BEFORE THE STATE ENGINEER, STATE OF NEVADA DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, DIVISION OF WATER RESOURCES

FILED
JUN 22 2006
STATE ENGINEER'S OFFICE

IN THE MATTER OF CHANGE APPLICATION 74081 FILED BY TRUCKEE MEADOWS WATER AUTHORITY TO CHANGE THE PLACE AND MANNER OF USE OF WATER HERETOFORE APPROPRIATED UNDER CLAIM 440 OF THE TRUCKEE RIVER DECREE AND PERMIT 66750

PROTEST AND REQUEST TO DENY APPLICATION 74081 PETITION FOR HEARING PURSUANT TO N.R.S. 533.365; AND ENVIRONMENTAL STUDY PURSUANT TO N.R.S. 533.368

COMES NOW THE TRUCKEE-CARSON IRRIGATION DISTRICT ("TCID"), by and through its attorneys, organized under Chapter 539 of the Nevada Revised Statutes, whose address is P.O. Box 1356, Fallon, Nevada, 89407-1356, with responsibilities under contract to operate and maintain the Newlands Reclamation Project and to deliver water to landowners who have contracted either with the United States or with TCID, and to comply with water rights decrees for water rights appropriated by the United States under the Reclamation Act (43 U.S.C. 371, et seq.) and as a party to the water rights decree of the Truckee River, known as the Orr Ditch Decree (*U.S. v. Orr Water Ditch Co.,* Equity A-3-LDG U.S. District Court, Nevada, September 8, 1944), hereby protests the granting of change application 74081 filed by Truckee Meadows Water Authority ("TMWA"), to change the place and manner of use of water heretofore appropriated under Claim No., 440 of the Orr Ditch Decree (or Truckee River Decree) and permit 66750. TCID protests the application for the following reasons and on the grounds, to wit:

///

///

2006 JUN 22 AM 9:56

1. On information and belief, the purported water rights arise from the Truckee River Agreement ("TRA"), to which TCID is a party, and which is incorporated by reference into the Orr Ditch Decree (*U.S. v. Orr Water Ditch Co.*, et al., CV-N- 73-003. D. Nev. (1944)), and such rights arise, if at all, based upon an express agreement of the parties to the Truckee River Agreement and not otherwise, and granting the application would violate the compromise reached in the TRA that allowed the Orr Ditch Decree to be entered.

2. Any change to the compromise reached by the parties to the TRA requires the consent of the parties to that agreement, which consent is withheld by TCID.

3. The Application is defective because it attempts to effect a unilateral modification to the Orr Ditch Decree by changing the TRA, without consent, approval or notice, and attempts to modify the Orr Ditch Decree without approval of the Orr Ditch Court.

4. The Application proposes that the beneficial places of use will be set forth in applications for secondary permits consistent with the Truckee-River Operating Agreement ("TROA"). TROA is still in the environmental review process and there is no guarantee that it will be approved. Further, the Application fails to adequately identify a specific project where the water will be applied for beneficial use. The Applicant has not demonstrated feasability of beneficial use of the water, therefore, the Application is premature and speculative.

5. The Truckee River Agreement and the Orr Ditch Decree Control the Distribution and Storage of Water in the Truckee River Basin. The TRA is incorporated into the Orr Ditch Decree as a part of the decree itself. See *U. S. v. Orr Water Ditch Company*, CV-N-73-0003 LDG at p. 86. The TRA sets forth the principles under which the Truckee River would be operated and allowed for the stipulated entry of the Orr Ditch Decree. The parties to the Truckee

River Agreement are: The United States of America; Truckee-Carson Irrigation District; Washoe County Water Conservation District (Conservation District); Sierra Pacific Power Company (Sierra), and such other users of the waters of the Truckee River and/or its tributaries, known as Parties of Fifth Part. The TRA required the Truckee River to be operated on the basis of Floriston Rates, as established in the 1915 General Electric Decree. *United States v. The Truckee River General Electric Company,* Case No. 14861 (N.D. Cal. 1915). For the last 70 years, the Truckee River has been managed by the parties to the TRA, along with the Federal Water Master. Several new reservoirs have been added to the Truckee River watershed that did not exist when the TRA was executed. These reservoirs are part of the Washoe Project and include Prosser Reservoir and Stampede Reservoir. These reservoirs are managed in conjunction with the other reservoirs serving the Truckee River basin. The Applicant has failed to show that the proposed diversion and use of water is consistent with the management regime of the Truckee River as set forth in the Truckee River Agreement and the Orr Ditch Decree. Moreover, any unused water in the Truckee River is to inure to the benefit of the Conservation District and TCID. Attempts to alter the division of unused water are in violation of the TRA and undermine the Orr Ditch Decree.

