

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

IN THE MATTER OF APPLICATION)
82207 FILED TO APPROPRIATE THE)
PUBLIC WATERS OF HENRY SPRING)
LOCATED WITHIN THE WASHOE)
VALLEY HYDROGRAPHIC BASIN (89),)
WASHOE COUNTY, NEVADA.)

RULING

#6339

GENERAL

I.

Application 82207 was filed on October 17, 2012, by The Carol A. Bailey 1994 Trust to appropriate 2.0 cubic feet per second (cfs) of water from Henry Spring for quasi-municipal purposes. The proposed point of diversion is described as being located within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28, T.16N., R.19E., M.D.B.&M. The proposed place of use is described as being located within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ and SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 21, NW $\frac{1}{4}$ SW $\frac{1}{4}$ and SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 22, and the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28, all in T.16N., R.19E., M.D.B.&M., being further described as Washoe County Assessor's Parcel Number (APN) 055-180-27.¹

II.

On October 17, 2013, State Engineer's Ruling No. 6241 denied Application 82207 on the grounds that that there is no unappropriated water at the source and that approval of Application 82207 would conflict with existing decreed water rights.² The Applicant filed a petition for judicial review with the Second Judicial District Court and served it on the State Engineer November 18, 2013. On May 13, 2014, staff of the Division of Water Resources (Staff) performed a field investigation of the proposed spring source for the purpose of additional field analysis in the matter of the appeal of State Engineer's Ruling No. 6241, with the agent and legal counsel for the Applicant in attendance.³ A second field investigation was conducted by Staff on June 24, 2014, to define the collection points and distribution system for the springs at issue, with the legal counsel for the Applicant in attendance.³ Based on the findings of these field investigations, Staff recommended that Ruling No. 6241 be vacated since it did not address all issues related to the

¹ File No. 82207, official records in the Office of the State Engineer.

² State Engineer's Ruling No. 6241, official records in the Office of the State Engineer.

³ Report of Field Investigation No. 1220, dated January 22, 2015, official records in the Office of the State Engineer.

matter. On September 24, 2015, the State Engineer vacated Ruling No. 6241, restored the Application to “ready for action” status, and through his legal counsel filed a motion with the Court to dismiss the petition for review as moot. On November 3, 2015, the Court ordered that the petition for judicial review was granted and remanded the matter back to the State Engineer and further ordered that the motion to dismiss was denied as moot.⁴

FINDINGS OF FACTS

I.

Staff from the Office of the State Engineer conducted two field investigations, first on May 13, 2014, and then on June 24, 2014. These investigations examined the three springs (identified as Henry Spring, Spring 1 and Spring 2), distribution systems, manners of use and places of use related to Application 82207 and Proof of Appropriation V-02771.³

On November 24, 2015, the State Engineer’s office received an affidavit from the Applicant in response to the Report of Field Investigation No. 1220. In this affidavit, Carol Bailey (Affiant) deposes 11 enumerated statements. The first five statements establish Ms. Bailey’s background and familiarity with the subject property, and are not at issue in this ruling.⁵

The sixth statement in the affidavit is “I filed the application on Henry’s [sic] Spring because I knew that spring was not one of the original 10 points of diversions [sic] attributable to Lewers Creek and its tributaries.”⁵

Item 7 of the affidavit describes five photographs the Affiant took of various portions of the ranch property that are attached to the affidavit as Exhibit 1. The first photo, dated July 1979, depicts a portion of the mountainside above the spring area to illustrate the pine trees that will have burned in the 1981 Little Valley Fire. The next photo is from July 1981 from a similar point of view as the first photo. The caption states in part, “The numerous trees prior to the Little Valley Fire in August 1981 were using a lot of water.”⁵ It is well understood that removal of vegetation such as trees near a spring area can increase the output from a spring or spring fed system; however, the pictures and statements in the captions do not provide quantitative evidence of the volume of water being consumed by evapotranspiration or to what degree the reduction of pine trees affected spring flow. The third photo is dated April 1994, and the caption indicates that it is facing west

⁴ Order of Remand, *The Carol S. Bailey 1994 Trust v. The Department of Conservation and Natural Resources and The Division of Water Resources*, Case No. CV-13-02475, Second Judicial District Court of Nevada (November 3, 2015).

