

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

IN THE MATTER OF APPLICATIONS 63125, )  
63281, 63282, 63310, 63311, 63528, )  
63614, 63615, 63617, 63618, 63644, 63645, )  
63649, 63699, 63701, 63709, 63711, )  
63713, 63714, 64050, 64052, AND 64059 )  
FILED TO CHANGE THE POINT OF DIVERSION, )  
PLACE AND MANNER OF USE OF VARIOUS )  
TRUCKEE RIVER CERTIFICATED AND DECREED )  
WATER RIGHTS, IN THE TRUCKEE CANYON )  
SEGMENT GROUNDWATER BASIN (91), WASHOE )  
COUNTY, NEVADA. )

RULING

**# 466 1**

GENERAL

I.

Application 63125 was filed on May 19, 1997, by the City of Reno, City of Sparks, Washoe County, and Sierra Pacific Power Company to change the point of diversion, manner of use and place of use of 2.862 cubic feet per second (cfs), not to exceed 554.94 acre-feet annually (afa), a portion of the waters of the Truckee River previously appropriated under Claim Numbers 198, 201, 204, 207, 208, 208½, 209, 211, 214, 215, and 218 of the Orr Ditch Decree.<sup>1</sup> The proposed manner of use is for municipal and domestic purposes within the Sierra Pacific Power Company's certificated water service area. The proposed points of diversion are described as being Sierra Pacific's existing water treatment plants. The existing manner of use is as decreed.<sup>2</sup>

II.

Application 63281 was filed on July 25, 1997, by Taywood-Dermody Partnership to change the point of diversion, manner of use and place of use of 0.0433 cfs, not to exceed 4.13 afa, a portion of the waters of the Truckee River previously appropriated under Claim Number 236 as modified by Permit No. 11489, of the Orr Ditch

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<sup>1</sup> Final Decree, U.S. v. Orr Water Ditch Co., In Equity A-3 (D. Nev. 1944) (hereinafter referred to as "Orr Ditch Decree").

<sup>2</sup> File No. 63125, official records in the office of the State Engineer.

Decree. The proposed manner of use is for municipal purposes within the Sierra Pacific Power Company's certificated water service area. The proposed points of diversion are described as being Sierra Pacific's existing water treatment plants. The existing manner of use is as decreed.<sup>3</sup>

**III.**

Application 63282 was filed on July 25, 1997, by Washoe County to change the point of diversion, manner of use and place of use of 0.0187 cfs, not to exceed 9.36 afa, a portion of the waters of the Truckee River previously appropriated under Claim Number 322 of the Orr Ditch Decree. The proposed manner of use is for municipal purposes within the Sierra Pacific Power Company's certificated water service area. The proposed points of diversion are described as being Sierra Pacific's existing water treatment plants. The existing manner of use is as decreed.<sup>4</sup>

**IV.**

Application 63310 was filed on August 8, 1997, by the City of Reno, City of Sparks, Washoe County, and Sierra Pacific Power Company to change the point of diversion, manner of use and place of use of 2.41 cfs, not to exceed 334.518 afa, a portion of the waters of the Truckee River previously appropriated under Claim Numbers 229, 230, 231, 232, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 247, 249, 250, 257, 261, and 264 of the Orr Ditch Decree. The proposed manner of use is for municipal and domestic purposes within the Sierra Pacific Power Company's certificated water service area. The proposed points of diversion are described

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<sup>3</sup> File No. 63281, official records in the office of the State Engineer.

<sup>4</sup> File No. 63282, official records in the office of the State Engineer.

as being Sierra Pacific's existing water treatment plants. The existing manner of use is as decreed.<sup>5</sup>

V.

Application 63311 was filed on August 8, 1997, by Sierra Pacific Power Company to change the point of diversion, manner of use and place of use of 0.366 cfs, not to exceed 77.76 afa, a portion of the waters of the Truckee River previously appropriated under Claim Numbers 179½, 206, and 259 of the Orr Ditch Decree. The proposed manner of use is for municipal and domestic purposes within the Sierra Pacific Power Company's certificated water service area. The proposed points of diversion are described as being Sierra Pacific's existing water treatment plants. The existing manner of use is as decreed.<sup>6</sup>

VI.

Application 63528 was filed on October 22, 1997, by Lewis Homes of Nevada and Empire Building Corporation to change the point of diversion, manner of use and place of use of 1.40 cfs, not to exceed 244.0 afa, a portion of the waters of the Truckee River previously appropriated under Claim Number 182 of the Orr Ditch Decree. The proposed manner of use is for municipal purposes within the Sierra Pacific Power Company's certificated water service area. The proposed points of diversion are described as being Sierra Pacific's existing water treatment plants. The existing manner of use is as decreed.<sup>7</sup>

VII.

