

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

IN THE MATTER OF APPLICATIONS 62405,)
62619, 62830, 62831, 62897, 63005, 63006,))
63008, 63009, 63025, 63026, 63027, 63034,))
63056, 63057, 63060, 63061, 63073, 63097,))
63098, 63104, 63105, 63106, 63137, 63138,))
63209, 63220, 63243, 63244, 63253, 63268,))
63280 AND 63283 FILED TO CHANGE POINTS OF)
DIVERSION, PLACES OR MANNER OF USE OF)
TRUCKEE RIVER DECREED WATER RIGHTS, IN)
THE TRUCKEE CANYON SEGMENT GROUNDWATER)
BASIN (91) AND TRUCKEE MEADOWS)
GROUNDWATER BASIN (87), WASHOE COUNTY,)
NEVADA)

INTERIM RULING
ON STANDING

#4602

GENERAL

I.

Since about 1980, the majority of the municipal growth in the Cities of Reno and Sparks has been served by converting irrigation water rights that are the subject of the Orr Ditch Decree¹ to municipal use by the filing of change applications with the Nevada State Engineer.² Between August 23, 1996 and July 25, 1997, (33) thirty three change applications were filed to convert water rights from irrigation to municipal use.

These (33) thirty three applications were protested by the City of Fallon and/or Churchill County primarily on the basis that:

- A. the water rights that are the subject of the change applications have been abandoned and, the reactivation of these water rights would interfere with existing water rights and would be detrimental to the public interest;
- B. the water rights that are the subject of the change applications have been forfeited for non-use, and the reactivation of these water rights would interfere with

¹Final Decree, U.S. v. Orr Water Ditch Co., In Equity A-3 (D. Nev. 1944) (hereinafter "Orr Ditch Decree").

²General provisions in the Orr Ditch Decree allow for the point of diversion, place, manner or means of use to be changed in the manner provided by law as set forth in NRS Chapter 533.

existing water rights and would threaten to prove detrimental to the public interest;

- C. the reactivation of these water rights would be in violation of the Endangered Species Act; and
- D. the reactivation of these water rights would be in violation of Public Law 101-618.

After notification by certified mail to all applicants, protestants and interested parties the State Engineer held a pre-hearing conference on December 12, 1997. The purpose of the pre-hearing conference was to better define and streamline the issues, determine which issues required a factual determination by evidence and testimony, and which issues were purely legal and could be covered by written briefing. In addition, the purpose of the pre-hearing conference was to determine what dates might be appropriate for an evidentiary hearing, if needed, what the applicants have in the way of witnesses, testimony and exhibits, and likewise, what the protestants have in the way of witnesses, exhibits and testimony.

At the pre-hearing conference, the issue of the standing of the protestants was raised. The applicants³ do not believe that the City of Fallon nor Churchill County have standing to bring these protests. To resolve that issue before the evidentiary hearings could commence, the State Engineer ordered that there be a time for the applicants to file motions on the issue of standing, for the protestants to file responses on standing, and for the applicants to file replies. The applicants' motion to summarily dismiss the protests was received on January 5, 1998, oppositions to the motion to summarily dismiss the protests of Churchill County

³Developers in the Reno and Sparks area must relinquish water rights to the City of Reno, City of Sparks, Washoe County or Sierra Pacific Power Company in order to get their development approved. In many of these applications the real party in interest is the developer and not necessarily the name on the application.

and the City of Fallon were received from those entities on January 20, 1998, and the applicants' reply was received on February 4, 1998. Washoe County filed a notice that the real parties in interest in these applications were developers that brought the water to Washoe County as required by various development ordinances, and that Washoe County would defer to those positions taken by the developers on the motion to summarily dismiss.

FINDINGS OF FACT

I.

Attorneys for the applicants refer to the State Engineer's Ruling on Remand No. 4591 issued on December 22, 1997, which overruled protests by the Pyramid Lake Tribe on similar change applications filed within the Newlands Project, which is within Churchill County and surrounding the City of Fallon. The issues in that ruling were whether the water rights had ever been perfected, i.e., put to beneficial use in the first place; whether the water rights were subject to statutory forfeiture for exceeding the five year period of non-use; or whether the water rights were the subject of common law abandonment. Attorneys for the applicants in this case contend that it is disingenuous for Churchill County and the City of Fallon to allege forfeiture and abandonment as to the applications that are the subject of this ruling, yet at the same time applaud and subscribe to the ruling on the same issues for those change applications filed within the Newlands Project, which held that neither forfeiture nor abandonment had been proven as to those water rights. Attorneys for the applicants are further accusing Churchill County and the City of Fallon for being in the wrong forum, arguing that they are asking the State Engineer to act as a special master in the Orr Ditch Court adjudicating the issues of forfeiture and abandonment without proper jurisdiction when that jurisdiction properly belongs in the Orr Ditch Court. The State Engineer finds that where similar issues were raised by the Pyramid Lake Tribe and the United

States in the Newlands Project change applications the Federal District Court and the Ninth Circuit Court of Appeals found that those issues were properly before the Nevada State Engineer.⁴ The State Engineer finds it interesting that the protestants are on one side of the issue in one portion of the state and on the opposite side of the issue in another part of the state; however, forfeiture and abandonment are absolute. If the facts are present it matters not who brings those facts to the surface.