6. The Applicant may not use Boca Reservoir or Lake Tahoe water as proposed in the Application. These water bodies are subject to the terms of the TRA, to which TMWA, a successor to the Sierra Pacific Power Company, is bound.

7. On information and belief, the proposed storage and secondary use under TROA of the water proposed in the Application (in conjunction with the other similar applications filed for upstream storage) will interfere with the management of Floriston Rates on the Truckee

River. Floriston Rates are defined in the TRA as the rate of flow in the Truckee River as measured at the Iceland Gage, consisting of an average flow of 500 cubic feet per second (cfs) each day during the year commencing March 1 and ending September 30 of any year and an average flow of 400 cfs each day from October 1 to the last day of February of the next year. Water in Lake Tahoe must also be released as required under the TRA to maintain Floriston Rates. The TRA sets limitations on when Floriston Rates can be changed and requires that before that can occur, the permission of the Conservation District, TCID and Sierra must be obtained. In addition, the United States and TCID must agree pursuant to their rights under the 1915 GE Decree. Changes in the flow from Boca Reservoir requires the consent of TCID. The TRA also calls for Reduced Floriston Rates under certain conditions that would also potentially be impacted by the proposed change. The proposed change applications purport to alter the TRA in violation of the aforementioned agreement.

8. All Washoe Project reservoirs, include Prosser Reservoir and Stampede Reservoir, must also be operated based on Floriston Rates. The operation of these reservoirs would also be altered to the detriment of TCID under the proposed change applications.

9. The Application must comply with the TRA, unless and until consent of all parties is received. TCID does not consent. TROA was born from the Preliminary Settlement Agreement between Sierra Pacific and the Pyramid Lake Paiute Tribe of Indians (PLIT), which was recognized in the Truckee-Carson-Pyramid Lake Settlement Act, P.L. 101-618, 104 Stat. 3289, November 16, 1990 (the Act). The Act contains a reservation that it is not to be construed to alter or conflict with any existing rights to use the Truckee River water in accordance with the applicable decrees. The TRA is incorporated into the Orr Ditch Decree as a part of the decree

itself. See *United States v. Orr Water Ditch Company*, CV-N-73-0003 LDG at p. 86. Specifically, the Act states that TROA will "ensure that water is stored in and released from Truckee River reservoirs to satisfy the exercise of water rights in conformance with the Orr Ditch decree and Truckee River General Electric decree." 104 Stat 3305. Therefore, even under TROA, if adopted, the Application must comply with the TRA requirements for storage and maintenance of Floriston rates. The Applicant has made no showing that the proposed diversion of the water complies with the TRA, nor can it.

10. The proposed Application fails to adequately identify the beneficial use of the water, the specific place of use, or a specific project where the water will be applied for beneficial use. The proposed place of use for the applications will be subsequently "....set forth in applications for secondary permits consistent with the Truckee River Operating Agreement." The Applicant has not demonstrated feasibility of beneficial use of the water; therefore, the Application is premature and speculative.

11. On information and belief, the granting of this Application would injure existing water rights adjudicated in the Orr Ditch Decree, and under the Orr Ditch Decree such a transfer cannot be approved if it will cause injury to an existing right under the decree. Potential uses under TROA for fish credit water will injure Newlands water users. The historic use of this water was for irrigation, which provided for return flows which could be beneficially used by Newlands farmers. Likewise, the current use of this water for municipal and domestic provides substantial return flows. However, uses under TROA for fish water do not provide return flows resulting in injury to Newlands Project farmers, especially in years of drought.

///

12. This Application along with other numerous similar applications filed by TMWA/Reno/Sparks are actually joint applications for storage of the consumptive portion and direct diversion of full diversion rate, which violates NRS 533.330 wherein an application must be limited to one source for one purpose.

