

APPENDIX B

Nevada State Engineer Ruling #5011

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

IN THE MATTER OF APPLICATIONS 63984,)
63985, 63986, 63987, 63988, 63989 AND)
64229 FILED TO APPROPRIATE AND STORE)
THE PUBLIC WATERS OF AN UNDERGROUND)
SOURCE WITHIN THE BOULDER FLAT)
HYDROGRAPHIC BASIN (61), EUREKA)
COUNTY, NEVADA)

RULING

5011

GENERAL

I.

Application 63984 was filed on March 27, 1998, by Newmont Gold Company to appropriate 7.0 cubic feet per second (cfs) of the underground water from the Boulder Flat Hydrographic Basin for mining, milling and dewatering purposes within all of Sections 1, 2, 3, 10, 11, 12, 13, 14, 15, the E½ of Section 16, the N½ of Section 22, and the N½ of Section 23, T.34N., R.4SE., M.D.B.&M., all of Sections 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 22, 23, 24, 25, 26, and 27, the N½ of Section 34, and the N½ of Section 35, T.34N., R.49E., M.D.B.&M., all of Section 16, the W½ of Section 4, the E½ of Section 5, the E½ of Section 8, and the W½ of Section 9, T.34N., R.51E., M.D.B.&M., all of Sections 13, 23, 24, 25, 26, 35, and 36, T.35N., R.48E., M.D.B.&M., all of Sections 2, 3, 5, 6, 7, 19, 20, 21, 28, 29, 30, 31, 32, 33, and 34, the S½ of Section 1, the N½ of Section 11, the N½ of Section 12, and the W½ of Section 18, T.35N., R.49E., M.D.B.&M., all of Sections 2, 3, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 23, and 24, T.35N., R.50E., M.D.B.&M., all of Sections 18, 19, 29, 30, and 32, the W½ of Section 20, and the E½ of Section 31, T.35N., R.51E., M.D.B.&M., all of Sections 2, 3, 10, 11, 13, 14, 15, 24, 25, 32, 33, 34, and 36, T.36N., R.49E., M.D.B.&M., and all of Sections 17, 18, 19, 20, 21, 28, 29, 30, 31, 32, and 33, T.36N., R.50E., M.D.B.&M. The proposed point of diversion is described as being located within the NE¼ of Section 10, T.35N., R.50E., M.D.B.&M.

File No. 63984, official records in the office of the State Engineer.

II.

Application 63985 was filed on March 27, 1998, by Newmont Gold Company to appropriate 1.0 cfs of the underground water from the Boulder Flat Hydrographic Basin for mining, milling and dewatering purposes within the same places of use identified in Application 63984. The proposed point of diversion is described as being located within the SE¼ of Section 3, T.35N., R.50E., M.D.B.&M.²

III.

Application 63986 was filed on March 27, 1998, by Newmont Gold Company to appropriate 7.0 cfs of the underground water from the Boulder Flat Hydrographic Basin for mining, milling and dewatering purposes within the same places of use identified in Application 63984. The proposed point of diversion is described as being located within the NW¼ of Section 2, T.35N., R.50E., M.D.B.&M.³

IV.

Application 63987 was filed on March 27, 1998, by Newmont Gold Company to appropriate 34.0 cfs of the underground water from the Boulder Flat Hydrographic Basin for mining, milling and dewatering purposes within the same places of use identified in Application 63984. The proposed point of diversion is described as being located within the SW¼ of Section 2, T.35N., R.50E., M.D.B.&M.⁴

V.

Application 63988 was filed on March 27, 1998, by Newmont Gold Company to appropriate 7.0 cfs of the underground water from the Boulder Flat Hydrographic Basin for mining, milling and dewatering purposes within the same places of use identified in Application 63984. The proposed point of diversion is described

² File No. 63985, official records in the office of the State Engineer.

³ File No. 63986, official records in the office of the State Engineer.

⁴ File No. 63987, official records in the office of the State Engineer.

as being located within the NE¼ of Section 11, T.35N., R.50E.,
M.D.B.&M.⁵

VI.

