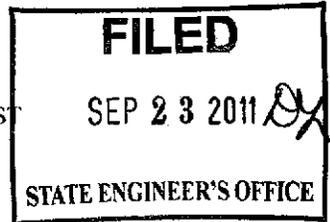


IN THE OFFICE OF THE STATE ENGINEER OF THE STATE OF NEVADA



IN THE MATTER OF APPLICATION NUMBER 80941
FILED BY TRI General Improvement District
ON June 29, 20 11

PROTEST

Comes now U.S. Bureau of Reclamation, Mid-Pacific Region

Printed or typed name of protestant

whose post office address is 2800 Cottage Way, MP-460, Sacramento, CA 95825-1898

Street No. or PO Box, City, State and ZIP Code

whose occupation is owner of Newlands Project facilities

and protests the granting

of Application Number 80941

, filed on June 29

, 20 11

by TRI General Improvement District

for the

waters of Truckee River

situated in Storey

an underground source or name of stream, lake, spring or other source

County, State of Nevada, for the following reasons and on the following grounds, to wit:

see attached

THEREFORE the Protestant requests that the application be

denied

Denied, issued subject to prior rights, etc., as the case may be

and that an order be entered for such relief as the State Engineer deems just and proper.

Signed

Donald R. Glaser

Agent or protestant

Donald R. Glaser, Regional Director

Printed or typed name, if agent

Address

Bureau of Reclamation, 2800 Cottage Way, MP-460

Street No. or PO Box

Sacramento, CA 95825

City, State and ZIP Code

(916) 987-5000

Phone Number

dglaser@usbr.gov

E-mail

Subscribed and sworn to before me this

22nd

day of

September

, 20 11



Jolene M. Conaty
Notary Public

State of California

County of Sacramento

RECEIVED
2011 SEP 23 AM 10:25
STATE ENGINEER'S OFFICE

+ \$25 FILING FEE MUST ACCOMPANY PROTEST. PROTEST MUST BE FILED IN DUPLICATE.
ALL COPIES MUST CONTAIN ORIGINAL SIGNATURE.

BACKGROUND

Application Number 80941, filed on June 29, 2011, purports to change the point of diversion, place and manner of use of Carson Division Newlands Project (Project) water rights under Claim 3 of the Orr Ditch Decree, yet it seeks to directly divert water out of an induction well adjacent to the Truckee River, approximately 3 miles upstream from Derby Dam, on an annual basis. The U.S. Bureau of Reclamation (Reclamation) makes several protests to this application, below, primarily predicated on the following: an application to change a right from Carson Division Newlands Project water to a direct diversion of Truckee River water upstream from Derby Dam must either maintain its character as a right to Newlands Project water, or it must be deemed a request for a new appropriation of direct flow of the Truckee River, and inappropriate for a change application.

The applicant, TRI GID, has obtained water rights originally granted by the United States to landowners within the Carson Division of the Project. Project water rights within the Carson Division of the Project are served primarily by Carson River water stored in and released from Lahontan Reservoir. While Carson River water stored in Lahontan Reservoir is comingled with water diverted from the Truckee River, the Truckee River water is merely a supplemental source of supply to the Carson Division, and Carson Division water rights are not entitled to Truckee River water each year. Yet, the applicant claims that all the water subject to this application comes from the United States' right to divert Truckee River water under Claim 3 of the Orr Ditch Decree.

As a Carson Division water right holder, the applicant has no annual entitlement to a fixed supply of Truckee River water. Under the Orr Ditch Decree, Claim 3, diversion of Truckee River water to Lahontan Reservoir is subject to beneficial use up to the maximum amount set by the water duties in Claim 3, thereby making the Truckee River a supplemental source of water to Project water rights in the Carson Division. Diversion of Truckee River water at Derby Dam for storage in Lahontan Reservoir may only occur when authorized by the Operating Criteria and Procedures (OCAP) for the Project, and when consistent with the decree in *Tribe v. Morton*, Public Law No. 101-618, and the doctrine of beneficial use. In addition, the rights obtained by the United States under Claim 3 are for direct diversion of the flow of the Truckee River at Derby Dam. The applicant has acquired rights to water which is stored and delivered by Project facilities to serve the Carson Division, not rights to directly divert from the Truckee River. While the Orr Ditch and Alpine Decree courts have recognized the primary jurisdiction of the Nevada State Engineer over applications to change the place of use, manner of use and point of diversion, this authority to administer such changes to Project water rights cannot be construed as the authority to convert a right to the stored waters of Lahontan Reservoir into a right to directly divert the flow of the Truckee River above Derby Dam.

