

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

IN THE MATTER OF PROTESTED)
APPLICATION 69427-T FILED TO)
CHANGE THE PLACE AND MANNER OF)
USE OF WATERS PREVIOUSLY)
APPROPRIATED UNDER CLAIM NO.3,)
ORR DITCH DECREE, TRACY SEGMENT)
(83), STOREY COUNTY, NEVADA.)

RULING

#5392

GENERAL

I.

Application 69427-T was filed on December 19, 2002, by the Pyramid Lake Paiute Tribe of Indians¹ (Tribe) to change the place and manner of use of 756.40 acre-feet (168.09 acres @ 4.5 acre-feet per acre) of the waters of the Truckee River, a portion of the waters previously appropriated under Claim No. 3, Final Decree, *U.S. v. Orr Water Ditch Co.*, In Equity A-3 (D.Nev. 1944). The application indicates that there will be no diversion of water from the Truckee River as the water is to remain in the river from Derby Dam to Pyramid Lake. The proposed manner of use is described as being wildlife, including instream flows for fish. The proposed place of use is described as being the Truckee River downstream of Derby Dam to the Pyramid Lake inlet. The existing places of use are described as being 12 different parcels of land as described on Attachment B to the application, generally Sections 6, 7, 8, 12 and 17, T.19N., R.27E., M.D.B.&M.²

II.

Application 69427-T was protested by the City of Fernley,³

¹ The application was originally filed in the name of the Pyramid Lake Paiute Tribe and the United States Acting through the Bureau of Indian Affairs; however, on May 2, 2003, the Bureau of Indian Affairs informed the State Engineer that it was not a signatory or party to the application.

² Exhibit No. 2, public administrative hearing before the State Engineer, February 10 - 13, 2004, official records in the Office of the State Engineer. Hereinafter the transcript and exhibits will be referred to merely by page number or exhibit number.

³ Exhibit No. 3.

the Truckee-Carson Irrigation District,⁴ the City of Fallon,⁵ and Churchill County.⁶ The City of Fernley protested on the grounds that the application should be denied because the proposed change application would conflict with existing rights or with protectible interests in existing domestic wells, and threaten to prove detrimental to the public interest.

The Truckee-Carson Irrigation District's protest was withdrawn at the administrative hearing based on the following conditions:

1. The Tribe agreed to pay the O&M assessment for the lands that comprise the existing places of use of the water rights being requested to be changed.
2. Any impacts from the transfers of these water rights on efficiencies of the Newlands Project would be neutral, that is, in calculating the efficiencies under the Operating Criteria and Procedures, these lands will neither help nor hinder the efficiencies, except that in the case where the transfers are not implemented this year, then those lands would not be included in the calculations at all.

The City of Fallon protested the application on many grounds, but said grounds are not relevant to the decision rendered below.

Churchill County protested the application on many grounds including the following:

The Applicants' purchase of water rights, which are now the subject of the instant transfer Application, was made in such a manner so as to permanently change the place and manner of use of said water rights without first seeking the authorization from the State Engineer as required under Nevada Law. Those water rights, purchased between 1998 and 2000 under 12 separate transactions, were acquired apart from the real property that the water rights were appurtenant to. The deeds transferring title to the water rights

⁴ Exhibit No. 4.

⁵ Exhibit No. 5.

⁶ Exhibit No. 6.

contained covenants which prohibited the property owner from ever using the conveyed water rights for irrigation on the subject parcel. In addition, the covenants in most instances only allowed irrigation with ground water and in other instances with ground water or other Newlands Project surface water rights with severe limitations. Violation of the covenants makes the property owner subject to legal action including an injunction....The Applicants' actions as set forth above are permanent in nature. Applicants' use of the temporary transfer process under N.R.S. 533.345 is improper and an attempt by the Applicants to avoid the notice and hearing requirements for a permanent change in the manner and use of water rights. As such Applicants' temporary application should be dismissed with instructions to the Applicants to file an Application for a permanent transfer under N.R.S. 533.325.⁷

III.

By letter dated April 17, 2003, the State Engineer informed the Applicant that NRS § 533.345 provides that if the State Engineer determines that the temporary change may not be in the public interest or may impair the water rights held by other persons, he shall give notice of the application as provided in NRS § 533.360 and hold a hearing and render a decision as provided in NRS chapter 533. The State Engineer determined that the application was inappropriate for the temporary change procedure and required publication of notice of the application.⁸ By letter dated May 6, 2003, the Tribe provided the fee for publication of notice of the application, and requested the State Engineer process the temporary application.⁹ By letter dated May 30, 2003, the Tribe's legal counsel informed Protestant Churchill County that even though the State Engineer had determined to hold a hearing pursuant to NRS § 533.345(3) it did not alter the temporary status of the Tribe's application, and indicated to Churchill County that the Tribe does not own or have a right to

⁷ Exhibit No. 6.

