

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

IN THE MATTER OF APPLICATION 77788)
FILED TO CHANGE THE POINT OF)
DIVERSION AND PLACE OF USE OF A)
PORTION OF THE PUBLIC WATERS OF THE)
TRUCKEE RIVER AND TRIBUTARIES)
HERETOFORE APPROPRIATED UNDER)
TRUCKEE RIVER DECREE CLAIMS 97/97A)
WITHIN THE TRUCKEE CANYON SEGMENT)
(91), WASHOE COUNTY, NEVADA.)

RULING
#6014

GENERAL

I.

Application 77788 was filed on January 13, 2009, by Belli Ranch Estates Association to change the point of diversion and place of use of 0.237 cubic feet per second, not to exceed 48.718 acre-feet annually, a portion of the waters of Truckee River Decree Claims No. 97/97A.¹ The proposed point of diversion is described as being located within the NE¹/₄ SW¹/₄ of Section 31, T.19N., R.18E., M.D.B&M., the Steamboat Canal.²

II.

Application 77788 was timely protested by Kelly Djukanovich who requested that the application be denied on the grounds that "APN 038-661-12 was appropriated 5.7645 acre feet of water before our purchase of the property."²

III.

Application 77788 was timely protested by Stephen and Sally Edney, Kelly and Gretchen Djukarovich, Phillip and Arleen Huddleston, and James R. Smith who requested that the application be denied on the following grounds:

1. Application 77788 should be denied as the Applicant did not have the authority to file such application. The procedure, meaning the decision

¹ Final Decree, *United States of America v. Orr Water Ditch Co. et al.*, Equity A-3 (D. Nev. 1944) (hereinafter "*Orr Ditch Decree*").

² File No. 77788, official records in the Office of the State Engineer.

to file Application 77788, which took place at a Belli Ranch Estates Association Board of Director's meeting in January 2009, consisted of four individuals being the Board of Directors. Three of the individuals had conflicts of interest, so abstained from voting. Hence, the authority to file Application 77788 was given by one individual. As set forth in the Declaration of Covenants, Conditions, and Restrictions for Belli Ranch Estates, dated August 13, 1983, filed for record in the Washoe County Recorder as Book 1919, page 0673 and assigned official Document Number 883299 ("Declaration"), one individual does not have authority to make a decision of this type. Thus, the decision by the Board of Directors to file 77788 is in direct violation of the Declaration and is, therefore, void.

2. The sought after effect of Application 77788 is a direct attempt to take, without compensation, the perpetual right to use water from four lot owners and simply "give it" to other lot owners. An attempt is being made to transfer water from what is known as the lower bench to what is known as the upper bench. Those property owners within the proposed place of use have a conventional means of getting water, meaning Truckee River water, to their properties. Further, a due diligence search prior to the acquisition of the upper bench lots apparently has not been made.

3. On July 13, 1982, under Review No. 2032F, on file in Permit 15227, entitled "Subdivision Review," page 2 reads as follows: "We will also put in the deeds of the lots that we sell, that the water is to remain appurtenant to the land and cannot be transferred." This language, prepared by the Developer, is perpetually binding.

4. Further, Gerald Brownfield, Hydraulic Engineer, then employed by the Nevada State Engineer, stated in the July 13, 1982, letter as follows: "A copy of this Certificate shall be furnished to the subdivider who in turn shall provide a copy of such Certificate to each purchaser of land prior to the time the sale is complete...." Thus, the above quoted language becomes a part of the formal State Engineer's subdivision approval. No provision exists for changing of this condition.

5. Parcel Map 3266, recorded with the Washoe County Recorder on November 7, 1977, Official No. 2151830, reads in part as follows: "Surface water rights that are appurtenant to each lot are to remain on that lot and cannot be transferred. (See records in the office of the Nevada State Engineer)." Hence, the Parcel Map refers to the State Engineer letter of July 13, 1982.

