

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

IN THE MATTER OF APPLICATIONS)
68038, 68039 AND 68200 FILED TO)
CHANGE THE MANNER OF USE AND PLACE)
OF USE OF A PORTION OF THE PUBLIC)
WATERS OF MUSGROVE CREEK AND)
TRIBUTARIES HERETOFORE APPROPRIATED)
UNDER CERTAIN CERTIFICATES WITHIN)
THE WASHOE VALLEY HYDROGRAPHIC)
BASIN (089), WASHOE COUNTY, NEVADA.)

RULING
#5936

GENERAL

I.

Application 68038 was filed on September 21, 2001, by DGD Development Limited Partnership to change the manner and place of use of 3.649 cubic feet per second (cfs), not to exceed 627.56 acre-feet (af), later amended by withdrawal letter of January 14, 2003, to 3.578 cfs, not to exceed 576.56 af, of water from Musgrove Creek and Tributaries heretofore permitted for appropriation under Permit 50071, Certificate 12436. The proposed manner and place of use is for in-stream flow purposes through Washoe Lake, Little Washoe Lake, Steamboat Creek and a portion of the Truckee River. The proposed point of diversion is described as being within the SW¼ NW¼ of Section 27, T.16N., R.19E., M.D.B.&M.¹

II.

Application 68039 was filed on September 21, 2001, by DGD Development Limited Partnership to change the manner and place of use of 1.3538 cfs, not to exceed 348.17 af, of water from Musgrove Creek heretofore permitted for appropriation under Permit 18198, Certificate 6278. The proposed manner and place of use is for in-stream flow purposes through Washoe Lake, Little Washoe Lake, Steamboat Creek and a portion of the Truckee River. The proposed

¹ File No. 68038, official records in the Office of the State Engineer.

point of diversion is described as being within the SW¼ NE¼ of Section 22, T.16N., R.19E., M.D.B.&M.²

III.

Application 68200 was filed on November 14, 2001, by DGD Development Limited Partnership to change the manner and place of use of 0.229 cfs, not to exceed 137.622 af, of water from Unnamed Creek and Tributaries (a tributary to Musgrove Creek) heretofore permitted for appropriation under Permit 50072, Certificate 12437. The proposed manner and place of use is for in-stream flow purposes through Washoe Lake, Little Washoe Lake, Steamboat Creek and a portion of the Truckee River. The proposed point of diversion is described as being within the SW¼ NW¼ of Section 27, T.16N., R.19E., M.D.B.&M.³

IV.

Applications 68038, 68039 and 68200 were timely protested by Churchill County. The protestant requested that the applications either be denied on the following grounds or issued subject to the following conditions:^{1, 2, 3}

1) [The applications request] a transfer of the full duty, however, these water rights are not always fully available for diversion and are not backed up by upstream storage. Data for determining the flows are also not readily available. In addition, the statement that the water will be considered as return flow upon passing the Vista Gauge is not clear as to whether the full duty will be credited to in-stream flow or the 50% which traditionally represents return flow. Therefore, if the transfer receives a full duty credit it could result in less water being available for diversion at Derby Dam and prove detrimental to the public interest.

2) Because the ultimate use and/or duty of the in-stream flow under this Application is not set forth in the Application, Churchill County is filing this protest in order to preserve its right to participate in any hearings held on this matter. If further information becomes available which indicates that the water transferred under this application will not

² File No. 68039, official records in the Office of the State Engineer.

³ File No. 68200, official records in the Office of the State Engineer.

result in a decrease to Truckee River flows available for diversion at Derby Dam, the protest will be withdrawn.

3) That if this Application is granted it be subject to the following conditions:

a) The water transferred hereunder upon passing Vista Gorge [sic] will be considered return flow and become available for downstream holders of water rights and shall not be claimed as credit for removal of Truckee River return flows; and

b) The water rights transferred hereunder may be diverted into the Truckee Canal to satisfy Claim No. 3 of the *Orr Ditch Decree*.

V.

Applications 68038, 68039 and 68200 were timely protested by Washoe County. The protestant requested that the applications be denied on the following grounds:^{1, 2, 3}

1) Granting of these applications is contrary to public interest

2) Granting of these applications is detrimental to existing rights

These applications collectively propose to divert 1113.752 acre-feet annually from Musgrove Creek and tributaries and Un-named Creek and tributaries for in-stream flow purposes. The applicant is proposing to allow this water to flow through the Little Washoe Lake reservoir system into the Steamboat Creek and ultimately into the Truckee River. The applications also state that upon passing Vista Gauge these waters would become return flow water and subject to consumption by downstream users. This quantity of water is in addition to 4710.10 acre-feet under Applications 66526 through 66529, which also propose to transfer the water into the Truckee River system.