Application 63614 was filed on December 11, 1997, by Northwest Partners to change the point of diversion, manner of use and place

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<sup>5</sup> File No. 63310, official records in the office of the State Engineer.

<sup>6</sup> File No. 63311, official records in the office of the State Engineer.

<sup>7</sup> File No. 63528, official records in the office of the State Engineer.

of use of 2.48 afa, and a prorata share of the diversion rate, a portion of the waters of the Truckee River previously appropriated under Permit 11489, Certificate 4827. The proposed manner of use is for municipal and domestic purposes within the Sierra Pacific Power Company's certificated water service area. The proposed points of diversion are described as being Sierra Pacific's existing water treatment plants. The existing manner of use is as decreed.<sup>8</sup>

VIII.

Application 63615 was filed on December 11, 1997, by Northwest Partners to change the point of diversion, manner of use and place of use of 6.66 afa, and a prorata share of the diversion rate, a portion of the waters of the Truckee River previously appropriated under Claim Numbers 335 and 336 of the Orr Ditch Decree. The proposed manner of use is for municipal and domestic purposes within the Sierra Pacific Power Company's certificated water service area. The proposed points of diversion are described as being Sierra Pacific's existing water treatment plants. The existing manner of use is as decreed.<sup>9</sup>

IX.

Application 63617 was filed on December 11, 1997, by Northwest Partners to change the point of diversion, manner of use and place of use of 0.63 afa, and a prorata share of the diversion rate, a portion of the waters of the Truckee River previously appropriated under Claim Number 566 of the Orr Ditch Decree. The proposed manner of use is for municipal and domestic purposes within the Sierra Pacific Power Company's certificated water service area. The proposed points of diversion are described as being Sierra

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<sup>8</sup> File No. 63614, official records in the office of the State Engineer.

<sup>9</sup> File No. 63615, official records in the office of the State Engineer.

Pacific's existing water treatment plants. The existing manner of use is as decreed.<sup>10</sup>

X.

Application 63618 was filed on December 11, 1997, by Northwest Partners to change the point of diversion, manner of use and place of use of 8.535 afa, and a prorata share of the diversion rate, a portion of the waters of the Truckee River previously appropriated under Claim Number 613 of the Orr Ditch Decree. The proposed manner of use is for municipal and domestic purposes within the Sierra Pacific Power Company's certificated water service area. The proposed points of diversion are described as being Sierra Pacific's existing water treatment plants. The existing manner of use is as decreed.<sup>11</sup>

XI.

Application 63644 was filed on December 19, 1997, by Sierra Pacific Power Company to change the point of diversion, manner of use and place of use of 0.0327 cfs, not to exceed 5.18 afa, a portion of the waters of the Truckee River previously appropriated under Claim Numbers 150 and 150½ of the Orr Ditch Decree. The proposed manner of use is for municipal purposes within the Sierra Pacific Power Company's certificated water service area. The proposed points of diversion are described as being Sierra Pacific's existing water treatment plants. The existing manner of use is as decreed.<sup>12</sup>

XII.

Application 63645 was filed on December 19, 1997, by Empire Building Corporation, c/o Lewis Homes of Nevada, to change the

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<sup>10</sup> File No. 63617, official records in the office of the State Engineer.

<sup>11</sup> File No. 63618, official records in the office of the State Engineer.

<sup>12</sup> File No. 63644, official records in the office of the State Engineer.

point of diversion, manner of use and place of use of 2.37 cfs, not to exceed 241.88 afa, a portion of the waters of the Truckee River previously appropriated under Claim Number 571 of the Orr Ditch Decree. The proposed manner of use is for municipal purposes within the Sierra Pacific Power Company's certificated water service area. The proposed points of diversion are described as being Sierra Pacific's existing water treatment plants. The existing manner of use is as decreed.<sup>13</sup>

XIII.

Application 63649 was filed on December 23, 1997, by T.C. Reno, Inc., to change the point of diversion, manner of use and place of use of 3.09 afa, and a prorata share of the diversion rate, a portion of the waters of the Truckee River previously appropriated under Permit 11489, Certificate 4827. The proposed manner of use is for municipal and domestic purposes within the Sierra Pacific Power Company's certificated water service area. The proposed points of diversion are described as being Sierra Pacific's existing water treatment plants. The existing manner of use is as decreed.<sup>14</sup>

XIV.

