

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

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IN THE MATTER OF CHANGE  
APPLICATION 76682 FILED BY  
WASHOE COUNTY, THE CITY  
OF RENO, AND THE CITY OF  
SPARKS AS TENANTS IN  
COMMON TO CHANGE THE PLACE  
AND MANNER OF USE OF WATER  
HERETOFORE APPROPRIATED UNDER  
CLAIM 3 OF THE TRUCKEE RIVER  
DECREE AND PERMIT 70143 CERT. 16815

**PROTEST AND REQUEST  
TO DENY APPLICATION  
76682; PETITION FOR HEARING  
PURSUANT TO N.R.S. 533.365;  
PETITION FOR A HYDROLOGICAL  
AND ENVIRONMENTAL STUDY  
PURSUANT TO N.R.S. 533.368**

**FILED**  
MAY 16 2008 *al*  
STATE ENGINEER'S OFFICE

ORIGINAL

COMES NOW THE TRUCKEE-CARSON IRRIGATION DISTRICT ("TCID"), by and through its attorneys, a political subdivision of the State of Nevada, organized under Chapter 539 of the Nevada Revised Statutes, whose address is 2666 Harrigan Road, 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 76682 filed by Washoe County, a political subdivision of the State of Nevada, the City of Reno, a municipal corporation, and the City of Sparks, a municipal corporation, as tenants in common, each as to a one-third (1/3) undivided interest, to change the place and manner of use of water heretofore appropriated under Claim No. 3 of the Orr Ditch Decree (or Truckee River Decree) and permit 70143, cert. 16815. TCID protests the application for the following reasons and on the grounds, to wit:

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1. The applicants seek to transfer water rights from 12.15 acres with an entitlement of 4.5 acre feet per acre, for a total annual duty of 54.675 acre feet per year. The Newlands Project Operating Criteria and Procedures ("OCAP") imposes requirements with respect to efficiency improvements involving conveyance efficiency. The granting of this transfer application would adversely impact conveyance efficiency and the ability to achieve the efficiency objectives and requirements, which will shift the burden to achieve these objectives on other water right owners within the District, and specifically those on the Truckee Division of the Project in violation of NRS 533.370(1)(b). This proposed transfer is located in the Swingle Bench area downstream of the Truckee Canal from Derby Dam. Approval of this transfer will adversely affect the cost of water to other water right owners within the District, lessen the District's efficiency in its delivery and use of the water, and may result in a decreased amount of water available to other water right owners because of efficiency requirements. Such results are against the public interest and, under N.R.S. 533.370, the State Engineer is required to disapprove and application if the proposed transfer may result in such additional costs or losses or lessen the efficiency of the district in its delivery or use of water.

2. Public Law 101-618 (November 16, 1990), and specifically § 209(b), purports to limit the increase of diversions of the Truckee River water to the Newlands Project. This transfer, if approved, will effectively transfer water from within the Newlands Project to instream flows outside of the Project. Accordingly, unless additional diversions are authorized, other users within the Truckee division of the Project will have to absorb the loss of additional water needed to meet efficiency requirements, particularly when losses due to delivery of water through the system, beginning at Derby Dam, are considered. The approval of this transfer also

will adversely limit the amount of water available for "return flow irrigation" which is encouraged under *United States v. Alpine*, 503 F. Supp. 877, 892 (D.C. Nev. 1980).

3. The applicants seek to transfer the full duty of 4.5 acre feet. If the application is granted, thus allowing the full duty transferred, there would be adverse consequences and impact with respect to "return flow irrigation," groundwater recharge and the downstream wetlands. At a minimum, if the transfer is approved over the protests herein cited, the amount of water should be reduced by the consumptive use requirements otherwise applicable to similar transfers of Newlands Project water rights, particularly in view of the fact that the transfer will effectively eliminate downstream return flows for the benefit of downstream users and wildlife preserves.

4. Under the Reclamation Act of June 17, 1902, and as decreed in the case of *United States v. Orr Water Ditch Co.* ("Orr Ditch Decree"), on September 8, 1944, Derby Dam and the Truckee Canal were established for the benefit of the landowners within the Newlands Project for irrigation, generating power, and supplying the inhabitants of cities and towns within the Project, including water for domestic and other purposes. The decreed water rights are appurtenant to lands within the Project. Under §209(a) of Public Law 101-618, the Project is to be operated and maintained for the purposes of municipal and water supply in Lyon and Churchill Counties, including the Fallon Indian Reservation, recreation, water quality and any other purpose recognized as beneficial under the laws of the State of Nevada. If this transfer is approved, the public interest will be violated in that the water so transferred will have a negative impact on groundwater sources relied upon by towns and municipalities within the Reclamation Project, will negatively impact flows to the wetlands and may adversely affect water quality.