The duty requested under these applications does not consider the actual yield of these streams, which may not be fully available most years. In fact, supplemental ground water appropriations under Certificates 6086 (Permit 20648), 8078 (Permit 23287), 10394 (Permit 30579), 9766 (Permit 30581) and 9769 (Permit 35554) have been issued to augment flows in these streams for irrigation purposes...

The applications as filed are requesting a change in both the consumptive and the non-consumptive portions of these water rights. The non-consumptive component of these water rights, in high flow years, has historically flowed through this system and has been appropriated under the Truckee River Decree. The State Engineer's ruling dated June 15, 1985, on Applications 35202 et.al.[sic] in part states:

"The Truckee River Decree specifically sets forth the rights or entitlement of the surplus flows of the tributaries to Washoe and Little Washoe Lakes"

These applications are unclear on how the water currently used in Township 16N, Range 19E will be conveyed to the southernmost portion of the proposed place of use located in Section 24, T.17N., R.19E. These applications refer to the "creek channel" as part of the proposed works of diversion to deliver water to the proposed place of use. The USGS topo maps show Musgrove Creek flowing into Washoe Lake near the section line common to Sections 14 and 23 of T.16N., R.19E., some 5 miles away from the proposed place of use. Therefore, if Washoe Lake is also a part of the works of diversion, then the following issues needs[sic] to be considered:

- 1) The conveyance of water through Washoe Lake into Little Washoe Lake is not possible in some years as the two lakes are not connected.
- 2) The evaporation losses during transit through Washoe Lake are great and have to be taken into consideration in the amount of return flow credit, if these applications are granted. Evaporation losses from Washoe Lake are estimated at 23,000 acre-feet annually (Arteage-Nicholes 1984).

Administration of the system to insure the conveyance of these waters past higher priority water rights holders/users along the way is nearly an impossible task.

Washoe County Development Code specifically discourages the State Engineer from approving any export of water resources from the South Valleys Area Plan, which includes all of Washoe Valley hydrographic basin. Export of these resources could reduce inflow to the Washoe Lake system, which could impact ground water

gradients. These changes to the ground water gradients could result in negative impacts to both the water quantity and quality of the ground water resources in Washoe Valley hydrographic basin.

Transfer of these resources out of this basin could have severe negative impacts on the wetlands and wildlife habitats within Scripps Wildlife Area in Washoe Valley. The State Engineer's Ruling dated June 5, 1985, on Applications 35202 et.al.[sic] in part states:

"Depletion of flows to the lakes will adversely impact the recreational and wildlife values of the valley and, therefore, would not be in the public interest"

Finally, the unknown quantity of these waters that may ultimately reach the Truckee River could be of such poor water quality that it could be detrimental to the quality of the Truckee River and damage the efforts of this community in improving water quality of the river.

FINDINGS OF FACT

I.

Nevada Revised Statute (NRS) § 533.365(3) provides that it is within the State Engineer's discretion to determine whether a public administrative hearing is necessary to address the merits of a protest to an application to appropriate the public waters of the State of Nevada. The State Engineer finds that sufficient information is available in the Office of the State Engineer and an administrative hearing to obtain additional evidence is not necessary.

II.

In both protests by Churchill County and Washoe County, the issue of available water flowing through Musgrove Creek and its tributaries is raised. Their claim is that the water typically available for diversion from the creek and its tributaries often does not meet the amount allowed for diversion under the decreed and certificated rights.