Application 63989 was filed on March 27, 1998, by Newmont Gold Company to appropriate 22.0 cfs of the underground water from the Boulder Flat Hydrographic Basin for mining, milling and dewatering purposes within the same places of use identified in Application 63984. The proposed point of diversion is described as being located within the NW¼ of Section 11, T.35N., R.50E., M.D.B.&M.⁶

VII.

Item 12 under Applications 63984 through 63989, inclusive, indicates under remarks that the applications are submitted for water right permits to dewater Newmont's Leeville Project, that the applications were filed pursuant to State Engineer's Order No. 1038, that the amount of water applied for is in accordance with preliminary studies of mine dewatering requirements, and that disposal options for the water produced in excess of uses described under Item 3 will be surface discharge, injection, infiltration, stockwatering, and irrigation by primary storage/secondary permits.

VIII.

Application 64229 was filed on June 15, 1998, by Newmont Gold Company to appropriate 78.0 cfs of the underground water developed from the mine dewatering under Applications 63984 through 63989, inclusive. The water is to be stored in a 20,000 acre-feet capacity reservoir for a total of 72,000 acre-feet upon filling and refilling. The application indicates that the manner of use is storage with secondary use applications to be filed for any use not permitted under the above-referenced applications. The

⁵ File No. 63988, official records in the office of the State Engineer.

⁶ File No. 63989, official records in the office of the State Engineer.

proposed point of diversion is described as being located within the NE¼ NW¼ of Section 3 (Lot 3), T.35N., R.49E., M.D.B.&M.⁷

IX.

Applications 63984, 63985, 63986, 63987, 63988, 63989 and 64229 were timely protested by Eureka County on the following grounds:⁴⁻⁷

1. The applications seek to appropriate 78 cfs or 35,008.74 gallons per minute and that the diversion and exportation of such quantity of water will lower the static water level in the groundwater basin and/or area, adversely affect the quality of remaining ground water and threaten springs, seeps and phreatophytes, which provide water and habitat critical to the survival of wildlife, grazing livestock and other surface area existing uses.
2. The appropriation of this water when added to the already approved appropriations and existing uses in the subject basin and/or area will exceed the annual recharge and safe yield of the basin and/or area, and the appropriation and use of water of this magnitude will lower the static water level, degrade the quality of water from existing wells, and cause negative hydraulic gradient influences and other negative impacts.
3. The diversion and exportation of such a quantity of water will deprive the area of origin, the County of Eureka, of water needed for its environmental and economic well-being and unnecessarily destroy environmental, ecological, socioeconomic, scenic and recreational values that the County holds in trust for its residents.
4. Granting or approving the subject applications in the absence of comprehensive water-resource development planning, including, but not limited to, environmental impacts, socioeconomic impacts and long-term impacts on the water

⁷ File No. 64229, official records in the office of the State Engineer.

resource, threatens to prove detrimental to the public interest.

5. Granting or approving the applications would conflict with or tend to impair existing water rights in the subject basin and/or area.

6. The Applicant has failed to provide information to enable the State Engineer to safeguard the public interest properly.

7. The Applicant has failed to provide relevant information denying the Protestant due process and a meaningful opportunity to submit protests to the applications.

8. The granting of the applications would be detrimental to the public interest inasmuch as it may allow the Applicant to "lock-up" vital water resources for sometime in the distant future beyond current planning horizons.

9. The applications should be denied because economic activity in the area is water-dependent and a reduction in quantity and/or quality of water in the area would adversely impact said water-dependent activity (irrigation, grazing, recreation) in the area and the way of life of the area's residents.

10. In a water extraction, and interarea/intercounty conveyance of this magnitude, it is impossible to anticipate all potential adverse effects without further information and study.

11. The exportation of the quantity requested under these applications outside of Eureka County would have an extreme deleterious affect upon the underground water supply of Northern Eureka County. The County requests that any permits granted under these applications be conditioned to provide that: (a) excess water may not be used or transferred out of the Boulder Flat Groundwater Basin and Eureka County, (b) any

uses permitted may not be changed or converted to other uses which would permit a change in place of use to a place outside the Boulder Flat Groundwater Basin and Eureka County, and (c) any permits granted must terminate upon the cessation of mining activity.

