

IN THE MATTER OF APPLICATION 25765)
FILED TO APPROPRIATE THE WATERS OF)
LAKE TAHOE FOR MUNICIPAL PURPOSES)
IN WASHOE COUNTY, NEVADA.)

RULING

GENERAL

Application 25765¹ was filed by the Incline Village General Improvement District on August 17, 1970, to appropriate 10.0 c.f.s. of water from Lake Tahoe for municipal purposes. The point of diversion is described as being in Lot 1 (extended South in the NW1/4 SW1/4) Section 16, T.16N., R.18E., M.D.B.&M. The place of use is described as all of Sections 1, 2, 3, 9, 10, 11, 13, 14, 15, 16, 17, 21, 22, 23 and 24; S1/2 Section 8; W1/2, W1/2 E1/2 Section 12; E1/2 Section 18, T.16N., R.18E., M.D.B.&M. The period of use is from January 1st to December 31st of each year. The application further indicates an annual duty limitation of 7250 acre-feet.

Application 25765 was timely protested¹ on September 21, 1970, by the United States of America on the following grounds:

"The proposed appropriation will result in injury to the United States as follows: By reducing the quantity of water stored in Lake Tahoe thus impairing the water supply and yield of Lake Tahoe to the United States and water users obtaining their supplies under rights held by the United States.

The United States claims a right to the use of water from Lake Tahoe, which right is based upon: Notice posted on May 21, 1903; United States appropriative rights to the storage in the use of Lake Tahoe waters confirmed by Decree of June 4, 1915, in the District Court of the United States, Northern District of California, Second Division, in the case of The United States of America v. The Truckee River General Electric Company; and Truckee River Decree entered September 8, 1944, in the District Court of the United States in and for the District of Nevada in the case of United States of America v. Orr Water Ditch Company, et al.

The extent of present and past use of water by the United States from Lake Tahoe is as follows: Substantial quantities are made

¹ Public record in the office of the State Engineer.

available by releases from Lake Tahoe for downstream diversion from the Truckee River and beneficial use by beneficiaries of the Truckee Storage, Newlands and Washoe Projects.

The United States' diversion point is located within the NW1/4 of NE1/4 of Section 7, T.15N., R.17E., M.D.B.&M.

WHEREFORE the United States prays that any permit issued on Application 25765 be conditioned as follows: 'Permittee is hereby put on notice that because this permit is junior in priority to all other water rights in the Lake Tahoe and Truckee River Basins, including those of the Pyramid Lake Paiute Tribe of Indians, existing as of August 17, 1970 (the date of filing of Application 25765), the water available might be less than the full amount stated herein if the allocation of water of the Tahoe Basin of Nevada under California-Nevada Compact or under a decree of a court of competent jurisdiction is inadequate to satisfy all rights of senior priority in Nevada'."

Application 25765 was timely protested¹ on October 7, 1970, by the Pyramid Lake Paiute Tribe on the following grounds:

"PROTEST TO APPLICATION 25765 AND TO ANY OTHER APPLICATION TO APPROPRIATE WATER IN THE TRUCKEE RIVER BASIN

Dear Mr. Westergard:

Reference is hereby made to the above application and to any other application to appropriate water within the Truckee River Basin. This letter will serve as a formal protest by the Pyramid Lake Paiute Tribe for all such applications upon the following grounds:

1. There is no unappropriated water remaining in the Truckee River Basin, rather the water in the Truckee River Basin has been over appropriated pursuant to the Winters Doctrine granting Indian tribes sufficient water to maintain a viable economy of their Indian reservations from appurtenant waters, in this case the Truckee River, and the Pyramid Lake Paiute Tribe located at the Pyramid Lake Paiute Indian Reservation at the end of the Truckee River. Winters v. United States, 207 U.S. 564 (1908).

Further, you will note that pursuant to the various decrees that have purportedly appropriated water from the Truckee River Basin including Lake Tahoe that there has been appropriated more than twice as much water as the water shed develops. See United States v. Orr Water Ditch Co., No. 83 (D. Nevada 1944) and other related decrees.

2. The protestant, the Pyramid Lake Paiute Tribe, would suffer injury from the approval of the above application since every drop of water taken out of the Truckee watershed upstream from the Tribe's Reservation causes a corresponding drop in the Tribe's lake which renders it unstable and too salty for development to provide the Tribe with the proper economy to which it is entitled.