⁸ File No. 69427-T, official records in the Office of the State Engineer.

⁹ Ibid.

use any of the land identified as the existing places of use under Application 69427-T.¹⁰

IV.

In accordance with NRS § 533.345 and the State Engineer's determination that required publication of notice of the application, after all parties of interest were duly noticed by certified mail, a public administrative hearing was held on February 10-13, 2004, before the State Engineer at Carson City, Nevada.¹¹

V.

At the end of the administrative hearing, the State Engineer ordered briefing on several areas of Nevada Water Law. Resulting from that order, the Truckee Meadows Water Authority (Water Authority), which was not a party to the proceeding, filed a Motion for Permission to Submit Amicus Brief. The Water Authority is interested in an issue the State Engineer requested the parties brief, that is the proper interpretation of NRS § 533.345 (the statutory provision that provides for temporary change applications). The Water Authority indicated that it has a quantity of water rights that are needed for municipal and industrial purposes only during severe droughts, and that under the temporary change mechanism, those rights can be changed to other beneficial uses when they are not so needed. The Water Authority alleged that it is not prudent to change those excess rights permanently to such other uses because of the risks and uncertainties associated with being able to timely return them to municipal and industrial uses when they are most needed during droughts. The Water Authority argues that because of its present and future need to seek temporary changes to its water rights, it has a significant interest in the proper interpretation of NRS § 533.345.

¹⁰ Ibid.

¹¹ Exhibit No. 1; Transcript, public administrative hearing before the State Engineer, February 10-13, 2004.

The only objection to the Motion to Submit Amicus Brief was filed by Churchill County, which argues that the Water Authority should have sought party status earlier in the proceeding and there is no authority for the Water Authority to jump in with a brief it has no legal right to file.

While it is true the regulations allow for interested party status to be granted for those who failed to timely file a protest, and if granted, allows for testimony on broad issues of law, the Water Authority obviously did not approach this application from the perspective as a protestant. Therefore, its motion is the only avenue available for the second largest metropolitan area in the state to provide input on the area of law the State Engineer requested be briefed by the parties and for which there is no interpretive authority. The State Engineer will grant the motion and consider the brief filed by the Water Authority.

FINDINGS OF FACT

I.

At the beginning of the administrative hearing, Churchill County moved to dismiss the application or have the State Engineer reject the application on the grounds that under NRS § 533.371(3) the proposed use is not temporary. The protestant argued that the application and attached deeds indicate that the water rights have de facto been effectively stripped off the properties that comprise the existing places of use and transferred on a permanent basis. Further, that restrictive covenants in the deeds forever prohibit re-watering of these properties with the water rights that are the subject of the application.

The Tribe in response to said motion argued that all that has happened is that the existing place of use was merely not irrigated, not that the water had been permanently stripped off the land. It argues that when the temporary change expires the water right will merely revert back to a status of non-use of the water.¹²

¹² Transcript, pp. 15-24.

Section 1 of Attachment B to Application 69427-T contains the Water Rights Deed by which the Tribe obtained the water rights and contains a Covenant on Re-Water Righting the lands from which the Truckee River water rights were purchased. Said covenant provides that the "Grantor may replace the water rights conveyed to Grantee by this Water Rights Deed and irrigate the Parcel only with (1) appropriate groundwater rights that do not adversely affect surface supplies; or (2) water rights to surface supplies from the Newlands Project transferred from other land that was water-righted prior to and not by virtue of any transfer approved since March 14, 1985 and was irrigated in any year between 1984 and 1989 inclusive."¹³

Section 2 of Attachment B to Application 69427-T contains a Grant, Bargain and Sale Deed by which the Tribe obtained land with appurtenant water rights, contains a Grant, Bargain and Sale Deed by which the Tribe conveys the land reserving to itself the appurtenant water rights, and contains a Covenant on Re-Water Righting the lands from which the Truckee River water rights were purchased. Said covenant provides that the "Grantee and its successors and assigns may replace the water rights (which water rights are expressly reserved to Grantor by this deed) and irrigate the real property conveyed to Grantee by this deed only with appropriate groundwater rights that do not adversely affect surface supplies."¹⁴

Section 3 of Attachment B to Application 69427-T contains a Grant, Bargain and Sale Deed by which the Tribe obtained land with appurtenant water rights, and contains a Water Rights Deed to 16.20 acres of water rights.¹⁵

Section 4 of Attachment B to Application 69427-T contains a Grant, Bargain and Sale Deed by which the Tribe obtained land with appurtenant water rights, contains a Water Rights Deed to 56.33

¹³ Exhibit No. 2, Section 1 Attachment B.