12. The approval of these applications as applied for would violate prior actions of the State Engineer and be detrimental to the public interest.

X.

After all parties of interest were duly noticed by certified mail, a public administrative hearing was held on November 27-30, 2000, before the State Engineer at Carson City, Nevada, regarding the protests to Applications 63984, 63985, 63986, 63987, 63988, 63989 and 64229.⁸

FINDINGS OF FACT

I.

The State Engineer initially described and designated the Boulder Flat Groundwater Basin on October 5, 1982, under the provisions of NRS § 534.030, as a basin in need of additional administration.⁹ On March 29, 1991, the State Engineer issued State Engineer's Order No. 1038 which provides for well spacing which accommodates the necessities and unique characteristics of mine dewatering within the northern portion of the Boulder Flat Groundwater Basin.¹⁰ The State Engineer finds that the proposed points of diversion under Applications 63984, 63985, 63986, 63987, 63988, 63989 and 64229 are located within the boundaries of the

⁸ Transcript, public administrative hearing before the State Engineer, November 27-30, 2000 (hereinafter "Transcript").

⁹ State Engineer's Order No. 799, dated October 5, 1982, official records in the office of the State Engineer.

¹⁰ State Engineer's Order No. 1038, dated March 29, 1991, official records in the office of the State Engineer.

designated Boulder Flat Groundwater Basin, and within the boundaries of the area designated under State Engineer's Order No. 1038.

II.

The Protestant alleged that the seven applications seek to appropriate a total of 78 cfs or 35,008.74 gallons per minute (gpm) and that the diversion and exportation of such quantity of water will lower the static water level in the groundwater basin and/or area adversely affecting the quality of remaining ground water and threatening springs, seeps and phreatophytes, which provide water and habitat critical to the survival of wildlife, grazing livestock and other surface area existing uses. The Protestant further alleged that the appropriation of this water when added to the already approved appropriations and existing uses in the subject basin and/or area will exceed the annual recharge and safe yield of the basin and/or area, and that appropriation and use of this magnitude will lower the static water level, degrade the quality of water from existing wells, and cause negative hydraulic gradient influences and other negative impacts.

At the administrative hearing, the Applicant never once indicated that it was planning on using the 35,000 gpm applied for, but rather, indicated that its anticipated maximum pumping rate would be 25,000 gpm, and this 25,000 gpm figure was the quantity used in its modeling and other planning. However, it wants to have the 35,000 gpm for flexibility.¹¹

While protesting the applications on the grounds that the diversion and exportation of such a quantity of water would threaten springs, seeps and phreatophytes, which provide water and habitat critical to the survival of wildlife, grazing livestock and other surface area existing uses, the Protestant also put on testimony that appeared to indicate its belief that increasing the

use of water by phreatophytes in the area was a waste of water.¹²

In 1989, the State Engineer made a policy decision to allow short-term over-pumping of the groundwater basin because mining is considered a temporary use of ground water, the quantity was relatively small and the basin would come back into equilibrium in a relatively short time. Now, the time frame for mining keeps extending out and the mines are requesting more and more quantities of water to be pumped and the time for recovery to equilibrium also keeps extending outward.

Testimony was provided that indicates that natural recharge to the Boulder Flat Groundwater Basin has been estimated at 11,584, 14,000 and 30,000 acre-feet annually,¹³ and evidence was provided that permitted and certificated water rights far exceed this amount.¹⁴ Between Newmont and Barrick, the maximum amount of water allowed to be pumped is 146,426 acre-feet annually, and this does not take into consideration other water rights in the groundwater basin.¹⁵

The Protestant recognizes that mining is an extremely important industry to the State of Nevada and Eureka County, and the Protestant does not want to see mining leave the county.¹⁶ In fact, much of the tax base of Eureka County comes from the mining industry;¹⁷ however, as more and more mines come on line, the Protestant has concerns with the continued dewatering and believes that the long-term issues should be addressed.¹⁸

The State Engineer finds the evidence does not support the 35,000 gpm applied for, but rather a maximum pumping rate of 25,000 gpm. The State Engineer finds the policy of short-term

¹² Transcript, pp. 15, 80-81, 262-263, 323, 407-408, 481, 681.