5. The water rights sought to be transferred in this application are subject to the preexisting contractual rights and obligations as manifested in water right contracts entered into initially with the United States Bureau of Reclamation or TCID, and which are administered by TCID. The provisions of these contracts provide that the water available to the applicants' property is an allocable share of available water in any given irrigation year to all of the Project water users. Accordingly, in a water shortage irrigation season, the burden of the loss of the water proposed for transfer will have to be assumed by other users within the Project on a pro rata basis resulting in injury.

6. The Applicant Claims to have an agreement with TCID to pay the Operation and Maintenance fees associated with this water right (*see* Application Section 15). In the event that this transfer is approved, compliance with such an agreement should be made a condition of granting this change Application.

7. The applicants seek to transfer the water right to an instream use in the Truckee River to the Pyramid Lake inlet for wildlife purposes, or, in other words, for an *in situ* appropriation of water. There has been no showing in the present application that the Applicants have an interest in dedicating water to such instream use, nor a showing that this is a beneficial use of water that is under the control of the Applicants. *See e.g. State v. Morros*, 104 Nev. 709, 766 P.2d 263 (1988).

8. The application opens the possibility of parties other than the State of Nevada, including both municipalities and private parties, purchasing water and transferring and dedicating the waters of the State of Nevada to instream uses in perpetuity. At issue is whether such permanent dedication of the state's resources by parties other than the State of Nevada is in

the public interest. *State v. Morros*, 104 Nev. 709, 766 P.2d 263 (1988). Also at issue is whether any entity other than the Nevada State Legislature can dedicate water of the state for instream flow or *in situ* purposes.

9. Upon information and belief, the contracts for the purchase of the water contain certain deed restrictions. As a result of those restrictions, if, in the future, it is no longer beneficial to continue to put the subject water to instream uses, and a transfer of that water is sought, the water right at issue here cannot be transferred back to the original place of use to which it is appurtenant. Upon information and belief, this water right has not been called upon for many years to be placed to beneficial use due to the deed restrictions. Therefore, the Applicants have unlawfully “informally transferred” this water rights to the Truckee River without complying with the formalities of the State Engineer’s transfer procedures. This is not in the public interest.

10. The Newlands Project was the first reclamation project established under the Reclamation Act of 1902. Pursuant to that Act, the Bureau of Reclamation appropriated and set aside water from the Truckee and Carson rivers specifically for the use of settlers within the Newlands Project and specifically for agricultural and related purposes. (*See Claim 3 Orr Ditch Decree*, September 8, 1943). The water so appropriated and beneficially used within the Project is appurtenant thereto and is necessary and appropriate for purposes of properly managing the Project for the benefit of the users. The applicants herein are attempting to transfer those water rights for alleged beneficial use outside of the Project. The proposed transfer of these water rights for use outside the Project and for purposes other than those authorized, is prohibited.

11. The Federal Water Master is charged with administering the Orr Ditch Decree. This role involves managing many fixed demands on the river. Because the application proposes no limitations on the dates that the water rights could be exercised, this will impede the Federal Water Master's ability to effectively manage the river. Moreover, the water rights proposed for transfer were heretofore appropriated under Claim 3 of the Orr Ditch Decree and, therefore, these rights share the same priority date as many other vested rights pursuant to the Decree. No provision has been made should there be insufficient water to meet all of the demands. If the Application is granted and there is insufficient water to meet the demands, Applicants should be required to share in the shortfall; otherwise the result would be that the Applicants will enjoy what is tantamount to a senior priority date to the detriment of other water users in the Project.

12. During certain seasons in particular, unappropriated water remains in the Truckee River and flows to Pyramid Lake. No provision has been made in the Application to determine how that water will be accounted for or whether it will be used to satisfy the amount of water sought pursuant to the present Application. Further, no provision has been made in the Application to account for the amount of water used *in situ* which would satisfy Applicants' claims. The result, if the application is granted and Applicants call upon the water at times other than when additional unappropriated water is flowing to Pyramid Lake and do not account for the receipt of other water during other seasons, is a windfall to the Applicants at the expense of other water users. In short, Pyramid Lake will receive the "free water" in addition to water specifically called upon pursuant to the terms of the application at issue, and water users within the Project will be injured as a result of being required to absorb the loss of this additional water.