Application 63699 was filed on December 31, 1997, by the City of Reno, City of Sparks, Washoe County, and Sierra Pacific Power Company to change the point of diversion, manner of use and place of use of 1.0006 cfs, not to exceed 118.472 afa, a portion of the waters of the Truckee River previously appropriated under Claim Numbers 387, 388, 390, 394, 395, 396, and 397 of the Orr Ditch Decree. The proposed manner of use is for municipal and domestic purposes within the Sierra Pacific Power Company's certificated water service area. The proposed points of diversion are described

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<sup>13</sup> File No. 63645, official records in the office of the State Engineer.

<sup>14</sup> File No. 63649, official records in the office of the State Engineer.

as being Sierra Pacific's existing water treatment plants. The existing manner of use is as decreed.<sup>15</sup>

XV.

Application 63701 was filed on December 31, 1997, by the City of Reno, City of Sparks, Washoe County, and Sierra Pacific Power Company to change the point of diversion, manner of use and place of use of 0.05 cfs, not to exceed 8.92 afa, a portion of the waters of the Truckee River previously appropriated under Permit 16903, Certificate 4548. The proposed manner of use is for municipal and domestic purposes within the Sierra Pacific Power Company's certificated water service area. The proposed points of diversion are described as being Sierra Pacific's existing water treatment plants. The existing manner of use is for irrigation, stockwatering, and domestic purposes.<sup>16</sup>

XVI.

Application 63709 was filed on January 6, 1998, by Washoe County to change the point of diversion, manner of use and place of use of 2.835 afa and a prorata share of the diversion rate, a portion of the waters of the Truckee River previously appropriated under Claim Numbers 153 and 168 of the Orr Ditch Decree. The proposed manner of use is for municipal and domestic purposes within the Sierra Pacific Power Company's certificated water service area. The proposed points of diversion are described as being Sierra Pacific's existing water treatment plants. The existing manner of use is as decreed.<sup>17</sup>

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<sup>15</sup> File No. 63699, official records in the office of the State Engineer.

<sup>16</sup> File No. 63701, official records in the office of the State Engineer.

<sup>17</sup> File No. 63709, official records in the office of the State Engineer.

**XVII.**

Application 63711 was filed on January 6, 1998, by Washoe County to change the point of diversion, manner of use and place of use of 0.58 afa, and a prorata share of the diversion rate, a portion of the waters of the Truckee River previously appropriated under Claim Numbers 337 and 338 of the Orr Ditch Decree. The proposed manner of use is for municipal and domestic purposes within the Sierra Pacific Power Company's certificated water service area. The proposed points of diversion are described as being Sierra Pacific's existing water treatment plants. The existing manner of use is as decreed.<sup>18</sup>

**XVIII.**

Application 63713 was filed on January 6, 1998, by Washoe County to change the point of diversion, manner of use and place of use of 6.125 afa, and a prorata share of the diversion rate, a portion of the waters of the Truckee River previously appropriated under Claim Number 609 of the Orr Ditch Decree. The proposed manner of use is for municipal and domestic purposes within the Sierra Pacific Power Company's certificated water service area. The proposed points of diversion are described as being Sierra Pacific's existing water treatment plants. The existing manner of use is as decreed.<sup>19</sup>

**XIX.**

Application 63714 was filed on January 6, 1998, by Washoe County to change the point of diversion, manner of use and place of use of 4.644 afa, and a prorata share of the diversion rate, a portion of the waters of the Truckee River previously appropriated under Claim Number 613 of the Orr Ditch Decree. The proposed manner of use is for municipal and domestic purposes within the

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<sup>18</sup> File No. 63711, official records in the office of the State Engineer.

<sup>19</sup> File No. 63713, official records in the office of the State Engineer.

Sierra Pacific Power Company's certificated water service area. The proposed points of diversion are described as being Sierra Pacific's existing water treatment plants. The existing manner of use is as decreed.<sup>20</sup>

XX.

Application 64050 was filed on April 22, 1998, by S and H Investments to change the point of diversion, manner of use and place of use of 17.99 afa, and a prorata share of the diversion rate, a portion of the waters of the Truckee River previously appropriated under Permit 11489, Certificate 4827. The proposed manner of use is for municipal and domestic purposes within the Sierra Pacific Power Company's certificated water service area. The proposed points of diversion are described as being Sierra Pacific's existing water treatment plants. The existing manner of use is as decreed.<sup>21</sup>

XXI.

