

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

IN THE MATTER OF APPLICATION 65075)
FILED CHANGE THE POINT OF DIVERSION)
OF A PORTION OF THE PUBLIC WATERS)
OF THE EAST FORK OF THE CARSON RIVER)
LOCATED WITHIN THE CARSON VALLEY)
HYDROGRAPHIC BASIN (105), DOUGLAS)
COUNTY, NEVADA.)

RULING

4952

GENERAL

I.

Application 65075 was filed on April 22, 1999, by Dangberg Holdings Nevada LLC to change the point of diversion of 540.55 acre feet of water of the East Fork of the Carson River and tributaries previously appropriated under Claim Numbers 815 and 816 of the Alpine Decree¹ for storage purposes. The proposed point of diversion is described as being located within the NW¼ SE¼ of Section 10, T.11N., R.20E., M.D.B.&M. The existing point of diversion is described as being located within the SE¼ SE¼ of Section 23, T.12N., R.20E., M.D.B.&M.²

II.

Application 65075 was timely protested by Carson Valley Conservation District ("CVCD") on the following grounds:²

After reviewing said application we feel it to be incomplete. It does not state the priority of the water in question, and furthermore a map was not submitted with the application. This data may allow the CVCD to make an educated decision about the application. Otherwise we feel the vagueness of the application could be used to violate, or at least reopen the Alpine Decree. The Alpine Decree is an essential document in preserving and protecting water rights, and any change would be detrimental to the community as a whole.

¹ Final Decree, U.S. v. Alpine Land and Reservoir Co., Civil No. D-183 (D.Nev.1980) ("Alpine Decree").

² File No. 65075, official records in the office of the State Engineer.

III.

Application 65075 was timely protested by Settlemeyer Ranches Inc. on the following grounds:²

This application is incomplete, a map was not submitted. In June of 1928 Arnold and Charlotte, [sic] Settlemeyer purchased by deed a tract of land, book S, p 432, #1372. It states, "Together with all water and water rights, ditches and ditch rights appurtenant thereto or used in conjunction therewith. Furthermore by historic and customary use my corporation [sic] has used a portion of the storage water and the 1/3 of the Carson River. Settlemeyer Ranches Inc. water rights may be damaged by the approval of said application.

IV.

The protest by Carson Valley Conservation District was conditionally withdrawn by letter dated October 22, 1999.² The board agreed to withdraw its protest using the wording: "That the waters diverted from Indian Creek into Mud Lake be measured, also the return flow back to Indian Creek from Mud Lake be measured to insure that the water will be returned to the East Fork of the Carson River. In addition the water will still be used as it has been historically used for agricultural purposes. If these conditions are not met then the CVCD protest is still valid and in effect."

V.

A public administrative hearing in the matter of the protest to Application 65075 was held on May 23, 2000, in Carson City, Nevada, before the State Engineer.³

FINDINGS OF FACT

I.

Claims 815 and 816 were confirmed in the Alpine Decree for the storage of waters from the East Fork of the Carson River in

³ Transcript, public administrative hearing before the State Engineer, May 23, 2000 (Hereinafter "Transcript").

Allerman Reservoirs #1, #2 and #4. The State Engineer finds that the decreed place of use under these claims is not specific and is defined in general terms as to the lands of the decreed owners.

II.

Application 65075 was filed to change the point of diversion of a portion of Claims 815 and 816 of the Alpine Decree.¹ The described proposed point of diversion is the decreed diversion into Mud Lake from Indian Creek⁴ a tributary to the East Fork of the Carson River. The existing point of diversion is described as being the Allerman Canal a diversion directly from the East Fork of the Carson River. Neither the proposed or existing points of diversion were described by a bearing and distance tied to a permanent land monument. The office of the State Engineer accepts points of diversion as they are described in the Alpine Decree. The State Engineer finds that Application 65075 was submitted in a full and complete manner and that the applicant has provided sufficient information for him to make a determination on the merits of the application.

III.

The protestant testified that his only question on the application was that he did not know how the water was to return from Mud Lake to Indian Creek.⁵ The agent for the applicant testified that he had sent a letter to the State Engineer, indicating that the applicant intended to pump the water from Mud Lake Reservoir to Indian Creek to flow into the East Fork of the Carson River so that an equivalent amount of water could be diverted at the Allerman Canal to irrigate the lands historically irrigated by the water stored under Claims 815 & 816 of the Alpine

¹ Claim 463 in the Alpine Decree allows for water to be diverted from the West Fork of the Carson River through the Millich ditch to Indian Creek and redirect it from Indian Creek to Mud Lake for storage during the winter. Also see Claims 814 and 814a for storage volumes and priority dates.

⁵ Transcript, p. 71.