¹³ See generally, testimony of Gary Small, pp. 584-585, 611-612, 621.

¹⁴ Transcript, pp. 284-285; Exhibit No. 14.

¹⁵ Exhibit No. 52(c).

¹⁶ Exhibit No. 52(c).

¹⁷ Transcript, p. 638.

¹⁸ Transcript, pp. 125-130, 304-316.

¹⁹ Transcript, pp. 638-639.

over-pumping will continue to be allowed; however, upon the granting of these applications Newmont Gold Company will be confined to the existing 2,000 million gallons annually water rights cap on consumptive use under which it already operates; therefore, in effect, the State Engineer is not granting any additional consumptive use from the groundwater basin. The State Engineer finds, due to the concerns of the long-term effects of the mine dewatering, and due to the fact that additional mines keep coming on line and the time line for pumping keeps being extended out, that he is requiring Newmont to recharge this dewatering water within the groundwater basin or use it as a substitution for agricultural water rights in the groundwater basin. However, discharge to the Humboldt River may only be permitted under the permits granted under these applications if the applicant can show there is no other solution for disposition of the excess water within the groundwater basin.

III.

The Protestant alleged that the diversion and exportation of such a quantity of water will deprive the area of origin, Eureka County, of water needed for its environmental and economic well-being and will unnecessarily destroy environmental, ecological, socioeconomic, scenic and recreational values that the County holds in trust for its residents. The State Engineer finds the Protestant provided no citation to authority which requires water to remain in the area of origin or that Eureka County holds environmental, ecological, socioeconomic, scenic and recreational values in trust for its residents. The State Engineer finds that by requiring recharge of the water within the groundwater basin as the first method of disposal or use as a substitution for existing water rights, the water will most likely remain in the area of origin.

IV.

The Protestant alleged that granting or approving the subject application in the absence of comprehensive water-resource development planning, including but not limited to, environmental impacts, socioeconomic impacts and long-term impacts on the water resource threatens to prove detrimental to the public interest. The State Engineer finds there is no provision in the Nevada Water Law which requires the type of comprehensive water resource development planning desired by the Protestant prior to the granting of a water right application. The State Engineer further finds that the requirement of a monitoring plan produces information relevant to the determination of environmental impacts, and it is the purpose of monitoring to assure there is an early warning system in case diversion needs to be curtailed.

V.

The Protestant alleged that the granting or approval of the applications would conflict with or tend to impair existing water rights in the subject basin and/or area. The State Engineer finds the Protestant did not provide evidence as to any specific water right that would be jeopardized by the granting of these applications.

VI.

The Protestant alleged that the Applicant failed to provide information to enable the State Engineer to safeguard the public interest properly. The State Engineer finds no evidence or argument as to this protest claim was provided at the administrative hearing.

VII.

The Protestant alleged that the Applicant failed to provide relevant information denying the Protestant due process and a meaningful opportunity to submit protests to the applications. The State Engineer finds no evidence or argument as to this protest claim was provided at the administrative hearing.

VIII.

The Protestant alleged that the granting of the applications would be detrimental to the public interest inasmuch as it may allow the Applicant to "lock-up" vital water resources for sometime in the distant future beyond current planning horizons. The State Engineer finds the Protestant did not provide any evidence or argument as to how this violates Nevada Water Law.

IX.

The Protestant alleged that the applications should be denied because economic activity in the area is water-dependent and a reduction in quantity and/or quality of water in the area would adversely impact water-dependent (irrigation, grazing, recreation) activity in the area and the way of life of the area's residents. The State Engineer finds the Protestant did not provide any evidence or argument as to how this violates Nevada Water Law.

X.