Application 64052 was filed on April 22, 1998, by S and H Investments to change the point of diversion, manner of use and place of use of 14.32 afa, and a prorata share of the diversion rate, a portion of the waters of the Truckee River previously appropriated under Claim Number 215 of the Orr Ditch Decree. The proposed manner of use is for municipal and domestic purposes within the Sierra Pacific Power Company's certificated water service area. The proposed points of diversion are described as being Sierra Pacific's existing water treatment plants. The existing manner of use is as decreed.<sup>22</sup>

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<sup>20</sup> File No. 63714, official records in the office of the State Engineer.

<sup>21</sup> File No. 64050, official records in the office of the State Engineer.

<sup>22</sup> File No. 64052, official records in the office of the State Engineer.

**XXII.**

Application 64059 was filed on April 24, 1998, by Tenaya Investment Company to change the point of diversion, manner of use and place of use of 3.81 afa, and a prorata share of the diversion rate, a portion of the waters of the Truckee River previously appropriated under Claim Numbers 79 and 189 of the Orr Ditch Decree. The proposed manner of use is for municipal and domestic purposes within the Sierra Pacific Power Company's certificated water service area. The proposed points of diversion are described as being Sierra Pacific's existing water treatment plants. The existing manner of use is as decreed.<sup>23</sup>

**FINDINGS OF FACT**

**I.**

Applications 63614, 63649, 63701 and 64050 request changes of certificated Truckee River water right permits whose origins can be traced back through a series of change permits to water right claims which were determined under the Orr Ditch Decree.<sup>8,14,16,21</sup> Under the provisions of NRS 533.040(1), a permit which is part of a series of change permits will be assigned the priority date of the original base right permit or claim. Therefore, the State Engineer finds that the priority date for each of the permitted rights which Applications 63614, 63649, 63701 and 64050 seek to change is identical to the priority date of their respective Truckee River claim base right.

**II.**

The transfer applications which are the subject of this ruling represent what will be identified as the second group of change applications that were protested by the City of Fallon and Churchill County. The initial group consisted of 32 applications which were the subject of a public administrative hearing held on

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<sup>23</sup> File No. 64059, official records in the office of the State Engineer.

June 15-17, 1998, before the State Engineer.<sup>24</sup> In compliance with the procedure established at the December 12, 1997, pre-hearing conference, extensive pre-filed testimony and exhibits, as well as additional testimony, were entered into the hearing record in support of the applicants' and protestants' positions. At the conclusion of the evidentiary portion of the hearing, the State Engineer issued an oral ruling in which the protests to those change applications which requested changes of pre-1913 Truckee River claims were overruled in their entirety. Those portions of the protests which addressed the forfeiture of Truckee River Claims which possess post-1913 priority dates were upheld with substantial portions of two change applications forfeited by the State Engineer.<sup>25</sup> The State Engineer finds that the degree of similarity between the subject applications and those heard during the June 1998 hearings is substantial and that the State Engineer can rely upon the record of evidence and testimony received at said hearing for a complete understanding of the water rights before him.

### III.

Since November 1996, the City of Fallon and Churchill County have filed written protests against the granting of certain change applications which sought to convert Truckee River decreed irrigation rights to municipal water right permits for use within the Sierra Pacific Power Company's service area. All of these change applications have been protested by one and/or both of the protestants on similar grounds which can be generalized as follows:<sup>1-23</sup>

- A. the water rights that are the subject of the change applications have been abandoned and, the reactivation of

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<sup>24</sup> Exhibit No. 1, public administrative hearing before the State Engineer, June 15-17, 1998.

<sup>25</sup> Transcript, pp. 474-479, public administrative hearing before the State Engineer, June 17, 1998. State Engineer's Ruling No. 4642, June 17, 1998, official records in the office of the State Engineer.

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 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.

Although some variations occur when comparing the earlier protests with the more recent ones, the State Engineer finds that each protest contains a common set of contentions, including those which were ruled upon during the June 1998 hearings.

#### IV.

In Alpine III, the Ninth Circuit Court of Appeals held that "[i]f the right vested before March 22, 1913, or if the appropriation of the right was initiated in accordance with the law in effect prior to that date, then it is not subject to possible forfeiture under NRS 533.060."<sup>26</sup> The State Engineer finds that all water rights requested for transfer pursuant to these transfer applications are changes of pre-1913 water rights established under the Orr Ditch Decree. Therefore, they are not subject to the forfeiture provisions of Nevada Revised Statute § 533.060. Furthermore, the State Engineer finds that since forfeiture is not an issue in this determination there is no need to request or receive additional evidence and testimony.