13. In view of the fact that this is an application for the permanent transfer of water which otherwise would be diverted at Derby Dam, under pre-existing contracts with the U.S.B.O.R. and/or TCID, a hydrological study and environmental impact study should be conducted pursuant to N.R.S. 533.368.

14. The water right at issue, if it is transferred to the Truckee River shall become subject to the restrictions of the Truckee River Agreement. Such agreement provides in Article VII that the right to the use of Diverted Flow in the Truckee River shall be allocated in accordance with subparagraphs (A)(1) and (2) of Article VII. These subparagraphs of the Truckee River Agreement provide for an allocation of water of Diverted Flow to TCID, Sierra Power Company (now the Truckee Meadows Water Authority) and the Washoe County Conservation District. However, in the event that certain waters are not needed by the Conservation District, then TCID has the right to divert and make use of such waters for its own purposes. Upon information and belief, Washoe County, and the Cities of Reno and Sparks are signatories to or successors to signatories to the Truckee River Agreement. As such they are bound by the terms of such agreement and any waters in excess of Diverted Flows, such as the water rights proposed for transfer here are subject to the provisions of Article VII, subparagraph (A)(1) and (2) of the Truckee River Agreement. Thus, any proposed transfers of water rights, if they are not being fully exercised for the purposes set forth in the Truckee River Agreement are subject to being diverted by TCID for its own purposes.

15. The transfer application provides only for the proposed transfer of water for instream use. However, the water right at issue was acquired as a result and in furtherance of the Truckee River Water Quality Settlement Agreement entered into by the

Applicants. The Water Quality Settlement Agreement and associated documents provide for the upstream storage and possible exchange of the water at issue, such that the water may never flow in the Truckee River as proposed by the Applicants. These additional uses are not revealed in the transfer application; however, they are uses which are nonetheless proposed and intended for the water at issue. Further, the water rights sought to be transferred here are to be subject to the proposed Truckee River Operating Agreement, which would allow for upstream storage and exchange of the subject water rights. Because Applicants failed to reveal all that they seek by way of this transfer application, the Application is defective on its face. Moreover, such additional uses of the water, including upstream storage of the water and exchange of the water, would as a practical matter, increase the availability of water to the Applicants to the detriment of other water users under Claim 3 to the *Orr Ditch Decree* and the public at large.

16. The Application as stated, would violate the *Orr Ditch Decree*, *U.S. v. Orr Water Ditch Co.*, Equity A-3, D. Nev., Sept. 8, 1944; the *Alpine Decree*, *U.S. v. Alpine Land and Reservoir Co.*, D-183-LDG, D. Nev., 1980; and the legal rulings in *Nevada v. U.S.*, 463 U.S. 110 (1983).

17. Application 76682 is similar in form and function to Application 70934 previously filed by the Applicants. Application 70934 is the subject of State Engineer's Ruling 5760, to which TCID retains interested party status. A Petition for Judicial Review and Request for Stay of State Engineer Ruling 5760 was filed by the City of Fallon on August 24, 2007, and is currently pending before the *Orr Ditch Court* (*United States v. Orr Water Ditch Co.*, Nevada District Court Case No. A-3-21-LDG). Because many of the protests points raised herein are the subject of appeal of Ruling 5760, and in

the interest of administrative economy and convenience, the State Engineer should wait to act on Application 76682 until the issues on appeal of Ruling 5760 are finally resolved.

18. If approved, in order to prevent injury to existing water rights, the amount diverted (either into storage or by direct diversion) should be restricted to deliveries during the irrigation season and 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.

19. If approved, in order to prevent injury to existing water rights, the water should be delivered at a constant rate of flow on a monthly schedule that is in approximate proportion to the historic Truckee Division diversions for that month.

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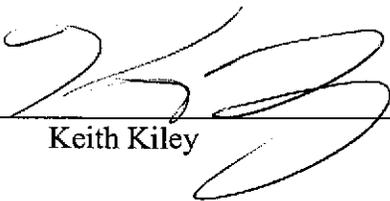
**CERTIFICATE OF SERVICE**

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 76682; PETITION FOR HEARING PURSUANT TO N.R.S. 533.365; PETITION FOR A HYDROLOGICAL 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 May 15, 2008 in San Francisco, California.

  
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Keith Kiley

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