

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

IN THE MATTER OF APPLICATIONS )  
71775, 73444 AND 73574 FILED TO )  
CHANGE THE PLACE OF USE OF THE )  
WATERS OF THE TRUCKEE AND )  
CARSON RIVERS, CARSON DESERT )  
HYDROGRAPHIC BASIN (101), )  
CHURCHILL COUNTY, NEVADA. )

**RULING**

**#5759**

**GENERAL**

**I.**

Application 71775 was filed on October 15, 2004, by Nevada Waterfowl Association (NWA) to change the place of use of 6.58 acre-feet annually (afa) (1.88 acres at 3.5 acre-feet per acre), a portion of the waters of the Truckee River and Carson River heretofore decreed and set forth under Claim No. 3 of the *Orr Ditch Decree* and under the *Alpine Decree*.<sup>1</sup> The Application proposes to change the place of use from the NW $\frac{1}{4}$  SW $\frac{1}{4}$  (1.68 acres), SW $\frac{1}{4}$  SW $\frac{1}{4}$  (0.20 acres) of Section 32, T.19N., R.28E., M.D.B.&M. to an area known as Carson Lake and Pasture.<sup>2</sup>

**II.**

Application 73444 was filed on November 7, 2005, by State of Nevada Department of Wildlife (NDOW) to change the place of use of 38.10 afa (74.70 acres at 0.51 acre-feet per acre), a portion of the waters of the Truckee River and Carson River heretofore decreed and set forth under Claim No. 3 of the *Orr Ditch Decree* and under the *Alpine Decree*. The Application proposes to change the place of use from the SW $\frac{1}{4}$  SW $\frac{1}{4}$  (36 acres), SE $\frac{1}{2}$  SW $\frac{1}{4}$  (38.7 acres) of Section 18, T.17N., R.29E., M.D.B.&M. to the Carson Lake and Pasture.<sup>3</sup> The remarks section of the application indicates that it is a request to transfer the remainder of the duty that was not transferred under Permit 60771.

---

<sup>1</sup> Final Decree, *United States v. Orr Water Ditch Co.*, Equity A-3 (D. Nev. 1944), Final Decree, *United States v. Alpine Land & Reservoir Co.*, Civil No. D-183 (D. Nev. 1980).

<sup>2</sup> File No. 71775, official records in the Office of the State Engineer. Exhibit No. 2, public administrative hearing before the Office of the State Engineer November 14 - 15, 2006. Hereinafter the Transcript and Exhibits will be referred to solely by the transcript page number or exhibit number.

<sup>3</sup> Exhibit No. 10.

### III.

Application 73574 was filed on December 12, 2005, by NWA to change the place of use of 19.25 afa (5.50 acres at 3.5 acre-feet per acre), a portion of the waters of the Truckee River and Carson River heretofore decreed and set forth under Claim No. 3 of the *Orr Ditch Decree* and under the *Alpine Decree*. The Application proposes to change the place of use from the NW¼ NE¼ of Section 34, T.19N., R.28E., M.D.B.&M. to the Carson Lake and Pasture.<sup>4</sup> The remarks section of the application indicates that Permit 71556 can be considered withdrawn upon approval of this application.

### IV.

Applications 71775, 73444 and 73574 were timely protested by the Pyramid Lake Paiute Tribe (PLPT) on the following grounds as summarized:

1. The application is defective because it does not seek to change the manner of use from as decreed for irrigation to recreation, wildlife and/or the maintenance and preservation of wetlands.
2. Under Administrative Provision VII of the *Alpine Decree*, the change in the manner of use from irrigation to any other use is limited to the net consumptive use of the water right sought to be changed which, in this case, is a maximum of 2.99 acre feet per acre, as opposed to the 3.5 acre feet per acre sought in the application. Application 73444 is requesting to change the non-consumptive portion of the water duty not previously transferred under Permit 60771, which is unconditionally not allowed by the Decree.
3. The applicant does not own or have an ownership interest in the proposed place of use and does not have the authority, or the consent of the landowner, to deliver the water duty to the proposed place of use.
4. The State Engineer should not act on the applications because the Governor and other officials of the State of Nevada have taken a position in favor of the applicant on the issues raised in this protest and the State of Nevada has at a minimum the appearance of a conflict of interest owing to several significant interests of the State of Nevada, including, but not limited to, its ownership of a substantial quantity of water rights whose value would be enhanced by granting the application, its ownership and operation of a state park at Lahontan Reservoir and its anticipated ownership of the proposed place of use at Carson Lake.