The applicant, TRI GID, cannot be granted more rights under its change application than it purchased from Newlands Project water users. As stated above, Carson Division water right holders have no annual entitlement to Truckee River water. In addition, Newlands Project water users' rights are further defined by contracts with the United States and/or with the Truckee Carson Irrigation District (TCID). Two key distinctions between a standalone direct diversion

2011 SEP 23 AM 10:25
STATE ENGINEER
RECEIVED

U.S. Bureau of Reclamation Protest Grounds
TRI GID
Application No. 80941

right and rights to waters served by Project facilities are that Project water right holders are required to share shortages and do not take in relative priority to each other (i.e., all Project water rights share a common priority date), and all Project water users agree to pay operation and maintenance costs of the Newlands Project facilities, including major repairs.

The original contracts state as follows:

Now, therefore, be it known that, on presentation of this certificate to the Engineer of the U.S. Reclamation Service in charge of the Truckee-Carson Project, the said applicant shall be entitled to receive, subject to the payment of the annual charges for building, operation, and maintenance, three (3) acre feet of water per annum per acre of water per annum per acre of irrigable land herein described, or so much thereof as shall constitute the proportionate share per acre from the water supply actually available for the lands under said project: *Provided*, That the supply furnished shall be limited to the amount of water beneficially used on said irrigable land.

In addition, the Orr Ditch Decree states that diversion of Project water under Claim 3 is under such control, disposal and regulation as the United States may make or desire.

Reclamation protests Application No. 80941 on the grounds that it purports to give an annual Truckee River right to a Carson Division right-holder, and further purports to transform rights to Project water into rights to directly divert flow from the Truckee River. These changes go beyond a mere change in point of diversion, place of use or manner of use of a Newlands Project water right and instead alter the nature of the rights themselves. The Application is therefore improper and contrary to law on its face.

While Application Number 80941 seeks only to change approximately 22 acre feet annually, there is a companion application, Number 80942, which seeks to change approximately 65 acre feet annually, for a total of approximately 85 acre feet annually. While these initial applications are for a relatively small amount of water, Reclamation is concerned that the precedent established by these applications, if approved, would have serious ramifications to the United States' interest in Project water and facilities. Application 80941 proposes to divert Project water directly off the Truckee River, before it is diverted by the United States at Derby Dam. Yet, the application makes no reference to the mechanisms in place to enforce shared shortages, operation and maintenance fees, or any other federal law or regulation, on the applicant if the application is granted.

Reclamation hereby protests Application Number 80941 on the following grounds:

1. The applicant has purchased Carson Division rights essentially for stored water in Lahontan Reservoir, yet it purports to be entitled to direct diversion of Truckee River water on an annual basis. With respect to the Carson Division of the Newlands Project, the United States' rights to Truckee River water are supplemental and are only exercised in the event storage targets in Lahontan Reservoir (representing the needs of the Carson Division as a whole) are not met by Carson River inflow as required under OCAP, and all other rules and regulations determining

RECEIVED
2011 SEP 30 AM 10:25
STATE ENGINEER

U.S. Bureau of Reclamation Protest Grounds
TRI GID
Application No. 80941

Truckee River diversions are met. There is no cause to grant rights to use Truckee River water on an annual basis to a water right holder in the Carson Division. The application can, and should, be summarily denied on that basis.