Recent flow measurements conducted by the Office of the State Engineer for Musgrove Creek and the unnamed tributary to Musgrove Creek show a total flow for the two creeks in late April of 2006 to be 7.830 cfs and dropping to 3.379 cfs by the end of May and varying between about 0.75 and 1.25 cfs during the summer and fall months. These measurements show a total flow for the two creeks in May of 2007 to be over 1 cfs and gradually dropping to 0.583 cfs by the end of June. In the course of taking these measurements, it was determined that no water reaches Washoe Lake.⁴

The most senior priority on the creek system is 1858 and prior to 1870 being portions of amended proof 02540 of the *Musgrove Creek Decree*. It is allowed a diversion rate of 7.645 cfs at these priorities.⁵ Permit 50071, Certificate 12436 changed the point of diversion of amended proof 02540. Portions of Permit 50071, Certificate 12436 have been subsequently abrogated by several permits. Permit 59385, Certificate 15754 and Permit 69734 have a priority date of prior to 1870.⁶

Except for that water allowed to pass for the benefit of downstream users under a rotation agreement, the entire amount of this water is diverted by the Thunder Canyon Golf Course (formerly the Golf Course at Lightning "W" Ranch) under Permit 66611, which changed the manner and place of use of 4.171 cfs and 717.75 acre-feet annually from Permit 50071, Certificate 12436 and has a priority of 1858, prior to 1870, and 1870.⁷

That portion of Permit 57001, Certificate 12436 to be changed by Application 68038 has a priority of 1858, prior to 1870, and 1870.⁶ Application 68038 would have a similar priority to Permit

⁴ File No. 50071, official records in the Office of the State Engineer.

⁵ *In the Matter of the Determination of Relative Rights in and to the Waters of Musgrove Creek (a.k.a. Big Canyon Creek) and Its Tributaries in Washoe County*, Second Judicial District Court of Nevada, in and for the County of Washoe, December 1, 1975, pp. 15-16.

⁶ File No. 50071, official records in the Office of the State Engineer.

⁷ File No. 66611, official records in the Office of the State Engineer.

66611, but the priorities for Applications 68039 and 68200 would be junior (being August 5, 1959 and May 22, 1959, respectively).

The State Engineer finds that current water use under active water rights consumes all currently available water on Musgrove Creek and tributaries before reaching Washoe Lake and that in most years junior priority water rights do not receive full duty.

III.

The protests by Churchill County and Washoe County raise the issue that these applications intend to change both the consumptive use portion and non-consumptive return flow portion of the base rights. The Washoe County protest also questions how such water from Musgrove Creek could be conveyed to the place of use.

In order for the water being conveyed by Musgrove Creek and its tributaries to reach the place of use, it must first enter Washoe Lake. At medium and low-level stages, the Washoe Lake and Little Washoe Lake are separated by a swampy or wetlands area, but do form a single large body when water levels are high. Only at times when the water level is high enough for the lakes to be connected could any water pass between them. Then the water must pass through Little Washoe Lake Reservoir to Steamboat Creek and through it to the Truckee River.

In high flow years, there may be sufficient flow to reach Washoe Lake, and the height of the lakes may be high enough for it to be possible for such waters to reach Little Washoe Lake, but such surplus flows have been appropriated under the Truckee River Decree, which states:⁸

As early as the year 1864 the surplus and unappropriated waters flowing naturally into Washoe Lake and Lower Washoe Lake from the streams arising in the mountains west and southwest of Washoe Valley and flowing therefrom across this valley and into these

⁸ Final Decree, *U.S. v. Orr Ditch Co.*, In Equity Docket A-3 (D. Nev 1944) ("Orr Ditch Decree") p. 75.

lakes...were appropriated and stored in Washoe Lake Reservoir and drawn therefrom during the irrigation seasons and used in the beneficial irrigation of crops...

The stockholders in Washoe Lake Reservoir and Galena Creek Ditch Company are entitled to receive and use,... for the irrigation of their lands and for stock and domestic purposes, the waters stored in or discharged from Washoe Lake Reservoir in proportion to the number [of stocks] that they hold respectively...

The Truckee River Decree describes Little Washoe Lake as Lower Washoe Lake and both lakes collectively as Washoe Lake Reservoir.

The State Engineer finds that all surplus (i.e. non-consumptive) flows into the Washoe Lake Reservoir are appropriated under the Truckee River Decree, and that the regulation and control of the Washoe Lake Reservoir storage capacity and outflow is under the jurisdiction of the federal court and the Federal Water Master.⁹

IV.

The water rights of Musgrove Creek are either determined through the adjudication of the stream system and the resulting state decree entitled *In the Matter of the Determination of Relative Rights in and to the Waters of Musgrove Creek (a.k.a. Big Canyon Creek) and Its Tributaries in Washoe County* or through appropriations as allowed under NRS chapter 533. The waters of Musgrove Creek and its tributaries are under the regulation and jurisdiction of the State Engineer.

