

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

IN THE MATTER OF APPLICATION 61184)
FILED TO CHANGE THE POINT OF)
DIVERSION, PLACE AND MANNER OF USE)
OF WATERS PREVIOUSLY APPROPRIATED)
FROM THE TRUCKEE RIVER, WASHOE)
COUNTY, NEVADA)

RULING

4287

GENERAL

I.

Application 61184 was filed by Clyde K. Emery, Jr. to change the point of diversion, place and manner of use of water previously appropriated under Claims 94 and 94A of the Orr Ditch Decree¹. The applicant seeks to change 0.27 cubic feet per second (cfs), limited to 194 acre-feet annually (afa), of Truckee River water from irrigation to quasi-municipal purposes within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 8; portions of the S $\frac{1}{2}$ SW $\frac{1}{4}$ and the SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 9, all within T.19N., R.18E., M.D.B. & M. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 9, T.19N., R.18E., M.D.B. & M.²

II.

Application 61184 was filed as part of a settlement agreement relating to litigation between the State Engineer and Clyde Emery, Jr.² A history of the permits and related litigation is provided for clarity.

Application 45245 was filed on January 18, 1982, by Clyde K. Emery, Jr., to change the point of diversion, manner and place of use of 2.0 cfs, a portion of waters of the Truckee River as decreed under Claims 94 and 94A of the Orr Ditch Decree. Permit 45245 was approved on March 1, 1983, for 2.0 cfs, not to exceed 202.7 afa, for quasi-municipal purposes.

¹ Final Decree, United States v. Orr Ditch Water Co., In Equity Docket No. A-3 (D. Nevada 1944).

² File No. 61184, official records of the Office of the State Engineer.

Application 45246, also filed on January 18, 1982, by Clyde K. Emery, Jr., sought to change the place of use of 2.03 cfs of water heretofore appropriated under Permit 27124. Permit 27124, approved on May 29, 1973, changed the point of diversion, place and manner of use of 2.03 cfs, a portion of the waters of the Truckee River as decreed under Claims 94 and 94A of the Orr Ditch Decree. Permit 45246 was approved on March 1, 1983, for 2.03 cfs, not to exceed 206 afa, for quasi-municipal purposes.

Application 45241, filed on January 18, 1982, by Clyde K. Emery, Jr., sought to appropriate 1.0 cfs of water from an underground source for quasi-municipal purposes for use within portions of Sections 8 and 9, T.19N., R.18E., M.D.B.&M. Permit 45241 was approved on March 1, 1983, for 1.0 cfs, not to exceed 251.7 afa. Permit 45241 was issued as a supplemental supply to surface water Permits 45245 and 45246 and the right to the use of water under Permit 45241 was only to be exercised when surface water was not available from the Truckee River.

Proof of beneficial use under Permits 45241, 45245 and 45246 was last due on April 1, 1994. These permits were cancelled after the permittee failed to respond to a final notice which stated that failure to file proof of beneficial use or a request for extension of time would result in the permits being cancelled.

The permittee requested the State Engineer review the cancellation of Permits 45241, 45245 and 45246. After an administrative hearing was held on the cancellation, pursuant to State Engineer Ruling No. 4163, the State Engineer rescinded the cancellation of Permit 45241, but upheld the cancellation of Permits 45245 and 45246.³

The permittee then filed a petition for judicial review of the State Engineer's Ruling No. 4163 in the United States District Court, District of Nevada. A Stipulation was entered into by the

³ State Engineer's Ruling No. 4163, dated February 2, 1995, official records of the Office of the State Engineer.

parties in settlement of permittee's suit and the United States District Court entered an Order on April 28, 1995, dismissing the lawsuit on the basis of the Stipulation.²

In the Stipulation, the parties agreed that State Engineer's Ruling No. 4163 was vacated with regard to the portion of the ruling relating to Emery's loss of his Truckee River water rights under Permits 45245 and 45246 (Claims 94 and 94A of the Orr Ditch Decree); however, all other portions of State Engineer's Ruling No. 4163 were upheld. Under the Stipulation the parties agreed that:

Clyde K. Emery, Jr. was to immediately begin reporting the use of underground water pumped under Permit 45241;

A request for an extension of time to file proof of beneficial use under Permit 45241 was granted until June 1, 1995;

Clyde K. Emery, Jr. agreed to file change applications in the Office of the State Engineer and in manner provided by law by June 1, 1995, to change the place of use of waters under Claims 94 and 94A of the Orr Ditch Decree to the location now designated as the place of use under Permit 45241;

The water rights so changed under Claims 94 and 94A of the Orr Ditch Decree would be made supplemental to underground water obtained by Clyde K. Emery, Jr. under Permit 45241; and,

Only when underground water is unavailable to fulfill Clyde K. Emery, Jr.'s needs as envisioned in Permit 45241, irrespective of the reason for the water's unavailability, may Emery use water rights held by him under Claims 94 and 94A, which are to be the subject of the referenced change applications.²

III.

