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

IN THE MATTER OF APPLICATION NUMBER 80944
FILED BY TRI General Improvement District
ON June 29, 20 11

PROTEST

FILED
DEC 09 2011
STATE ENGINEER'S OFFICE

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 80944, filed on June 29, 20 11

by TRI General Improvement District for the

waters of Carson River situated in Lyon
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

AMY L. ROBERTS
NOTARY PUBLIC
STATE OF NEVADA
My Commission Expires: 07-21-2015
Certificate No: 03-84107-3

State of Nevada
County of Carson

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

U.S. Bureau of Reclamation Protest Grounds
TRI GID
Application No. 80944

BACKGROUND

Application Number 80944 purports to request a change to the point of diversion, place and manner of use of Carson Division Newlands Project (Project) water rights under the Alpine Decree, yet it seeks to divert water out of an induction well which appears to be situated within the high water mark of Lahontan Reservoir, upstream from Lahontan Dam. While such an induction well may be diverting water which has been diverted and stored by Lahontan Dam and Reservoir, because the applicant would not be re-diverting reservoir releases but directly diverting from the reservoir pool upstream from the dam, if the applicant's diversions are unregulated by federal Newlands Project water rules, the applicant's diversions would affect the Newlands Project water supply as if it were an upstream direct diversion of Carson River water. 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 diversion of Carson River water upstream from Lahontan 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 Carson 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. This water is a comingled supply with Truckee River water, which is diverted to Lahontan Reservoir as a supplementary source for serving Carson Division water rights.

The applicant, TRI GID, cannot be granted more rights under its change application than it purchased from Newlands Project water users. 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 diversion 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, Newlands Project water rights are regulated by state and federal case law, statutes and regulations, including *Tribe v. Morton*, Public Law No. 101-618, and the Newlands Operating Criteria and Procedures (OCAP), 43 CFR § 418.1 *et. seq.* Reclamation hereby protests Application Number 80944 on the following grounds:

1. 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 Carson River water only. The applicant proposes to move the diversion point above Lahontan Dam to an induction well which appears to be situated below the high water mark of Lahontan Reservoir. 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 diversion from the Carson River, because that would be how the diversion of this water would affect supplies to the Newlands Project downstream if unregulated by the same rules governing the Newlands Project. 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.

2. The applicant has purchased Carson Division rights essentially for stored water in Lahontan Reservoir representing a comingled supply from the Carson and Truckee Rivers, yet it purports to be entitled to divert only Carson River water on an annual basis. With respect to the Carson Division of the Newlands Project, the United States holds rights to supplement stored Carson River water with water from the Truckee River 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. The diversion of this supplemental supply is governed by the Newlands OCAP, as well as other rules and regulations. There is no cause to grant rights to use only Carson River water to a single water right holder in the Carson Division. The application can, and should, be summarily denied on that basis.

The application, taken in conjunction with the companion application number 80943, 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. However, in extremely dry years in the Carson River basin, the Carson Division may well 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.

3. The change application, absent applicable federal rules and regulations, would have the same effect as an application to obtain a new direct diversion off the Carson River, yet the Carson 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 Carson 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 and 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 Carson River water 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 application proposes 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, and will not divert reservoir releases, but take directly from the reservoir. During a year when all needs cannot be met on the river systems, this would allow the applicants to divert water before it reaches and/or is released from Lahontan 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 application should be rejected. At a minimum, the application should be required to be 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 could increase diversions from the Truckee River, contrary to Public Law No. 101-618 Section 209(b) and 43 CFR § 418.17 and should be denied on that basis.

The point of diversion is an induction well which appears to derive its supply from Lahontan Reservoir. The reservoir provides storage for a comingled volume of water, with supplies from both the Carson and Truckee Rivers. The application purports to transfer the "Carson River" portion of the Newlands Project water right, but by taking water from Lahontan Reservoir, would actually derive some of its supply from the Truckee River. When taken in conjunction with the water applied for under Application 80943, this would have the effect of increasing the demand on the Truckee River supply beyond that of the original Carson Division water right. These applications, together, would essentially provide the applicant with two opportunities to extract water from the Truckee River.

(See, also *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 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 80944, 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.

11. The United States owns the land upon which the applicant proposes to construct an induction well. This land is also under a management agreement with the State of Nevada. The applicant has not obtained approval for access to this land from either entity, and the application 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 (5-4-46)

(date)

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 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 80 acres, of which 70 acres are now classed as irrigable, and is more particularly described as follows: N½SW¼ 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 of 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 maintenace 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 forclose 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 follwing 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, J. M. Moore a Notary Public in and for the said County of Paul P. Conlan 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.

J. M. Moore
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. W. Emery
~~Project Manager~~. Secretary

65455

Filed for record at the Request of
Pat Emery
JAN 6 1946
at 14 min. past 10 o'clock A.M.,
and Recorded in Book 2 of
W. A Page 567
Records of Churchill County, Nev.
Charlotte Jewel Sanford
Recorder
Fee, $ 3.95

VERIFIED