---

<sup>4</sup> Exhibit No. 15.

5. The State Engineer should refer the issue described above in the first and second grounds of protest to the *Alpine* Court in the first instance to decide whether the proposed use of water at Carson Lake is a change to a use other than irrigation.
6. Approval of the application with the proposed water duty of 3.5 acre feet per acre would increase diversions of Truckee River water to the Newlands Project and would therefore be inconsistent with the Truckee-Carson-Pyramid Lake Water Rights Settlement Act, Public Law 101-618.
7. Approval of the application would threaten to prove detrimental to the public interest.<sup>5</sup>

V.

Application 71775 was timely protested by the United States Department of Interior, Bureau of Reclamation (BOR) on the grounds that:

1. The applicant has failed to establish that it has any legal interest in the water rights to be transferred.
2. The *Alpine* Decree for the Carson River appears to limit the proposed transfer to the consumptive use amount only.
3. The applicant has not provided any evidence of ownership interest in the land to which the water rights are proposed to be transferred and the protestant is not aware of any such interest.
4. Because the applicant does not appear to have any ownership interest or access rights to the land to which the water rights are proposed to be transferred to, the applicant is not able to put the transferred water to beneficial use.
5. If the proposed transfer is granted by the state engineer, such transfer, or at least any amount above the consumptive use portion, cannot be effective until affirmed by a court order that is final and nonappealable.
6. The state engineer is constrained in his authority to act on this transfer by the Agreement for the Transfer and Management of Carson Lake and Pasture to which the State of Nevada is a party.

---

<sup>5</sup> Exhibit Nos. 7, 12, and 16. The PLPT withdrew Protest Claim No. 7 during the administrative hearing. Transcript, p. 178.

7. Approval of the proposed transfer would be inconsistent with the Truckee-Carson Pyramid Lake Water Rights Settlement Act of 1990, Title II of Pub. L. 101-618.<sup>6</sup>

## **FINDINGS OF FACT**

### **I.**

By letter dated September 7, 2006, the BOR voluntarily dismissed protest grounds number 1, 3 and 6 related to Application 71775. The BOR attempted to modify its protest grounds as to number 4 indicating that the Applicant could only put the water to beneficial use in compliance with existing federal approvals. The State Engineer finds he does not allow protest grounds to be modified after the date for filing the protest. However, the State Engineer also finds all water right permits are conditioned on applicants obtaining other necessary approvals from local, state and federal entities, if any are necessary.

### **II.**

The PLPT alleges that the State Engineer should not act on the applications because the Governor and other officials of the State of Nevada have taken a position in favor of the Applicant on the issues raised in this protest and the State of Nevada has at a minimum the appearance of a conflict of interest owing to several significant interests of the State of Nevada, including, but not limited to, its ownership of a substantial quantity of water rights whose value would be enhanced by granting the application, its ownership and operation of a state park at Lahontan Reservoir and its anticipated ownership of the proposed place of use at Carson Lake. The State Engineer finds every water right application is judged against the criteria found in Nevada water law and relevant judicial decrees in spite of the fact that one of the applicants is another State agency.

### **III.**

The PLPT alleges that the State Engineer should refer the issue described above in the first and second grounds of protest to the *Alpine* Court in the first instance to decide whether the proposed use of water at Carson Lake is a change to use other than irrigation. The State Engineer finds he is the proper authority to make this decision in the first instance.

---

<sup>6</sup> Exhibit No. 8.