13. The Application incorrectly names the source of the water and fails to designate a point of diversion. NRS 533.440(2) specifies "the application shall refer to the reservoir for a supply of water." The Application does not specify the named reservoirs in Exhibit B as the "supply," rather the reservoirs are named as points of diversion, the source of supply for the Applications is actually tributaries to the Truckee River. The point of diversion cannot be a storage facility.

14. The Application fails to provide evidence of sufficient capacity in the named reservoirs or the existence of agreements for the storage of water. NRS 533.440(2) specifies "the application...shall show by documentary evidence that an agreement has been entered into with the owner of the reservoir for a **permanent** and sufficient interest in such reservoir to impound enough water for the purpose set forth in the application." No such evidence has been provided in the Application regarding sufficient capacity in each reservoir and no evidence has been provided to demonstrate that permanent storage agreements have been entered into with the United States. Likewise, TCID has not given Applicant permission to store credit storage or exchange water in Donner Lake, Lake Tahoe, or Boca Reservoir.

15. The Applicant has provided no evidence of a permanent water right to store the subject water under California law. They propose to divert water from a point in which they have no right or control. The water rights change petitions submitted to the California State

Water Resources Control Board by the United States/TMWA/Washoe County Water Conservation District for credit storage under TROA in Prosser Reservoir, Boca Reservoir, Stampede Reservoir, and Independence Lake as well as the two water rights applications for increasing the storage at Prosser Reservoir and Stampede Reservoir are still pending. Thus, the Application is premature and speculative.

16. The Applicant has not demonstrated that the proposed water can be stored in the reservoirs without displacing water that would otherwise be stored to the benefit of the Newlands Project.

17. The Application fails to provide a full understanding of the proposed change. Because negotiations for TROA are ongoing, the agreement has not been finalized, and the Draft environmental impact statement/environmental impact report ("DEIS/EIR") has not been certified, the Application is inadequate pursuant to NRS 533.345 wherein any application to change the place of diversion, manner of use, or place of use must contain "....such information as may be necessary to a full understanding of the proposed change." This is particularly true because the applications for secondary permits have not been filed and the potential impacts cannot be fully understood until TROA is finalized, if at all, and the beneficial uses and places of use are identified. It is noted that such secondary permits are not published in accordance with NRS 533.440 and thus, even though the actual points of diversion and the source of such diversions are not shown in the Application, the Applicant(s) are attempting to bypass the notice provisions, thus shifting the burden to potential protestants to monitor application filings for the subsequent secondary permits and file additional protests at that time.

///

18. Exhibit D of the Application describes the intent to store only the consumptive use portion of the water right and includes incomplete and vague language that the consumptive use portion shall be at least 2.5 acre feet per acre. This is problematic for two reasons. First, it appears the language is vague to allow the Applicant at some later time to attempt to increase the storage rate beyond the specified 2.5 acre feet per acre. If the Application is approved, it should specify that "the consumptive use portion shall not **exceed** the actual consumptive use portion of the water right, as determined by the State Engineer." Second, the Application (and in many instances the underlying permits and certificates) does not expressly state the number of acres to be used in determining the storage quantity under each right. The Application should specifically state the number of acres associated with the underlying water right. Moreover, the Application does not state the actual amount of water in acre feet that will be stored in the reservoirs, making the Application defective.

19. The Application for "Primary Storage" and "Secondary Uses" will dramatically alter the flow regime of the Truckee River with potential injury to Newlands Project water right owners. The Application specifies the proposed period of use as January 1 to December 31 of each year, whereas the existing period of use is generally "as decreed." The underlying water rights for the claims in the Orr Ditch Decree were originally used for irrigation purposes, thus the historical diversion pattern was on an irrigation pattern. The Orr Ditch Decree does not specify a prescribed irrigation season rather it is purposely left open to allow for flexibility in changing hydrologic conditions. Although the prior change permit was issued without restricting the municipal use to a historical diversion pattern, the permits generally contain language to the effect that the permit is issued subject to the terms and conditions of the Orr Ditch Decree and

"with the understanding that no other rights on the source [Truckee River] will be affected by the change proposed herein." Further, the prior change permit was issued allowing municipal and domestic uses for a period of use specified "as decreed." Year-round use of water historically used on an irrigation pattern may cause injury to downstream rights and that proposed storage of these rights increases the potential for injury to downstream rights. If the Applicant is allowed to store these water rights in the non-irrigation season with subsequent releases for municipal use or for conversion to fish water, the regime of the Truckee River will be dramatically altered resulting in potential injury to existing water right owners. The proposed period of use should be restricted to the "irrigation season" as determined each year by the Federal Water Master.