3. The basis of the Pyramid Lake Paiute Tribe's water rights is the Winters Doctrine as articulated by the United States Supreme Court is the case of Winters v. United States, 207 U.S. 564 (1908); and other methods of making a viable economy by Indians, such as fishing which would be applicable to the Pyramid Lake Tribe. Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918).

4. From time immemorial and before the whiteman came to this country the Pyramid Lake Paiute Tribe used all of the waters developed in the Truckee River watershed including Lake Tahoe to provide a fishery to feed all the Indians of northern Nevada and California. Since the coming of the whiteman in the late 19th century waters developed in the Truckee River watershed have been illegally diverted away from the Tribe despite the Winters Doctrine; and this unlawful diversion has resulted loss in the economy of the Pyramid Lake Tribe, namely, the said fishery. However, it has been demonstrated within the past year that the fishery can be revived if the Indians are allowed to have at least 350,000 acre feet to 375,000 acre feet of water per year from the Truckee River watershed to maintain their lake. Further, their fishery economy could be supplemented by a recreation economy which

the United States Government, Department of Interior, Bureau of Outdoor Recreation says has the highest recreation potential of any lake in Northern Nevada and California. 1969 Report of the Bureau of Outdoor Recreation, page 14.

As stated above this protest can be considered a formal protest to all applications for water appropriations in the Truckee River watershed presented to your office."

FINDINGS OF FACT

I.

EXISTING WATER RIGHTS HELD BY THE APPLICANT

Incline Village General Improvement District, hereinafter referred as IVGID, holds the following water rights¹ for municipal and quasi-municipal use within the place of use set forth under each right.

<u>PERMIT NO.</u>	<u>SOURCE</u>	<u>ACRE-FEET</u>	<u>TOTAL DUTY PER YEAR MILLION GALLONS</u>
19393*	Underground	3.36	1.095
40509*	Mill Creek	27.50	8.961
40510*	Lake Tahoe	390.60	127.100
40512*	Lake Tahoe	1250.00	407.314
40514*	Incline Creek	1447.94	471.813
40515*	Lake Tahoe	See 40512	
43042*	Lake Tahoe	<u>0.50</u>	<u>0.163</u>
	TOTAL	3119.36	1016.446
**42945*	Lake Tahoe	<u>7.84</u>	<u>2.555</u>
	GRAND TOTAL	3127.20	1019.001

*Permit to change an earlier right.¹

** Owned by North Lake Property Owner Association but served through Incline Village General Improvement District facilities. Water to be used on specific lots in North Lake Subdivision.¹

II.

CALIFORNIA-NEVADA INTERSTATE COMPACT

The California-Nevada Interstate Compact was ratified by the California Legislature on September 19, 1970, and the Nevada Legislature on March 5, 1971. Congressional consent is presently pending. Article V (d) of the compact provides for the allocation of water between the states of California and Nevada within the Lake Tahoe Basin as follows:

"D. Upon construction of the overflow weir provided for in Section B of this article, the total annual gross diversions for use within the Lake Tahoe Basin from all natural sources including ground water and under all water rights in said basin shall not exceed 34,000 acre-feet annually, of which 23,000 acre-feet annually is allocated to the State of California for use within said basin, and 11,000 acre-feet annually is allocated to the State of Nevada for use within said basin. After use of the water allocated herein, neither export of the water from the Lake Tahoe Basin nor the reuse thereof prior to its return to the lake is prohibited. This allocation is conditioned upon the construction of the overflow weir; however, it is recognized that there may well be a period of time between the effective date of the compact and the construction of the overflow weir; during that period of time both states shall be permitted to use waters within the Lake Tahoe Basin subject to the same conditions, both as to place of use and amounts of use, as are provided in this Article V."

Article III (A) further provides:

"Each State shall have jurisdiction to determine, pursuant to its own laws, the rights to the use of waters allocated to it herein; provided, however, that the right to use such water shall be limited to such quantities of water as shall reasonably be required for the beneficial use to be served and shall not extend to the waste or unreasonable use of water. Such provision shall not be construed to affect the water rights laws of either state with respect to any waters, other than the waters allocated to the state hereunder. Each state will recognize and accept applications for such permits, licenses or other permissions as are required by the law of the state where

the application is filed to enable the other state to utilize water allocated to such other state. This provision shall neither require nor prohibit the United States of America from complying with provisions of state law relating to the appropriation of water allocated to the states by this compact."

Water use inventories² compiled by the State Engineer's office for the Tahoe Basin indicate diversions are not exceeding the Nevada allocation under the pending compact.

