYDROGRAPHIC BASIN)
(209), LINCOLN COUNTY, NEVADA.)

RULING

#6338

GENERAL

I.

Application 62431 was filed on September 4, 1996, by the United States Fish and Wildlife Service to appropriate 0.75 cubic feet per second (cfs) of the waters of Cottonwood Spring and associated seeps for wildlife use within the Pahrnagat Valley Hydrographic Basin. The proposed point of diversion is described as being located within the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 23, T.8S., R.61E., M.D.B.&M. The proposed place of use is described as being located within the boundaries of the Pahrnagat National Wildlife Refuge T.7S., R.61E.; T.8S., R.61E.; T.8S., R.62E.; and T.9S., R.62E., M.D.B.&M.¹

II.

Application 62432 was filed on September 4, 1996, by the United States Fish and Wildlife Service to appropriate 0.2 cfs of the waters of South Maynard Spring for wildlife use within the Pahrnagat Valley Hydrographic Basin. The proposed point of diversion is described as being located within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 4, T.9S., R.62E., M.D.B.&M. The proposed place of use is described the same as under Application 62431, within the boundaries of the Pahrnagat National Wildlife Refuge.²

III.

Application 62433 was filed on September 4, 1996, by the United States Fish and Wildlife Service (USFWS) to appropriate 0.2 cfs of the waters of North Maynard Spring for wildlife use within the Pahrnagat Valley Hydrographic Basin. The proposed point of diversion is described as being located within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 4, T.9S., R.62E., M.D.B.&M. The proposed place of

¹ File No. 62431, official records in the Office of the State Engineer.

² File No. 62432, official records in the Office of the State Engineer.

use is described the same as under Application 62431, within the boundaries of the Pahrnagat National Wildlife Refuge.³

IV.

Applications 62431, 62432 and 62433 were timely protested by the Lincoln County Commissioners and the Alamo Irrigation Corporation on the grounds that the additional water is not necessary for the USFWS operations. Also, the proposed use may cause economic hardship on the residents and other users of the water in that area due to a proposed recovery plan, which has been vigorously opposed by the entire group of water right holders and users. The proposed appropriation allows the USFWS to continue to ignore economic, custom and culture concerns that the residents of the valley have raised, and that the total use of wildlife to the exclusion of all others is not in the public interest.

V.

The Lincoln County Public Land Commission, on behalf of members of its citizenry, timely protested Applications 62431, 62432 and 62433 on the grounds that the USFWS has proposed a Recovery Plan for the Pahrnagat Valley Chub and other aquatic species that will infringe upon private property and water rights of the residents of the valley. The owners of said property and water right holders, as well as residents of the community have unanimously opposed the USFWS proposal. The applications are seen as a way to avoid settling the USFWS disagreement with the citizens of Pahrnagat Valley. The various recovery plans proposed will adversely affect the economy, custom and culture of Pahrnagat Valley residents and the residents of Lincoln County. The proposed use is to support and maintain wildlife, which is the current use, and the change does not seem to make sense. The Protestant objects to the extension of the season of use and manner of use. The Protestant alleges that the change of season and extension of season of use can and will have negative impacts on surrounding water right holders. It questions federal ownership of water indicating that in 1995 an addition was made to the Nevada Revised Statutes (NRS), which allowed federal water holdings jointly with residents, and alleges that the USFWS does not maintain the channel that feeds their storage areas, and if it did, it would not need more water. It alleges that the channel is a flood hazard to all private property owners because it is not maintained, and additionally, alleges that the proposed change of customary uses can have a negative impact on other

³ File No. 62433, official records in the Office of the State Engineer.

water rights that are used for irrigation. It is a concern that if the season of use is extended then the USFWS will try to usurp other rights to see these ponds filled. If the USFWS can no longer irrigate under the change of use, its noxious weed problem will be a bigger threat to the neighboring agricultural community. The Commission alleges that the USFWS has not proven to be a good neighbor and has not kept up with their agreements to allow cattle to use the water by fencing the area off after agreeing to allow continued use. The Protestant alleges that this history, along with other proposals that the agency is involved with, is seen as a threat to property rights, the economy and the culture of the valley and that the USFWS took all the water 20 years ago and then courts gave it back, and that this history leaves no room for trust.

