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

IN THE MATTER OF TEMPORARY) APPLICATIONS 79884-T, 79885-T and) 79886-T FILED TO CHANGE THE PLACE) OF USE AND MANNER OF USE OF) TRUCKEE RIVER WATER PREVIOUSLY) APPROPRIATED WITHIN THE TRACY) SEGMENT HYDROGRAPHIC BASIN (83),) STOREY COUNTY, NEVADA.)	**RULING** **#6048**

GENERAL

I.

Application 79884-T was filed on June 4, 2010, by the City of Fernley to temporarily change the place of use and manner of use of 3,360.6 acre-feet annually (afa) of Truckee River water previously appropriated under Permits 56226, 61893, 67449, 70130, 73142, 73161, 73162, 73163, 73164, 73243 (portion), 73245, 73255, 73704 (portion), 73758 (portion), 74481, and 74503. The existing manner of use is for municipal purposes and the proposed manner of use is for wildlife purposes. The existing place of use is described as the City of Fernley Municipal Area and the proposed place of use is described as the Truckee River beginning at the point of diversion (Derby Dam) and then downstream to the Pyramid Lake inlet. The proposed point of diversion is unchanged and is described as the Derby Dam, located within the N½ SW¼ of Section 19, T.20N., R.23E., M.D.B.&M.[1]

II.

Application 79885-T was filed on June 4, 2010, by the City of Fernley to temporarily change the place of use and manner of use of 2,799.15 afa of Truckee River water previously appropriated under Permits 74911, 74943, 74980, 75503, 75504, 75581, 75582, 75583, 75862, 75863, 75864, 75865, 76061, 76209, 76292, 76837, 76976, 76977, 77006, 77050, 77276, 77533, 77534, 77535, 77923, 77924, 78073, and 78626. The existing manner of use is for municipal purposes and the proposed manner of use is for

[1] File No. 79884-T, official records in the Office of the State Engineer.

wildlife purposes. The existing place of use is described as the City of Fernley Municipal Area and the proposed place of use is described as the Truckee River beginning at the point of diversion (Derby Dam) and then downstream to the Pyramid Lake inlet. The proposed point of diversion is unchanged and is described as the Derby Dam.[2]

III.

Application 79886-T was filed on June 4, 2010, by the City of Fernley to temporarily change the place of use and manner of use of 483.485 afa, a portion of water previously appropriated under Truckee River Decree Claim No. 3, as set forth in the *Orr Ditch* Decree.[3] The existing manner of use is as decreed (irrigation) purposes and the proposed manner of use is for wildlife purposes. The existing place of use is described as the City of Fernley Municipal Area and the proposed place of use is described as the Truckee River beginning at the point of diversion (Derby Dam) and then downstream to the Pyramid Lake inlet. The proposed point of diversion is unchanged and is described as the Derby Dam.[4]

IV.

Applications 79884-T, 79885-T and 79886-T were protested by Truckee Carson Irrigation District (TCID) on the following grounds:[1,2,4]

1. Timing, in that it does not follow the pattern of traditional use of the water, and does not follow the pattern that would be used if it were being used for M and I.
2. Diversions at Derby mean Truckee Canal users suffer all the losses.
3. City of Fernley and domestic well users are not being replenished by the water that once supplied them. Remaining users are doing all the replenishment of the aquifer through losses.
4. Carson Division doesn't get claim 3 water it is entitled to under decree and OCAP.
5. Contractual rights by TCID to store and deliver pooled water are being injured.
6. Carry over storage in Lahontan is reduced.
7. Hydro production and thus revenues bring additional hardship to all users of pooled water supply with higher O&M fees.

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[2] File No. 79885-T, official records in the Office of the State Engineer.
[3] Final Decree in *United States v. Orr Water Ditch Co.*, In Equity Docket No. A-3 (D. Nevada 1944).
[4] File No. 79886-T, official records in the Office of the State Engineer.

8. The Public Interest in the Newlands project is not served. Accordingly, these temporary applications should be denied because the applications are not temporary in nature, the proposed use conflicts with existing rights had by water right holders within the Newlands Reclamation Project, and the proposed transfers are contrary to public policy.

V.