#### V.

Abandonment requires a union of acts and intent and cannot be presumed to have occurred solely upon evidence of a prolonged

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<sup>26</sup> U.S. v. Alpine Land & Reservoir Co., 983 F.2d 1487, 1496 (9th Cir. 1992).

period of non-use.<sup>27</sup> During the evidentiary portion of the June 1998 hearings there was a general consensus among the applicants' and protestants' counsel that it would be difficult, if not impossible to reach back through the years to discern any intent which the original owner of the water right may have had to abandon his right. The protestants instead relied upon non-use alone to create a presumption of intent to abandon. This was accomplished through a series of exhibits and testimony which related entirely to the issue of non-use. During the June 1998 hearings, the State Engineer accepted the fact that the holders of those water rights by either reserving them out of deeds or transferring them to new owners evidenced an intent not to abandon those rights. The situation is not any different here. The State Engineer finds that the protestants, relying heavily upon evidence of non-use, did not establish an intent to abandon. The applicants here are not the original decreed owners. Surface water rights in the Truckee Meadows are bought and sold on a regular basis. The applicants here purchased Truckee River water rights from willing sellers. Whether one reserves water rights in a land transaction or severs the water from the land with the intent to sell, the State Engineer finds that any claim of intent to abandon must fail. The State Engineer further finds there is no need to request additional evidence and testimony to build a case for abandonment based solely on non-use of the water right.

#### VI.

Both the City of Fallon and Churchill County contend that the approval of the subject applications would violate the Endangered Species Act and Public Law 101-618. The State Engineer finds that these are legal issues which do not require additional testimony and evidence beyond that received during the June 1998 hearings.

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<sup>27</sup> Re Waters of Manse Spring, 60 Nev. 280 (1940); Revert v. Ray, 95 Nev. 782, 786 (1979).

VII.

The State Engineer upon consideration of a protest may at his discretion hold hearings and require the filing of such evidence as he may deem necessary for a full understanding of the water rights involved.<sup>28</sup> The State Engineer finds that the subject applications and protests are similar in nature to those which were evaluated, considered, and ruled upon at the June 1998 hearings; therefore, the need for any additional hearings to consider the merits of the protests can be satisfied by the information contained within the record of said hearing and the office of the State Engineer without scheduling additional hearings.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>29</sup>

II.

The State Engineer is prohibited by law from granting a permit under an application to change the public waters where:<sup>30</sup>

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

III.

The City of Fallon and Churchill County have since 1996 filed protests against Truckee River change applications which request a conversion of agricultural water rights to municipal water rights. In June 1998 a public administrative hearing in the matter of 32 of these types of applications was held before the State Engineer which culminated in the issuance of State Engineer's Ruling No. 4642. As set forth in that ruling, the protests of 30 of the 32

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<sup>28</sup> NRS § 533.365(3).

<sup>29</sup> NRS Chapter 533.

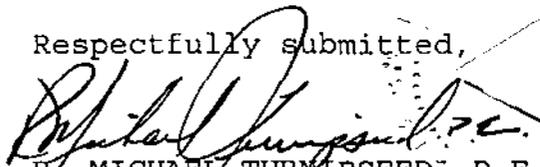
<sup>30</sup> NRS § 533.370(3).

applications were overruled after it was determined by the State Engineer that their approval would not conflict with existing water rights or threaten to prove detrimental to the public interest. The applications and protests which are the subject of this ruling differ little from those heard during the June 1998 hearing. The findings of fact and the conclusions of law which were formulated by the State Engineer and utilized as the basis of his ruling during the June 1998 hearing can be applied in considering the approval or denial of these applications as well. Based on these findings and conclusions, the State Engineer concludes that the approval of the subject applications would not conflict with existing rights nor threaten to prove detrimental to the public interest.

RULING

The protests to Applications 63125, 63281, 63282, 63310, 63311, 63528, 63614, 63615, 63617, 63618, 63644, 63645, 63649, 63699, 63701, 63709, 63711, 63713, 63714, 64050, 64052, and 64059 are hereby overruled and the above applications are approved subject to existing rights and the payment of the statutory filing fees.

Respectfully submitted,

  
R. MICHAEL TURNIPSEED, P.E.  
State Engineer

RMT/MDB/cl

Dated this 26th day of  
August, 1998.