#### IV.

The PLPT alleges that the Applicant does not own or have an ownership interest in the proposed place of use and does not have the authority, or the consent of the landowner, to deliver the water duty to the proposed place of use. The State Engineer finds Exhibit No. 88 demonstrates that the NDOW has the right to develop, manage and administer the Carson Lake and Pasture area for the purposes of conservation, rehabilitation and management of wildlife, its resources and habitat, and that the Carson Lake and Pasture area is to be managed as a State Wildlife Management Area. Management of the area contemplates the transfer of water to the area for wetlands protection. As Exhibit No. 89 demonstrates, NWA has an agreement with the NDOW that allows use of its water rights as part of management of Carson Lake and Pasture. The State Engineer finds the Applicants adequately demonstrated access to the proposed place of use through the management and water use agreements thereby also demonstrating an ability to place the water to beneficial use.

#### V.

The heart of both the BOR's and the PLPT's protests to these transfer applications is expressed in the duty which the State Engineer should allow to be transferred. The PLPT alleges the applications are proposing a change in manner of use from irrigation to recreation, wildlife and/or the maintenance and preservation of wetlands, and, as such, the transfers are requesting a change in manner of use and under the *Alpine* Decree changes in manner of use are limited to a consumptive use duty of 2.99 acre-feet per acre. The Protestants argue the transfers proposed by the NWA should be cutback from the 3.5 acre-feet per acre requested for transfer to 2.99 acre-feet per acre, and the transfer proposed by the NDOW should not be allowed at all because the 2.99 acre-feet per acre has already been transferred under another water right permit and the 0.51 acre-feet per acre being proposed under its application is the difference that makes up the 3.5 acre-feet per acre water right. The PLPT argues that NRS § 533.330 provides that a water right application can only be made for one purpose and the major purpose (manner of use) identified must encompass all that is going on and in this case that major purpose should be identified as wildlife, which, is a change in manner of use and should be limited to the consumptive use of 2.99 acre-feet per acre. The PLPT additionally argues that there is no need to have the additional 0.51 acre-feet

per acre as this enhanced duty is to cover on-farm efficiency losses since the use of water at Carson Lake and Pasture is 100% efficient.

The Applicants argue that the use of water at Carson Lake and Pasture is to grow vegetation be it submergent or emergent and that the distribution and use of water is the same as irrigating traditional crops. The Applicants argue that the *Alpine* Decree has already recognized the area as mostly an area of irrigation and no appeal was taken from that decision.<sup>7</sup> Additionally, that the policy behind the decision as to a consumptive use limitation does not apply because the water under these applications will be used at the end of the system and there is no return flow to protect. These applications are requesting changes of both Truckee River and Carson River water and the *Orr Ditch* Decree does not specifically provide for the same consumptive use limitation upon a change in manner of use.

The PLPT provided a witness who testified that if the State Engineer were to only grant the 2.99 acre-feet per acre that is the amount that would actually be delivered to Carson Lake and Pasture and that any transportation loss would have been in the system moving the water from Lahontan Reservoir to Carson Lake and Pasture. The 3.5 acre-feet per acre is not needed to be delivered as the water use is at the end of the system and it is 100% efficient and there are no on-farm losses; therefore, the 3.5 acre-feet per acre is not needed.<sup>8</sup>

The Applicants provided a good deal of evidence in support of their position that these applications are not requesting a change in manner of use. A former Nevada State Engineer testified that in his mind irrigation is taking water from a source, applying it to soil to grow a plant and he believes that is what is taking place at Carson Lake and Pasture.<sup>9</sup> Testimony from a NDOW employee who had spent approximately 40 years working on Carson Lake and Pasture indicated that Carson Lake and Pasture was originally under the control of the Truckee-Carson Irrigation District (TCID). NDOW began working with the TCID in order to consider maximizing the benefits associated with the area for all and an agreement was reached that if certain improvements

---

<sup>7</sup> Transcript, pp. 335-345; Exhibit Nos. 106, 107, 108.

<sup>8</sup> Transcript, pp. 64-65.

