

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

IN THE MATTER OF APPLICATION 62272-T)
FILED TO CHANGE THE POINT OF DIVERSION,)
PLACE AND MANNER OF USE OF A PORTION OF)
THE PUBLIC WATERS OF WHITE'S CREEK IN)
THE TRUCKEE MEADOWS GROUNDWATER BASIN,)
(087), WASHOE COUNTY, NEVADA.)

RULING

4439

GENERAL

I.

Application 62272-T was filed on June 27, 1996, by Washoe County, to temporarily change the point of diversion place and manner of use of 0.313 cubic foot per second (cfs), not to exceed 50 acre feet annually, a portion of water from White's Creek previously appropriated under Permit 41662 for quasi-municipal purposes.¹ The existing point of diversion under Permit 41662 is described as being located within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 30, T.18N., R.20E., M.D.B.&M., at the divergence of Howard's Creek and Brown's Creek from White's Creek. Permit 41662 changed the place and manner of use of Claim 716 under the Final Decree in United States of America vs. Orr Water Ditch Co., In Equity Docket No. A-3 (D. Nev. 1944)(hereinafter "Truckee River Decree").² The proposed manner of use is for construction water, i.e., dust control and compaction, for one year. The proposed point of diversion under Application 62272-T is described as being located further downstream on Howard's Creek from the authorized point of diversion for either Permit 41662 or Claims 716 or 717, within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 19, T.18N., R.20E., M.D.B.&M.¹

¹File No. 62272-T, official records in the Office of the State Engineer.

²File No. 41662, official records in the Office of the State Engineer.

II.

Application 62272-T was protested on July 11, 1996, by Ramon H. Schmutz on the grounds that the application would be detrimental to the delivery of his White's Creek water shares down stream, and requested the application be denied.¹

III.

Application 62272-T was protested on July 17, 1996, by Russell B. Crook on the following grounds:

I am protesting this as it is, to my best knowledge, illegal to remove water from above the point of diversion.

This seem (sic) to be a developers problem and not a County, State or Landowners problem. This is changing the use as is only for a small area to be developed for dust abatement.

Mr. Crook also requested the application be denied.

IV.

A letter of concern was received by facsimile on July 11, 1996, from Rusty Crook, president, Thisisit Ranch Camp, Inc. The letter conveys the concern that the applicant through this change may enhance its right to the detriment of the other water right holders on the system.¹

V.

Application 62272-T was also protested by Lyn Mundt on August 30, 1996, on the grounds that the granting of the application would be contrary to the public interest in that property values along the creek would decline, harm would be caused to the riparian flora and fauna, and it would be detrimental to the water quality of Steamboat Creek.¹

VI.

By letter dated August 12, 1996, Vahid Behmaram, of the Utility Division of Washoe County, responded to the protests of Schmutz and Crook. He indicated that Washoe County was willing to compensate the Protestants for any loss of head resulting from the diversion.

FINDINGS OF FACT

I.

The point of diversion for Claims 716 and 717 as described in the Truckee River Decree is located within Section 36, T.18N., R.19E., M.D.B.&M.³ Permit 41662 describes the point of diversion as being located within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 30, T.18N., R.20E., M.D.B.&M. The United States Geological Survey Mt. Rose NE, Nev. 7.5' Quadrangle map does not indicate that either White's Creek or Howard's Creek flow within Section 36, T.18N., R.19E., M.D.B.&M. The State Engineer finds that historical and physical data indicate that the point of diversion under Claims 716 and 717 is located at the divergence of Howard's Creek and Brown's Creek from White's Creek. The State Engineer finds that Howard's Creek may be considered as the means of conveyance for Claims 716 and 717 as the point of diversion is actually upstream from the places of use and the present location of where water is diverted. The State Engineer finds that Application 62272-T proposes to move the point of diversion downstream of the splitter box that divides White's Creek into Brown's Creek and Howard's Creek, i.e., downstream of the legal point of diversion for Claim 717. The State Engineer further finds that the legal point of diversion for the Claim 717 water is actually upstream from the point of diversion described under Application 62272-T.

II.

By letter dated July 19, 1996, Alfred Gardner, P.E., of the Utility Division of Washoe County described how Washoe County plans to divert water from Howard's Creek. He indicated that the design will use an aggregate infiltration gallery in the stream bed to fill a wet well adjacent to the creek, and only when the pump in the wet well is running will water be diverted from the creek. The

³Truckee River Decree at p. 81. R.29 E. was corrected to R.19 E. per errata sheet from the Federal Water Master as found in File No. 62272-T.