Applications 79884-T, 79885-T and 79886-T were protested by Mike Lowry on the following grounds:[1,2,4]

> The Newlands Project is realizing an adverse impact upon its viability as a result of the incremental transfers of water from within the project to outside of the project. The reclamation act does not allow for project waters to transfer outside of a project. My research does not find any subsequent legislation that overrides this provision. This application is in violation of complying with the purpose and intent of Temporary Water Transfers.

FINDINGS OF FACT

I.

Last year on May 14, 2009, the Applicant filed temporary change Applications 78507-T and 78508-T, similar to the temporary applications at issue in this ruling, in that all applications seek to temporarily change the manner and place of use of City of Fernley surface water not currently being used for municipal and industrial purposes to instream flow for wildlife purposes. Applications 78507-T and 78508-T were approved by the State Engineer on June 26, 2009, and expired on November 15, 2009. The TCID appealed the State Engineer's granting of Permits 78507-T and 78508-T and requested to stay the effect of State Engineer's decision pending review of its petition to the United States District Court, District of Nevada. A ruling was issued by the Court on September 2, 2009, denying the request to stay the State Engineer's decision.[1]

In the Court's ruling of September 2, 2009, significant findings and conclusions were made that are also applicable to Applications 79884-T, 79885-T, and 79886-T. The Court made the following conclusions:

> The court has considered each of the required elements. At issue is whether to stay the State Engineer's decision to approve Fernley's application to temporarily change the place and manner of use of its water right. The court finds that staying the State Engineer's decision will harm Fernley by depriving it of significant benefits it will receive from its changed use of its water rights. The TCID has not shown that it (or the water users to whom it delivers water) will be irreparably harmed by Fernley's changed use of its water rights (as compared to conditions that would exist if Fernley exercised its water rights as permitted prior to the change). The TCID has also failed to show that it is likely to succeed on any of those alleged errors. Finally, precluding Fernley from exercising its changed use of its water rights is likely to reduce the amount of water flowing in the Truckee River, reducing water quality, and thus can be considered as a harm suffered by the public. Having considered each of the required elements, the court holds that execution of the State Engineer's decision should not be stayed pending judicial review.

Applications 79884-T, 79885-T and 79886-T were filed to provide a temporary change of existing surface-water rights held by the City of Fernley. The surface water is not needed by the City of Fernley for this year; therefore, it has chosen to file temporary change applications to have the benefit of utilizing its water rights that would otherwise go unused. In the past, the City of Fernley's unused water has benefitted the TCID and other downstream users, but this does not preclude the City of Fernley from exercising its water rights for either municipal use under existing water rights or for wildlife use as proposed under the temporary applications.

The State Engineer finds that the City of Fernley has the right to file temporary change applications on its water to enable it to exercise its water rights and is not required to allow its water rights to flow to downstream users. The State Engineer finds that whether the City of Fernley uses its water for municipal use or wildlife use, with no change in point of diversion, there would be no difference in impact to the Protestants.

II.

The protests allege that the change applications are not temporary in nature and the applications are in violation of complying with the purpose and intent of temporary water transfers. Nevada Revised Statutes § 533.345 allows for an applicant to file for a temporary change in point of diversion, manner or place of use of water already

appropriated. The Applicant has filed the appropriate application form requesting a temporary change in place of use and manner of use. A temporary change application can only be approved for a maximum of one year in duration or for a lesser period of time after which the application is expired and the water reverts to the originating permits or *Orr Ditch* decree rights. In interpreting the provisions of NRS § 533.345, the State Engineer is required to make a determination of whether or not the temporary change is in the public interest.

The City of Fernley has surface-water rights from the Truckee River that it is not able to use this season. Rather than letting their surface water go unused, the City of Fernley has reached a water use agreement with the Pyramid Lake Paiute Tribe (PLPT) and has filed temporary applications to allow a portion of their surface-water rights to be used for in-stream flow to the benefit of fish species including the endangered cui-ui.

The State Engineer finds that the applications are for a temporary use of water and the temporary changes are in the public interest.

III.

The protests claim that the change applications do not follow the pattern of traditional use of the water with respect to timing. The temporary change applications are not seeking to change the period of use as noted on items No. 9 and No. 10 of the applications; the period of use is "as decreed." The State Engineer finds that distribution of the waters of the Truckee River are under the continuing jurisdiction and regulation of the *Orr Ditch* Decree Court and the Federal Water Master and the period of use is not changing.

IV.