<u>Study Year</u>	<u>Total Use (AC-FT)</u>
1965/1966	3,268.7
1966/1967	3,473.0
1967/1968	4,147.6
1968/1969	4,443.9
1969/1970	4,589.2
1970/1971	5,124.6
1971/1972	5,624.9
1972/1973	5,689.0
1973/1974	5,693.4
1974/1975	5,920.1
1975/1976	5,904.9
1976/1977	5,646.6
1977/1978	6,150.8
1978/1979	6,725.5
1979/1980	6,832.2
1980/1981	7,252.0
1981/1982	6,813.2

IV.

DIVERSIONS AND WATER DEMAND

Several factors will control and/or affect future diversions of water within the Lake Tahoe Basin for development. There are land acquisition programs in effect, specifically, the Santini/Burton Act and the California bond issue which provide substantial funding for acquisition of sensitive lands. The Tahoe Regional Planning Compact under one of its Key provisions

² Public record in the office of the State Engineer. The data collected in the inventories included a) the source of water; b) the amount of water used, determined from metered service or best estimate; c) the place and manner of use; d) the character of the water right; e) the number of dwellings or persons served; f) population estimates and/or projections where available; g) current owner of water right; h) details of water use by discussion with user.

is mandated to establish threshold carrying capacities for the basin. This provision states:

"In order to enhance the efficiency and governmental effectiveness of the region, it is imperative that there be established a Tahoe Regional Planning Agency with the powers conferred by this compact including the power to establish environmental threshold carrying capacities and to adopt and enforce a regional plan and implementing ordinances which will achieve and maintain such capacities while providing opportunities for orderly growth and development consistent with such capacities."

The membership and voting procedures of the Tahoe Regional Planning Agency are carefully structured to assure strict compliance with this statutory directive. The land use and implementation elements of a final plan will provide the goals and public policy direction for the Tahoe Basin as a whole.

The U.S. Forest Service in implementing the provisions of the Santini/Burton Act has made significant progress and success in acquisition of sensitive lands within the basin and the service area of IVGID.³

V.

PROTEST OF THE UNITED STATES

The protest of the United States is based on its claim of right of use of water from Lake Tahoe, primarily storage in and use of water from the lake. The protest prays that any permit issued under Application 25765 be conditioned and expressly issued subject to existing rights. The doctrine of prior appropriation is the basic foundation of Nevada Water Law and any permit issued under Application 25765 would necessarily be subject to prior and existing rights. It should be noted that the U.S. Supreme Court in a recent decision⁴ reaffirmed the finality of the decree referred to in the protest.

³ Information submitted to the State Engineer by IVGID and public record in the office of the State Engineer.

⁴ Nevada vs. United States et al., _____ U.S. _____, 77 L Ed 2nd 509, 103 S. Ct. _____, June 24, 1983.

VI.

PROTEST OF THE PYRAMID LAKE PAIUTE TRIBE

The protest of the Tribe is primarily based on its claim to a Winters Doctrine right to maintain a fishery on the Truckee River and sufficient water to maintain the level of Pyramid Lake at the terminus of the Truckee River system. This claim was the primary cause of action in the U.S. Supreme Court decision referred to previously.⁴ The Supreme Court rejected the Tribe's claim for additional water and reaffirmed the finality of the existing Truckee River decree.

CONCLUSIONS

I.

The State Engineer has jurisdiction in this matter pursuant to the provisions of NRS Chapter 533.

II.

The total annual gross diversions under existing rights do not equal or exceed 11,000 acre-feet in the Nevada portion of the Lake Tahoe Basin allocation as set forth in the pending California-Nevada Interstate Compact.

III.

The protest to Application 25765 by the United States of America can be upheld to the extent that a permit can be issued subject to existing rights.

IV.

The protest to Application 25765 by the Pyramid Lake Paiute Tribe can be overruled based on the decision⁴ of the U.S. Supreme Court in Nevada and based on a finding that the granting of a permit under Application 25765 will not affect prior and existing rights nor be detrimental to the public interest and welfare with conditions consistent with the goals and public policy direction adopted by the Tahoe Regional Planning Agency.

V.

The duty of water and rate of diversion approved under Application 25765 necessarily must be limited to only sufficient water to allow buildout under presently approved development and consistent with Tahoe Regional Planning Agency approval.

VI.