As to Application 62431, the Protestant alleges that any new water may be used by the USFWS as a means to “take” waters from private property in times of drought by demanding they not use their shares.

As to Application 62432 and 62433 the Protestant alleges that all stock watering rights must be maintained and conditions of use be in place to protect previous water holdings.

VI.

On August 6, 2007, and November 23, 2009, the State Engineer requested additional information from the Applicant to verify that the source of water for Cottonwood Spring, South Maynard Spring and North Maynard Spring are independent sources and do not originate from seepage as the result of on-site storage of surface water from Crystal and/or Ash Springs. Specifically, the State Engineer asked for isotopic data from analysis of samples of the spring water.

VII.

On September 4, 2015, Applications 62431, 62432 and 62433 were republished in the Lincoln County Record for four consecutive weeks in accordance with the Nevada Supreme Court decision in the matter of *Great Basin Water Network, et al. v. State Engineer and the Southern Nevada Water Authority*.⁴ Consequently, the protest period was reopened.

VIII.

The Lincoln County Water District timely protested Applications 62431, 62432 and 62433 on the grounds of economic, historical custom and culture concerns raised by the community. The Protestant alleges that the only studies available to support the applications are reconnaissance level

⁴ 126 Nev. Adv. Op. 20, 234 P.3d 912(2010).

studies and estimates and not specific data showing spring discharge to adequately determine water availability. The Protestant alleges that there has not been any biological study to determine the type and quantity of wildlife the springs can support. The Protestant feels that the State Engineer should require the Applicant to provide comprehensive hydrologic studies showing there is enough flow available to appropriate, and that comprehensive biological studies should be conducted to document wildlife use. Until such studies are performed, there is insufficient data to determine if there is enough water to be appropriated. The Protestant alleges that the USFWS has failed to address concerns brought forward by water and property right holders as well as residents of the community. The Protestant alleges that impacts associated with this spring are not known and may impact existing rights and protectable interests. The Protestant alleges that the use of wildlife water rights to the exclusion of all other uses is not in the public interest.

IX.

The Southern Nevada Water Authority timely protested Applications 62431, 62432 and 62433 on the grounds that the amounts of water requested by the applications do not exist reliably for Cottonwood Spring and the Maynard Springs. The Protestant alleges that over appropriation of the source would prove detrimental to the public interest. The Protestant requests that should the applications be granted, that the permit terms require the installation of a gauging station and that the Applicant submit continuous mean daily values to the State Engineer to support the permitted flow rate. The Protestant also requests that the permit terms include an annual flow measurement reporting requirement. The Protestant requests that any certificate issued should reflect actual spring flows based on the above measurements.

X.

The Nevada State Grazing Board for District N-4 timely protested Applications 62431, 62432 and 62433 incorporating the same grounds as previously asserted under the 1997 protests filed by the Lincoln County Board of Commissioners, the Alamo Irrigation District, the Lincoln Public Lands Council and the Lincoln County Water District. In particular, the Grazing Board identified the following concerns: The Protestant asserts that the USFWS has applied for a place of use of this water at various locations within 21 sections of land (some 4,994 acres). That will require diversion and transportation of these waters for lawful diversion and beneficial use. Also, the USFWS, fails to identify what kind or how many wildlife animals drink from this water and how much water that number of animals requires. The USFWS, as a federal agency, does not own any wildlife and has

applied for a water right that it cannot lawfully put to beneficial use. The Protestant asserts that, as defined by Nevada law, water already has been reserved for beneficial use for wildlife, the Protestant believes that a permit sought by this application for wildlife use is not necessary and adds to the regulatory costs.

XI.

The Lincoln County Commission submitted a letter, which was received by the State Engineer on November 9, 2015. The Commission's letter states that it is being filed as a protest and in opposition to Applications 62431, 62432 and 62433. The letter was untimely, as having been received outside the 30-day period for filing a protest, was not accompanied by any fees for filing a protest, and was not notarized by the author. For all of these reasons, the Commission's letter fails the statutory criteria for protests.⁵

XII.