⁵ Affidavit of Carol Bailey, File No. 82207, official records in the Office of the State Engineer.

towards the spring area from a pasture. The caption also states in part, “The growth does not extend to upper portion of the canyon where the spring is now located.” However, based on the location of the point of diversion described in Application 82207, examination of topographic mapping^{6,7,8} and the site visits described in the Report of Field Investigation No. 1220, phreatophytic vegetation does reach or nearly reach the location of Henry Spring. The fourth photo also dated April 1994, depicts remnants of the pine trees from the 1981 fire, and does not provide any additional insight into the status of the subject springs. The last photo is dated May 2014 depicted the extensive willow and alder growth were the spring is located. This is consistent with Report of Field Investigation No. 1220, and is a qualitative representation of the spring area conditions, but does not provided any quantitative information regarding the precise location of the alleged new source or additional flow from said source.

Item 8 of the affidavit states “As as result of the Little Valley Fire in 1981, there are several new artisan [sic] springs located in the Sierras contiguous to my property with Henry’s [sic] Spring being the only new spring on my 80-acre ranch.”⁹

Items 6 to 8, inclusive, offer a position that the removal of proximal phreatophytic vegetation gave rise to a new spring source. Again, it is generally accepted that removal of a phreatophytes near a spring source can cause an increase in flow from that source, and likewise growth of such phreatophytes will in turn reduce spring flow as the water is consumed before surfacing. This is not the same as producing a “new” spring, as discussed below.

Springs generally do not emanate from a single discrete point through unconsolidated alluvial material, but come to the surface via the path of least resistance through the material covering faults and bedrock fractures. Springs in this sense are a portion of a spring area, and the location where the water emerges at the surface can change with geological conditions. A geological analysis of the mountainside where the springs (Henry Spring and Unnamed Spring 2) emerge suggests that there is a fault line that would intercept the waters emanating from the spring

⁶ U.S. Geological Survey, “Carson City, Nev” 7.5 minute quadrangle map.

⁷ Washoe County Quick Map, accessed December 1, 2015, from Washoe County Assessor’s web site: <http://wcfgisweb.washoecounty.us/QuickMap/>.

⁸ Division of Water Resources Web Map, accessed December 1, 2015, from DWR’s web site: <http://webgis.water.nv.gov/>.

⁹ Note that the Applicant’s use of the word “artesian” is not applicable to these springs. “Artesian” is typically only used to describe an underground water source that will rise through a well due to hydrostatic pressure.

area.¹⁰ Additionally, in the Report of Field Investigation No. 1220, Staff found that Henry Spring is directly tributary to Spring 2, and the waters of Henry Spring and Spring 2 are commingled and collected into a single 4-inch diameter pipeline.³

Item 9 of the affidavit states the representatives of the State Engineer suggested that Henry Heidenreich, father of the Applicant, was blind at the time of the adjudication of Lewers Creek and its tributaries and the locations of the 10 diversions of Lewers Creek are not accurate, and that attached photos in Exhibit 2 of the affidavit prove otherwise. A search of the files in the Office of the State Engineer related to the adjudication of Lewers Creek and its tributaries found no reference suggesting that Mr. Heidenreich had any diminished physical or mental capacity. Affidavits were filed by Bertha Cliff Scott, E.P. Osgood, and Henry Heidenreich swearing that the map filed in support of Claim V-02771 is a true and correct representation of the diversions, water sources, and irrigated acreage from Lewers Creek and its tributaries. Mr. Osgood was the licensed water rights surveyor who performed the survey and generated the supporting map for Mr. Heidenreich. There is no evidence in the record that the locations of the points of diversion are inaccurate.¹¹

Item 10 first states that “there has been suggestion during this administrative application that Henry’s [sic] Spring was in fact Diversion 2 on the original adjudication of Lewers Creek and its tributaries,” and again refers to Exhibit 1 photographs to assert that the lack of vegetative growth indicated that Henry Spring did not exist at the time of the photographs. This is already addressed above in the discussion of items 6 to 8, inclusive.