6. Page 6 of the Declaration reads in part as follows: "Notwithstanding the transfer of title to the Water Rights to the Association, The [sic] Water rights shall remain appurtenant to the Subject Property. The Association

shall not sell, convey, encumber or otherwise transfer the water rights, or any portion thereof, or interest therein, unless this Declaration is terminated pursuant to the provisions of Paragraph 11.3 below.” The provision has not been terminated, so therefore is fully binding. Quite simply, water cannot be transferred from a “water-righted” lot to a dry lot.

7. Article XI, page 40, of the Declaration reads in part as follows: “Each and every Owner shall have the right to commence an action against the Association for failure to perform its duties under this Declaration.” Accordingly, it is readily apparent that the single Board of Director [sic] member, who voted in favor of filing Application 77788, is liable for all costs, as set forth in Article XI of the Declaration.

8. The granting of Application 77788 is clearly detrimental to the public interest as set forth in NRS 533.370(5). As described above, it is simply taking water from four lots and transferring it to other lots within the Belli Ranch Subdivision. Such attempt is clearly contrary to the State Engineer’s Subdivision approval, the bylaws of Belli Ranch Estate[sic] Association, and public opinion.²

FINDINGS OF FACT

I.

Nevada Revised Statute § 533.365(3) provides that it is within the State Engineer’s discretion to determine whether a public administrative hearing is necessary to address the merits of a protest to an application to appropriate the public waters of the state of Nevada. The State Engineer finds that there is sufficient information contained within the records of the Office of the State Engineer to gain a full understanding of the issues and a hearing on this matter is not required.

II.

The protest filed by Kelly Djukanovich only makes a statement regarding the quantity of water rights on his parcel prior to purchase. The State Engineer finds this protest asserts no grounds as to why the application should be denied; therefore, this protest is dismissed.

III.

In the protest by Stephen and Sally Edney, Kelly and Gretchen Djukarovich, Phillip and Arleen Huddleston, and James R. Smith, the issues regarding the authority of the Applicant to file the application (protest claim 1) and the liability of the member of the

board of directors who made that authorization (protest claim 7) are civil matters between the Applicant and Protestants. The State Engineer finds that it is not within his jurisdiction to make determinations on these issues; therefore, these protest claims are dismissed.

IV.

Protest claim 2 states that the water rights are being taken from four lot owners and given to other lot owners. The owner of record for that portion of the base right, Claims 97/97A of the *Orr Ditch* Decree, that is to be changed by Application 77788 is the Belli Ranch Estates Association.³ No Report of Conveyance has been filed by any of the Protestants to establish ownership in the records of the Office of the State Engineer.⁴ The State Engineer finds that the Applicant is the owner of record of the water right that is sought to be changed and not the Protestants.

V.

Protest claims 3, 4, 5, and 6 relate to the language used in the subdivision review letters by the State Engineer on the parcel map for the Belli Ranch Estates subdivision and in the Declaration of Covenants, Conditions and Restrictions for the Belli Ranch Estates. The controversy involves whether or not the limitation on the transfer of water rights is for changing the place of use to a place outside of the subdivision or for any change in the place of use, even if the change is within the subdivision.

As stated in protest claims 3 and 4, the July 13, 1982, subdivision review letter for Review No. 2032F from the Office of the State Engineer does incorporate language from the March 17, 1982, letter from W. K. Tower, Inc. to the State Engineer. They certified in this letter that they “will not transfer from the *Belli Ranch area* the water rights that we have acquired with the purchase of the Ranch [emphasis added].” It makes no mention in this letter regarding transfer between lots within the subdivision.⁵

³ Truckee River Transfer File No. DTR-097/097A, official records in the Office of the State Engineer.

⁴ Nevada Division of Water Resources Titles Report July 10, 2009, official records in the Office of the State Engineer.

⁵ File No. 15227, official records in the Office of the State Engineer.

