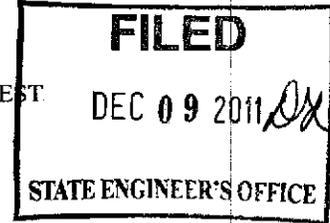


IN THE OFFICE OF THE STATE ENGINEER OF THE STATE OF NEVADA

IN THE MATTER OF APPLICATION NUMBER 80943  
FILED BY TRI General Improvement District  
ON June 29, 20 11



PROTEST

DEC 09 2011

Comes now Bureau of Reclamation

Printed or typed name of protestant

whose post office address is 705 N. Plaza St., Rm 327, Carson City, NV 89701

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 80943

, 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

*Kenneth L. Parr*

Agent or protestant

Kenneth L. Parr, Area Manager

Printed or typed name, if agent

Address

705 N. Plaza St., Rm 327

Street No. or PO Box

Carson City, NV 89701

City, State and ZIP Code

775-882-3436

Phone Number

kparr@usbr.gov

E-mail

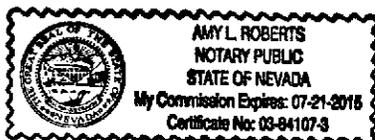
Subscribed and sworn to before me this

9th

day of

December

, 20 11



*Amy L. Roberts*  
Notary Public

State of

Nevada

County of

Carson

STATE ENGINEER'S OFFICE  
2011 DEC 9 AM 2:55  
PROTEST

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

## BACKGROUND

Application Number 80943, 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

U.S. Bureau of Reclamation Protest Grounds  
TRI GID  
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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:

The quantity of water to be furnished hereunder shall be that quantity which may be applied beneficially in accordance with good usage in the irrigation of the land described in paragraph 2: PROVIDED, That in case of a shortage at any time the amount to be furnished shall be an equitable proportionate share, as nearly as practical operations will permit, of the water actually available at the time for all of the area being watered from the same source of supply, such proportionate share to be determined by the project manager.

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. 80943 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 80943 seeks only to change approximately 78 acre feet annually, there is a companion application, Number 80944, which seeks to change approximately 233 acre feet annually, for a total of approximately 311 acre feet annually. There are also two similar applications filed concurrently, 80941 and 80942, for a total of approximately 88 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 80943 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 80943 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

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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 is attached hereto as Attachment 1. 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.

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

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TRI GID

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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 80943, 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.

Serial No. 622

**TRUCKEE-CARSON IRRIGATION DISTRICT**  
Newlands Irrigation Project

**APPLICATION FOR PERMANENT WATER RIGHT**

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

MAY 4 1946

(date)

(5-4-46)

1. IN PURSUANCE of the provisions of the act of June 17, 1902 (32 Stat., 388), and acts amendatory thereof or supplementary thereto, especially the act of August 9, 1912 (37 Stat., 265), and the act of August 18, 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 80 acres, of which 70 acres are now classed as irrigable, and is more particularly described as follows: N $\frac{1}{2}$ SW $\frac{1}{4}$  of which 2 acres are covered by water right leaving 68 acres covered by this application.

, Section 35, Township 20 N., Range 29 E. M. D. M.

3. Description of Water Right.—The quantity of water to be furnished hereunder shall be that quantity which may be applied beneficially in accordance with good usage in the irrigation of the land described in paragraph 2: PROVIDED, That in case of a shortage at any time the amount to be furnished shall be an equitable proportionate share, as nearly as practical operations will permit, of the water actually available at the time for all of the area being watered from the same source of supply, such proportionate share to be determined by the project manager. A plan of rotation shall be followed wherever, in the opinion of the project manager, it is practicable. If a measuring device is not installed at the point or points of delivery to the Applicant, the amount of water delivered shall be determined by the estimate of the project manager. In distributing and apportioning the water the project manager may take into consideration the character and necessities of the land. On account of drought, inaccuracy in distribution, or other cause, there may occur at times a shortage in the water supply, and while the District will use all reasonable means to guard against such shortages, in no event shall any liability accrue against the District or United States, or either of their officers, agents, or employees, for any damage direct or indirect arising therefrom.

4. Agreement to Pay Water Charges.—The Applicant hereby agrees to pay to the District the charges now and hereafter assessable against said land on account of said water right, and an equitable proportion of any charges that may become due from the District to the United States under the terms of their said Contract dated Dec. 18th, 1926, together with any penalties for delinquency that may accrue, as provided by law and by the regulations, orders, rules and by-laws now or hereafter adopted by the District, such payments to be made in the manner, at the times, and subject to the conditions provided by said law, regulations, rules and by-laws, which charges are as follows:

(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 \$...3672.00 (being 68..... irrigable acres at \$54.00 per acre) to be paid at the times and in the manner following: The sum of \$...91.80..... upon the execution of this contract, the receipt whereof is acknowledged by the District, and the remaining sum of \$...3580.20.. in not less than 78..... 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

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. 25 of Deeds, at Page 88 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.

*Paul P. Conlan* (Seal)  
Paul P. Conlan (Seal)  
(Seal)

State of Nevada }  
County of Churchill } ss.

On this 4 day of May, A. D. one thousand nine hundred and forty-six, personally appeared before me, W. Wood a Notary Public in and for the said County of Churchill known to me to be the person described in and who executed the foregoing instrument, who acknowledged to me that he 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 \_\_\_\_\_, the day and year in this certificate first above written.

*W. Wood*  
Notary Public in and for the County of Churchill, State of Nevada

My Commission expires March 20, 1948

APPROVAL BY THE DISTRICT

Approved and Accepted this 4th day of May, 1946, by authority of the Board of Directors.

*H. D. Emery*  
Project Manager. Secretary

65455

Filed for record at the Request of  
Walter Campbell  
April 6 1946

of 14 min. part 10 of block A.M.  
and Recorded in Book 2 of  
W. 2 Page 567

Receipts of Chryshell Coyne, Nov.  
Paul J. Jule Sheriff  
Recorder

Fee \$ 3.95

VERIFIED