¹⁴ Exhibit No. 2, Section 2 Attachment B.

¹⁵ Exhibit No. 2, Section 3 Attachment B.

acres of water rights, contains Grant, Bargain and Sale Deed(s) whereby the Tribe conveys the land reserving to itself the water rights, and contains Covenant(s) on Re-Water Righting the lands from which the Truckee River water rights were purchased. Said covenant provides that the "Grantee and its successors and assigns may replace the water rights (which water rights are expressly reserved to Grantor by this deed) and irrigate the real property conveyed to Grantee by this deed only with appropriate groundwater rights that do not adversely affect surface supplies."¹⁶

Section 5 of Attachment B to Application 69427-T contains a Corrected Water Rights Deed by which the Tribe obtained 9.75 acres of water rights and contains a Covenant on Re-Water Righting the lands from which the Truckee River water rights were purchased. Said covenant provides that the "Grantor may replace the water rights conveyed to Grantee by this Water Rights Deed and irrigate the Parcel only with (1) appropriate groundwater rights that do not adversely affect surface supplies; or (2) water rights to surface supplies from the Newlands Project transferred from other land that was water-righted prior to and not by virtue of any transfer approved since March 14, 1985 and was irrigated in any year between 1984 and 1989 inclusive."¹⁷

Section 6 of Attachment B to Application 69427-T contains a Grant, Bargain and Sale Deed by which the Tribe obtained land with appurtenant water rights, contains a Water Rights Deed to 5.11 acres of water rights, contains a Grant, Bargain and Sale Deed whereby the Tribe conveys the land reserving to itself the water rights, and contains a Covenant on Re-Water Righting the lands from which the Truckee River water rights were purchased. Said covenant provides that the "Grantee and its successors and assigns may replace the water rights (which water rights are expressly reserved to Grantor by this deed) and irrigate the real property

¹⁶ Exhibit No. 2, Section 4 Attachment B.

¹⁷ Exhibit No. 2, Section 5 Attachment B.

conveyed to Grantee by this deed only with appropriate groundwater rights that do not adversely affect surface supplies."¹⁸

Section 7 of Attachment B to Application 69427-T contains a Grant, Bargain and Sale Deed by which the Tribe obtained land with appurtenant water rights, contains a Water Rights Deed to 14.45 acres of water rights, contains a Grant, Bargain and Sale Deed whereby the Tribe conveys the land reserving to itself the water rights, and contains a Covenant on Re-Water Righting the lands from which the Truckee River water rights were purchased. Said covenant provides that the "Grantees and its successors and assigns may replace the water rights (which water rights are expressly reserved to Grantor by this deed) and irrigate the real property conveyed to Grantee by this deed only with appropriate groundwater rights that do not adversely affect surface supplies."¹⁹

Section 8 of Attachment B to Application 69427-T contains a Quitclaim and Release of Interest, and a Grant, Bargain and Sale Deed by which the Tribe obtained land with appurtenant water rights, contains a Water Rights Deed to 40.00 acres of water rights, contains a Grant, Bargain and Sale Deed whereby the Tribe conveys the land reserving to itself the water rights, and contains a Covenant on Re-Water Righting the lands from which the Truckee River water rights were purchased. Said covenant provides that the "Grantee and its successors and assigns may replace the water rights (which water rights are expressly reserved to Grantor by this deed) and irrigate the real property conveyed to Grantee by this deed only with appropriate groundwater rights that do not adversely affect surface supplies."²⁰

Section 9 of Attachment B to Application 69427-T contains a Water Rights Deed to 13.70 acres of water rights by which the Tribe obtained the water rights and contains a Covenant on Re-

¹⁸ Exhibit No. 2, Section 6 Attachment B.

¹⁹ Exhibit No. 2, Section 7 Attachment B.

²⁰ Exhibit No. 2, Section 8 Attachment B.