<sup>9</sup> Transcript, p. 329.

were made to the irrigation system that the irrigation district was willing to dedicate a percentage of drain flows for wildlife purposes.<sup>10</sup> Carson Lake and Pasture consists of a community pasture area for the use and benefit of livestock owners within the irrigation district and an area of open marsh that provides natural habitat for waterfowl and other wildlife.<sup>11</sup> An agreement for improvement of the area indicates that the TCID agreed that the water distributed and delivered to the area would be allocated as 50% for the irrigation of existing livestock grazing areas and 50% for the maintenance of wildlife marsh areas.<sup>12</sup> This agreement indicates that Carson Lake Pasture consists of a gross area of approximately 30,000 acres and the area that was to be maintained for wildlife was not to exceed 5,500 acres. Another exhibit indicates that since the 1870s the Carson Lake Pasture has served the Lahontan Valley farmers by providing a substantial grazing area on the periphery of the Carson Lake Pasture wetlands, but that the wetlands area had been diminishing since 1967 and that as of the date of the September 1980 document the pasture area covered approximately 10,000 acres of improved pasture and 5,500 acres of the area was wetlands.<sup>13</sup> Other testimony indicated that currently the total Carson Lake and Pasture area is considered to be about 22,000 acres with about 9,000 acres of that being wet meadow or pasture.<sup>14</sup>

Testimony was provided that Carson Lake is not really a lake, but rather lake was a term coined back in the 1800s and has stuck with the area, which is a unique shallow body of water that is really a wetland habitat and not a lake.<sup>15</sup> The majority of the water in lake area is less than 18 inches deep and a significant majority is less than a few inches deep and the area should not be construed as a lake.<sup>16</sup> In some years, such as 1992, which was a period of significant drought, the wetlands area can be non-existent.<sup>17</sup> In other years, in the area the PLPT alleges is open water, the Applicants argue it is open water for a period of time only because you do not see the emergent vegetation at that particular snapshot in time.<sup>18</sup>

---

<sup>10</sup> Transcript, pp. 214-215.

<sup>11</sup> Exhibit No. 91.

<sup>12</sup> Exhibit No. 91.

<sup>13</sup> Exhibit No. 93.

<sup>14</sup> Transcript, p. 279.

<sup>15</sup> Transcript, pp. 223; 363-364.

<sup>16</sup> Transcript, pp. 223-224.

<sup>17</sup> Transcript, pp. 235-236; Exhibit No. 193.

<sup>18</sup> Transcript, pp. 247-250.

Testimony and evidence demonstrated that water is managed in the area by water conveyance structures and drains.<sup>19</sup> The drain system provides drain return flows, which are used in the operation of the irrigation system to provide water to pastures and the wetland area.<sup>20</sup> Additional water called prime water is brought through the drain system and is applied to maximize the amount of food production in the wetland areas and is not used in the pasture area.<sup>21</sup> Personnel from the TCID primarily undertake the irrigation of the pasture area. While cattle are the primary beneficiaries of that irrigation, Canadian geese are frequent grazers and the water pools in certain areas, which generate phytoplankton, are fed upon by other wildlife.<sup>22</sup> During the spring or early summer months some wetlands units are allowed to go dry in order to concentrate the water in other areas to maintain habitat for nesting, feeding and cover and in the areas that are drying out there may be some emergent vegetation, but generally the submergent vegetation is lost.<sup>23</sup> The focus of this testimony is that water is managed to grow and maximize vegetation for wildlife use. The use of water at Carson Lake by NDOW is for the irrigation of the crop they are attempting to grow,<sup>24</sup> as was also demonstrated by water right applications the TCID filed with the Nevada State Engineer in 1950, which indicated the applications were filed to use drain flow water for the stated purpose of irrigation of marsh pasture.<sup>25</sup>

The focus of the Applicants' testimony and evidence was that the main use of the water is to grow vegetation/habitat for wildlife be it emergent, submergent or phytoplankton vegetation. Phytoplankton are single-celled plants that are grown to supply food to zooplankton (aquatic insects) that are a food source for various migratory birds and fish. Other submergent vegetation are important food sources for wildlife that consume the seeds or nutlettes the plants produce, as well as for the wildlife that feeds on the entire vascular structure of the plants, including the tubers found in the mud. Examples of the types of vegetation being grown include: Sago pond weed,

---

<sup>19</sup> Exhibit No. 80.

