

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

IN THE MATTER OF APPLICATIONS)
71976-T AND 71977-T FILED TO CHANGE)
THE PLACE AND MANNER OF USE OF)
DECREED SURFACE WATERS WITHIN)
THE TRACY SEGMENT HYDROGRAPHIC)
BASIN (83) AND THE PYRAMID LAKE)
VALLEY HYDROGRAPHIC BASIN (81),)
STOREY COUNTY AND WASHOE)
COUNTY, NEVADA.)

RULING
5714

GENERAL

I.

Application 71976-T was filed on December 8, 2004, by the United States as trustee for the Pyramid Lake Paiute Tribe of Indians, acting through the Bureau of Indian Affairs, and the Pyramid Lake Paiute Tribe of Indians to change the place and manner of use of 15,344.55 acre-feet annually (afa) (2,745 acres @ 5.59 acre-feet per acre) of water as decreed under Claim No. 2 as set forth in the *Orr Ditch Decree*.¹ Application 71976-T proposes to change the manner of use from irrigation to wildlife purposes, including instream flows for fish. There will be no diversion of the water from the Truckee River as it is to remain in the river from Derby Dam to Pyramid Lake. The existing point of diversion is described as being located in the N½ SW¼ of Section 19, T.20N., R.23E., M.D.B.&M.,² which is Derby Dam. The existing place of use is described as decreed on Pyramid Lake Indian Reservation bench lands. The proposed place of use is described as the Truckee River downstream of Derby Dam to the Pyramid Lake inlet as shown on the map accompanying Application 67182.

The remarks on the application indicate, among other things, that the water will be used during the irrigation season through November 15th, subject to the condition that no more than 25 percent of the total water right amount will be used in any one month. In addition, no more than 68.6 cubic feet per second (cfs) will be used at any one time. The application further provides that

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

²File No. 71976-T, official records in the Office of the State Engineer.

the right sought under the temporary change application voluntarily will be exercised in conjunction with other Tribal water rights for wildlife purposes so as to avoid limitations on diversions of Truckee Meadows water rights pursuant to Article VII(B) of the Truckee River Agreement.

Application 71976-T was timely protested by the City of Fallon, Churchill County, and the Truckee-Carson Irrigation District.²

The *Orr Ditch* Decree provides under Claim No. 2 for the diversion, with a priority date of December 8, 1859, of one-fortieth of one cfs per acre for the irrigation of 2,745 acres of bench lands on the Pyramid Lake Indian Reservation.³ The water so allowed for bench lands is allowed to be diverted through the Truckee Canal or any other ditch now or thereafter constructed as the United States may desire or authorize; provided that the amount of water for bench land shall not exceed during any calendar year 5.59 acre-feet per acre diverted from the river, nor exceed during any calendar year 4.1 acre-feet per acre applied to the lands for the aggregate number of acres of land being irrigated during any calendar year.

II.

Application 71977-T was filed on December 8, 2004, by the United States as trustee for the Pyramid Lake Paiute Tribe of Indians, acting through the Bureau of Indian Affairs, and the Pyramid Lake Paiute Tribe of Indians (PLPT) to change the place and manner of use of 9,914.00 afa (2,105 acres @ 4.71 acre-feet per acre), a portion of the water decreed under Claim No. 1 of the *Orr Ditch* Decree. Application 71977-T proposes to change the manner of use from irrigation to wildlife purposes, including instream flows for fish. There will be no diversion of the water from the Truckee River as it is to remain in the river from Indian Ditch to Pyramid Lake.⁴ The existing point of diversion is Indian Ditch. The existing place of use is described as Pyramid Lake Indian Reservation bottom lands. The proposed place of use is described as the Truckee River downstream of Indian Ditch to the Pyramid Lake inlet as shown on the map accompanying Application 67182.

The remarks on the application indicate, among other things, that the water to be transferred will be used during the irrigation season through November 15th, subject to the condition that no

³ The 1/40th of one cfs per acre for the entire 2,745 acres converts to a total diversion rate of 68.63 cfs.