The application proposes to separate the diversion of water between the Truckee and Carson Rivers based on the supposed long-term historic average supplies to the Carson Division of the Project. The data and underlying assumptions for the division of the water supplies were not provided. The actual division of the sources of water to Carson Division Project water rights in any given year are generally weighted more, or entirely, from the Carson River. Only in extremely dry years in the Carson River basin would the Carson Division receive more Truckee River water than Carson River water. Creating a fixed division of these water rights based on a long-term average, in any given year, would adversely impact either the Carson River or the Truckee River downstream of the diversion points depending on the actual supply for that year.

2. The applicant has purchased Carson Division rights to water supplied from storage in Lahontan Reservoir, and has identified the source of the water in its application as the Truckee River. The applicant proposes to move the diversion point approximately 3 miles upstream from Derby Dam. As stated above, a Carson Division right cannot be satisfied with an annual right to use Truckee River water. However, even if it could, the water subject to the change application should retain its character as rights to Project water, or should be considered an application for a new direct diversion from the Truckee River. A change application cannot transform rights to water conveyed and stored by Project facilities, which are derivative of the United States' right to directly divert flow of both of the Carson and Truckee Rivers, into an independent direct diversion right. The applications can, and should, be summarily denied on that basis.

3. The change application is really an application to obtain a new direct diversion off the Truckee River, yet the Truckee River is fully appropriated in Nevada, and should be denied on that basis.

4. If this is an application to change the place of use, point of diversion, and manner of use of Project water, essentially the stored waters in Lahontan Reservoir, the application has incorrectly identified the source of the water as the Truckee River, and should be denied on that basis. In the alternative, the applicant should be required to abide by all commitments and obligations applicable to its predecessors in interest and cannot use a change application to expand on the rights it has purchased. An example of the original rights granted to the stored waters of Lahontan, as well as a contract with the TCID to secure operation and maintenance fees are attached hereto as Attachments 1 and 2. In addition, the applicant would only be allowed to divert Truckee River water in those years when such diversion would be authorized under OCAP, and would only be allowed to divert in such quantities as the original Carson Division water right holder (minus any water due to a change in manner of use (water duty)).

5. Assuming the application is for a change in the diversion point, place of use and manner of use of the stored waters in Lahontan Reservoir, the application will adversely affect the cost of water for other holders of water rights in the district, contrary to NRS 533.370 1(b), and should be denied on that basis.

RECEIVED
SEP 23 AM 10:25
SANTA BARBARA COUNTY
WATER CONTROL OFFICE

6. Assuming the application is for a change to the use of the stored waters in Lahontan Reservoir, the application will impair the rights of other Newlands Project water right holders and should be denied on that basis.

A. The applications propose to move the point of diversion for these water rights to a location upstream of the existing point of diversion for the remainder of the Newlands Project water rights. During a year when all needs cannot be met on the river systems, this would allow the applicants to divert Truckee River water before it reaches Derby Dam, essentially providing for a higher priority right than the remaining Newlands Project water rights, causing increased impacts to the Newlands Project water rights. For this reason, the applications should be rejected. At a minimum, the applications should be required to be placed subject to the determination of shortage allocations by the United States and/or its operations and maintenance contractor for the Newlands Project (currently TCID).

B. The applications propose to change the season of use from the normal traditional irrigation season to a year-round season with no limitations. This will allow the applicants to potentially supply their water right much earlier (or later) in the year than the remaining Project water rights. In water short years, allocations to Project water rights are not normally determined until just before the beginning of the irrigation season based on predicted supply conditions from snowmelt runoff, and often change during the course of the season to reflect actual water supply conditions resulting from the snowmelt runoff. By taking water before (or after) the traditional irrigation season with no oversight, limitation, or regulation by the United States or TCID, the applicants may have the ability to take advantage of more of the supply of water in a water short year, thus avoiding sharing equally in shortage conditions with the other water rights of the Newlands Project. This will have the effect of further lessening the water supply available to other water rights of the Project, causing increased shortage to those rights. For these reasons, the applications should be rejected. At a minimum, the applications should be required to be placed subject to any and all shortage allocations or other allocation restrictions put in place by the United States and/or its operations and maintenance contractor for the Project (currently TCID).