II.

Attorneys for the applicants argue there is no evidence in the protests that the exercise of the rights that are the subject of these change applications will at any time cause a reduction in the water to the Carson Division or to groundwater recharge within the Carson Division of the Newlands Project. Attorneys for the City of Fallon and Churchill County argue that each has title and ownership of both surface and underground rights within the Newlands Project and various studies⁵ show that a substantial portion of the underground water in the Fallon area available for capture is a result of ditch loss, canal loss and applied irrigation within the Project. The City of Fallon argues that their municipal wells serve 8,200 residents and that it has a statutory duty to protect the health, safety and welfare of its inhabitants and to protect against threats to the City's assets. It further points to a

⁴U.S. v. Alpine Land and Reservoir Co., 878 F.2d 1217, 1227 (9th Cir. 1989).

⁵Glancy, P.A., Geohydrology of the Basalt and Unconsolidated Sedimentary Aquifers in the Fallon Area, Churchill County, Nevada, U.S.G.S., Water Supply-Paper 2263 (1986); Maurer, D.K., Johnson, A.K., Welch, A.H., Hydrogeology and Potential Effects of Changes in Water Use, Carson Desert Agricultural Area, Churchill County, Nevada, U.S.G.S., Open File Report 93-463 (1994).

notice of curtailment⁶ of issuing new appropriations issued by the Nevada State Engineer in 1995.

The State Engineer finds that although the protestants did not articulate what the injury might be, the fact that they each own surface and groundwater rights that might be impacted and claim such in their protest does not prejudice their case to bring such detailed information to the hearing and make it a part of the record on which the State Engineer will base his ruling. The State Engineer further finds that the majority of the ground water available for capture by wells is contributed by land application of surface water from both the Carson and Truckee Rivers. The amount contributed by the Truckee River for the purposes of this ruling is yet unknown.

III.

Attorneys for the applicants argue that the protestants lack standing because they do not fit the definition of person under NRS § 0.039. NRS § 0.039 provides "[e]xcept as otherwise expressly provided in a particular statute or required by the context, "person" means a natural person, any form of business or social organization and any other nongovernmental legal entity including, but not limited to, a corporation, partnership, association, trust or unincorporated organization. The term does not include a government, governmental agency or political subdivision of a government." Applicants further contend that the protestants do not fit the definition of person under NRS § 533.010 which states "[a]s used in this chapter, "person" includes the United States and this state." Attorneys for Churchill County and City of Fallon argue that if they do not fall under the category of person under

⁶The State Engineer in Order No. 1116 curtailed new appropriations of ground water larger than 4,000 gpd because of the conversion of surface water irrigation water rights to wetlands use thereby reducing the recharge to the groundwater system that is available for capture by wells.

those two statutes then neither does the City of Reno and the Washoe County Water Conservancy District in their protests to the Pyramid Lake Tribe's applications to appropriate the unappropriated water on the Truckee River and, therefore, their protests must also fail for lack of standing. Counsel for the protestants further point out that if they do not meet the criteria under definition of person under NRS § 533.365 which allows "an interested person" to protest an application then neither do they qualify under the definition of person under NRS § 533.325 which allows "persons" to appropriate water.

The State Engineer finds that the definition of person found in NRS § 0.039 is a fairly generic definition, and the definition of person in NRS § 533.010 expands the definition to include the United States and this State. Counsel for the applicants disregard an additional definition in NRS § 534.014 which provides for including in the definition of person any municipal corporation, power district, political subdivision of this state or any state or an agency of the United States Government. The State Engineer additionally finds that he attempted to resolve the differences in the two definitions in a legislative study committee that came out of the 1993 legislative session (Senate Bill 327)⁷. Although a bill was drafted for the 1995 session of the legislature, there was no consensus on what the definition of person should include and, therefore, the bill failed to pass out of the 1995 session of the legislature. Therefore, the State Engineer must look at legislative intent when it enacted NRS § 533.010 and 534.014.

⁷S.B. 327 (1993) called for an interim legislative subcommittee to study water management, the water law and the appropriation of water. That study committee work resulted in Legislative Counsel Bureau Bulletin #95-4 and several bills in the 1995 session of the legislature. The bill to clarify the definition of person was S.B. 100 of the 1995 session of the Nevada Legislature.

The long held principle of statutory construction is that differing provisions bearing upon the same question should be harmonized whenever possible so as to make the statutes consistent and to arrive at the true legislative intent in so doing.⁶ To read NRS § 533.010 and NRS § 534.014 harmoniously allowing the State Engineer to administer the Nevada Water Law in a consistent manner, it is necessary for each definition to incorporate the items listed in the other definition of person. The State Engineer finds that the statutory scheme supports his long standing interpretation of NRS § 533.365 allowing those who timely protest an application based on any of the criteria in NRS 533.370(1) to participate in the administrative process.