Water Righting the lands from which the Truckee River water rights were purchased. Said covenant provides that the "Grantor may replace the water rights conveyed to Grantee by this Water Rights Deed and irrigate the Parcel only with (1) appropriate groundwater rights that do not adversely affect surface supplies; or (2) water rights to surface supplies from the Newlands Project transferred from other land that was water-righted prior to and not by virtue of any transfer approved since March 14, 1985 and was irrigated in any year between 1984 and 1989 inclusive."²¹

Section 10 of Attachment B to Application 69427-T contains the Grant, Bargain and Sale Deed by which the Tribe obtained land with appurtenant water rights, contains a Water Rights Deed to 4.38 acres of water rights, contains a Grant, Bargain and Sale Deed whereby the Tribe conveys the land reserving to itself the water rights, and contains a Covenant on Re-Water Righting the lands from which the Truckee River water rights were purchased. Said covenant provides that the "Grantee and its successors and assigns may replace the water rights (which water rights are expressly reserved to Grantor by this deed) and irrigate the real property conveyed to Grantee by this deed only with appropriate groundwater rights that do not adversely affect surface supplies."²²

Section 11 of Attachment B to Application 69427-T contains a Water Rights Deed to 3.81 acres of water rights by which the Tribe obtained the water rights and contains a Covenant on Re-Water Righting the lands from which the Truckee River water rights were purchased. Said covenant provides that the "Grantor may replace the water rights conveyed to Grantee by this Water Rights Deed and irrigate the Parcel only with appropriate groundwater rights that do not adversely affect surface supplies."²³

²¹ Exhibit No. 2, Section 9 Attachment B.

²² Exhibit No. 2, Section 10 Attachment B.

²³ Exhibit No. 2, Section 11 Attachment B.

Section 12 of Attachment B to Application 69427-T contains the Grant, Bargain and Sale Deed by which the Tribe obtained land with appurtenant water rights, contains a Water Rights Deed to 3.50 acres of water rights, contains a Grant, Bargain and Sale Deed whereby the Tribe conveys the land reserving to itself the water rights, and contains a Covenant on Re-Water Righting the lands from which the Truckee River water rights were purchased. Said covenant provides that the "Grantee and its successors and assigns may replace the water rights (which water rights are expressly reserved to Grantor by this deed) and irrigate the real property conveyed to Grantee by this deed only with appropriate groundwater rights that do not adversely affect surface supplies."²⁴

The Tribe does not own or have access to the lands to which these water rights are appurtenant.²⁵ It has sold the land to which these water rights are appurtenant or solely purchased the water rights, and holds no right to use the lands comprising the existing places of use of these water rights. It is unfathomable how the Tribe can legitimately argue that when any temporary permit approved would expire, the water merely reverts back to a status of non-use on lands to which it has no right of use. The Tribe by its own actions has removed the ability to place these waters to beneficial use on the lands to which they are appurtenant. The Tribe having no right in the lands comprising the existing places of use cannot claim it has the right to have the water revert back to those lands for non-use of the water. As the Tribe has argued many times before, water rights are appurtenant to the specific land irrigated. The State Engineer finds that the Tribe's argument lacks merit. The State Engineer finds this application is not appropriate for the temporary change process as the water right will not revert for beneficial use on the existing place of use or for the existing manner of use upon expiration of any temporary application granted.

²⁴ Exhibit No. 2, Section 12 Attachment B.

²⁵ Transcript, p. 24; Letter dated May 30, 2003, File No. 69427-T, official records in the Office of the State Engineer.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and of the subject matter of this action and determination.²⁶

II.

At the administrative hearing, Churchill County moved to dismiss the application citing to NRS § 533.371 for authority and arguing that the requested changes were not temporary since the Tribe itself had made the water right unable to revert back to its existing place or manner of use. Therefore, the State Engineer should dismiss or reject the application.

Nevada Revised Statute § 533.371 provides that:

The State Engineer shall reject the application and refuse to issue a permit to appropriate water for a specified period if he determines that:

1. The application is incomplete;
2. The prescribed fees have not been paid;
3. The proposed use is not temporary;
4. There is no water available from the proposed source of supply without exceeding the perennial yield or safe yield of that source;
5. The proposed use conflicts with existing rights; or
6. The proposed use threatens to prove detrimental to the public interest.

Nevada Revised Statute § 533.371 was added in 1991 and was enacted in response to the many, many applications filed for all the unappropriated water in many groundwater basins in Nevada. The reason for the provision was to allow the State Engineer to issue an intermediate permit, for example, 10 years, while waiting for the development of water, already appropriated, under a large project that may not use the water for 10-15 years. The statutory provision allowed for a temporary use to be granted in basins that were fully appropriated but not over-pumped, and when the use was only for a finite period of time. For example, a gravel mining operation to run 5 years.