The Washoe Lake Reservoir system, Steamboat Creek, and the Truckee River are under the regulation and jurisdiction of the federal court and the Federal Water Master.

The State Engineer finds that if approved, these change applications would commingle waters of two stream systems that fall under separate jurisdictions.

⁹ *Orr Ditch Decree*, p. 75.

V.

In State Engineer's Ruling 3201 in the matter of Applications 35202, et al. the State Engineer concluded that:¹⁰

The record provides substantial evidence on the:

- (A) complexity, interconnection, and delicate balance between the surface and ground water systems in Washoe Valley;
- (B) limited capacity for ground water recharge and storage without significantly altering the surface water and ground water inflows to Washoe and Little Washoe Lakes;
- (C) depletion of flows to the lakes will adversely impact the recreational and wildlife values of the valley and, therefore, would not be in the public interest;...

The State Engineer finds that exporting water from the valley would impair the value of the local recreational and wildlife areas and conflict with existing rights.

VI.

There is no feasible means to account for transmission losses including but not limited to evaporation losses from Washoe Lake and to evaporation and seepage losses from the creek channels. There is no feasible means to measure the water or to ensure that water of Musgrove Creek would actually reach Vista Gauge. There is no means to ensure that those waters under the State Engineer's jurisdiction from the Musgrove Creek decree would not be diverted by water right holders who are in priority in the Federal Water Master's jurisdiction under the Truckee River Decree or that waters to which these Truckee River Decree water right holders would be entitled would instead be carried past them to Vista Gauge. The State Engineer finds that the proposed changes would be unmanageable and would conflict with existing decreed rights on the Truckee River.

¹⁰ State Engineer's Ruling 3201, Official Records in the Office of the State Engineer, June 5, 1985, pg 20.

VII.

Washoe County raised the issue of reduced water quality in the Truckee River if the waters of Musgrove Creek and tributaries were to reach it. The effect of the proposed changes on water quality cannot be conclusively determined due to the complexity of the proposed works of diversion, which would route water through a "creek channel," then through Washoe Lake, then through Little Washoe Lake, then through Steamboat Creek, and then on to the Truckee River. The State Engineer finds that this uncertainty regarding the effects on water quality of the Truckee River to be an unacceptable risk to this vitally important water source.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.¹¹

II.

The State Engineer is prohibited by law from granting a permit under a change application that requests to appropriate the public waters where:¹²

- A. there is no unappropriated water at the proposed source;
- B. the proposed use or change conflicts with existing rights;
- C. the proposed use or change conflicts with protectible interests in existing domestic wells as set forth in NRS § 533.024; or
- D. the proposed use or change threatens to prove detrimental to the public interest.

III.

The State Engineer concludes that approval of these change applications, when the amount of water reaching and passing through the place of use cannot be determined and may reduce the amount of water available to other water right holders, would

¹¹ NRS chapter 533.

¹² NRS § 533.370(5).

threaten to prove detrimental to the public interest and conflict with existing rights.

IV.

The State Engineer concludes that approval of these change applications for the portion that is surplus water already appropriated under the Truckee River Decree would conflict with existing rights.

V.

The State Engineer concludes that conflating the jurisdictions of the Federal Water Master and the State Engineer would adversely affect the ability of the Federal Water Master to regulate the use of the Truckee River system and of the State Engineer to regulate the use of the Musgrove Creek system.

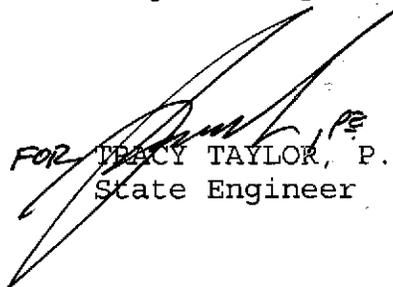
VI.

The State Engineer concludes that to export water from the valley would impair the value of the local recreational and wildlife areas; therefore, approval of the change applications would threaten to prove detrimental to the public interest.

RULING

The protests to Applications 68038, 68039 and 68200 are hereby upheld, and Applications 68038, 68039 and 68200 are hereby denied on the grounds that the proposed changes would conflict with existing rights and threaten to prove detrimental to the public interest.

Respectfully submitted,


FOR TRACY TAYLOR, P.E.
State Engineer

TT/MJW/jm

Dated this 10th day of
February, 2009.