The protests allege that diversions at Derby Dam means Truckee Canal users suffer all the losses. By letter received June 14, 2010, Protestant TCID requested that the point of delivery be at Gilpin Spill to share canal losses and to allow more water for canal use, which would result in more push or pressure to make deliveries.[5]

In response, the Applicant noted that the quantity of water that TCID may divert includes the duty per acre of farmland plus conveyance losses in the Truckee Canal and

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[5] *See,* TCID letter to State Engineer, received June 14, 2010, File No. 79884-T, official records in the Office of the State Engineer.

laterals. Fernley is under no obligation to contribute additional water to any losses that may occur as a result of the use of other water users Claim No. 3 entitlement. It would be unfair to require Fernley to replace losses, if any, to other Claim No. 3 users based merely on Fernley's decision to use its water in its best interest.[6] The State Engineer finds the City of Fernley is entitled to the full use of its water rights and the remaining water users are still entitled to their water.

V.

The protests state that the City of Fernley and domestic well users are not being replenished by the water that once supplied them. Remaining users are doing all the replenishment of the aquifer through losses. The State Engineer finds if the temporary applications are not approved then the City of Fernley surface waters will not be utilized this year. Groundwater users may receive a benefit of secondary recharge from surface-water diversions and uses; however, they do not have a permitted claim to any secondary recharge that may occur.

VI.

The protests contend that Carson Division does not get the Claim 3 water it is entitled to under decree and OCAP, the contractual rights of TCID to store and deliver pooled water are being injured, carry over storage in Lahontan is reduced, and the loss of hydro production revenues bring additional hardship to all users of pooled water supply with higher operation and maintenance fees.

The State Engineer finds that the distributions of the waters of the Truckee River are under the continuing jurisdiction and regulation of the *Orr Ditch* Decree Court and it is the Federal Water Master's responsibility to deliver what water TCID is entitled to receive.

VII.

The protests claim the Newlands Project is realizing an adverse impact upon its viability as a result of the incremental transfers of water from within the Project to outside of the Project and that the Reclamation Act does not allow for project waters to

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[6] *See,* Taggart & Taggart, Ltd. letter to State Engineer, received June 23, 2010, File No. 79884-T, official Records in the Office of the State Engineer.

transfer outside of a project. In State Engineer's Ruling No. 5760[7] the State Engineer addressed a similar argument where the protestants alleged that granting the application would be a violation of the *Alpine* Decree and the *Orr Ditch* Decree and the Order and Judgment entered in the case of *Nevada v. U.S.*, 463 U.S. 110 (1983) on the grounds that the Newlands Project water rights are an integrated set of rights appropriated and decreed for the benefit of each in relation to all others and no owner of Newlands Project water rights may secede from the Newlands Project, which this Applicant proposes to do, for the benefit of other segments of the Truckee River. Accordingly, that application was actually an attempt to unilaterally amend the *Orr Ditch* Decree and as such is unlawful. They also argued that the Newlands Project framework is the 1902 Reclamation Act, which restricts service to the Project area, and that interrelated sections of the Reclamation Act require continued use of Reclamation water within projects and are evidence of Congress's intention that the projects and their related water rights remain intact over time and that this transfer must be denied unless the Secretary of the Interior approves it.

Claim No. 3 of the *Orr Ditch* Decree confirms a water right for the irrigation of lands on the Newlands Project, for storage in Lahontan Reservoir, for generating power, for supplying the inhabitants of cities and towns on the Project and for domestic and other purposes. In the *Orr Ditch* Decree, the Federal District Court established the parameters of the water right under Claim No. 3, i.e., water use within the Newlands Project for various purposes, and identified the United States as the owner of the water right. However, since that time, the *Alpine* Court has held that the water rights on the Newlands Project covered by approved water rights applications and contracts are appurtenant to the land irrigated and are owned by the individual land owners in the Project. While the United States may have title to the irrigation works, as to the appurtenant water rights it maintains only a lien holders interest to secure repayment of the project construction costs.[8] Additionally, the Ninth Circuit Court of Appeals has held that state law governs the validity of transfers of water

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[7] State Engineer's Ruling No. 5760 dated August 21, 2007, official records of the Office of the State Engineer.

