

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

IN THE MATTER OF APPLICATION)
71604 FILED TO CHANGE THE)
PLACE OF USE OF THE PUBLIC)
WATERS OF A SURFACE WATER)
SOURCE WITHIN THE CARSON)
DESERT HYDROGRAPHIC BASIN)
(101), CHURCHILL COUNTY,)
NEVADA.)

RULING

#5848

GENERAL

I.

Application 71604 was filed on August 24, 2004, by the United States of America, Fish and Wildlife Service to change the place of use of 157.12 acre-feet annually (52.55 acres at 2.99 acre-feet per acre), a portion of the water previously appropriated under Permit No. 61415 Truckee-Carson Irrigation District (TCID) Serial No. 70, Claim No. 3 *Orr Ditch Decree*, and *Alpine Decree*.¹ The proposed point of diversion is described as being located at Lahontan Dam. The existing place of use is described as being 20.7 acres located within the NW¼ NE¼, and 31.85 acres located within the SW¼ NE¼ of Section 4, T.18N., R.28E., M.D.B.&M. The proposed place of use is described as all federally owned or controlled lands within the approved boundary of the Stillwater National Wildlife Refuge, further described in Exhibit A attached to this ruling.² The proposed manner of use is described as the maintenance of wetlands for recreation and wildlife/storage with the existing manner of use being identified as being "as decreed." Under the remarks set forth in Item 15 of the application, the Applicant indicates that it expressly reserves the right to transfer, in a later proceeding, the remaining 0.51 acre-feet per acre for each of the 52.55 acres from which the 2.99 acre-feet per acre are transferred under this application.

¹ Final Decree, U.S. v. Orr Water Ditch Co., In Equity A-3 (D.Nev. 1944) (*Orr Ditch Decree*); and Final Decree, U.S. v. Alpine Land and Reservoir Co., Civil No. D-183 (D.Nev. 1980) (*Alpine Decree*).

² File No. 71604, official records in the Office of the State Engineer.

II.

Application 71604 was timely protested by the City of Fallon on the following grounds.²

1. Granting this application would conflict with, injure, and impair existing water rights owned by the City of Fallon which supply its municipal water system upon which its 8,500 residents rely for their drinking water. Fallon's municipal water utility has been operated by the City since the early 1900's, supplying drinking water from groundwater wells to the citizens and businesses of Fallon. Fallon's supply of groundwater for its municipal water utility relies on both vested and permitted underground Nevada water rights, including but not limited to these identified under State Engineer Permit No.(s) 19859, 19860, 26168, 40869 and 55507.

2. The application, if granted, would be detrimental to the public interest of the State of Nevada because it would remove water resources from areas of the Lahontan Valley which the Nevada State Engineer and the United States Geological Survey have determined recharges the groundwater aquifer, identified as the Carson Desert Basin 101 by the State Engineer, consequently impairing the existing groundwater system upon which the City of Fallon relies to supply its residents drinking water.

3. The application, if granted, would present a hazard and danger to the health, safety and welfare of the residents of the City of Fallon and the surrounding community at large because it would jeopardize the sole drinking water supply of the City's 8,500 residents, said result being directly contrary to the public interest of the State of Nevada, which is to enhance public municipal drinking water supplies. Pyramid Lake Paiute [sic] Tribe of Indians v. Washoe County, 112 Nev. 743, 918 P.2d 699 (1996).

4. The application, if granted, would violate the Safe Drinking Water Act as enforced by the State of Nevada through the Nevada Department of Environmental Protection and the Nevada Bureau of Health Protection Services because its depletion of groundwater quantity would have a corresponding negative affect on groundwater quality upon which the City of Fallon's municipal water supply relies.

5. Consistent with the above, and with the open court representation on November 7, 2002 by counsel for the Nevada State Engineer before the United States Ninth Circuit Court of Appeals concerning State Engineer Ruling

4979, in United States v. Alpine Land + Reservoir Company, 341 F.3d 1172 (9th Cir., 2003), Nevada law at NRS 533.368 requires a hydrologic and environmental study to determine the cumulative consequences of this application and related applications to the City's existing public water system and the City's existing water rights and Nevada's public interest.

6. The State Engineer issued Order No. 1116 on August 22, 1995 which curtails groundwater appropriations within Carson Desert Basin 101, which constitutes a moratorium on all groundwater development (above 4,000 g.p.d. for preferred uses), for the reason that the cumulative affects of water right transfers by this applicant and others under the Truckee-Carson Pyramid Lake Settlement Act, Public Law 101-618, specifically under the applicant's "Wetlands Acquisition Program" render uncertain the amount of sustainable groundwater necessary to protect existing rights. Approval of this application without first knowing the affects upon the aquifer only adds to the uncertainty which underwrites Order 1116 and intensifies the need for extending the moratorium, which confirms the necessity of a prerequisite hydrologic and environmental study under NRS 533.368.

Therefore, the protestant requested that the application be denied.

III.

The Applicant filed an Answer to Protest of Application 71604.²

FINDINGS OF FACT

I.

The State Engineer has considered nearly identical protest issues to similar change applications ruled on in State Engineer's Ruling No. 5506.³

The State Engineer finds that the protest issues, as to Application 71604, are substantially the same as those issues raised and addressed in State Engineer's Ruling No. 5506.