⁴ File No. 71977-T, official records in the Office of the State Engineer.

more than 25 percent of the total water right amount will be used in any one month. In addition, no more than 33.0 cfs will be used at any time. The application further provides that the right sought under the temporary change application voluntarily will be exercised in conjunction with other Tribal water rights for wildlife purposes so as to avoid limitations on diversions of Truckee Meadows water rights pursuant to Article VII(B) of the Truckee River Agreement.

Application 71977-T was timely protested by the City of Fallon, Churchill County and the Truckee Carson Irrigation District. These are the same Protestants raising essentially identical issues to those already considered in previous change applications on these water rights.²

The *Orr Ditch* Decree provides under Claim No. 1 for the diversion, with a priority date of December 8, 1859, through Indian Ditch of not exceeding 58.7 cfs, to an amount not exceeding 14,742 afa of water in any calendar year for the irrigation of 3,130 acres of bottom lands on the Pyramid Lake Indian Reservation, provided that the amount of water so diverted shall not exceed a flow of one-miner's inch, or one-fortieth of one cfs per acre for the aggregate number of acres of land being irrigated during any calendar year,⁵ and the amount of water applied to the land after an estimated transportation loss of 15 percent shall not exceed 85-100 of an inch or 85-100 of one-fortieth of one cfs per acre for the total number of acres irrigated, and provided that the amount of water diverted during any such year shall not exceed 4.71 acre-feet per acre for the aggregate number of acres of land being irrigated during that year, and further provided that the amount of water applied to the land shall not exceed 4 acre-feet per acre for the aggregate number of acres of land being irrigated during any calendar year.

III.

Applications 71976-T (Claim No. 2) and 71977-T (Claim No. 1) were protested on various grounds most of which have been previously addressed in a ruling on identical transfer applications, those being Applications 67666-T and 68157-T.⁶

⁵ The 1/40th of one cfs per acre for the entire 3,130 acres converts to a total diversion rate of 78.25; however, the decree provides an upper limit on the diversion rate of 58.7 cfs. If the allowed diversion rate were proportioned by ratio to the authorized acreage, 39.33 cfs would be that portion of the diversion rate assignable to 2,105 acres.

⁶ See, State Engineer's Ruling No. 5185, dated December 6, 2002, official records in the Office of the State Engineer.

FINDINGS

I.

When Applications 71976-T and 71977-T were filed, legal counsel for the Pyramid Lake Paiute Tribe followed the applications with a letter indicating the Tribe would accept granting of the permits under the same conditions the State Engineer had granted them in State Engineer's Ruling No. 5185.¹ The letter also indicated that since a full evidentiary hearing had already been held and all of the issues decided there appeared to be no reason for additional hearings.

The former State Engineer issued State Engineer's Ruling No. 5185 on December 6, 2002, on temporary change Applications 67666-T and 68157-T, which were filings identical to the temporary change applications under consideration in this ruling. The Applicant and various Protestants appealed that decision to the Federal District Court and later the Ninth Circuit Court of Appeals. When the applications under consideration in this ruling were filed, the former State Engineer determined because of the pending appeals and the significant issues presented by those appeals that the temporary changes may not be in the public interest, and therefore, notice of the applications should be published. By decision dated November 21, 2005, the Ninth Circuit Court of Appeals affirmed the State Engineer's decision in State Engineer's Ruling No. 5185.⁷

As to temporary change applications Nevada Revised Statute § 533.345(2) and (3) provide 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.

⁷ *United States v. State Engineer*, 429 F. 3d 902 (9th Circuit 2005).

As noted above, when Applications 71976-T and 71977-T were filed, due to the pending litigation, the State Engineer found the proposed changes may not be in the public interest and required the filing of the applications be published, which gives notice of the applications. Nevada Revised Statute § 533.345(3) then requires a hearing being held and a decision be issued as provided in chapter 533 of the Nevada Revised Statutes. However, since an evidentiary hearing has already been held on applications identical to those under consideration in this ruling, the State Engineer finds another hearing is not required as it would waste the resources of the Applicant, Protestants and the Office of the State Engineer to conduct the hearing a second time and a decision can be made on these applications with the information presently before the State Engineer.

II.

The State Engineer specifically adopts and incorporates the Findings of Fact and Conclusions and conditions of issuance of the permits in State Engineer's Ruling No. 5185 into the decision on these applications.