Decree.⁶ Applications made to the State Engineer for storage purposes are not required to indicate how the water is going to be conveyed to the beneficial use after the water is released from storage. The State Engineer finds that the application provided the information that the State Engineer requires for an application for storage purposes.

IV.

In the State of Nevada, a water right placed to beneficial use is considered real property, and as such the transfer of title must be accomplished by deed specifying its transfer if it is not appurtenant to the specific property.⁷ The deed recorded on behalf of the predecessor of the protestant in Douglas County under Book S, p. 432, #1372 does not describe the reservoir rights in the property to be transferred. The 11th Partial Report of the Special Master for the pending Alpine Decree by John V. Mueller, filed on March 27, 1950, indicates that in testimony in the Alpine Decree case that the reservoirs are used exclusively for the Dangberg Company. The ownership for Claims 815 and 816 of the Alpine Decree shown in the office of the Federal Water Master is Dangberg Holdings LLC.⁸ The records of the office of the State Engineer reflect that Dangberg Holdings LLC is current owner of Claims 815 and 816 of the Alpine Decree.⁹ The State Engineer finds that the protestant does not have any title to the right to the storage waters of Claims 815 and 816 of the Alpine Decree.

V.

The waters established under Claims 815 and 816 are to be stored in Allerman Reservoirs #1, #2 and #4. By letter dated

⁶ Transcript, p. 17.

⁷ Carson City v Lompa, 88 Nev. 541,501 P.2d 662(1972); In re Application of Filippini, 66 Nev. 17,22,202 P.2d 535 (1949) (A right to use water has become fixed either by actual diversion and application to beneficial use or by appropriation, according to the manner provided by water law, and is a right which is regarded and protected as property).

⁸ Exhibit No. 7, public administrative hearing before the State Engineer, May 23, 2000.

⁹ Carson River Claim Nos. 815 and 816 transfer file, official records in the office of the State Engineer.

February 27, 1999, the State Engineer's office indicated that Allerman Reservoir #2 (NV 10469) must not be filled until the dam is repaired and the dam creating Allerman Reservoir #4 (NV 00091) must also be repaired prior to the breach in its embankment being repaired or the dam otherwise being rendered capable of storing water. The letter indicates that Allerman Reservoir #1 (NV 00092) needs minor repair, but is allowed to impound water. The combined storage volume under Claims 815 and 816 of the Alpine Decree is 1,081.1 acre-feet. The State Engineer finds that Allerman Reservoirs #2 and #4 are unable to store water at this time, as there is insufficient reservoir capacity to hold the full volume recognized in Claims 815 and 816 of the Alpine Decree.

VI.

The protestant contends that its corporation has historically used a portion of the storage water to augment peak flow demands in the Allerman and Virginia Ditch System.¹⁰ Application 65075 proposes to change a portion of the non-irrigation season storage right from the Allerman Reservoirs to Mud Lake. By letter dated April 22, 1999, the agent for the applicant, indicated that this application was only filed to change the place of storage of the waters during the non-irrigation season.² The letter provides that the applicant wishes to reserve the right for the seasonal spring fillings of the reservoirs to regulate the flows of the Allerman and Virginia ditches.¹¹ A witness for the applicant testified that the waters transferred to Mud Lake would be used late in the season when the river had gone on regulation as set forth in the Alpine Decree.¹² The Alpine Decree provides that when the East Fork of the Carson River drops below a flow rate of 200 cubic feet per second (c.f.s.), 1/3 of this flow is to be diverted into the Allerman Canal and 2/3 of the flow stays in the river. This

¹⁰ Transcript, p. 47.

¹¹ Alpine Decree, Findings of Fact (3)(b), the Allerman Reservoirs are allowed to be filled 3 times yearly, once during February and March, and twice later in the year to regulate water flows.

¹² Transcript, p. 96.

equates to a maximum flow rate of 66 2/3 c.f.s. being diverted during regulation. The protestant testified that the Allerman Canal could handle at least 100 c.f.s. at the start of the irrigation season.¹³ The State Engineer finds that this application is only for diversion during the non-irrigation season and would provide storage water for use during the late season. The State Engineer finds there is capacity in the Allerman Canal to transport decreed direct diversion rights as well as water released from storage in Mud Lake.

VII.

Testimony from the protestant indicates that he and others used Allerman Reservoirs #1, #2 and #4 as regulating reservoirs.¹⁴ That is, if farmers wanted to take a long weekend over Easter or Memorial Day, they would let the Allerman Ditch water accumulate in the reservoirs and then irrigate with a greater head when they resumed. Apparently, these other irrigators would also release their Alpine Reservoir storage right, divert the water into the Allerman Canal and temporarily store that water in Allerman Reservoirs #1, #2 and #4.¹⁵ The State Engineer finds that use by others than the predecessors to Dangberg Holdings must have been by "gentlemen's agreement" or by "historic practices, customs and agreements".¹⁶

VIII.

