

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

IN THE MATTER OF APPLICATIONS 76111,)
76112, 77077, 77576, 77677 AND 77678 FILED)
TO CHANGE THE POINT OF DIVERSION,)
MANNER OF USE AND/OR PLACE OF USE OF)
A PORTION OF THE PUBLIC WATERS FROM)
VARIOUS SURFACE AND UNDERGROUND)
SOURCES WITHIN THE PLEASANT VALLEY)
HYDROGRAPHIC BASIN (88), WASHOE)
COUNTY, NEVADA.)

RULING

6017

GENERAL

I.

Application 76111 was filed by Michael and Elizabeth Schuler on August 1, 2007, to change the point of diversion of a portion of Steamboat Creek or Galena Creek under *Orr Ditch* Decree Claims 696, 696½ and 697¹ for the irrigation of 8.94 acres of land located within portions of the NW¼ NE¼ and NE¼ NE¼ of Section 4, T.17N., R.20E., M.D.B.&M., further described as a portion of Washoe County Assessor's Parcel No. 017-310-21. The proposed point of diversion is the Big Ditch, which is described as being located within the SW¼ SE¼ of Section 5, T.17N., R.20E., M.D.B.&M. The existing point of diversion is described as the Meadow Ditch, which is described as being located within the NW¼ SW¼ of Section 4, T.17N., R.20E., M.D.B.&M.²

II.

Application 76112 was filed by Gordon M. and Heidi A. Cowen on August 1, 2007, to change the point of diversion of a portion of Steamboat Creek or Galena Creek under *Orr Ditch* Decree Claims 696, 696½ and 697 for the irrigation of 7.52 acres of land located within portions of the NE¼ NE¼ of Section 4, T.17N., R.20E., M.D.B.&M., further described as a portion of Washoe County Assessor's Parcel No. 017-400-34. The proposed point of diversion is the Big Ditch, which is described as being located within the SW¼ SE¼ of Section 5, T.17N., R.20E., M.D.B.&M. The

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

² File No. 76111, official records in the Office of the State Engineer.

existing point of diversion is described as the Meadow Ditch, which is described as being located within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 4, T.17N., R.20E., M.D.B.&M.³

III.

Application 77077 was filed by HSTL Land Company, LLC on May 27, 2008, to change the place and manner of use of a portion of Steamboat Creek and Tributaries under *Orr Ditch* Decree Claims 676, 677, 678 and 679. This application proposes to strip 9.73 acres from Claims 677, 678 and 679 and 0.82 acres from Claim 676 from land located within portions of the SW $\frac{1}{4}$ SE $\frac{1}{4}$ and the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 5, T.17N., R.20E., M.D.B.&M., further described as a portion of Washoe County Assessor's Parcel No. 017-430-01. The existing and proposed points of diversion, being at the Pleasant Valley Ditch and the Big Ditch, described as being located within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 5, T.17N., R.20E., M.D.B.&M. and at the Hughes and Cameron Ditch and Ferretto Ditch, described as being located within the SW $\frac{1}{4}$ SE $\frac{1}{4}$, and SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 5, T.17N., R.20E., M.D.B.&M. Water will no longer be diverted into the ditches at these points of diversion and will be allowed to remain in the Steamboat Creek channel as in-stream flow.⁴

IV.

Application 77576 was filed by Washoe County, a political subdivision of the State of Nevada, on November 7, 2008, to change the point of diversion, place and manner of use of Permit 52316, which changed the point of diversion and place of use of a portion of Steamboat Creek and Galena Creek under *Orr Ditch* Decree Claims 687 and 688. This application proposes to strip 0.22 acres from land located within a portion of the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 21, T.18N., R.20E., M.D.B.&M. The proposed point of diversion being at the Big Ditch is described as being located within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 5, T.17N., R.20E., M.D.B.&M. The existing point of diversion is from the Crane Ditch, described as being located within the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 33, T.18N., R.20E., M.D.B.&M. Water will no longer be diverted into the ditch and will be allowed to remain in the Steamboat Creek channel as in-stream flow.⁵

³ File No. 76112, official records in the Office of the State Engineer.

⁴ File No. 77077, official records in the Office of the State Engineer.

⁵ File No. 77576, official records in the Office of the State Engineer.

V.

Application 77677 was filed by Anne Louise Britton, on December 11, 2008, to change the point of diversion and place of use of a portion of supplemental underground water under Permit 52421, Certificate 14630. This water was originally appropriated under abrogated Permit 49616. This application proposes to strip 2.50 acres from land located within a portion of the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 4, T.17N., R.20E., M.D.B.&M. The proposed point of diversion is located within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 4, T.17N., R.20E., M.D.B.&M. The existing point of diversion is located within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 4, T.17N., R.20E., M.D.B.&M.⁶

VI.