Application 25765 can be approved with the following terms and conditions:

1. The total combined annual duty of water under Application 25765 and Permits 19393, 40509, 40510, 40512, 40514, 40515, 43042 and 42945¹ shall not exceed 3,904.2 acre-feet.
2. The annual duty of water shall not exceed 777.0 acre-feet.
3. With the express understanding that approval is subject to the terms and conditions and final allocation of water to the State of Nevada under the pending California-Nevada Interstate Compact.
4. With the express understanding that the beneficial use of the amount of water granted herein is subject to development approval by the Tahoe Regional Planning Agency within the place of use under Application 25765. Should action by the Tahoe Regional Planning Agency eliminate or reduce the requirement of IVGID to provide water service to the properties within the place of use or service area of IVGID, the State Engineer may reduce the amount of water or cancel Permit 25765 consistent with this action. The State Engineer shall provide written notice to IVGID or any successor in interest of intent to reduce the amount of water granted therein or intent to cancel Permit 25765. IVGID or any successor in interest shall then have 30 days from the date of said notice to request a public hearing before the State Engineer for the purpose of presenting any additional information, evidence or testimony prior to action by the State Engineer.
5. The amount of water granted under Application 25765 is based upon information³ submitted to the State Engineer's office by IVGID representing the estimated water needs of IVGID consistent with anticipated Tahoe Regional Planning Agency approval as follows:

INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT
Water Needs Summary
As of October 1, 1983

Water Produced - 12 Months Ending 9/30/83				2624.0 AF
Will-Serve Commitments:				
McCloud Condos:	224 Units	0.34 AF/Year/Unit	= 76.2 AF	
Bitterbrush:	185 Units	0.34 AF/Year/Unit	= 62.9 AF	
3rd Creek Condos:	155 Units	0.34 AF/Year/Unit	= 52.7 AF	
Nevada Lodge Expansion:			= 30.0 AF	
Tahoe Mariner Expansion:			= 35.0 AF	256.8 AF
Estimated Need for Residential Build Out (1) (4)				
Single Family:	1324 Units	0.56 AF/Year/Unit (2)	=741.4 AF	
Multiple:	556 Units	0.34 AF/Year/Unit	=189.0 AF	930.4 AF
Additional Commercial:	10% of Residential Build Out Requirement			<u>93.0 AF</u>
Total Estimated Water Need				3,904.2 AF
Currently Permitted Water Rights				3,127.2 AF
Additional Water Right Required				777.0 AF

- (1) Per Alternative 2 & 3 T.R.P.A. Plan
- (2) Equates to 500 GPD/Unit
- (3) Equates to 300 GPD/Unit
- (4) Excludes 44 lots acquired by Forest Service plus 30 lots being considered for acquisition by Forest Service

6. With the express understanding that the approval is subject to the final disposition and determination under the action titled State of Nevada vs. United States, et al., pending before the Federal District Court for the State of Nevada.⁵

7. The rate of diversion shall not exceed 3.0 c.f.s.

⁵ The Pyramid Lake Paiute Tribe of Indians has petitioned the Federal District Court to amend its original complaint in Nevada vs. United States et al. (No. 81-2245, 81-2276, 82-38). The matter is presently pending before the Court.

RULING

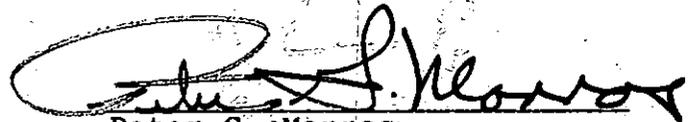
The protest to the granting of Application 25765 is upheld to the extent that the approval of Application 25765 is subject to prior and existing rights.

The protest to the granting of Application 25765 by the Pyramid Lake Paiute Tribe is overruled on the grounds that there is unappropriated water at the source consistent with the State of Nevada's allocation under the pending California-Nevada Interstate Compact and on the grounds that the claim of prior right sought by the protestant has been determined by the U.S. Supreme Court⁴ and further on the grounds that the granting will not adversely affect prior or existing rights on the source or be detrimental to the public interest and welfare.

Application 25765 will be approved upon receipt of the statutory permit fees and subject to the following terms and conditions:

1. Subject to the terms and conditions under Conclusion VI, 1 through 7.
2. Subject to the prior and existing rights on the source.
3. IVGID will submit to the State Engineer an annual water use budget or inventory detailing the commitment and usage described under the water needs summary for the purpose of establishing the limit and extent of beneficial use.
4. Totalizing meter(s) shall be installed at the point of diversion and accurate measurements of all water diverted will be submitted to the State Engineer on an annual basis or as deemed required by the State Engineer.

Respectfully submitted.



Peter G. Morros
State Engineer

PGM/bl

Dated this 27th day of

MARCH, 1984.