The Protestant alleges that in a water extraction, and interarea/intercounty conveyance of this magnitude, it is impossible to anticipate all the potential adverse effects without further information and study. The State Engineer finds this protest claim does not provide any issue of Nevada Water Law that can be addressed by this ruling.

XI.

The Protestant alleged that the exportation of the quantity requested under these applications outside of Eureka County would have an extreme deleterious affect upon the underground water supply of Northern Eureka County and requests that any permits granted under these applications be conditioned to provide that: (a) excess water may not be used or transferred out of the Boulder Flat Groundwater Basin and Eureka County, (b) that any uses permitted may not be changed or converted to other uses which would permit a change in place of use to a place outside the Boulder Flat Groundwater Basin and Eureka County, and (c) any

permits granted must terminate upon the cessation of mining activity. The State Engineer finds he is requiring that Newmont only be allowed to discharge out of the groundwater basin if it can show there is no other solution for use of the excess water within the groundwater basin, and the other permit terms requested by the protestant are being incorporated.

XII.

The Protestant alleged that approval of these applications as applied for would violate prior actions of the State Engineer and be detrimental to the public interest. The State Engineer finds the Protestant did not provide any evidence or argument as to this protest claim at the administrative hearing.

Mining has been a predominant economic force in Nevada since before statehood, and mining related activities are recognized to be of paramount interest to the State. Mining has been designated as the preferred use of water in many groundwater basins in Nevada; however, no such designation has been made in Boulder Flat Groundwater Basin. The State Engineer finds that the mining, milling and dewatering uses of water contemplated under the applications are a beneficial use of water and approval of the use of ground water for these purposes does not threaten to prove detrimental to the public interest.

XIII.

The State Engineer finds that mining, milling and dewatering are by their very nature a temporary use of water and the State Engineer may issue permits to appropriate the public waters under the preferred use provisions of NRS § 534.120(2).

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and of the subject matter of this action and determination.¹⁹

¹⁹ NRS chapters 533 and 534.

II.

Nevada Revised Statute § 534.120(2) provides that in the interest of public welfare the State Engineer is authorized and directed to designate preferred uses of water within the respective areas so designated and from which the ground water is being depleted, and in acting on applications to appropriate ground water he may designate such preferred uses. The State Engineer concludes that mining is identified as a preferred use of ground water under Nevada Water Law within this groundwater basin.

III.

The State Engineer is prohibited by law from granting a permit under an application to appropriate the public waters where:²⁰

- A. there is no unappropriated water at the proposed source, or
- B. the proposed use conflicts with existing rights, or
- C. the proposed use threatens to prove detrimental to the public interest.

IV.

The State Engineer concludes that since he is requiring these appropriations to be contained within the consumptive use cap on water already appropriated by the Applicant from the groundwater basin, he does not consider these water rights to be an additional appropriation of water. The State Engineer further concludes that mine dewatering presents a unique situation that may require pumping to remove water in excess of the perennial yield in order to reach the ore body. Since mining is considered to be a temporary use of water and is an industry of such importance to the State of Nevada, State Engineers have previously allowed the appropriation of underground water from a particular area in

²⁰ NRS chapter 533.370(3).

excess of the perennial yield. This was done under the analysis that when mining ceases the water right permits also cease to exist, that is, the right to appropriate water ceases and the water is returned to the source and the system will return to a balance over time.

V.

The State Engineer concludes that no provision of Nevada Water Law requires that water be retained in the area of origin and no citation to authority for this protest claim was provided. The State Engineer further concludes that Eureka County did not cite to any provision of the law indicating that Eureka County holds in trust for its residents the environmental, ecological, socioeconomic, scenic and recreational values which requires any analysis in conjunction with the granting of a water right application or how this restricts a request to appropriate water.

VI.

The State Engineer concludes that no provision of Nevada Water Law requires the type of comprehensive water-resource development planning requested by the Protestant prior to the approval of a water application; therefore, it does not threaten to prove detrimental to the public interest to grant a water right application in the absence of such planning.

VII.

The State Engineer concludes since the Protestant did not provide evidence as to any specific water right that would be jeopardized by the granting of these applications and he is unaware of any water right impaired by the granting of these applications, the granting or approval of the applications will not conflict with or tend to impair existing water rights in the subject basin and/or area.