20. The amount diverted (either into storage or by direct diversion) should be restricted to the 25 percent maximum monthly amount in accordance with the Orr Ditch Decree. See *United States v. Orr Water Ditch Company*, CV-N-73-0003 LDG at p. 88.

21. The Application is defective because there is no information provided regarding the releases and use of the stored water and thus the potential injury or impacts cannot be ascertained.

22. It is understood from review of the TROA DEIS/EIR that the stored water will be used as (1) subsequent municipal releases and diversions or (2) the expanded uses under TROA to include conversion to fish water, releases for minimum instream flows, and releases for the broader lower Truckee River streamflow objectives. Any subsequent releases of the stored water should be subject to reservoir evaporation and seepage losses as well as river conveyance losses to the new point of diversion in order to prevent such losses from being incurred by the Newlands Project.

23. By diverting water and storing it in up stream reservoirs, the Application is keeping water out of the river to the detriment of other water right holders, particularly in years of drought. Further, agreements would be required with users of both Truckee and Carson River waters for modification of certain established water rights. No such agreement has been obtained.

24. Storage in up-stream reservoirs is to the detriment of Lake Tahoe. The water which is the subject of the Application, which would otherwise be credited into storage in Lake Tahoe, will result in an artificial decrease in the Lake Tahoe levels, adversely affecting water rights under Claims No. 3 and 4 of the Orr Ditch Decree. Further storage in up-stream reservoirs is counter to the 1990 Settlement Act which states that TROA may include "methods to diminish the likelihood of Lake Tahoe dropping below its natural rim . . ." Approval of the Application would have the exact opposite effect.

25. On information and belief, the purported Application will negatively impact Hydrographic Basin 87. The flow of the Truckee River is hydrographically linked to underground water. By storing water in upstream reservoirs that normally flowed in the river, the Application (in conjunction with the other similar applications filed for upstream storage) will negatively impact recharge of Hydrographic Basin 87. Further, TMWA currently utilizes Hydrographic Basin 87 as a source of substantial water which is pumped from the basin. By storing water up-stream they are in effect utilizing the water twice to the detriment to other water users whose water will now recharge the basin, especially in times of drought. Removing this water from the basin prevents it from partially recharging the aquifer. Well pumping then must use other groundwater that is hydrographically connected to the Truckee River, thus affecting

flows in the river for downstream users.

26. Based upon information and belief, the Applicant will divert a portion of their surface water rights that historically go to recharge Hydrographic Basin 87 to the named up-stream reservoirs. This will unreasonably lower the water table resulting in injury to others who have wells in the Truckee Meadows. The State Engineer must take into account whether the proposed change conflicts with protectable interests in existing domestic wells as set forth in NRS 533.370(5). These wells must then draw water that is hydrographically connected to the Truckee River, thus adversely affecting downstream water right owners.

27. Basin 87 is designated by the State Engineer under Chapter 534 of the NRS, and moving surface water from the basin will have a detrimental effect on the groundwater.

28. The application is premature, speculative, and detrimental to the public interest as there are a number of conditions that must occur before the water may be utilized as proposed in the application, including: (1) no permanent agreement to store water in the named reservoirs, (2) no permission to store water in Donner Lake from TCID, (3) TROA has not been finalized, and (4) the California State Water Resource Control Board has not issued permits to store this water under California law. Nevada law mandates that the State Engineer either approves or denies an application, and an application can not be contingent on subsequent conditions. NRS 533.370. At this time there is insufficient information for the State Engineer to act.

29. On information and belief, Applicant intends with the secondary use to use the water below the current point of diversion. Any secondary use below the original point of diversion should be treated as a new application with a priority date as of the date of the change application to prevent injury to existing water right owners. Further, the Applicant has no right

to divert and use water at diversion points outside of Truckee Meadows. Moreover, a change in the point of diversion downstream will have a negative effect on upstream and downstream users.

30. Storage of water at Stampede Reservoir which otherwise would be stored in Lahontan Reservoir can not be accomplished without agreement with TCID. No such agreement has been made in regards to this Application.

31. Upon information and belief, the proposed change Application will violate the 1991 Groundwater Management Agreement between Westpac Utilities, a division of Sierra Pacific Power Company, and TCID regarding surface water rights and use of shallow infiltration wells and/or Ranney Collectors.