<sup>20</sup> Transcript, p. 228.

<sup>21</sup> Transcript, pp. 282-283.

<sup>22</sup> Transcript, pp. 265-267.

<sup>23</sup> Transcript, pp. 267-270.

<sup>24</sup> Transcript, pp. 228-230.

<sup>25</sup> Exhibit Nos. 96, 97, 98.

widgeon grass, alkalai bulrush, saltgrass, hard stem bulrush, red goosefoot, smart weeds, and water grass millets.<sup>26</sup> The emergent vegetation is also a food source with some species consuming the seeds, some consuming the root systems and tubers. Livestock graze on the stalks and leafy vegetation, but wildlife only rely on that part of the vegetation for nesting cover.<sup>27</sup> The managers of the area believe that as far as moving water around to different units they are in fact irrigating, that is, the application of water to land in an effort to produce a product.<sup>28</sup>

Nevada Revised Statute § 533.023 provides that “wildlife purposes” includes the watering of wildlife and the establishment and maintenance of wetlands, fisheries and other wildlife habitats. Nevada Revised Statute § 533.030 provides that use of water for recreation is a beneficial use and the Nevada Supreme Court has held that the use of water for wildlife can be encompassed in the NRS § 533.030 definition of recreation as a beneficial use of water.<sup>29</sup> The Protestants allege that because bird watching and hunting take place in the area the use of water should be broadly termed as wildlife. However, the State Engineer finds that just because bird watching and hunting also take place does not mean it is not irrigation. These are incidental to the actual use of the water.

The State Engineer has previously addressed this issue in State Engineer’s Ruling No. 5078,<sup>30</sup> which were change applications filed by the United States Department of Interior, Fish and Wildlife Service, which sought to change Newlands Project water rights to use at the Stillwater National Wildlife Refuge. In those applications, the Fish and Wildlife Service only filed the applications as a change in place of use. Even though the applications indicated the proposed manner of use was the maintenance of wetlands for recreation and/or wildlife/storage the Fish and Wildlife Service filed them as if the use was going from irrigation to irrigation. The applications were protested on the grounds that they were a change in manner of use and should be limited to the consumptive use duty of 2.99 acre-feet per acre. In that ruling, the State Engineer referenced to a witness for the United States Department of Interior, Fish and Wildlife Service, a sister agency of Protestant United States Department of Interior, Bureau of Reclamation, who testified for the Fish

---

<sup>26</sup> Transcript, pp. 242-243, 267-272.

<sup>27</sup> Transcript, pp. 225-228.

<sup>28</sup> Transcript, pp. 273-274.

<sup>29</sup> *State, Bd. of Agriculture v. Morros*, 104 Nev. 709, 766 P.2d 263 (Nev. 1988).

<sup>30</sup> State Engineer’s Ruling No. 5078, dated September 26, 2001, official records in the Office of the State Engineer.

and Wildlife Service and indicated that the applications were filed based on a strategy developed in cooperation with the Fish and Wildlife Service, Nevada Division of Water Resources, Nevada Division of State Lands and Nevada Division of Wildlife as to the complex issue of what was the appropriate duty of water to be used in transfers of this type, that is, from irrigation to wetlands.<sup>31</sup> The witness indicated that the problem arose from the fact that the *Alpine* Decree was issued in 1980, but the authorization to expand the purposes of the Newlands Project to include wildlife purposes and wetlands did not come until 1990. Therefore, there was a consensus that the *Alpine* Decree did not contemplate an appropriate duty for wetlands. The witness testified there were two camps: one that says the *Alpine* Decree provides that for any uses other than irrigation only the 2.99 acre-feet per acre consumptive use can be moved, and the other camp arguing that it is not really a change in manner of use in that whether one irrigates alfalfa for cows and horses or irrigates grasses for wildlife it is the same use, irrigation.