Application 61184 was timely protested on July 24, 1995, by the Truckee Carson Irrigation District ("TCID") on the following grounds:²

This application is seeking to change the point of diversion, place of use, and manner of use of the entire duty (4.5 acre-foot/acre) of decreed Truckee River rights under claims 94 and 94A (Coldron Ditch) from irrigation to quasi-municipal. This application, if granted should

be issued for the consumptive use portion only of the original decreed use, as the effluent generated from this quasi-municipal development will not be returned to the Truckee River via the Reno/Sparks Reclamation Facility. Granting an application for the full duty without returning the effluent to the Truckee River will reduce the amount of return flows to the River which have historically occurred under the existing decreed use. If the application is approved for the full duty without effluent return to the River, the amount of water available for existing downstream decreed rights will be reduced and negatively impacted.

The protestant requested that the application be issued subject to the condition that the duty of water not exceed the consumptive use portion of the original decreed use.

FINDINGS OF FACT

I.

The State Engineer finds that Application 61184 was filed by Clyde K. Emery, Jr. to comport with the agreement set forth in the Stipulation previously referenced.

II.

Based on the Stipulation, use of water under Application 61184 is only allowed when underground water is unavailable for use by Clyde K. Emery, Jr. under Permit 45241.² The State Engineer finds that the use of Truckee River water under a permit granted on Application 61184 would only be supplemental to use under Permit 45241, and use of the water on a regular and sustained basis is not envisioned.

III.

Permit 45245 and 45246, prior to their cancellation, allowed for the diversion and consumptive use of 408.7 acre-feet annually for 510 individual units. Application 61184 only seeks to change 194 acre-feet to provide a back-up water supply for 173 individual units plus a club house and lawn.

The Orr Ditch Decree¹ contains no consumptive use limitation on the quantity of water allowed under an application to change the point of diversion or place or manner of use. The State Engineer

has previously approved changes of Truckee River decreed water rights to municipal use as he did under Permits 45245 and 45246, which allowed the entire duty to be changed.

In this case, the TCID protested on the basis that granting the application for the full duty without the return of effluent to the Truckee River would reduce the historical return flows to the river. The State Engineer finds that in typical situations use of these rights will not be utilized at all under a permit granted on Application 61184. Therefore, the 194 afa previously used for irrigation under Claims 94 and 94A will remain in the Truckee River leaving more water in the River for downstream users. Only under unusual circumstances would the 194 afa previously appropriated under Claims 94 and 94A be diverted or consumptively used under Permit 61184.

The State Engineer further finds that as long as underground water is the primary source of water for the development, the concerns voiced by the TCID in its protest to the granting of the application are alleviated by the fact that the use of water granted under the application would only be supplemental to Permit 45241 and use would only occur when water is not available for use under Permit 45241.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action.⁴

II.

The State Engineer is prohibited by law from granting a change application where:

- A. The proposed use conflicts with existing rights, or

⁴ NRS Chapters 533-534.

- B. The proposed use threatens to prove detrimental to the public interest.⁵

III.

NRS 533.345(1) provides that an application can be filed to change the point of diversion, place or manner of use of water already appropriated. Water already appropriated, in reference to a change application, refers to water represented by a water right permit or certificate in good standing.⁶ The State Engineer concludes that Claims 94 and 94A are water rights in good standing and can be changed by Application 61184.

IV.

The State Engineer concludes that the use of water under a permit granted under Application 61184 is supplemental to the use of groundwater under Permit 45241, and the use of Truckee River water under Application 61184 is not envisioned on a regular and sustained basis, and the use of water under the application is only allowed when water is not available under Permit 45241, and more water will actually be left in the Truckee River on a consistent basis as long as the underground water under Permit 45241 is the primary source of water for the development.

⁵ NRS 533.370.

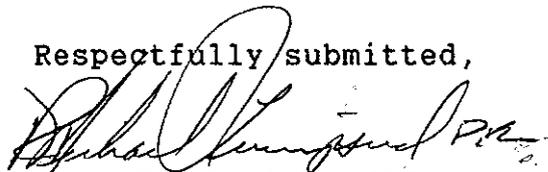
⁶ NRS 533.324.

RULING

The protest filed by the TCID is overruled and Application 61184 is hereby approved subject to the following conditions:

1. Payment of statutory fees.
2. The permittee will file quarterly reports, based on monthly data, of the use of underground water under Permit 45241 and of the use of surface water under Permit 61184.
3. If for some reason it becomes necessary for Permit 61184 to become the primary source of water for servicing the place of use, the permittee will be required to address the issue of return flows and, if necessary, provide a plan for mitigating the effects of the loss of return flows, if any.
4. Permit 61184 cannot be transferred off the present place of use.

Respectfully submitted,


R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/SJT/ab

Dated this 24th day of
January, 1996.