7. Assuming the application is for a change to the use of the stored waters in Lahontan Reservoir, the application will increase diversions from the Truckee River, contrary to Public Law 101-618 Section 209(b), and should be denied on that basis.

(See, e.g., Paragraphs A. and B., above.)

8. Assuming the application is for a change to the use of the stored waters in Lahontan Reservoir, the application proposes to use Newlands Project water for M&I purposes in Storey County, Nevada, contrary to Public Law 101-618 Section 209(a)(1)(B) which authorizes M&I use only in Lyon and Churchill Counties, and should be denied on that basis.

9. The application would change water used for irrigation purposes to municipal purposes, yet the application purports to be entitled to the full duty as used for irrigation. Under the Alpine

STATE ENGINEERING DIVISION
2011 FEB 23 AM 10:25
RECEIVED

U.S. Bureau of Reclamation Protest Grounds
TRI GID
Application No. 80941

Decree, applicants may not transfer a full agricultural water duty from irrigation to a different purpose or manner of use. The applicant is not entitled to the full duty of the water as used for irrigation purposes and should be denied on that basis.

10. The United States holds an interest in the title to the water proposed to be changed in Application Number 80941, yet the applicant has not shown any approval by the United States to change the water use as described in the application, and should be denied on that basis.

RECEIVED
2011 SEP 23 AM 10:25
STATE ENGINEERS OFFICE

SERIAL 04488

409

CERTIFICATE OF FILING WATER RIGHT APPLICATION.

RECLAMATION ACT.

DUPLICATE

Certificate No. 04488

~~Truckee-Carson~~ Project.

DEPARTMENT OF THE INTERIOR,

U. S. LAND OFFICE AT Carson City, Nev

Nov. 17, 1900, 190

THIS IS TO CERTIFY that, pursuant to the provisions of the act of June 17, 1902 (32 Stat., 388), S. Rosenberg, of Fallon, Nevada, has filed application for Water Right (Form B-1) for * Farm Unit that part of S₁ NE₁ and S₁ NW₁ lying north of Fallon R.R. right of way in section 27, township 19 N, range 28 E.M.O. P. M., containing 78 acres of irrigable land of which 48 acres have vested right (or claimed so) in connection with homestead entry No. ~~XXXXXX~~, 190 .)

Now, therefore, be it known that, on presentation of this certificate to the Engineer of the U. S. Reclamation Service in charge of the TRUCKEE-CARSON Project, the said applicant shall be entitled to receive, subject to the payment of the annual charges for building, operation, and maintenance, three (3) acre feet of water per annum per acre of irrigable land herein described, or so much thereof as shall constitute the proportionate share per acre from the water supply actually available for the lands under said project: *Provided*, That the supply furnished shall be limited to the amount of water beneficially used on said irrigable land. (Assignee of 04312)

Louis. Cohn

Register.
 2011 SEP 23 AM 10:25
 RECEIVED
 STATE ENGINEERS OFFICE

* Where land is in private ownership, strike out the words "Farm Unit" and insert subdivisional description of land.

† Strike out, when application is made on Form B, for land in private ownership.

TRUCKEE-CARSON IRRIGATION DISTRICT
Newlands Irrigation Project

APPLICATION FOR PERMANENT WATER RIGHT

(For all lands except entries under the reclamation law.)

JUN 4 - 1947

(date)

1. IN PURSUANCE of the provisions of the act of June 17, 1902 (32 Stat., 888), and acts amendatory thereof or supplementary thereto, especially the act of August 9, 1912 (37 Stat., 265), and the act of August 13, 1914 (38 Stat., 686), all herein styled the reclamation law, and the rules and regulations established under said law, and the terms of that certain Contract between the United States of America and the Truckee-Carson Irrigation District, dated Dec. 18th, 1926, and subject to the conditions named in this instrument, application is hereby made to the TRUCKEE-CARSON IRRIGATION DISTRICT, herein styled District, by the UNDERSIGNED, herein styled Applicant, for a permanent water right for the irrigation of and to be appurtenant to all of the irrigable area now or hereafter developed under the above-named project within the tract of land described in paragraph 2.

