

IN THE OFFICE OF THE STATE ENGINEER

IN THE MATTER OF APPLICATIONS)
47797, 47800, 47804, 47805, 47808,)
47810, 47811, 47812, 47813, 47816,)
47817, 47819, 47820, 47823, 47825,)
47827, 47828, 47829, 47833, 47834,)
47835, 47841, 47844, 47845, 47847,)
47849, 47850, 47852, 47853, 47854,)
47855, 47856, 47857, 47862, 47868,)
47869, 47872, 47873, 47875, 47878,)
47879, 47880, 47881, 47883, 47884,)
47888, 47891, 47893, 47894, 47895,)
47897, 47900, 47904, 47905, 47906,)
47998, 47999 AND 48000 FILED TO)
CHANGE THE PLACE OF USE OF WATERS)
HERETOFORE DECREED AND SET FORTH IN)
THE TRUCKEE RIVER AND CARSON RIVER)
DECREES.)

RULING

GENERAL

I.

The fifty eight (58) applications to change the place of use of decreed rights under the Truckee River and Carson River decrees¹ are the subject matter of this ruling and are set forth in the record.² The applications represent requests to change the place of use of decreed water on irrigated lands within the Newlands Reclamation Project under the provisions set forth in the Orr Ditch and Alpine decrees.³

¹ Final Decree in United States v. Orr Water Ditch Co., et al., Equity A-3 (D. Nev. 1944), hereinafter referred to as Orr Ditch; and Final Decree in United States v. Alpine Land & Reservoir Co., et al., Equity No. D-183 BRT (D. Nev. 1980), hereinafter referred to as Alpine.

² State of Nevada Exhibits No. 2 and 3, public administrative hearing before the State Engineer.

³ Orr Ditch Final Decree, p. 88. Alpine Final Decree, pp. 161-162.

II.

The applications were timely protested⁴ by the Pyramid Lake Paiute Tribe of Indians on the following grounds:

"Comes now The Pyramid Lake Paiute Tribe of Indians whose post office address is P.O. Box 256, Nixon, Nevada 89424 whose occupation is (See attachment B), and protests the granting of Application Numbers (See attachment A), filed on (See attachment A) by (See attachment A) to change the place of use of the waters of Carson and Truckee Rivers situated in Washoe, Storey, Lyon, Churchill and Humboldt Counties, State of Nevada for the following reasons and on the following grounds, to wit:

1. Pursuant to the federal reclamation law, 43 U.S.C. §389, said applications require the approval of the Secretary of the Interior which has not been obtained.

2. The approval of said applications by the Secretary of the Interior is not in the interests of the Newlands Reclamation Project or of the United States because: (i) it would violate the Secretary's obligations pursuant to the Endangered Species Act, 16 U.S.C. §§1531 et seq.; (ii) it would violate the Secretary's trust obligations to the Pyramid Lake Paiute Tribe of Indians; (iii) it would violate the Secretary's duty to protect, preserve and restore the Pyramid Lake fishery for the use and benefit of the Pyramid Lake Paiute Tribe of Indians; (iv) it would violate the reserved right of the Pyramid Lake Paiute Tribe to the unappropriated waters of the Truckee River that are needed to maintain, restore and preserve the Pyramid

⁴ In both Orr Ditch and Alpine, the procedures are set forth for accomplishing changes in point of diversion, and place, means, manner or purpose of use. See Footnote 3. The applications and protests have been subject to provisions set forth under the Nevada Water Law, specifically those provisions of Nevada Revised Statutes, Chapter 533. The applications were published in a newspaper of general circulation in the County of Churchill as required by NRS 533.360. NRS 533.365 provides that an interested person may file verified protests to an application within 30 days from the date of last publication of the notice of application. See State of Nevada Exhibit 4, administrative hearing before the State Engineer. See also United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 858 (9th Cir. 1983): "We agree with the district judge that the notice and protest procedures of Nevada law are adequate to allow exploration of these issues, when they arise, before the state engineer." (Emphasis added).

Lake fishery; and (v) the Truckee-Carson Irrigation District, and, on information and belief, the applicants have not complied and are not in compliance with the rules and regulations of the Secretary of the Interior applicable to the Newlands Project and approval of said applications would encourage further violations of those rules and regulations.