32. The amount of acreage shown on the Application is more than the consumptive use portion. If approved, the Application should be limited to the actual consumptive use portion.

33. If such applications are approved any permit should be issued subject to the following specific conditions:

a. Assure that all irrigated lands and residual acreage associated with prior transfers do not receive any Truckee River water either inadvertently or directly.

b. The diversion shall be according to a new priority based on the date of the underlying change application.

c. The period of use for the first diversion either into storage or for direct diversion at the water treatment plants must be restricted to the irrigation season specified by the Federal Water Master.

d. The first diversion either into storage or for direct diversion must be

restricted to the 25 percent maximum monthly amount in accordance with the Orr Ditch Decree.

e. The consumptive use portion to be stored in the reservoirs shall not exceed the actual consumptive use portion of the water right as determined by the State Engineer, calculated based on a specified number of acres provided in the permit.

f. The non-consumptive use portion shall remain in the river to protect the historical flow regime of the Truckee River.

g. Any subsequent releases of the stored water shall be subject to reservoir evaporation and seepage losses as well as river conveyance losses to the new point of diversion in order to prevent such losses being incurred by downstream users.

h. Proposed accounting forms shall be approved by the State Engineer and the Federal Water Master tracking by right and priority amounts of water including but not limited to diversion to storage, direct diversion, exchanges, conversion to fish water, subsequent reservoir releases, reservoir losses, and river conveyance losses.

i. Conditions to insure that the proposed storage of water can be stored in the reservoirs without displacing water that would otherwise be stored to the benefit of the Newlands Project.

j. NRS 533.440 (1) provides that there is no notice requirements for secondary permits. Here, the unknown and speculative nature of the secondary uses in the application could result in injury to other water right owners. Therefore, there should be a specific notice requirement for secondary uses with this Application, if approved.

k. The transportation component of the water should be stored in Lake Tahoe for use by other water owners entitled to diversions under the Orr Ditch Decree.

l. The permit is issued subject to the terms and conditions of the Orr Ditch Decree and with the understanding that no other rights on the source Truckee River will be affected by the change proposed.

m. The permit is issued subject to uses for a period of use specified "as decreed."

34. Since the full scope of this project is unknown and referenced subsequent secondary recovery applications will be filed which are not published, TCID reserves the right to add or amend this Protest as more information becomes available.

35. On information and belief, the water rights at issue have been abandoned or forfeited due to non use.

THEREFORE, TCID respectfully requests that the State Engineer require hydrological and environmental impact studies to be conducted pursuant to N.R.S. 533.368, that the State Engineer hold a hearing on the application, and that the application be denied and an order be entered by the State Engineer denying said application.

///

///

///

///

///

///

///

///

Dated this 20th day of June, 2006.

Respectfully submitted,

MICHAEL J. VAN ZANDT, Esq.
Nevada State Bar No. 7199
McQUAID BEDFORD & VAN ZANDT, LLP
221 Main Street, 16th Floor
San Francisco, CA 94105
Telephone: 415-905-0200
Fax: 415-905-0202
Attorneys for Truckee-Carson Irrigation District

State of California)
)
County of San Francisco)

Subscribed and sworn to (or affirmed) before me this 20th day of June, 2006, by Michael J. Van Zandt, personally known to me or proved to me on the basis of satisfactory evidence to be person(s) who appeared before me.

TERESA BECHELLI
Comm. # 1379760
NOTARY PUBLIC - CALIFORNIA
City & County of San Francisco
My Comm. Expires Oct. 12, 2006

Teresa Bechelli

Notary Public

Notary Seal

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years, and that I am not a party to nor interested in this action. On the date stated below, I caused to be served a true and correct copy of the within **PROTEST AND REQUEST TO DENY APPLICATION NO. 74081; PETITION FOR HEARING PURSUANT TO N.R.S. 533.365; and ENVIRONMENTAL STUDY PURSUANT TO N.R.S. 533.368** by the method indicated below:

By First Class Mail - I caused each such envelope, with first-class postage thereon fully prepaid, to be deposited in a recognized place of deposit of the U.S. mail in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein following ordinary business practices.

and addressed to the following parties listed on the attached Service List.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 21, 2006 in San Francisco, California.

Dené W. Tatmon