The legislative history of this provision points out that it is not relevant to the type of temporary change application under

²⁶ NRS chapter 533.

consideration here. The provision found in NRS § 533.371 allows the State Engineer to issue a permit for a new appropriation of water for a specified period of time and is distinct from the temporary change provision found in NRS § 533.345. An application granted under NRS § 533.345 automatically expires after one year, whereas an application granted under NRS § 533.371 can be granted for longer periods of time. The legislative history notes that if there is a use for the water between the time the water in the basin becomes fully utilized by the senior permittees it is to the benefit of the state to have the water used in the interim.²⁷

The State Engineer concludes the statutory provision found in NRS § 533.371 is distinct from the provision found in NRS § 533.345, which provides for temporary change applications. The State Engineer concludes NRS § 533.371 is only applicable to a new appropriation of water. The State Engineer concludes that Churchill County's motion to dismiss under NRS § 533.371 is denied on the grounds that the statutory section cited is inapplicable to the temporary change application under consideration here.

III.

Nevada Revised Statute § 533.345 provides that:

1. Every application for a permit to change the place of diversion, manner of use or place of use of water already appropriated must contain such information as may be necessary to a full understanding of the proposed change, as may be required by the State Engineer.
2. If an applicant is seeking a temporary change of place of diversion, manner of use or place of use of water already appropriated, the State Engineer shall approve the application if:
 - (a) The application is accompanied by the prescribed fees;
 - (b) The temporary change is in the public interest; and
 - (c) The temporary change does not impair the water rights held by other persons.
3. If the State Engineer determines that the temporary change may not be in the public interest, or may impair the water rights held by other persons, he shall give

²⁷ Appendix B to Pyramid Lake Paiute Tribe's Post-Hearing Brief.

notice of the application as provided in NRS 533.360 and hold a hearing and render a decision as provided in this chapter.

One of the most basic premises of Nevada Water Law is that beneficial use is the basis, the measure and the limit of the right to the use of water in the State of Nevada.²⁸ If this temporary application were granted, when it expired after the one-year period of time, the water would not be applied to irrigation on the lands to which it is still appurtenant, and the water right holder has no right of access to those lands. To devise a plan by which water under a temporary application would revert to the status of non-use on places of use to which the water rights are appurtenant, does not comport with a basic premise of Nevada water law, that of beneficial use and is not within the spirit of the temporary change provision. Nor does it comport with the 1902 Reclamation Act.

Section 8 of the Act provides:

That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder...Provided, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.²⁹

The State Engineer concludes that the proposal set forth by the applicant is not in the public interest, and it is not in the public interest to allow the temporary change provision of Nevada water law to be used in the fashion proposed here. The water rights will not revert to the manner of beneficial use on the existing places of use from which they are requested to be

²⁸ NRS § 533.035.

²⁹ *U.S. v. Alpine Land & Reservoir Co.*, 878 F.2d 1217, 1223 (9th Cir. 1989).

transferred. The applicant has no access to or right of use on to the places of use from which the water is being transferred. Under Nevada's water law, the words of a statute should be given their plain meaning unless to do so violates the spirit of the statute.³⁰ The proposal by the applicant that the water sought to be changed under this temporary application would revert to the status of non-use does not comport with doctrine of beneficial use and violates the spirit of the statutory provision for temporary change applications. The State Engineer concludes it is not in the public interest to allow the temporary change provision of Nevada's water law to be used in the manner proposed by the applicant.

IV.

The State Engineer is prohibited by law from granting a permit under a change application to appropriate the public waters where³¹:

- 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 protectible 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.

The State Engineer concludes it threatens to prove detrimental to the public interest to allow the temporary change application process established under NRS § 533.345 to be used in the manner fashioned under Application 69427-T based on the inability upon expiration of any temporary change granted to revert to the manner or place of beneficial use.

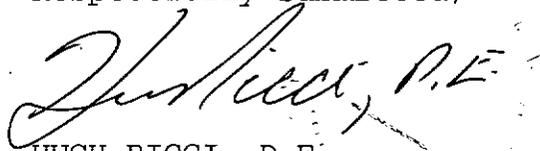
³⁰ *U.S. v. Alpine*, 983 F.2d 1487, 1493, n.6 (9th Cir. 1992) citing to *Application of Filippini*, 66 Nev. 17, 202 P.2d 535, 538 (1949).

³¹ NRS § 533.370(4).

RULING

Application 69427-T is hereby denied on the grounds that it is not in the public interest and threatens to prove detrimental to the public interest to allow the temporary change provision of Nevada's water law to be used in the manner proposed. Churchill County's protest is upheld in part. No ruling is made on the merits of the other protest claims.

Respectfully submitted,



HUGH RICCI, P.E.
State Engineer

HR/SJT/jm

Dated this 22nd day of
June, 2004.