The State Engineer further finds that the legislature intended cities and political subdivisions of this state to be able to appropriate water under NRS § 533.325 and to discard those political subdivisions from appropriating water because they fail to meet the definition of person would have an absurd result.

IV.

Attorneys for the applicants point to the phrase "any person interested" found in NRS § 533.365 and believes that past rulings of the State Engineer have ignored the word "interested." Counsel argue that the legislature put the word interested in the statute to have some meaning and that the protestants have no interest in the outcome of these change applications. Attorneys for the applicants point to the Nebraska case of Metropolitan Utilities District v. Twin Platte Natural Resources District, wherein the equivalent of the Nebraska State Engineer denied standing to the

⁶State ex. rel. Allen v. Brodigan, 34 Nev. 486, 492, 125 P.699 (1912); City Council of Reno v. Reno Newspapers, Inc., 105 Nev. 886, 892, 784 P.2d 974 (1989).

Twin Platte Natural Resources District⁹ and the Nebraska Supreme Court upheld that decision. Attorneys for the protestants argue that the issue of standing should be interpreted to be much broader in an administrative hearing than in a judicial setting. The State Engineer must rely on criteria found in NRS § 533.370, amongst other statutes, when ruling on applications to appropriate water and change applications like those that are the subject of this ruling. One of the criteria found in NRS 533.370 is whether a change application "threatens to prove detrimental to the public interest." For instance, the State Engineer could not approve a change application, if in doing so, it would kill the last Bald Eagle on earth. "Persons interested" may bring these types of issues to the forefront and make them part of the administrative record provided they have the science to substantiate their claim. The protestants certainly have an "interest" in the outcome of these change applications. The State Engineer finds that the Nebraska case is distinguishable from the case at hand since the Twin Platte Natural Resources District is some 250 miles upstream from the proposed point of diversion by the Metropolitan Utilities District and further that Twin Platte Natural Resources District holds no water rights and did not make a public interest argument. The State Engineer further finds that the protestants in this case are downstream and hold existing surface and groundwater rights and, therefore, qualify as an "interested party."

CONCLUSIONS

I.

The State Engineer concludes that the protestants can oppose findings of forfeiture and abandonment in the Newlands project and at the same time argue for forfeiture and abandonment in the Truckee Meadows. The facts needed to prove abandonment or

⁹Metropolitan Utilities District v. Twin Platte Resources Dist., 550 N.W. 2d 907 (Neb. 1996).

forfeiture are independent of who brings forth the issue. There are several hundred separate owners of water rights to Truckee River waters. One may have intended to abandon a water right and forsake the use of that water forever while another owner may not have the same intent. It doesn't matter who carries the burden of proving the facts. If the facts are present, a water right can be lost through abandonment or forfeiture.¹⁰

II.

The State Engineer concludes that the protestants hold water rights to both surface and ground water and they lie downstream of the water rights that are the subject of the change applications. Although the Operating Criteria and Procedures, promulgated by the Secretary of Interior, regulates the amount of water that can be diverted from the Truckee River to the Newlands Project, there may be circumstances where the approval of these change applications would conflict with the protestants water rights.

III.

The State Engineer concludes that the protestants are political subdivisions of this state and, therefore, fall under the definition of person found in NRS § 534.014. The fact that they do not fit the definition of person in NRS § 533.010 is insufficient to disqualify them as a bona fide protestant.

IV.

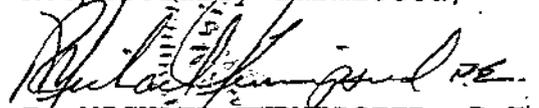
Although the State Engineer has historically been fairly liberal in allowing standing to protestants, it does not mean that he will entertain frivolous protests. In the case at hand, the State Engineer concludes that the protestants have a genuine interest in the outcome of these change applications and, therefore, are bona fide protestants under NRS § 533.365.

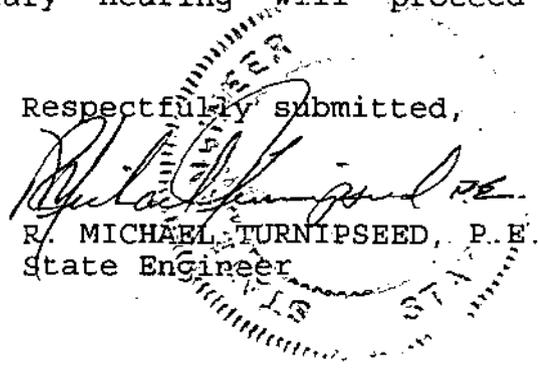
¹⁰NRS § 533.060 and NRS § 534.090.

RULING

For the above reasons, the applicants' motion to summarily dismiss the protests of Churchill County and the City of Fallon is hereby denied and the evidentiary hearing will proceed as scheduled.

Respectfully submitted,


R. MICHAEL TURNIPSEED, P.E.
State Engineer



RMT/bk

Dated this 24th day of
February, 1998.