III.

Several of the Protestants raise the issue in their current protests that this is the second application for temporary transfers of these water rights and the use of the temporary transfer application process to accomplish what is tantamount to a permanent transfer is detrimental to the public interest. Additionally, it is alleged that the use of the temporary transfer application process is limited to alleviate drought situations and/or for emergencies and no such condition exists here.

The State Engineer notes that nothing in NRS § 533.345 specifically provides that temporary applications are only to be used in emergency situations, such as a drought. However, 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. In order to understand what the legislature contemplated under the public interest criterion, the State Engineer has looked to the legislative history. That history indicates that it was State Engineer Morros who requested the bill allowing for temporary transfers, that it was his belief that during the drought the

need arose for more flexibility in allowing temporary changes of existing water rights, and that in special circumstances there became a need to circumvent the usual statutory change application process. He indicated that the intent was not to allow any transfer of water rights to be permanent, but rather the intent was to handle emergency situations and to make temporary transfers more flexible. He additionally noted that whether to hold the hearing was to be discretionary with the State Engineer and it would not be held unless it was necessary. Assemblymen Regan addressed the concern that the use of the temporary transfer provisions not be abused.

In order to see how other State Engineers have interpreted the temporary transfer provision, the State Engineer researched the records of the Office of the State Engineer. In an early decision after enactment of the legislation, a temporary change was granted under Application 53334-T, which allowed for a replacement irrigation well to be drilled and used while the permanent change application was being processed. In June 1989 temporary change applications were granted for the filling of a new recreational area dam.⁸ In the first few decisions on temporary change applications after the legislation was enacted, the State Engineer does not appear to have interpreted the law as only applying to emergency situations. Rather, he appears to have looked at the public interest criterion as granting him discretion broader than emergency situations in the determination of whether or not to grant a temporary application.

Other State Engineers also appear to have approached temporary applications the same way, as many temporary change applications have been granted, the bulk of which have been related to mining, mine dewatering and activities related to mining. However, others have been granted for construction activities like dust control⁹ and to keep an irrigator in business while a permanent change application was processed.¹⁰ Many temporary change applications have been granted within the Newlands Project with one even permitted one for Protestant Churchill County.¹¹

The State Engineer finds his predecessors have not interpreted this provision of the water law as only relating to emergency situations. However, they all appear to have scrutinized whether the use of the water was truly temporary and whether there were special circumstances that

⁸ Application 53359-T, official records in the Office of the State Engineer.

⁹ Application 69079-T, official records in the Office of the State Engineer.

¹⁰ Application 60966-T, official records in the Office of the State Engineer.

¹¹ Application 68632-T, official records in the Office of the State Engineer.

demonstrated a need to circumvent the usual statutory change application process. The State Engineer finds he will also scrutinize temporary change applications to determine whether or not the use is really temporary and if there are special circumstances warranting use of the temporary change application process, and if not, the application will be denied. Repeated filings of the same temporary change may indicate the use is not temporary.

Additionally, a temporary change must also have the ability to revert to the existing place and manner of use otherwise it is not a temporary change. In the case under consideration here, this is only the second time in a three-year period this Applicant has filed these identical temporary changes; thus, the State Engineer does not believe the repeated use of the temporary change process warrants the analysis that the changes being requested are really permanent. Additionally, the changes being requested are changes to federal reserved water rights and upon expiration of the temporary changes those rights revert to the manner and place of use described under the *Orr Ditch Decree* whether or not those federally reserved water rights have actually been placed to beneficial use. Federal reserved water rights are distinct from those granted pursuant to state water law in such aspects as they are not required to be placed to beneficial use to be considered valid water rights.

IV.