3. The approval of said applications by the Secretary of the Interior would violate the Order, Judgment and Decree entered in the case of Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1973), specifically Section D(4) of the Operating Criteria and Procedures for Coordinated Operation and Control of the Truckee and Carson Rivers for Service to Newlands Project (OCAP), in that: (i) the Truckee-Carson Irrigation District is not in compliance with said OCAP; and (ii) on information and belief, the applicants who are seeking permission to change the use of water within the Newlands Reclamation Project are not in compliance with Sections C(1), C(3), and/or C(5) of said OCAP and/or with the provisions of the decrees in United States v. Orr Water Ditch Co., Equity No. A-3 (D. Nev. 1944), and United States v. Alpine Land & Reservoir Co., Equity No. D-183 BRT (D. Nev. 1980).

4. Granting or approving the above referenced applications by the State Engineer and/or the Secretary of the Interior would conflict with and tend to impair the value of the Pyramid Lake Tribe's existing rights to waters of the Truckee River because the Tribe is entitled to the use of all the waters of the Truckee River which are not subject to valid, vested, and perfected rights and the applicants do not have a vested right to use the waters of the Truckee River on the proposed places of use described in their applications.

5. Granting or approving the above referenced applications by the State Engineer would be detrimental to the public welfare in that it would: (i) be likely to jeopardize the continued existence of Pyramid Lake's two principal fish, the endangered cui-ui and the threatened Lahontan cutthroat trout; (ii) prevent or interfere with the conservation of those endangered and threatened species; (iii) take or harm those threatened and endangered species; (iv) adversely affect the recreational value of Pyramid Lake; and (v) interfere with the purposes for which the Pyramid Lake Indian Reservation was established.

6. The Pyramid Lake Paiute Tribe of Indians will be adversely affected if the above referenced applications are granted because: (i) they will result in greater diversions of Truckee River water away from

Pyramid Lake to the detriment of the threatened and endangered species inhabiting Pyramid Lake; (ii) they will prevent the adequate enforcement and encourage the continued violation of the OCAP; and (iii) they will impair, conflict and interfere with the Tribe's reserved right to the unappropriated waters from the Truckee River that are needed to maintain, restore and preserve the Pyramid Lake fishery and to fulfill the purposes of the Pyramid Lake Indian Reservation.

THEREFORE the protestant requests that the application be Denied and that an order be entered for such relief as the State Engineer deems just and proper." (Emphasis in original).

III.

The United States Department of the Interior petitioned the State Engineer to intervene as an unaligned party in interest.⁵ Intervention was granted on the grounds that there were federal interests in these proceedings that justify standing as a party in interest.⁶

IV.

A public administrative hearing in the matter of the subject applications to change was held before the State Engineer on November 26th through 29th, 1984, in Fallon, Nevada. The applicants and protestants made evidentiary presentations and extensive testimony was received from experts and witnesses on behalf of the parties who had standing in this matter.⁷ All parties concluded by submitting post hearing briefs setting forth their respective positions.

⁵ See Interior Exhibit 1, administrative hearing before the State Engineer.

⁶ United States v. Alpine Land & Reservoir Co., supra at 858. See also transcript of public hearing before the State Engineer, Vol. I., pp. 6-14.

⁷ Transcript of the public administrative hearing available as public record in the Office of the State Engineer, Carson City, Nevada.

FINDINGS OF FACT

I.

In addressing change applications, both Orr Ditch and Alpine cases and decrees specifically set forth the procedure to accomplish changes in the point of diversion, manner, purpose and place of use.

Orr Ditch provides that:⁸

"Persons whose rights are adjudicated hereby, their successors or assigns, shall be entitled to change, in the manner provided by law the point of diversion and the place, means, manner or purpose of use of the waters to which they are so entitled or of any part thereof, so far as they may do so without injury to the rights of other persons whose rights are fixed by this decree." (Emphasis added).⁹

Similarly, Alpine provides:¹⁰

"Applications for changes in the place of diversion, place of use or manner of use as to Nevada shall be directed to the State Engineer. Any person feeling himself aggrieved by any order or decision of the State Engineer on these matters may appeal that decision or order to this court." (Emphasis added)

The State Engineer finds that the change applications that are the subject matter herein are properly before him for consideration and decision.

⁸ Orr Ditch Final Decree, p. 88.

⁹ Recently the Court interpreted this controlling provision: "This Court has interpreted 'in manner provided by law' to mean in accordance with Nevada state procedures for allowing changes.: Final Order Granting the State of Nevada's Motion for Summary Judgment on the Issue of the United States' Application for Changes In Use and Changes In Purpose dated February 28, 1984, United States v. Orr Ditch Water Co. et al., Equity A-3-2-WEC (D. Nev.). In accord, Memorandum Decision and Order dated June 26, 1940, United States v. Orr Ditch Water Co. et al., Equity A-3 (D. Nev.) (Raffetto Decision).