The Applicant, submitted an Answer dated December 21, 2015, in response to the protests to Applications 62431, 62432 and 62433. The Applicant states in the Answer that the springs support several species of fish including an endangered species and provide habitat for migrating shore birds, marsh birds and waterfowl. The springs originate and are entirely contained within the refuge and there is no surface water flow leaving the refuge. The Applicant states that the springs exist on the refuge and the fact that there are no other water rights on those sources shows that the water is available for appropriation. Because the outflow from the springs does not exit the refuge, there is no potential to injure other existing water rights through these applications. Finally, the Applicant asserts that the appropriation of water for wildlife and refuge purposes is in the public interest and these uses are appropriate beneficial uses under Nevada water law. The Applicant also states that flow rates under the applications for all three springs were based on site visits in 1997 and that the quantity available for appropriation will be determined through the proof of beneficial use of the water rights.

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

⁵ NRS §§ 533.365(1), 533.435.

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.

II.

On April 28, 2010, the State Engineer issued Ruling No. 5945-A in which the protests, filed by many of the same protestants asserting the same grounds against Applications 62434 through 62440, were overruled and the applications were granted. The State Engineer finds that overwhelmingly, many of the protest issues filed against Applications 62431, 62432 and 62433 have already been considered and overruled, and will therefore not be re-examined here.⁶

III.

The Lincoln County Water District and The Nevada State Grazing Board's protests to Applications 62431, 62432 and 62433 allege that no biological studies have been conducted to determine the type and quantity of wildlife that Cottonwood and the Maynard Springs can support. The Nevada State Grazing Board further asserts that the Applicant has applied for a place of use at various locations within 21 sections of land, which will require diversion and transportation of this water to prove beneficial use. The Lincoln County Commission asserts that the applications do not contain details of how the USFWS would divert and transport this water over the 4,994 acres encompassed by the Applicant's place of use and that the USFWS failed to enumerate which species of wildlife are present and the amount of water they are expected to consume. The State Engineer finds the Applicant described the species of wildlife present in its Answer and that any works of diversion are described within the applications.³

IV.

The Lincoln County Water District's protest to Applications 62431, 62432 and 62433 asserts that there is no specific data showing spring discharge to adequately determine water availability and that until studies are performed there is insufficient data to determine if there is enough water to be appropriated. The Southern Nevada Water Authority further asserts that the amounts of water requested by the applications do not exist reliably for Cottonwood Spring and the Maynard Springs. The State Engineer is aware of seasonal flow variations and non-existent flows due to cyclical climate

⁶ State Engineer's Ruling No. 5945-A, dated April 28, 2010, official records in the Office of the State Engineer.

changes due to drought and extreme drought conditions. The State Engineer realizes that Cottonwood Spring and the Maynard Springs can, and have gone dry periodically. The State Engineer finds that Pahrnagat Lake is located entirely on property controlled by the Applicant and that Pahrnagat Lake is the terminus of flow from Cottonwood Spring. Flow from Cottonwood Spring into Pahrnagat Lake does not leave the property controlled by the Applicant. The State Engineer finds that North and South Maynard springs are very near the boundary between land controlled by the Applicant and the U.S. Bureau of Land Management (BLM) controlled land, but that use of the water occurs on the Applicant's land designated as the Desert National Wildlife Refuge. The State Engineer finds that other than the Applicant, there are no holders of water rights from the springs. The State Engineer finds that the Applicant is applying for all of the flow from Cottonwood Spring and the Maynard Springs and that NRS § 533.400 requires that the Applicant submit actual flow records along with the *Proof of Application of Water to Beneficial Use* prior to the issuance of any certificates on Applications 62431, 62432 and 62433. Any certificates issued by the State Engineer will be for an amount of water actually placed to beneficial use, or in other words, actual available flow from the springs.

V.

