

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

IN THE MATTER OF APPLICATION 73471)
FILED TO CHANGE THE POINT OF)
DIVERSION, PLACE OF USE AND MANNER)
OF USE OF WATER PREVIOUSLY)
APPROPRIATED UNDER CLAIM 744 OF THE)
TRUCKEE RIVER DECREE, TRUCKEE)
CANYON SEGMENT (091), WASHOE)
COUNTY, NEVADA.)

RULING
5669

GENERAL

I.

Application 73471 was filed on November 10, 2005, by North Valley Holdings, LLC to change the point of diversion, place of use and manner of use of 2.12 acre-feet along with a pro rata share of the diversion rate of the water of the Truckee River previously appropriated under Claim 744 of the *Orr Ditch Decree*¹ for municipal and domestic purposes within T.18N., R.18E.; T.19N., R.18E.; T.20N., R.18E.; T.21N., R.18E.; T.17N., R.19E.; T.18N., R.19E.; T.19N., R.19E.; T.20N., R.19E.; T.21N., R.19E.; T.16N., R.20E.; T.17N., R.20E.; T.18N., R.20E.; T.19N., R.20E.; T.20N., R.20E.; T.21N., R.20E.; T.20N., R.21E.; and T.21N., R.21E., M.D.B.&M.² The proposed point of diversion is described as being located at Truckee Meadows Water Authority's water treatment plants. The existing point of diversion is described as being located within the W½ of Lot 1 in the NW¼ of Section 5, T.19N., R.20E., M.D.B.&M.. The remarks section of the application indicates that water is diverted from the Truckee River via the Sullivan and Kelly Ditch and conveyed through lateral ditches to the existing point of diversion.

FINDINGS OF FACT

I.

This is the second attempt by an applicant to move the water identified in the *Orr Ditch Decree* as Claim 744. On July 19, 2002, Application 68968 was filed in the name of Washoe County to change the point of diversion, place of use and manner of use of 2.12 acre-feet

¹ Final Decree, *U.S. v. Orr Ditch Co.*, In Equity A-3 (D. Nev. 1944) ("*Orr Ditch Decree*").

² File No. 73471, official records in the Office of the State Engineer.

annually of the water identified under Claim 744 of the *Orr Ditch* Decree. Under that application, the applicant argued that the water under decreed Claim 744 was ground water. By State Engineer's Ruling No. 5263 dated June 18, 2003, the State Engineer denied the change application.³ Under Application 73471 the Applicant now attempts to move the water claiming it is a direct diversion right to use the waters of the Truckee River system and requests that it be considered a stand alone water right to support municipal and domestic use through the Truckee Meadows Water Authority's water treatment plants.

Claim 744 is found under a section of the *Orr Ditch* Decree specifically identified as "Drain and Waste Waters." The Decree indicates under the column identified as "Ditch" that the water was obtained by "pumping from a well," and identifies the point of diversion as the side of the stream in the W½ of Lot 1 of the NW¼ of Section 5, T.19N., R.20E., M.D.B.&M. As with every water right identified in the Decree, it further indicates in the column marked as "Acres Irrigated" two subcategories. These subcategories identify the first column as direct diversion and the second column as acres irrigated by drain water. Under the General Provisions of the *Orr Ditch* Decree it indicates that in the table and columns pertaining to irrigation water rights the word, "Direct," means that the "acreages specified thereunder are irrigated by water hereby allowed to be diverted from the river, creek or stream last named above the acreage,"⁴ and the word "'Drain,' means that the acreages thereunder are irrigated by drain or waste water hereby allowed and ordered for the irrigation thereof."⁵ The claims identified in the Decree specifically identify the river, creek or stream immediately above the claims, for example, English Mill Ditch⁶ or Galena Creek.⁷ However in relation to Claim 744 the "river, creek or stream last named above the acreage" is determined to be "Drain and Waste Waters." Even though the decree indicates that Claim 744 allows for the direct diversion of these waters, that does not change their essential characteristic of being drain and waste waters. The distinction appears to

³ File No. 68968, official records in the Office of the State Engineer; State Engineer's Ruling No. 5263, dated June 18, 2003, official records in the Office of the State Engineer.