2. Description of Land.—The land on account of which a water right is desired, contains a total of 305 acres, of which 223 acres are now classed as irrigable, and is more particularly described as follows:

Part of the South Half of the North Half south of S.P.R.R., the Northeast Quarter of the Southwest Quarter, the Northwest Quarter of the Southwest Quarter, part of the Southwest Quarter of the Southwest Quarter, Part of the Southeast Quarter of the Southwest Quarter of Section 27, The Southeast Quarter of the Northeast Quarter, the Northeast Quarter of the Southeast Quarter and part of the Northwest Quarter of the Southeast Quarter of Section 28, of which 170 acres are covered by prior water rights leaving 53 acres as shown in the following tabulation (being the difference between 66 acres irrigable in excess of water right in certain subdivisions and 13 acres of water right in other subdivisions in excess of the irrigable area thereof) covered by this water right, all in Township 19 North, Range 28 East, M.D.M.

Subdivision	Total Area	Irrigable Area	Present Water Right Vested	Water Right Applied	Water Right in Excess of Irrigable Area	Irrigable Area in Excess of Water Right	Corrected Water Right
Section 27							
Pt. S $\frac{1}{2}$ N $\frac{1}{2}$ south of S. P. R. R.	66	49	43	6			49
NE $\frac{1}{4}$ SW $\frac{1}{4}$	40	35	10				35
NW $\frac{1}{4}$ SW $\frac{1}{4}$	40	31	16				31
Pt. SW $\frac{1}{4}$ SW $\frac{1}{4}$	20	4					4
Pt. SE $\frac{1}{4}$ SW $\frac{1}{4}$	35	22					22
Section 28							
SE $\frac{1}{4}$ NE $\frac{1}{4}$	40	35	25	13	3		35
NE $\frac{1}{4}$ SE $\frac{1}{4}$	40	28	15	23	10		28
Pt. NW $\frac{1}{4}$ SE $\frac{1}{4}$	24	19	19				19
Totals	305	223	128	42	13	66	223

25
15
20
STATE ENGINEERS OFFICE
2011 SEP 23 AM 10:25
RECEIVED

(a) An annual operation and maintenance charge for operating and maintaining the irrigation system, and

(b) Cost of the Water Rights herein applied for in the sum of \$.....2862.00. (being53..... irrigable acres at \$54.00 per acre) to be paid at the times and in the manner following: The sum of \$.....21.55..... upon the execution of this contract, the receipt whereof is acknowledged by the District, and the remaining sum of \$.....2790.45. in not less than76..... equal semi-annual installments, which shall be placed upon the District assessment roll from year to year hereafter, the first and remaining installments of which shall become due and payable as and when and in the same manner as similar District assessments become due and payable as provided by law.

(c) If additional area of said land is hereafter found irrigable by the District, the applicant agrees to purchase water right therefor at the same rate per acre and under the same terms as herein specified for the above irrigable area.

5. The Applicant Agrees, at his own expense, to construct, according to plans and specifications and at locations approved by the District, whatever ditches and | or structures or other irrigation facilities may be required to deliver water to the above described lands. The District shall not be required to deliver water to said lands until such construction has been completed in a manner satisfactory to the District.

6. The Applicant hereby accepts, approves and adopts, and agrees to abide by, all and singular the terms, covenants and conditions of that certain contract between the United States of America and the District, dated December 18th, 1926.

7. Lien to Secure Payment of Water Charges.—For the purpose of securing payment to the District of the obligations, and each of them, described in paragraph 4, according to the conditions therein stated, a lien in favor of the District in the amount of the total obligation described in paragraph 4, is hereby created and made a charge upon all of the said land, both irrigable and nonirrigable, together with its privileges and appurtenances, including all water rights. Upon the failure of Applicant to pay when due any installment of charges described in paragraph 4, the District is empowered to foreclose the lien hereby created and sell said land to satisfy the obligation due the District.