This subdivision review letter was superseded by the subdivision review letter dated September 20, 1982, which makes no additional requirements on the approval of the subdivision.⁵

On October 19, 1982, a tentative approval letter for Review No. 2032T-Ext voided all previous reviews made by the Office of the State Engineer. It states: "Before the final map is approved, a note must be placed on the map which states, 'Surface water rights that are appurtenant to each lot are to remain on that lot and cannot be transferred. See records in the office of the Nevada State Engineer.'"⁵

The final subdivision map, Tract Map 2097, was signed by a representative of the Office of the State Engineer on March 3, 1983, and included the above statement. Parcel Map 3266 referenced in protest claim 5 depicts a parcel split of one of the lots on Tract Map 2097, and was not signed by a representative of the Office of the State Engineer, but does carry the note from Tract Map 2097.^{6,7}

A copy of the Belli Ranch Estates Declaration of Covenants, Conditions and Restrictions was received in the Office of the State Engineer on June 7, 2007. Protest claim 6 quotes a portion of the Declaration, but loses some of the context. In the statement that "the Water Rights shall remain appurtenant to the Subject Property," the "Subject Property" is not individual lots, but the subdivision as a whole.⁸

The State Engineer has in the past approved applications by the Belli Ranch Estates Association to change the place of use of water rights appurtenant to lands within the Belli Ranch Estates. In both cases, the place of use remained within the subdivision.^{8,9}

The State Engineer finds that the intent of the restriction is to ensure that the water rights already appurtenant to the subdivision remain appurtenant to the subdivision and not that the water rights already appurtenant to particular lots within the subdivision remain appurtenant to the same lots within the subdivision.

⁶ See, Tract Map 2097, File No. 77788, official records in the Office of the State Engineer.

⁷ See, Parcel Map 3266, File No. 77788, official records in the Office of the State Engineer.

⁸ File No. 73506, official records in the Office of the State Engineer.

⁹ File No. 48742, official records in the Office of the State Engineer.

VI.

Protest claim 8 reiterates previous protest claims 2, 3, 4, 5, and 6 and argues that the granting of Application 77788 is detrimental to the public interest because the attempt to move the water right from some lots to other lots within the Belli Ranch Estates subdivision is “contrary to the State Engineer’s subdivision approval, the bylaws of Belli Ranch Estate [sic] Association, and public opinion.”²

Findings have already been made in this ruling regarding the subdivision review by this office. As for the bylaws of the Belli Ranch Estates Association, the State Engineer finds that it is not within the State Engineer’s jurisdiction to rule on the bylaws of a home owners association, and any resolution of the conflicts between the home owners and their association must be resolved in another venue.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the subject matter of this determination.¹⁰

II.

The State Engineer is prohibited by law from granting a permit for an application to change the public waters where:¹¹

- 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 that the Applicant is the owner of record of the water right to be changed under the application. The State Engineer concludes that the Protestants are not owners of record of the water right proposed to be changed by Application 77788, and will not be treated as such.¹²

¹⁰ NRS chapter 533.

¹¹ NRS § 533.370(5).

¹² NRS § 533.386(5).

IV.

The State Engineer concludes that the intent of the limitation on changing the place of use of water rights appurtenant to lands within the Belli Ranch Estates applies to keeping the water rights within the subdivision and that changing the place of use on or between lots within the subdivision is keeping with that intent.

V.

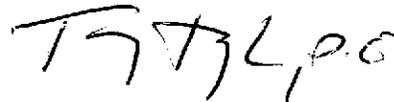
The State Engineer concludes that issues regarding compliance with association bylaws is a civil matter and not within the State Engineer's jurisdiction.

RULING

The protests to Application 77788 are hereby overruled and Application 77788 is approved subject to:

1. payment of statutory fees;
2. existing rights on the source; and
3. continuing jurisdiction and regulation by the Federal Water Master.

Respectfully submitted,



TRACY TAYLOR, P.E.
State Engineer

Dated this 15th day of
September, 2009.