⁴ *Orr Ditch* Decree at 86.

⁵ *Orr Ditch* Decree at 86.

⁶ *Orr Ditch* Decree at 42.

⁷ *Orr Ditch* Decree at 72.

be that in other places in the Decree, the drain waters are taken out of a surface drain as opposed to Claim 744 where the waters were appropriated by a six-foot hole in the ground.

In the remarks section of the Application, the Applicant states that the water is diverted from the Truckee River via the Sullivan and Kelly Ditch and conveyed through lateral ditches to the existing point of diversion. The Decree indicates that the place of use under Claim 744 is described as being located within the W $\frac{1}{2}$ of Lot 1 in the NW $\frac{1}{4}$ of Section 5, T.19N., R.20E., M.D.B.&M.. The portion of the *Orr Ditch* Decree that addresses water rights allowed to divert water off the Sullivan and Kelly Ditch does not identify any place of use described as being in Section 5, T.19N., R.20E., M.D.B.&M., and specifically does not identify Claim 744 as being authorized for diversion from that ditch.⁸ However, the Decree does identify places of use just to the west and north of the point of diversion and place of use of Claim 744, those being in Section 6, T.19N., R.20E., and Section 31, T.20N., R.20E., M.D.B.&M. If Claim 744 was a direct diversion right to use of water from the Sullivan and Kelly Ditch it would have been identified in the section of the *Orr Ditch* Decree that addresses those water rights and not in the section that addresses the right to use drain and waste waters.

As was done in State Engineer's Ruling No. 5263, the State Engineer again refers to the package of evidence the applicant submitted in support of Application 68968 and Exhibit H in that evidence package, which is an enlarged copy of a portion of the 1920 plane table map prepared by the Bureau of Reclamation.⁹ This map depicts the S $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 5, T.19N., R.20E., M.D.B.&M. Of note is that in the center of the S $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ a large spring and a swamp are identified and a wild hay pasture occupies the rest of the S $\frac{1}{2}$ S $\frac{1}{2}$ of the NW $\frac{1}{4}$ of said Section 5 and the map further noted the area was irrigated entirely by seepage. From Exhibit A in that applicant's evidence package, which is identified as a 1913 plane table map, it is notable that from said Section 5 south to the Truckee River the map indicates there were some marshy

⁸ *Orr Ditch* Decree at. 44-45.

⁹ See also Exhibit A in Applicant's Evidence Package, File No. 68968, official records in the Office of the State Engineer

pastures, marshy meadows, and seeps. This indicates that in the area where the "well" at issue was located the land was waterlogged.

That applicant's evidence package noted that deeds, identified as Exhibits G and J, refer to the method of diversion as a "pumping plant" and that the pumping plant would either be a "well or a sump." A sump is a low-lying place, such as a pit, that receives drainage, a cesspool or a hole at the lower point of a mine shaft into which water is drained in order to be pumped out.¹⁰ By the fact that the water was either going to be removed by a "well or sump" is further indication the water was to be removed from a waterlogged area. This analysis supports why the Decree court would have allowed the inclusion of Claim 744 under the provision for "Drain and Waste Waters."

Upon review of all the claims found in the Section of the *Orr Ditch* Decree identified as Drain and Waste Waters, it is notable that all the claims are all within the four sections of land, those being, Sections 4, 5, 8 and 9, T.19N., R.20E., M.D.B.&M. The 1920 plane table maps describe that throughout this entire area it was swampy, very wet, marshy meadows, marshy pasture, boggy, seeps and covered with drains. Claims 737, 738, 739 and 740 identify the points of diversion as "by springs" and "by pumping from sump and well" and all are located to the east of the area under discussion in relation to Claim 744, of note, east of the area in the Exhibit H that shows a large spring and swampy area. Claims 742, 743 and 744 are all within the NW¼ of Section 5, T.19N., R.20E., M..D.B.&M. Claims 742 and 744 gather the water by pumping it from a shallow well or sump and Claim 743 specifically indicates that it is "waste water from Peoples' Drain ditch by Laity ditch through Lot 2 of NW¼ Sec. 5 T.19N., R.20E."