State Engineer finds that the proposed diversion will have minimal impact on the adjacent riparian vegetation.

III.

An informal field investigation was conducted on July 19, 1996,¹ on Howard's Creek by personnel from the Division of Water Resources. The State Engineer finds that there is a loss of water from White's Creek into Steamboat Canal due to poor maintenance of the flume structure which takes White's Creek water over Steamboat Canal. The amount of water leaking from the flume is an amount of water approximately equal to the amount applied for under Application 62272-T. The State Engineer finds if the downstream water users will repair this leak, no effect will be seen in the quantity of water available to the protestants upon granting of a permit under Application 62272-T.

IV.

The State Engineer finds from flow measurements taken in the past by the Federal Water Master's Office¹ that Claim 717 water right holders have been diverting more water than allowed in the Truckee River Decree. The percentage of water diverted has been disproportional to the advantage of the users of Claim 717 since the current diversion structure at Virginia Street was built.

V.

The State Engineer finds only one subdivision has been approved downstream of the proposed point of diversion under Application 62272-T, and there is no indication on the subdivision map that any land within this subdivision has been set aside for open space along this stretch of the creek nor does any riparian water right exist for those land owners adjacent to the Howard's Creek for the maintenance of any instream flows.⁴ The State Engineer finds that the property holders have no water rights in

⁴The riparian rights doctrine was repudiated in Jones v. Adams, 19 Nev. 78 (1885), and stated that the riparian right doctrine has never been the law in Nevada.

Howard's Creek. The State Engineer further finds that the applicant is the legal owner of this water right and legally entitled to the consumptive use of this water.

VI.

The State Engineer finds that the historic flows of Howard's Creek since the time of the Truckee River Decree have been fully utilized for irrigation purposes up gradient of Steamboat Creek by the decreed owners and their assigns and there is no historical flow from Howard's Creek to Steamboat Creek.

VII.

The State Engineer finds that the conveyance of water to the Claim 717 users and to the point of diversion under a permit granted under Application 62272-T through Howard's Creek will insure that water will remain in the creek bed to provide water for the native flora and fauna. However, the Claim 717 owners could choose to take their water at the legal point of diversion which is upstream at the divergence of Howard's Creek and Brown's Creek. There is no water right which supports maintenance of these creeks.

VIII.

The State Engineer finds that the applicant is willing to compensate for head loss, if any, for the Claim 717 users.

IX.

The point of diversion under Application 62272-T is downstream from the authorized point of diversion under Claim 717. The State Engineer finds that the effect of the proposed diversion rate would have minimal effect on the head of water at the Claim 717 diversion structure which is actually located downstream from the decreed point of diversion.

X.

Nevada law requires contractors to control the dust generated from construction sites.⁵ Contractors have been fined and sued for

⁵NAC 445B.001 - 445B.395, in particular NAC 445B.365.

large sums of money for not controlling dust from construction sites.⁶ The State Engineer finds that appropriating water for the purpose of controlling dust at construction sites is in the public interest.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the subject matter of this action and determination.⁷

II.

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

- A. The proposed use conflicts with existing rights, or
- B. The proposed use threatens to prove detrimental to the public interest.

III.

The State Engineer concludes the granting of Application 62272-T would not conflict with existing rights. The applicant has offered to compensate for any head loss due to the granting of a permit under Application 62272-T.

IV.

The State Engineer concludes that granting of Application 62272-T would not prove detrimental to the public interest. The water remaining in Howard's Creek to serve Claim 717 users will provide a source of water for riparian flora and fauna. The waters of Howard's Creek do not normally influence the water quality of Steamboat Creek, as the water of Howard's Creek is not historically tributary to Steamboat Creek.

⁶State Env'tl. Comm'n. v. John Lawrence Nevada, 108 Nev. 431 (1992).

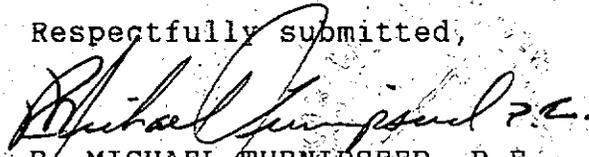
⁷NRS Chapter 533.

RULING

The protests to Application 62272-T are hereby overruled and said application is hereby approved subject to:

1. payment of statutory fees,
2. existing rights on the source,
3. the permittee providing for any head loss, if any, of the other Howard's Creek users due to this permit,
4. continuing jurisdiction and regulation by the Federal Water Master, and
5. Permit 62272-T will expire one year from the date of the issuance of the permit.

Respectfully submitted,


R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/MJR/ab

Dated this 25th day of
September, 1996.