¹⁰ United States v. Alpine Land & Reservoir Co., supra at 857-858. Alpine Final Decree, pp. 161-162.

II.

It is clear upon review of Alpine and Orr Ditch that the State Engineer in considering applications to change is guided by whether the applications would "tend to impair the value of existing rights or to be otherwise detrimental to the public welfare".¹¹ The question of availability of unappropriated water is not at issue. In accordance with the position affirmed by the 9th Circuit,¹² the applications seek only to change water already appropriated under determined rights.

III.

Water duty was addressed at length in Alpine.¹³ The Court rejected the contention that contracts executed by Interior and the land owners within Newlands were binding as to duty of water. The Court 697 F.2d at 853 further found that:

"The right to the use of water acquired under the provisions of this act [Reclamation Act of 1902, 43 U.S.C. §372 (1976)] shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." (Emphasis added).

The Court's additional findings are significant and binding on these proceedings since in general it is undisputed by the record that beneficial use under the change applications has historically occurred on lands described and set forth under the proposed places of use within the project boundaries.¹⁴ The Court 697 F.2d at 853 specifically stated:

"The issue we review is whether the District Court reached a correct determination of beneficial use as of 1980." (Emphasis added).

¹¹ United States v. Alpine Land & Reservoir Co., supra at 858; NRS 533.370(3).

¹² United States v. Alpine Land & Reservoir Co., supra at 857.

¹³ United States v. Alpine Land & Reservoir Co., supra at 853-857.

¹⁴ Applicant's Exhibit "A", Transcript of public administrative hearing, testimony of Barry Alan Fitzpatrick, Vol. II, p. 275 et seq. Vol. IV pp. 549-550; Vol. III p. 314; other references throughout the hearing transcript firmly establishes the beneficial use of water on the proposed places of use.

"In the circumstances, it is clear the District Court did not err in giving the contracts and the Nevada statute relied on by the United States little evidentiary significance." 697 F.2d at 856.

Although these findings were in the context of addressing water duty, they are compelling in influencing the State Engineer's determination as to the validity of the historical beneficial use on the land represented in the record.

Notwithstanding the foregoing, the protestant seeks to disqualify the change applications on the basis of noncompliance with Nevada Water Law. The record, however, demonstrates that the United States was fully aware of the irrigation practices of the Newlands farmers and, until recently if not encouraged, allowed continued irrigation of lands described under the proposed places of use.¹⁵ The record provides no evidence that enforcement of the contracts has ever been consistently maintained.

IV.

The record documents the historic and actual beneficial use as of 1980. Beneficial use for a number of years has been accomplished by application of water to lands described under the proposed places of use. As the Court noted in Alpine,¹⁶ there was no evidence of enforcement of the contracts and historically no distinction was made between land owners with and without the limiting contracts. Both Orr Ditch¹⁷ and Alpine¹⁸ set forth the limit and extent to which the project is entitled to water and the finality of these decrees has been confirmed by the United States Supreme Court.¹⁹ The lands under the proposed places of use are entitled to a duty of water consistent with a determination as to their appropriate classification as bench or bottom lands and nothing more.

¹⁵ Protestant's Exhibits 2, 3, 4, 14, 15; Interior's Exhibit 3; and Applicant's Exhibits B, F, G, J, K, public administrative hearing before the State Engineer. Testimony of Gordon Lyford indicates that all of the lands under the proposed places of use have been classified preliminarily as irrigable, Vol. I, p. 90.

¹⁶ United States v. Alpine Land & Reservoir Co., supra at 856.

¹⁷ Orr Ditch Final Decree Claim #3 and #4, pp. 10 and 11.

¹⁸ Alpine Final Decree, pp. 151, 152.

¹⁹ Nevada vs. United States, 103 S. Ct. 2906 (1984); United States v. Alpine Land & Reservoir Co., supra, cert. denied 104 S. Ct. 193 (1983).

V.