Additional review of the 1920 plane table maps beyond that small section of the map provided in the previous applicant's evidence package, particularly the maps to the west and north of the map submitted as Exhibit H, one finds that the areas north and west of the location of Claim 744 were irrigated by laterals off the Sullivan and Kelly Ditch; but there is no indication that Claim 744 had a direct diversion right to water from the Sullivan and Kelly

¹⁰ *Water Words Dictionary*, Nevada Division of Water Planning, Department of Conservation and Natural Resources, 8th ed. 1998.

Ditch. The closer one gets to the existing point of diversion of Claim 744 the area becomes covered by drain ditches, and the point of diversion for Claim 744 is right where these drain ditches come into the SW $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 5, T.19N., R.20E., M.D.B.&M. and where the areas to the east and south are identified as swamp, entirely seepage irrigated, marshy meadow, and seepage. The plane table maps do indicate that the areas around Claim 744 were irrigated from the Sullivan and Kelly Ditch, but there is no evidence that this Claim 744 has a direct diversion right under Claim 744, but rather, there is substantial evidence to demonstrate that the water appropriated under Claim 744 is the drain and waste water that ran off fields either to the north and west of Claim 744 that were irrigated with water from the ditches decreed to supply water.¹¹

The State Engineer finds that by looking through the entire *Orr Ditch* Decree as a whole, the section for "Drain and Waste Waters" appears to be a place where the court identified drain and waste waters being used; however, those waters are not identified as being diversions from specific rivers, creeks, or springs, in other words, they are not direct diversion rights from the stream system, but rather are waters that are unique to their geographic location. The State Engineer finds that under Application 73471 the Applicant attempts to move the water as if it were a direct diversion water right from the Truckee River or its tributaries and not the drain and waste water it is identified to be under the *Orr Ditch* Decree. The State Engineer finds the water requested for appropriation under Application 73471 is not a direct diversion surface water right under the *Orr Ditch* Decree, but rather is as it is identified, drain or waste water, which was unique to the location in which it was used.

II.

The *Orr Ditch* Decree did not declare the waters of the Truckee River and its tributaries fully appropriated. However, by State Engineer's Ruling No. 4683, the State Engineer granted to the Pyramid Lake Paiute Tribe the unappropriated water of the Truckee River.¹² The State Engineer finds the water of the Truckee River and its tributaries is fully appropriated.

¹¹ See, 1920 Plane table maps sheets 8 and 9, *Orr Ditch* Decree.

¹² State Engineer's Ruling No. 4683, dated November 24, 1998, official records in the Office of the State Engineer.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.¹³

II.

The State Engineer is prohibited by law from granting a permit to appropriate the public waters where:¹⁴

- 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.

III.

The *Orr* Ditch Decree indicates that the use of water under Claim 744 is not a right to a direct diversion of water from the original channel of the Truckee River or one of its tributaries or from a ditch that supplied water from the Truckee River or one of its tributaries. Rather the use of water under Claim 744 is identified as drain or waste water collected for use through a well or sump. There is no evidence that supports a claim that the water under Claim 744 was diverted from the Truckee River via the Sullivan and Kelly Ditch.

The Nevada Supreme Court addressed a similar case in *Gallio v. Ryan*, 52 Nev. 330 (1930). The *Gallio* case addressed a dispute between two users of the waters of Star Canyon Creek. The plaintiff held a permit issued by the State Engineer for irrigation using the water of Star Canyon Creek, but alleged that during the years 1922 and 1923 the defendant had deprived the plaintiff of the use of the water of the creek. The defendant insisted that the water appropriated under the permit issued by the State Engineer was waste water and therefore not

¹³ NRS chapters 533 and 534.