The City of Fallon alleged that the transfer is detrimental to the public interest because there is no designated place of use for the water and once the temporary transfer has ended, by definition the water must revert to its original manner of use and place of use from which it was transferred. It alleged it is not in the public interest to allow a transfer of water when it is not being transferred from anywhere and will not revert to any location once the transfer is complete. The water rights the Applicant is requesting to transfer under these applications are those federally reserved water rights identified as Claim Nos. 1 and 2 in the *Orr Ditch Decree*. The decreed places of use for Claim Nos. 1 and 2 are the Pyramid Lake Indian Reservation bench and bottom lands; however, it is recognized that the water under Claim No. 2 has never been placed to beneficial use. The State Engineer finds that once the temporary transfer has expired under Claim No. 2 the water is to revert to the Claim No. 2 bench lands and since no water has ever been developed and will not revert to use on those bench lands it may raise a question as to whether the transfer, particularly if

continually repeated, is really a temporary transfer. Under Claim No. 1 lands had been put in irrigation and water had been placed to beneficial use. In order to address the concern that lands would not continue to be irrigated from which water had been stripped under the temporary change application, when the State Engineer issued State Engineer's Ruling No. 5185, he also required the filing of a map in order to show what lands under Claim No. 1 would be remaining in irrigation. Thus, upon expiration of the temporary transfer the water reverts to those lands from which it had been stripped. The State Engineer finds, under the circumstances of these change applications that at this time he is not prepared to find the transfer is not really a temporary transfer.

V.

The City of Fallon alleges that the application is not in the public interest because the Pyramid Lake Paiute Tribe has in the past and continues to divert more water than it is entitled to under Claim No. 2 of the *Orr Ditch Decree*. Thus, the application for a temporary transfer has the effect of increasing the total amount of water decreed to the Tribe above the amount set forth in the Decree; thus, injuring the City of Fallon and other upstream users. It is the State Engineer's understanding that other than the previous temporary transfer granted no water has ever been developed under Claim No. 2 and finds that issues of over diversion of water rights decreed under the *Orr Ditch Decree* are for resolution in the Decree court and not by the State Engineer.

CONCLUSIONS

I.

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

¹² NRS chapter 533 and Final Order Granting the State of Nevada's Motion for Summary Judgment on the Issue of the United States' Application for Change in Use and Change of Purpose, dated February 25, 1984, U.S. v. Orr Water Ditch Company, In Equity No. A-3.

II.

The *Orr Ditch* Decree provides that:

Persons 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 waters to which they are so entitled or of 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(2)(3) 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.

The State Engineer concludes that once 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 gives notice of the application as provided in NRS § 533.360, and then analyzes the applications under the provisions of NRS § 533.370(5). The State Engineer concludes this is the meaning of NRS § 533.345(3) that provides that once the application is noticed, the State Engineer is to render a decision as provided in chapter 533 of the Nevada Revised Statutes. He is to determine whether the use of the water as proposed under the applications threatens to prove detrimental to the public interest. The analysis is not that found under NRS § 533.345(2) of whether the “temporary change is in the public interest.”

¹³ Final Decree, *U.S. v. Orr Water Ditch Co.*, In Equity A-3 (D.Nev. 1944) p. 88.

The State Engineer concludes these applications are filed for a beneficial use of water and it does not threaten to prove detrimental to the public interest to allow the use of water under these temporary change applications in support of the fishery.

RULING

Based on the analysis in State Engineer's Ruling No. 5185, as supplemented in this ruling, the State Engineer holds that the protests to Applications 71976-T and 71977-T are hereby upheld in part and denied in part. Application 71976-T is granted in the amount of 11,254.5 acre-feet annually. Application 71977-T is granted in the amount of 8,420 acre-feet annually for a total under the two applications of 19,674.5 acre-feet annually. The water rights shall be exercised under the requirements established in State Engineer's Ruling No. 5185, as set forth in either proposed Alternative 3 or 4 as described in the Environmental Assessment meaning the water will be taken in equal amounts over a certain number of months. Applications 71976-T and 71977-T are hereby granted in the amounts identified subject to:

1. Existing rights;
2. Continuing jurisdiction and regulation by the *Orr Ditch* Decree Court and the Federal Watermaster;
3. Applications 71976-T and 71977-T expire one year from the date of the issuance of the permit; and,
4. Confirmation by the Applicant that the map required by State Engineer's Ruling No. 5185 that shows what lands under Claim No. 1 will remain in irrigation is still an accurate depiction of those lands.

Respectfully submitted,



TRACY TAYLOR, P.E.
State Engineer

TT/SJT/jm

Dated this 8th day of

February, 2007.