Item 10 also states that the map for the Lewers Creek adjudication depicts Diversions 1 and 2 as being combined in a ditch and pond to irrigate the entire meadow currently owned by the Applicant and her neighbor. Photos from 2012 and 2015 are attached in Exhibit 3 of the affidavit showing the ditches and ponds that combine the diversions. This is the distribution system observed by Staff and described in Report of Field Investigation No. 1220.

¹⁰ U.S. Geological Survey and Nevada Bureau of Mines and Geology, 2006, Quaternary fault and fold database for the United States, accessed December 1, 2015, from USGS web site: <http://earthquakes.usgs.gov/regional/qfaults/>.

¹¹ Generally, the adjudication file related to the Findings of Fact, Conclusions of Law, Judgment and Decree, *In the Matter of the Determination of the Relative Rights In and To the Waters of Lewers Creek (a.k.a. Musgrove Creek) and Its Tributaries in Washoe County Nevada*, Case No. 301866, Second Judicial District Court of Nevada, In and For the County of Washoe (August 18, 1976), and specifically File No. V-02771, official records in the Office of the State Engineer.

Item 11 expressed the Affiant's belief that Henry Spring is a new spring distinct from Diversions 1 or 2 of the Lewers Creek adjudication based on the Affiant's familiarity owing to the considerable time spent on the ranch where the spring area is located. This is already addressed above in the discussion of items 6 to 8, inclusive.

Based on the Report of Field Investigation No. 1220 and the discussion of the points made in the response to said field investigation report, the State Engineer finds that the source of water described in Application 82207, Henry Spring, is tributary to Spring 2 and is not a new or separate source of water.

II.

The claims for the use of the waters of Lewers Creek (a.k.a. Musgrove Creek) and tributaries were adjudicated, and a decree was issued August 18, 1976. Proof of Appropriation V-02771 is a claim for water on Lewers Creek (a.k.a. Musgrove Creek) and tributaries and was subject to this decree. The decree describes ten points of diversion from the main stem creek and from tributary springs. The first two points of diversion (numbered 1 and 2 in the Lewers Creek Decree) are the springs described as Spring 1 and Spring 2, respectively, in this ruling and in the Report of Field Investigation No. 1220.¹²

The State Engineer finds that Spring 2 is a tributary to Lewers Creek and is accounted for in the Lewers Creek Decree; therefore, the State Engineer finds that Henry Spring, being tributary to Spring 2, is also accounted for in said decree and is not a distinct source of water.

III.

During the May 13, 2014, field investigation, flow measurements from natural channels leaving Henry spring were performed. The southerly channel flowed 0.012 cfs and the northerly channel flowed 0.043 cfs, but the boggy nature of the spring indicated some un-measurable subsurface flow. A measurement taken further downstream was done to confirm the total flow from the two channels and to see if any flow was gained or lost in the reach. The flow at this location was 0.08 cfs.³ The Lewer's Creek Decree established the claimants' right to divert 2.5 cfs of water per 100 acres of land irrigated, not to exceed the seasonal duty established as 4.5

¹² *Findings of Fact, Conclusions of Law, Judgment and Decree, In the Matter of the Determination of the Relative Rights In and To the Waters of Lewers Creek (a.k.a. Musgrove Creek) and Its Tributaries in Washoe County Nevada, Second Judicial District Court of Nevada, Case No. 301866 (August 18, 1976). (Hereafter referred to as "Lewers Creek Decree").*

af/acre/season for Harvest Crop and 4.0 af/acre/season for Meadow Pasture.¹³ There are 32.6 acres of land within the place of use of Proof V-02771 that is on the Bailey and McClellan properties that cannot be physically irrigated from the Lewers Creek proper, and thus must be irrigated from the springs. Applying the 2.5 cfs per 100 acres from the decree, 0.815 cfs is allowed for diversion to supply the water necessary to irrigate these lands. The combined flow as measured and described in Report of Field Investigation No. 1220 was 0.107 cfs (or 48.2 gpm) total from the three springs. This is only about one eighth the amount required to satisfy the existing decreed water rights. The State Engineer finds that the flow from Henry Spring is inadequate to support the 2 cfs diversion rate requested in Application 82207, especially with the existing appropriation under Proof V-02271 of the Lewers Creek Decree.