In the original *Alpine* Decree issued by the Federal District Court, which adjudicated the waters of the Carson River, the Court discussed water use at Carson Pasture and Stillwater areas in a section of the decision dealing with vested water rights acquired by purchase by the United States. The Court noted that the United States owned the Carson Pasture and Stillwater areas, that these areas received water largely from drainage or seepage from Project farms and very occasionally from direct flows and that the amount of land actually irrigated varied greatly from year to year depending on the available water. Thus, the State Engineer found in Ruling No. 5078 that it appears that the decree court and the parties believed that use of water on Carson Pasture and Stillwater areas was a form of irrigation. In Ruling No. 5078, the State Engineer found that he did not believe the intent of the applications should be constrained by the use of the words "maintenance of wetlands" when in other instances a beneficial use can fall under several different categories. For example, use of water for a golf course could come under the description of irrigation, recreation or municipal water use. The use for a factory could be considered a commercial, industrial or municipal use. The State Engineer found that just because a definition exists, which provides that the maintenance of wetlands can fall under the definition of wildlife purposes does not preclude that lands irrigated for wildlife purposes could not fall under the

---

<sup>31</sup> Exhibit No. 158.

definition of irrigation. The growth of grass on a golf course is often considered irrigation, but the grass is not sold as a commodity. It is the recreational use on top of the grass that is the result sought. The growth of wetlands vegetation in this instance is akin to a rice patch, which is the growth of a cereal grass grown in standing water for its seed.

The State Engineer finds substantial evidence was provided to support a determination that the use of water for the provision of food and habitat for migratory wildlife is a beneficial use of water that can be described as irrigation. It is the provision of water for plant growth and thus the Applicants are not requesting a change in manner of use.

## VI.

Nevada Revised Statute § 533.370(1) provides that the State Engineer must take into consideration whether the proposed change, if within an irrigation district, will adversely affect the cost of water for other holders of water rights in the district or lessen the efficiency of the district in its delivery or use of water. The State Engineer finds there was no evidence presented demonstrating an adverse affect as to the cost of water for other water right holders and there is no evidence that efficiency would be lessened. However, testimony was provided by several witnesses indicating that efficiency should increase in the delivery of larger blocks of water as opposed to smaller amounts passing through multiple delivery channels; therefore, efficiency would not be lessened.

## VII.

The Protestants argue that any water allowed to be transferred above 2.99 acre-feet per acre would increase diversions of Truckee River water to the Newlands Project, and would therefore be inconsistent with the Truckee-Carson-Pyramid Lake Water Rights Settlement Act, Public Law 101-618. The State Engineer finds that 3.5 acre-feet per acre is already allowed and as such there will not be any increase in diversions from the Truckee River.

## CONCLUSIONS

### I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>32</sup>

---

<sup>32</sup> NRS chapter 533.

**II.**

The State Engineer is prohibited by law from granting a permit to appropriate the public waters where:<sup>33</sup>

- 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.

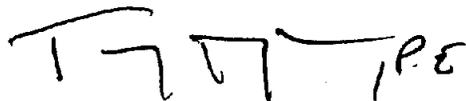
**III.**

The State Engineer concludes approval of the applications will not violate the *Alpine* Decree or Nevada water law. The State Engineer concludes no evidence was provided that the proposed change would conflict with existing rights or threaten to prove detrimental to the public interest.

**RULING**

The protests to Applications 71775, 73444 and 73574 are hereby overruled and the applications are granted subject to the payment of statutory permit fees and existing rights. Permit 71556 is considered withdrawn as Application 73574 is hereby approved.

Respectfully submitted,



TRACY TAYLOR, P.E.  
State Engineer

TT/SJT/jm

Dated this 14th day of  
August, 2007.

---

<sup>33</sup> NRS 533.370(5).