

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

IN THE MATTER OF APPLICATION)
68968 FILED TO CHANGE THE)
POINT OF DIVERSION, PLACE OF)
USE AND MANNER OF USE OF)
WATER WITHIN THE TRUCKEE)
MEADOWS HYDROGRAPHIC BASIN)
(87), WASHOE COUNTY, NEVADA.)

RULING

5263

GENERAL

I.

Application 68968 was filed on July 19, 2002, by Washoe County to change the point of diversion, place and manner of use of 2.12 acre-feet annually of the water under Claim 744 of the *Orr Ditch Decree*.¹ The proposed manner of use is for municipal and domestic purposes within portions or all of: T.18N., R.18E.; T.19N., R.18E.; T.20N., R.18E.; T.21N., R.18E.; T.18N., R.19E.; T.19N., R.19E.; T.20N., R.19E.; T.21N., R.19E.; T.18N., R.20E.; T.19N., R.20E.; T.20N., R.20E.; T.21N., R.20E.; T.20N., R.21E.; T.21N., R.21E.; M.D.B.&M. The proposed point of diversion is described as being located within the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 8, T.18N., R.20E., M.D.B.&M. The existing point of diversion is described as being located within the W $\frac{1}{2}$ of Lot 1 of the NW $\frac{1}{4}$ of Section 5, T.19N., R.20E., M.D.B.&M.²

FINDINGS OF FACT

I.

The *Orr Ditch Decree* provides:

That the parties, persons, corporations, intervenors, grantees, successors in interest and assigns and substituted parties above and hereinafter named and their successors in interest and assigns are, and each of them is, as against every other one, hereby adjudged to be the owners of the water rights

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

² File No. 68968, official records in the Office of the State Engineer.

hereinafter specified and set forth and entitled and allowed to divert and use, from the Truckee River and its tributaries and from the streams, springs, drain and waste waters hereinafter mentioned, and by and through their respective ditches, canals, flumes, dams and reservoirs, for the irrigation of their respective hereinafter described lands, for generating electricity and power, for municipal purposes, for supplying the people living in cities and towns, for reclamation of arid lands, for watering livestock, for domestic uses and other beneficial purposes, water in the respective amounts and subject and according to the respective dates of appropriation and priorities as hereinafter stated, found and allowed. (Emphasis added).

The State Engineer finds the *Orr Ditch Decree* is not an adjudication of the ground water of the Truckee Meadows, but rather specifically provides it is only an adjudication of the Truckee River and its tributaries, and identified streams, springs, drain and waste waters.

II.

Claim 744 is found under a section of the *Orr Ditch Decree* specifically identified as "Drain and Waste Waters."³ The Decree indicates that the water right has a priority of 1920, and under the column "Ditch" it indicates that the water is obtained "by pumping from well." Under the provision for the point of diversion under the "Side of Stream" column it indicates that the point of diversion is "On" the side of the stream, in the W $\frac{1}{2}$ of Lot 1 of the NW $\frac{1}{4}$ of Section 5, T.19N., R.20E., M.D.B.&M., and that it irrigated 13.5 acres by "Direct" diversion.

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

³ *Orr Ditch Decree* at 85.

acreage..."⁴ In this case, the "river, creek or stream" last named above the acreage is "Drain and Waste Waters."

Looking through the entire *Orr Ditch Decree*, the section of "Drain and Waste Waters" appears to be a catch-all for drain and waste waters not found under specific rivers, creeks, or springs. Claims 742 and 744 indicate the diversion of water by pumping from a well with direct diversion rights for the irrigation of specific lands. Nowhere in the *Orr Ditch Decree* does the Federal District Court indicate it has jurisdiction or is adjudicating the right to ground water.

Claim 744 was apparently added to the *Orr Ditch Decree* by a stipulation signed by Patrick McCarran, Sardis Summerfield and Ethelbert Ward, Special Assistant to the Attorney General. There is no indication it was presented to the other decree claimants.⁵ This stipulation provided for four water rights granted to Patrick McCarran from the Truckee River and provided for Claims 737 through 744 all found in the section on "Drain and Waste Waters." Claims 737, 738 and 741 are for water from springs, Claims 739 and 740 are for water from springs and water by pumping from swamps and waste water, Claims 742 and 743 are for water by pumping from a well and also waste water from a drain ditch, and Claim 744 is for water obtained by pumping from a well.

As the *Orr Ditch Decree* was not an adjudication of the ground water in the area, the State Engineer finds it would be inherently unfair to allow the Applicant to claim one of the oldest groundwater rights in the Truckee Meadows without all

⁴ *Orr Ditch Decree* at 86.

⁵ An agent for the Applicant provided the State Engineer with a package of materials titled "Evidence in Support of a Well Source for Truckee River Claims #742 and #744" (hereinafter "Applicant's Evidence Package"); Applicant's Evidence Package Exhibit K. File No. 68968, official records in the Office of the State Engineer.

other vested right claimants being given an opportunity to object or participate in the adjudication of such rights.

III.

The State Engineer finds that change Application 68968 proposes to move the point of diversion from an existing point of diversion in Sparks, Nevada, north of the Truckee River to a proposed point of diversion in southeastern Reno, Nevada, south of Reno-Tahoe International Airport.

IV.

The general purpose of the Applicant's Evidence Package" appears to be an attempt to convince the State Engineer that the water under Claim 744 was obtained from a well; therefore, it must have been ground water and not drain or waste water, and as such the Applicant should be allowed to move said ground water to Washoe County's well. As noted above, the *Orr Ditch Decree* was not an adjudication of ground water. The two claims identified as Claims 742 and 744 appear to be an anomaly in the decree. While the water was diverted from what was identified as "pumping from wells," the State Engineer as demonstrated below does not find it to be the same water source from which Washoe County diverts water from the proposed point of diversion.