IV.

Application 82207 was filed to appropriate the waters of Henry Spring for quasi-municipal purposes. Quasi-municipal use is for water to serve multiple single family dwellings, a mixture of businesses and/or homes, trailer parks, etc. that are not served by a municipal water system. Item 8 of the application describes a distribution system with sprinklers. Item 13 of the application states in part, "This spring has irrigated portions of the place of use for the last 23 years."¹

Nevada Revised Statutes (NRS) § 533.340 requires certain additional information on applications for certain specific uses. If the application is for irrigation purposes, NRS § 533.340(1) requires that the number of acres by legal subdivision to be irrigated be provided. If the application is for municipal supply or for domestic use, NRS § 533.340(3) requires that the approximate number of persons to be served and the approximate future requirement be provided.

Application 82207 proposed a quasi-municipal use, but does not make it clear how many people or residences are to be served, and Item 12 only states that the project is to "improve [the Applicant's] property by developing this spring and placing the water to use on the subject property." It does not state how the water will be used on the subject property.

Report of Field Investigation No. 1220 states that during a conversation with the Applicant's agent, the proposed use of the water was represented as continued irrigation of the decreed acreage, maintenance of landscaping around the Bailey Residence, stock watering use and domestic use.

¹³ Judgement and Decree Items IV. and V., Lewers Creek Decree pp. 13-14.

If the intended use is for irrigation, then the manner of use described in Item 3 on Application 82207 is incorrect and Item 12 lacks the detail regarding the acres to be irrigated as required by NRS § 533.340(1). Since no duty was described in the application, the acreage could have been used to calculate a duty base on the duty rate fixed in the Lewers Creek Decree (4.5 acre-feet per acre for harvest crop and 4.0 acre-feet per acre for Meadow Pasture).

The map filed in support of Application 82207 depicts the place of use as areas outside the existing decreed place of use for irrigation, stockwater and domestic purposes under Proof V-02271. Therefore, even if it is argued that this application is for a new point of diversion for continued irrigation, the acreage is being expanded beyond that which is allowed in the Lewers Creek Decree and would result in an increased consumptive use of the water.

The State Engineer finds that manner of use proposed under Application 82207 is ambiguous and that it is either inaccurately or inadequately described, depending on the actual intent of the Applicant.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.¹⁴

II.

The State Engineer is prohibited by law from granting a permit under an application to appropriate the public waters where:¹⁵

- 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.

The proposed source, Henry Spring, is tributary to Spring 2, which is a source accounted for in the Lewers Creek Decree. The proposed diversion rate far exceeds the flow rate measured from the spring, which is a source for water rights that are part of the Lewers Creek Decree. Therefore,

¹⁴ NRS Chapter 533.

¹⁵ NRS § 533.370(2).

the State Engineer concludes that there is no unappropriated water at the proposed source and approval of the application would conflict with existing rights.

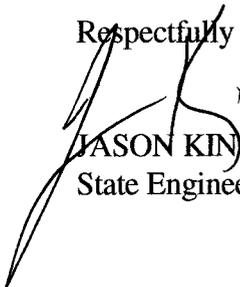
IV.

The State Engineer concludes that given the ambiguity as to the manner of use proposed under Application 82207, approval of the application would threaten to prove detrimental to the public interest.

RULING

Application 82207 is hereby denied on the grounds that there is no unappropriated water at the proposed source and that approval of the application would conflict with existing rights and threaten to prove detrimental to the public interest.

Respectfully submitted,


JASON KING, P.E.
State Engineer

Dated this 12th day of
February 2016.