8. Rights of Way—As a further consideration for said water right, the Applicant hereby grants, sells and conveys to the District, without claim or compensation on account thereof, the following rights of way:

(a) A right of access to and control over all ditches, gates, and other structures for the delivery of water to said land, now or hereafter placed upon said land.

(b) Rights of way and the right to locate same over and across said lands, of a maximum width of 100 feet, for all irrigation, drainage and power ditches, canals, flumes, and pipes, and for telegraph, telephone and electric transmission lines and other structures, now or hereafter necessary, in the opinion of the District, for the proper construction and operation and maintenance of said project. If said land was taken up under any of the public land laws subsequent to October 2, 1888, it is agreed that said land is subject to the Congressional right-of-way act of August 30, 1890 (26 Stat., 391).

9. Waste and Seepage Water.—The District reserves the right to collect for use on said project all waste and seepage water coming from said land. The Applicant releases the District, its officers, agents and employees from every claim for damage, direct or indirect, arising by reason of the presence of waste or seepage water on said land.

10. Land Transferred for Other than Agricultural Purposes.—Should said land or any portion thereof be transferred for a railroad, manufacturing or other nonagricultural purpose, then all of the charges described in paragraph 4, and the amount of any benefits apportioned by the District to said land, shall at

STATE ENGINEER
 2011 SEP 23 AM 10:25

once become due and payable, anything hereinbefore to the contrary notwithstanding, and upon payment thereof such area shall be eliminated from the irrigable area of the project and shall not thereafter be subject to the payment of operation and maintenance charges.

11. Remedies under Application Not Exclusive.—Nothing in this application contained shall be construed as in any manner abridging, limiting or depriving the District of any means of enforcing any remedy at law or in equity for the breach of any of the provisions of this application which it would otherwise have.

12. The Applicant affirms that his interest in said land is Fee Simple, as shown by an instrument recorded in the Records of Churchill County, Nevada, in Vol. 22 of Deeds, at Page 24 thereof and that the Applicant will cause his copy of this contract be recorded forthwith in the Records of said County.

13. Conditions of Application to be Continuing.—When used herein, the term "District" shall be construed to include its successors and assigns, and the term "Applicant" shall be construed to include the one or more persons executing this application, and their respective heirs, executors, administrators, and assigns. All of the within terms and conditions, in so far as they relate to said land, are, and each of them hereby is, made a charge upon said land to run with the title to same.

IN WITNESS WHEREOF, the Applicant has hereunto set his hand and seal on the date first above written.

Elma S. Shuey (Seal)
Elma S. Shuey

..... (Seal)
..... (Seal)

State of Nevada
County of Churchill

On this 4th day of June 1947 personally appeared before me, GEO. W. FORBES a Notary Public in and for the said County of Churchill, Elma S. Shuey known to me to be the person described in and who executed the foregoing instrument, who acknowledged to me that she executed the same, freely and voluntarily, for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal at my office in the County of Churchill, the day and year in this certificate first above written.

My Commission expires August 18 - 1950

Geo W Forbes
Notary Public in and for the County of Churchill, State of Nevada

RECEIVED
2011 SEP 23 AM 10:25
NOTARIAL OFFICE

APPROVAL BY THE DISTRICT

Approved and Accepted this 6th day of June by authority of the Board of Directors.

W. H. Emery
Project Manager Secretary

67612

Filed for record at the Request of
Truckee-Carson Irrigation Dist.

JUN 6 1947

at 38 min. past 4 o'clock P.M.,

and Recorded in Book 2 of

Vol. A Page 639

Records of Churchill County, Nev.

Gladys H. Dalbey
Recorder

Fee, \$ 4.50

VERIFIED

STATE ENGINEERS OFFICE

2011 SEP 23 AM 10:25

RECEIVED