[8] *U.S. v. Alpine Land & Reservoir Co.*, 503 F. Supp. 877, 879 (D. Nev. 1980).

rights within the Newlands Project and that this is simply an application of the 1902 Reclamation Act, which expressly disclaimed any intention of displacing state water law.[9]

While the Reclamation Act was the basis for the creation of the Newlands Project, Section 8 of the 1902 Reclamation Act itself provides that nothing in the Act is to be construed as affecting or interfering with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation.[10] It has been held that an important unifying factor in the long working relationship between the United States and the several arid western states in the area of reclamation projects is the purposeful and continued deference to state water law by Congress and the only area where state law may not control is where it conflicts with explicit congressional directives in the Reclamation Act.[11] Nevada Revised Statute § 533.325 provides for the filing of change applications. While the Protestants in that case argued that the water right originally granted for the Project has to stay as part of the Project, they did not demonstrate any specific language in the *Orr Ditch* Decree, the *Alpine* Decree or the Reclamation Act that so restricts the water rights or any specific conflict with an explicit congressional directive in the Reclamation Act.

Both the *Orr Ditch* Decree and the *Alpine* Decree provide for the filing of change applications on decreed water rights. The *Orr Ditch* Decree provides that "[p]ersons whose rights are adjudicated hereby, their successors or assigns, shall be entitled to change, in the manner provided by law the point of diversion and the place, means, manner or purpose of use of the water to which they are so entitled or of any part thereof, so far as they may do so without injury to the rights of others persons whose rights are fixed by this decree."

The State Engineer finds state water law governs the appropriation and use of water in the Newlands Project. The State Engineer finds that NRS § 533.325 and the *Orr Ditch* Decree provide for the filing of change applications. The State Engineer finds that NRS § 533.023 provides that water may be used for wildlife purposes, which includes use of water for fisheries and their related habitats. The State Engineer finds the courts have held that the water rights in the Project are owned by the property owners who contracted with the United

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[9] *U.S. v. Alpine Land & Reservoir Co.*, 878 F.2d 1217, 1223 (9th Cir. 1989).
[10] 43 U.S.C. § 383.
[11] *U.S. v. Alpine Land & Reservoir Co.*, 503 F. Supp. at 880.

States for use of the water and those rights may be changed subject to Nevada water law. The State Engineer finds no specific restriction is found within the Reclamation Act that indicates the water must be used within the Newlands Project.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.[12]

II.

The *Orr Ditch* Decree provides that:

> Persons whose rights are adjudicated hereby, their sucessors or assigns shall be entitled to change, in the manner provided by law the point of diversion and the place, means, manner or purpose of use of the waters to which they are so entitled or any part thereof, so far as they may do so without injury to the rights of other persons whose rights are fixed by this decree.[13]

III.

Nevada Revised Statute § 533.345 provides that:

2. If an applicant is seeking a temporary change of place of diversion, manner of use or place of use of water already appropriated, the state engineer shall approve the application if:
   (a) The application is accompanied by the prescribed fees;
   (b) The temporary change is in the public interest; and
   (c) The temporary change does not impair the water rights held by other persons.
3. If the State Engineer determines that the temporary change may not be in the public interest, or may impair the water rights held by other persons, he shall give notice of the application as provided in NRS 533.360 and hold a hearing and render a decision as provided in this chapter.
4. A temporary change may be granted for any period not to exceed 1 year.

The State Engineer concludes that the change applications are filed for a temporary beneficial use of water and it is in the public interest to allow this temporary use of water for wildlife purposes. The State Engineer concludes that Applications

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[12] NRS Chapter 533.

[13] Final Decree in *United States v. Orr Water Ditch Co.*, In Equity Docket No. A-3 (D. Nevada 1944) p. 88.

79884-T, 79885-T and 79886-T, will not impair the water rights held by other persons when the proposed use of water under the temporary change applications is compared to the use of the water that could occur under the existing water rights for municipal use.

IV.

The State Engineer concludes that Applications 79884-T, 79885-T and 79886-T were filed for a temporary change in the use of surface waters owned by the Applicant as provided for under NRS § 533.345, and the temporary changes are in the public interest.

RULING

The protests to Applications 79884-T, 79885-T and 79886-T are hereby overruled and the applications are granted subject to:

1. Existing rights;
2. Continuing jurisdiction and regulation of the *Orr Ditch* Decree Court and the Federal Water Master; and
3. Payment of statutory permit fees.

Respectfully submitted,

JASON KING, P.E.
State Engineer

Dated this 13th day of

July, 2010.