¹⁴ NRS 533.370(5).

subject to appropriation under the water code. The Nevada Supreme Court found that the fact that the plaintiff ran the ditches as he had along the easterly and southerly sides of the land irrigated by the defendant, of itself, was sufficient evidence to show that the ditches were for the purpose of collecting drain or waste waters caused by the defendant's irrigation system.

The Court noted that waste water "may be defined to be such water as escapes from the works or appliances of appropriators without being used; or, such water as escapes from an appropriator's lands after he had made all the beneficial use thereof that is possible and which cannot be returned into the natural stream from which it was originally taken." (Citing Kinney on Irrigation (2d ed.), sec. 661.)¹⁵

Where 'surplus water' is made up from water running off from ground which has been irrigated; water not consumed by the process of irrigation; water which the land irrigated will not take up; is waste water. It is subject to capture and use, but that is the limit and extent of the right. The user cannot impose upon the owner permitting the waste or escape of water to cause it to be wasted or to require the continuance of its flow. *Wedgeworth v. Wedgeworth*, 20 Ariz. 518, 181 P. 952.

The Court held that "[w]here one has acquired the right to waste water from ditches or laterals of another, he does not thereby become vested with any control of any such ditches or laterals, or the water flowing therein, nor is the owner of such ditches required to continue or maintain conditions so as to supply the appropriation of waste water at any time or in any quantity when acting in good faith."¹⁶ The Court held that:

These authorities are all to the effect that a claimant to waste water acquires a temporary right only to whatever water escapes from the works or lands of others, and which cannot find its way back to its source of supply; that such a use of the water does not carry with it the right to any specific quantity of water; nor the right to interfere with the water flowing in the ditches or works of others lawfully appropriating it. *Kinney on Water Rights* (2d ed.), sec. 661. The author states that the authorities hold that while the water so denominated as waste water may be used after it escapes, no permanent right can be acquired to have

¹⁵ *Gallio v. Ryan*, 52 Nev. at 343-344.

¹⁶ *Id.* at 344.

the discharge kept up, either by appropriation or a right by prescription, estoppel, or acquiescence in its use while it is escaping, and that, too, even though expensive ditches or works were constructed for the purpose of utilizing such waste water, unless some other element enters into the condition of affairs, other than the mere use of the water.¹⁷

The Court found that the mere taking and use of the water made up from the defendant's irrigation system did not constitute an appropriation as that term is used in our statutes, as he acquired no usufruct right in the water as to entitle him to compel the continuation of the condition furnishing him with water.¹⁸ The Court found that no valid or legal appropriation was made by the plaintiff from the waters of Star Canyon Creek.

The State Engineer concludes that the use of the drain and waste water under Claim 744 was not a direct diversion of the waters of the Truckee River and its tributaries. The State Engineer concludes that the use of the drain and waste water under Claim 744 was unique to its geographic location. The State Engineer concludes that such use of drain and waste water in that location cannot be transferred and claimed as a direct diversion of Truckee River water that can be appropriated at the Truckee Meadows Water Authority's water treatment plants. The State Engineer concludes that these drain and waste waters under Claim 744 cannot be transferred in support of municipal use and to allow such a transfer would threaten to prove detrimental to the public interest as the right to use the water is a recognition of its unique use in its unique geographic location, and not the type of source that municipal use for a city such as Reno or a county such as Washoe County can be allowed to rely on. The State Engineer concludes to allow Claim 744 to be elevated to a direct diversion right would conflict with existing rights as the Truckee River system is fully appropriated.

¹⁷ *Id.* at 345.

¹⁸ *Ibid.*

Ruling
Page 9

RULING

Application 73471 is hereby denied on the grounds that its issuance would conflict with existing rights and threaten to prove detrimental to the public interest.

Respectfully submitted,



TRACY TAYLOR, P.E.
State Engineer

TT/SJT/jm

Dated this 9th day of
October, 2006.