Historically the waters stored in Allerman Reservoirs #1, #2 and #4 have been released by the end of the irrigation season and only the water remaining was that in the dead pool at the elevation below the outlet works. The State Engineer finds that historical and customary usage under Carson River Claims 815 and

¹³ Transcript, p. 57.

¹⁴ Transcript, p. 47.

¹⁵ Alpine Decree p. 6 & 7, Findings of Fact X (3) under segment 2 (a), (b) & (c), after the Carson River goes on regulation several irrigators in the Heyborne Tract, St. Louis Straight and Homestream Ditches and others use the Allerman Canal and presumably the reservoirs to transport and store their water rights. Also, reference is made to ensuring that there is sufficient head provided for these irrigators.

816 was to use all the water diverted during a calendar year and there was no carry over storage.

IX.

The Federal Court has appointed a Water Master to regulate the Carson River. The Water Master is charged with the regulation of head gates along the river and the delivery of stored water of any reservoir.¹⁷ The State Engineer finds that the Federal Water Master has jurisdiction over the delivery of stored water of the Carson River System.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.¹⁸

II.

The State Engineer is prohibited by law from granting a change application to appropriate the public waters where:¹⁹

- A. the proposed use conflicts with existing rights; or
- B. the proposed use threatens to prove detrimental to the public interest.

III.

The State Engineer concludes based on the protestant's testimony that sufficient information has been provided to make a determination on this application.

IV.

The protestant did not furnish any documentation to support its contention that it is the vested owners of any portion of Claims 815 and 816 of the Alpine Decree. The State Engineer concludes that the records of his office are correct in showing

¹⁶ Alpine Decree, p. 5, Finding of Fact X.

¹⁷ Alpine Decree, p. 163.

¹⁸ NRS chapter 533 and Alpine Decree, p. 161.

¹⁹ NRS § 533.370(3).

Dangberg Holdings Nevada LLC as the owner of Claims 815 and 816 of the Alpine Decree.

V.

The office of the State Engineer has issued letters prohibiting the filling of Allerman Reservoirs #2 and #4 due to dam safety issues. The State Engineer concludes that there is insufficient safe storage in the Allerman Reservoirs, as they exist today, for all the water under Claims 815 and 816 of the Alpine Decree.

VI.

The cover letter filed with Application 65075 indicates that application was only intended to transfer a portion the storage rights of Claims 815 and 816 of the Alpine Decree. Based on testimony at the evidentiary hearing, the State Engineer concludes that the water would be used when the East Fork of the Carson River is on regulation as determined by the Alpine Decree and the Federal Water Master. Under regulation, the amount of water released from Mud Lake and diverted to the Allerman Canal is within its capacity. The State Engineer concludes that there is the ability to deliver water under this application.

VII.

The State Engineer concludes that nothing in this ruling precludes the other irrigators that have historically used Allerman Reservoirs #1, #2 and #4 for temporary storage of their direct flow right or their Alpine Reservoir storage from continuing to do so assuming the dams that impound Reservoirs #2 and #4 were satisfactorily repaired.

VIII.

The State Engineer concludes that Carson River Claims 815 and 816 were not historically and customarily used for carry over storage from one year to the next and therefore any water used during a calendar year must be used or released during that year.

IX.

The Alpine Decree charges the Federal Water Master with the regulation of head gates to direct the transportation of water from reservoirs to the person entitled thereto. The State Engineer concludes that the Federal Water Master will regulate headgates on the Carson River to deliver water in accordance with the Alpine Decree.

RULING

The protest to Application 65075 is hereby overruled and said application is hereby approved subject to the following:

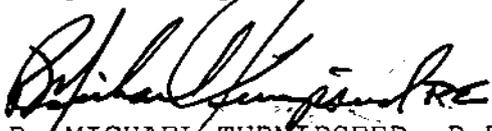
1. The payment of the statutory permit fees.
2. The Alpine Decree and Regulation by the Federal Water Master.
7. A measuring device and continuous recorder being approved by the Federal Water Master and the State Engineer shall be installed, operated and maintained by the applicant to measure:
 - a. water diverted to Mud Lake for storage;
 - b. water released/pumped from Mud Lake;
 - c. water flowing in Indian Creek above the point where the water is delivered from Mud Lake;
 - d. water entering the East Fork of the Carson River from Indian Creek.
4. All records of measurements being submitted to the Federal Water Master on a monthly basis.

5. Any water not used for irrigation under Claims 815 and 816 shall be released/pumped to the East Fork of the Carson River to continue downstream to other priority users after the irrigation season ends. There will be no carry over storage under this permit.

6. All water stored and released from Mud Lake under this permit shall be used on lands historically irrigated under Claims 815 and 816.

7. To all other existing rights.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/MJR/cl

Dated this 26th day of
July, 2000.