II.

Nevada Revised Statute § 533.365(3) provides that it is within the State Engineer's discretion to determine whether a public administrative hearing is necessary to address the merits of a

³ State Engineer's Ruling No. 5506, dated, September 9, 2005, official records in the Office of the State Engineer.

protest to an application to appropriate the public waters. The State Engineer finds that a hearing is not necessary to consider the merits of the protest filed by the City of Fallon as the protest issues are the same as those already addressed in State Engineer's Ruling No. 5506.

III.

The State Engineer finds the reasoning found in State Engineer's Ruling No. 5506 is applicable here and adopts and incorporates those findings and conclusions into the decision on this application.

IV.

The existing place of use of Application 71604 is approximately $\frac{1}{4}$ mile to the northwest of the existing place of use of Application 70948. Application 70948 was part of four applications previously considered and ultimately approved for transfer under State Engineer's Ruling No. 5506. The location of the water sought for transfer under Application 71604 is significant as the same issues are raised by this application that were addressed in relation to Application 70948 in State Engineer's Ruling No. 5506.

As to Application 71604, the existing place of use is southwest of the City of Fallon and southwest of the southwestern edge of the basalt aquifer. The general direction of groundwater flow is to the southeast, away from the City of Fallon and the basalt aquifer, towards Carson Lake.⁴ As such, transferring the irrigation water rights off the existing place of use will not affect recharge to the basalt aquifers from which the municipal water system appropriates ground water.

Previous testimony in the administrative hearing resulting in State Engineer's Ruling No. 5506, indicated that simulations using numeric groundwater models indicate that there is as much recharge to the shallow aquifer from canals as from the application of water to the irrigated places of use. This result occurs because the

⁴ State Engineer's Ruling No. 5506, p.19.

water that would have been applied to the fields stays in the canal for transport to the new places of use, which are down gradient. The increased amount of water in the canals will increase seepage from the canals, which in turn offsets the lack of recharge from irrigating the existing places of use.

The State Engineer finds that the approval of Application 71604 will have no significant affect, if any, on recharge to the shallow aquifer. The State Engineer finds that any recharge to the shallow aquifer that may be reduced by the approval of the application is recharge to the shallow aquifer in an area where groundwater flow is away from the basalt aquifer, where the Protestant's groundwater rights are located. The State Engineer finds that water transferred from the existing place of use will be transported to the new places of use through existing canals, which will minimize any reduction in recharge to the shallow aquifer.

V.

Nevada Revised Statute § 533.368 provides that if the State Engineer determines that a hydrological study, environmental study or any other study is necessary before he makes a final determination on an application pursuant to NRS § 533.370 and the applicant, a governmental agency or other person has not conducted such a study or the required study is not available, the State Engineer shall advise the applicant of the need for the study and the type of study required.

It was noted in State Engineer's Ruling No. 5506 that numerous studies have already been conducted and the State Engineer found that additional studies were not necessary.⁵ The State Engineer finds that, in his determination, additional hydrological, environmental or other studies are not necessary to make a final determination on Application 71604.

⁵ State Engineer's Ruling No. 5506, p. 16.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁶

II.

The State Engineer is prohibited by law from granting a permit under an application to change the public waters where:⁷

- 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 State Engineer concludes that conclusions reached in State Engineer's Ruling No. 5506 are applicable and are hereby adopted and incorporated herein.

IV.

The State Engineer concludes that the granting of the application will not conflict with existing rights, conflict with protectible interests in domestic wells as set forth in NRS § 233.024 or threaten to prove detrimental to the public interest.

V.

The State Engineer concludes that the determination of whether additional studies are needed under Nevada Revised Statute § 533.368 is discretionary with the State Engineer. The State Engineer further concludes that additional studies are not necessary at this time; therefore, a determination on Application 71604, pursuant to NRS § 533.370, is proper.

⁶ NRS chapter 533.

⁷ NRS § 533.370(5).

RULING

The protest to Application 71604 is hereby overruled and the application is granted subject to:

1. the payment of statutory permit fees;
2. existing water rights.

Respectfully submitted,



TRACY TAYLOR, P.E.
State Engineer

TT/TW/jm

Dated this 14th day of
May, 2008.

EXHIBIT No. A

The Stillwater National Wildlife Refuge is described as consisting of all Federally-owned or Federally-controlled lands within:

In T.21N., R.32E., M.D.B.& M. - Sections 2 through 11, Sections 14 through 22, Sections 27 through 34.

In T.21N., R.31E., M.D.B.& M. - all Sections.

In T.20N., R.32E., M.D.B.& M. - Sections 3 through 10, Sections 16 through 21, Sections 29 and 30.

In T.20N., R.31E., M.D.B.& M. - all Sections.

In T.19N., R.31E., M.D.B.& M. - Sections 2 through 11, Sections 14 through 22, Sections 27 through 33.

In T.19N., R.30E., M.D.B.& M. - Section 13 - all those portions of the NE $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$ and SE $\frac{1}{4}$ SE $\frac{1}{4}$ lying east of Stillwater Slough; Section 24 - NE $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$ and SW $\frac{1}{4}$ NE $\frac{1}{4}$.