VIII.

The State Engineer concludes that since the Protestant did not provide any evidence or argument to support its protest claim

that the Applicant failed to provide information to enable the State Engineer to safeguard the public interest properly, the claim is without merit.

IX.

The State Engineer concludes that since the Protestant did not provide any evidence or argument to support its protest claim that the Applicant failed to provide relevant information denying the Protestant due process and a meaningful opportunity to submit protests to the applications, the claim is without merit.

X.

The State Engineer concludes that Nevada is a prior appropriation state, that is, first in time, first in right, and that the granting of a water right would not "lock-up" water resources as long as the resource is put to beneficial use within a reasonable amount of time in the project applied for under the applications. The State Engineer concludes that this prior appropriation analysis also applies to the protest claim that economic activity in the area is water-dependent and a reduction in quantity and/or quality of water in the area may or could adversely impact water-dependent (irrigation, grazing, recreation) activity in the area and the way of life of the area's residents. In addition, mining also provides an economic base for the County.

XI.

The Protestant alleges that in a water extraction, and interarea/intercounty conveyance of this magnitude, it is impossible to anticipate all the potential adverse effects without further information and study. The State Engineer concludes this protest claim does not provide any issue of Nevada Water Law.

XII.

The Protestant alleged that approval of these applications as applied for would violate prior actions of the State Engineer and be detrimental to the public interest. The State Engineer concludes that since the Protestant did not provide any evidence

or argument as to this protest claim at the administrative hearing he is unable to address the merits of the claim, and therefore, concludes the claim is without merit.

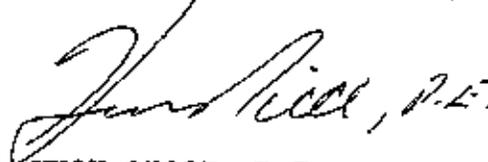
RULING

The protests to Applications 63984, 63985, 63986, 63987, 63988, 63989 and 64229 are hereby overruled in part and granted in part. Applications 63984, 63985, 63986, 63987, 63988, 63989 and 64229 are hereby granted subject to:

1. Existing rights;
2. Payment of the statutory permit fees;
3. A monitoring program approved by the State Engineer prior to the pumping of any water under these permits;
4. The permittee shall submit to the State Engineer by February 15th each year a report which includes a water management plan with the expected pumping for the next year and expected methods of disposal, water level measurements, and a summary of the pumping over the last year;
5. No water is to be discharged out of the groundwater basin unless the permittee can show there is no other solution for disposal;
6. The total combined consumptive duty of water under Permits 49960, 50688 (Certificate 13878), 50939 (Certificate 13880), 51074, 51750, 51963, 52354, 52795 (Certificate 13396), 52797 (Certificate 13397), 52999, 53000, 54335, 54337, 55127, 56607, 56608, 56609, 56610, 56611, 56612, and 63984 through 63989, inclusive, and any subsequent changes of these permits will not exceed 2,000 million gallons annually;
7. The pumping rate under Applications 63984, 63985, 63986, 63987, 63988 and 63989 is limited to 25,000 gallons per minute;

8. Application 64229 is limited to 55.7 cfs and any use of water under the primary permit will be specified on secondary applications as to the place of use and beneficial use.
9. Any uses permitted may not be changed or converted to other uses which would permit a change in place of use to a place outside the Boulder Flat Groundwater Basin;
10. Upon cessation of mining activity and mine reclamation these water rights will return to the source;
11. Under Applications 63984, 63985, 63986, 63987, 63988 and 63989, wells or sumps may be located and drilled anywhere within said 160-acre area as required for mine dewatering purposes without filing for a temporary change in point of diversion during that year. A change application shall be filed on or before January 15th of each of the subsequent years setting forth more exact location(s) of each producing well or pumping site within the 160-acre areas permitted.

Respectfully submitted,



HUGH RICCI, P.E.

State Engineer

HR/SJT/hf

Dated this 5th day of

April, 2001.