The Lincoln County Water District's protest to Applications 62431, 62432 and 62433 asserts that impacts associated with (Cottonwood Spring and the Maynard Springs) are not known and may impact existing rights. The State Engineer finds that Pahrnagat Lake is located entirely on property controlled by the Applicant and that Pahrnagat Lake is the terminus of flow from Cottonwood Spring. Flow from Cottonwood Spring into Pahrnagat Lake does not leave the property controlled by the Applicant. The State Engineer finds that North and South Maynard springs are very near the boundary between land controlled by the Applicant and BLM controlled land, but that use of the water occurs on the Applicant's land designated as the Desert National Wildlife Refuge. The State Engineer finds that other than the Applicant, there are no holders of water rights from the springs. The State Engineer finds the permits will be subject to existing rights on the sources and the water stored in Pahrnagat lake is limited to that which is available without demand upon existing rights for release.

VI.

The Lincoln County Commission's protest to Applications 62431, 62432 and 62433 asserts that the USFWS has previously been granted a vested water right. The State Engineer finds that after searching the records of the State Engineer, no vested water rights have ever been granted to USFWS on Cottonwood Spring and the Maynard Springs, and that this protest issue lacks merit.^{7,8}

VII.

On August 6, 2007, and November 23, 2009, the State Engineer requested isotopic data from analysis of water samples from Cottonwood Spring and the Maynard Springs to verify that the source of water for Cottonwood Spring, South Maynard Spring and North Maynard Spring are independent sources and do not originate from seepage as the result of on-site storage of surface water from Crystal and/or Ash Springs. The State Engineer finds that a study by James B. Paces and Frederic C. Wurster, published in the Journal of Hydrology, concludes that analysis of isotopes from the springs demonstrates that water from the springs is from a separate source and not seepage from storage.⁹

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.¹⁰

II.

The State Engineer is prohibited by law from granting a permit under an application to appropriate the public waters where:¹¹

- 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.

⁷ Nevada Division of Water Resources' Water Rights Database, December 1, 2015, official records in the Office of the State Engineer.

⁸ Water Rights Township Plat, Township 8 South, Range 61 East, and 9 South, Range 62 East, M.D.B.&M., official records in the Office of the State Engineer.

⁹ James B. Paces and Frederic C. Wurster, *Natural uranium and strontium isotope tracers of water sources and surface water-groundwater interactions in arid wetlands – Pahranaagat Valley, Nevada, USA*, Journal of Hydrology 517, (2014) 213-225.

¹⁰ NRS Chapter 533.

¹¹ NRS § 533.370(2).

III.

Nevada Revised Statute § 533.023 provides for wildlife as a beneficial use of water under Nevada water law, including the establishment and maintenance of wetlands, fisheries and other wildlife habitats. The State Engineer concludes that the applications were filed to support a wildlife refuge and that the use of water to enhance habitat and attract wildlife is a beneficial use of said water.

IV.

A study of naturally occurring isotopes demonstrates that water from Cottonwood Spring, South Maynard Spring and North Maynard Spring are from a separate source and not from seepage from storage; therefore, the State Engineer concludes that granting the applications will not conflict with existing rights.

V.

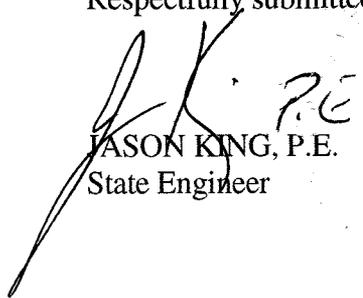
Pahranagat Lake is located entirely on property controlled by the Applicant and is the terminus of flow from Cottonwood Spring. The flow into the lake does not leave the property controlled by the Applicant. Other than the Applicant there are no holders of water rights from Cottonwood Spring and the Maynard springs. Accordingly, the State Engineer concludes that granting the applications do not conflict with existing rights.

RULING

The protests to Applications 62431, 62432 and 62433 are hereby overruled and the applications are granted subject to:

1. the payment of the statutory permit fees;
2. the installation of a measuring device; and
3. flow rate reporting requirements.

Respectfully submitted,


JASON KING, P.E.
State Engineer

Dated this 12th day of
February, 2016.