The protestants documented the record with substantial evidence and testimony as to the precarious nature of the habitat of the Lahontan cutthroat trout and cui-ui sucker, classified respectively as threatened and endangered species in the lower reaches of the Truckee River.²⁰ The record also reflects that man's activities in the lower reaches has resulted in additional impediments to the natural spawning habits of these species.²¹ The State Engineer recognizes and is sympathetic to public interest values closely tied to continued survival of the species, however, there is no evidence that the Newland's right set forth under Orr Ditch has ever been or would be exceeded if the change applications were approved. Orr Ditch is binding²² on all parties thereto and the Truckee-Carson Irrigation District is entitled to a diversion through the Truckee Canal, storage and comingling with the waters of the Carson River in Lahontan Reservoir for the irrigation of lands within the Newlands Project. Upon careful review of the record, the State Engineer can find no conclusive or compelling evidence that approval of the change applications would constitute an injury to the existing rights of the protestant or any other existing rights set forth in the subject decrees. To the contrary, the record can be relied on as substantial and conclusive evidence that the changes will not detrimentally effect or impair protestant's existing rights simply based on the historical beneficial use.

²⁰ Protestant's Exhibits 6, 7 and transcript of public administrative hearing before the State Engineer, testimony of Chester Buchanan, pp. 101-208, and testimony of Alan Ruger, pp. 193-223.

²¹ Testimony of Chester Buchanan, Vol. II, pp. 136-139, transcript of public administrative hearing before the State Engineer.

²² Nevada vs. United States, supra at 2920-2925.

VI.

Eight of the subject applications²³ seek to change the place of use in total or in part from the Truckee division to the Carson division of the project. Testimony and evidence as to irrigation efficiencies within the two divisions was received into the record.²⁴ The relevancy of efficiencies to this matter is questionable but in the context of any possible element of waste or unreasonable use represented by the proposed changes, the State Engineer will enter a finding.

Protestants attempt to demonstrate²⁵ an additional burden on the TCID Truckee River diversions based on information contained in a flow chart from a 1971 report. Applicants effectively discredit the validity of this evidence on the basis of the absence of hard data and reliance on assumption, the reasonableness of which is questionable.²⁶ The State Engineer finds that the evidence of protestant does not sufficiently and accurately reflect current irrigation practices within the project. Furthermore, the record reflects that the acre-feet sought to be changed by the applications cumulatively represents a reduction in diversion from the existing places of use which results in less demand on project water.²⁷

CONCLUSIONS

I.

The State Engineer has jurisdiction of the parties and subject matter of this action.²⁸

²³ Protestant's Exhibit 13, public administrative hearing before the State Engineer.

²⁴ Testimony of Ali Shahroody, Vol. II, pp. 235-254; testimony of Roderick L. Hall, pp. 522-589; Applicant's Exhibits L-1, L-2, J, K; Protestant's Exhibit 9.

²⁵ Protestant's Exhibits 9, 10, public administrative hearing before the State Engineer. Testimony of Ali Shahroody, Vol. II, pp. 236-244.

²⁶ Transcript Vol. II, pp. 242-244; pp. 250-266 testimony of Ali Shahroody, public administrative hearing before the State Engineer.

²⁷ Applicant's Exhibits B, J; Protestant's Exhibit 15, public administrative hearing before the State Engineer.

²⁸ NRS Chapter 533; See Footnote 3.

II.

The Orr Ditch and Alpine decrees set forth the procedure and authority in the matter of applications to change the point of diversion, manner, purpose or place of use of decreed waters of the Carson and Truckee Rivers.

III.

The record of evidence is substantial and conclusive as to the historical uses of the water under the subject applications to change.

IV.

The record of evidence establishes the duty of water to which the lands under the proposed changes are entitled.

V.

There is no conclusive evidence that the approval of the applications to change in this matter will effect or impair the value of other existing rights set forth under the subject decrees.

VI.

There is no conclusive evidence that the approval of the applications to change in this matter will be detrimental to the public interest or welfare.

RULING

The protests to the granting of applications to change 47797, 47800, 47804, 47805, 47808, 47810, 47811, 47812, 47813, 47816, 47817, 47819, 47820, 47823, 47825, 47827, 47828, 47829, 47833, 47834, 47835, 47841, 47844, 47845, 47847, 47849, 47850, 47852, 47853, 47854, 47855, 47856, 47857, 47862, 47868, 47869, 47872, 47873, 47875, 47878, 47879, 47880, 47881, 47883, 47884, 47888, 47891, 47893, 47894, 47895, 47897, 47900, 47904, 47905, 47906, 47998, 47999 and 48000 are herewith overruled and the applications will be approved subject to existing rights on the sources and subject to water duties affirmed or modified by the Federal Water Master.

Respectfully submitted,



PETER G. MORROS
State Engineer

PGM/bl

Dated this 15th day of

March, 1985.