Exhibit H in the Applicant's Evidence Package is an enlarged copy of a portion of the 1920 plane table map prepared by the Bureau of Reclamation.⁶ 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 $\frac{1}{4}$ there is identified a large spring and a swamp, 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 was irrigated entirely by seepage. Upon review of Exhibit A in 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

⁶ See also Exhibit A in Applicant's Evidence Package.

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

The Applicant's Evidence Package notes 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.⁷ By the fact that the water was either going to be removed by a "well or sump," there is further indication the water was to be removed from a waterlogged area. Just because it was called a "well" does not mean it took water from the source that the Applicant now requests to divert water from under Application 68968. This analysis supports why the decree court would have allowed the inclusion of Claims 742 and 744 under the provision for "Drain and Waste Waters."

In the Applicant's Evidence Package, the State Engineer was provided with a photograph identified as Exhibit S. The Applicant uses this photograph to argue there are no lakes or standing water in the area. First of all, the quality of the photograph is extremely poor. Second, it would not have to show a lake or standing water to be a waterlogged area. A marshy or swampy area would not necessarily look like a lake.

The Applicant provided evidence that when the property was later acquired by Brunetti, he deepened the "well" for use for a fish hatchery. In the Applicant's Evidence Package, Exhibit X shows the well log submitted by Brunetti, which indicates that from 0 to 12 feet was an "old pit" and that drilling began at 12 feet. The Applicant through the use of Exhibit X indicates that water was encountered nine feet below where drilling began in

⁷ *Water Words Dictionary*, Nevada Division of Water Planning, Department of Conservation and Natural Resources, 8th ed. 1998.

1948. What existed in 1948 is not the relevant inquiry, but rather what was there in 1920 is the relevant inquiry. By 1948, the City of Sparks was growing in the area and the area had most likely changed from the early 1900's. If the original decree claimant had not gone any further than 12 feet to withdraw this water from the "old pit", it further indicates that this was a waterlogged area from drain or waste waters.

Application 68968 indicates that the well identified as the proposed point of diversion is an existing Washoe County well. Well log #40058 indicates that Washoe County wants to pump water from a well that is 180 feet deep in a completely different area than in which Claim 744 is located.

As the State Engineer has previously held, just because someone holds a water right, it does not mean that water right can be changed to another use or point of diversion, particularly if there are indications the water would be appropriated from a different source.⁸ In the case just referenced, the applicants were requesting to use water, which was appropriated from a sub-surface drainage source that was collected from a horizontal pipe several feet under the ground and move it to one of Washoe County's deep wells. The crux of those applicants' argument was that since the water was collected under the ground it should then be classified as ground water and subject to change to a much deeper well in another place within the hydrographic basin. Those applicants argued the collection system should not be considered a drainline, but rather a horizontal well. Just like this case, the area was surrounded by a great deal of land irrigated with water from the Truckee River. The plane table maps in the previous example showed there was much seepage found in the area

⁸ State Engineer's Ruling No.4855, dated February 18, 2000, File No. 63775, official records in the Office of the State Engineer.

and there was only pasture in the area, which is a crop that can tolerate having its "feet" wet.

In this case, the Applicant argues the water came from a "well" and thus, is ground water and should be subject to change. As in the example noted above, the State Engineer does not agree with that simplistic analysis. In this case, the applicant requests to move the point of diversion to a 180-foot deep well far south of the Truckee River.

Most of the water appropriated for quasi-municipal and municipal purposes in the Truckee Meadows is from the deeper aquifers and is not from the sources that supplied the near-surface water sources, which are the drain and waste waters from which Claim 744 obtained water. The water obtained under Claim 744 is unique to that area and locally influenced.

The State Engineer finds the Applicant's evidence ignores the historical information that the area was waterlogged, that is, much of the area was marshy or swampy, and that the *Orr Ditch Decree* did not adjudicate ground water. The State Engineer finds that the source of water requested to be diverted from under Application 68968 is not the same source of water, which was diverted under Claim 744. The State Engineer finds the Applicant did not prove sufficiently to his satisfaction that any water appropriated under Claim 744 is solely derived from the same source of water requested to be appropriated from a much deeper well miles to the south of the existing point of diversion.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁹

⁹ NRS chapter 533.

II.

The State Engineer is prohibited by law from granting a permit under a change application to appropriate the public waters where:¹⁰

- 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.

By State Engineer's Order No. 708, the State Engineer designated and described the Truckee Meadows Hydrographic Basin as a basin in need of additional administration.¹¹ For over 20 years, the State Engineer has been concerned about additional appropriations of ground water from the Truckee Meadows. The State Engineer concludes that to allow the appropriation of what is the collection of drain or waste water to be converted to an underground municipal right would conflict with many existing water rights in the area and threaten to prove detrimental to the public interest.

IV.

The Applicant's evidence did not sufficiently convince the State Engineer that the source of water to be appropriated under Application 68968 is derived from the same source as that appropriated under Claim 744.

¹⁰ NRS § 533.370(3).

¹¹ State Engineer's Order No. 708, dated March 1, 1978, official records in the Office of the State Engineer.

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RULING

Application 68968 is hereby denied on the grounds that the evidence did not sufficiently convince the State Engineer that the proposed source of water is the same as collected under Claim 744, and that a change from the original source to the one requested to be appropriated from under Application 68968 would in effect be a new appropriation of water, conflict with existing rights, and threaten to prove detrimental to the public interest.

Respectfully submitted,



HUGH RICCI, P.E.
State Engineer

HR/SJT/jm

Dated this 18th day of

June, 2003.