Application 77678 was filed by Anne Louise Britton, on December 11, 2008, to change the point of diversion and place of use of a portion of supplemental underground water under Permit 52421, Certificate 14630. This water was originally appropriated under abrogated Permit 49616. This application proposes to strip 3.75 acres from land located within a portion of the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 4, T.17N., R.20E., M.D.B.&M. The proposed point of diversion is described as being located within the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 4, T.17N., R.20E., M.D.B.&M. The existing point of diversion is located within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 4, T.17N., R.20E., M.D.B.&M.⁷

VII.

Application 76111 was timely protested by The Big Ditch Company on the following grounds:²

The Schulers' application requests the change in point of diversion for alleged water right from the Steamboat Creek or Galena Creek formerly accessed through the Meadow Ditch, which is no longer in existence, so that the Schulers can access their water through the Big Ditch. The members of the Big Ditch Company protest this application for change in the point of diversion by the Schulers because Big Ditch does not currently have sufficient capacity to carry the current holders' rights. Secondly, the Big Ditch Company members receive their water through flood irrigation. Pumping is not allowed in the Big Ditch Company Bylaws and the ditch company rules. This protest is made pursuant to NRS 533.370(5), 533.345 (2)(c), (3); 533.354;533.365. The proposed use and change of the Schulers conflicts with existing rights and with protectible interests in existing

⁶ File No. 77677, official records in the Office of the State Engineer.

⁷ File No. 77678, official records in the Office of the State Engineer.

water rights of the holders using the Big Ditch; furthermore, the proposed use and change threatens to prove detrimental to the public interest as noted above.

VIII.

Application 76112 was not timely protested, but many of the issues regarding protested Application 76111 also apply to Application 76112.

IX.

Application 77077 was timely protested by Virginia (Ginger) Pierce on the following grounds:⁴

Steamboat Creek & Tributaries are the sole source [sic] of water for both Pleasant Valley & Steamboat.

Application 77077 was timely protested by The Big Ditch Company on the following grounds:⁴

1. It is imperative that the Ditch Co. keeps all its water to help maintain an adequate head of water for irrigation
2. By maintaining this water in the valley it helps to re charge [sic] the ground water.

X.

Application 77576 was timely protested by The Big Ditch Company on the following grounds:⁵

1. It is imperative that the Ditch Co. keeps all its water to help maintain an adequate head of water for irrigation
2. By maintaining this water in the valley it helps to recharge the ground water.

XI.

Application 77677 was timely protested by Richard Taras, Merle Erickson, Ox-Yoke Land & Cattle, LLC, and Michael Marigold on the following grounds:⁶

The proposed change, if granted, will conflict with existing rights, or with protectible interests in domestic wells, or will threaten to prove detrimental to the public interest for the following reasons.

The Truckee River decreed surface water rights (Claims 696, 696.5 and 697) appurtenant to the proposed place of use, APN 017-400-34, as shown on Nevada Division of Water Resources Drawing No. TR-021 approved February 5, 2008, **are physically incapable of delivery**. The Big Ditch rights indicated by the Drawing (.41 afa) have no physical connection to or means of conveyance from the Big Ditch. The Meadow Ditch as shown in the drawing has been completely severed by the water ski lake and other impediments to historical flow situated southwest of the proposed place of use. Thus, the Meadow Ditch is also physically incapable of delivering the corresponding decreed rights (7.11 afa) to the proposed place of use.

The proposed place of use now receives a varying and unquantifiable amount of surface water solely as waste water, or tail water, by way of gravity flow resulting from surface water irrigation by upstream Big Ditch water rights users. This water is received coincidentally, or by default, but not pursuant to decree. As a result of the circumstances described above, the proposed place of use **does not receive any of its decreed duty of surface water rights**.

Therefore, the granting of the proposed change would, in effect, elevate the supplemental groundwater in issue to the status of a primary source of supply and stand alone right (because zero duty of surface water is being delivered), and allow, both in theory and practice, the pumping of 10 afa of groundwater on a **permanent, regular, and continuing basis**.

Supplemental groundwater rights are not intended for use as a substitute for surface water rights, or as an annual source of supply. Such rights are intended for intermittent use on an irregular basis, and only to supplement or fill a void in duty of surface rights not received. As stated above, the void in this case on a continuing annual basis is the entire duty of appurtenant decreed surface water rights.

The proposed place of use is surrounded by existing domestic wells, or parcels with existing rights to domestic wells. The pumping of 10 afa of groundwater, an amount equal to the allowed annual consumption for 5 domestic wells, at the proposed point of diversion in a designated basin, will conflict with existing rights and protectible interests in nearby domestic wells.

Until such time as a means of conveyance and delivery of the decreed appurtenant surface water rights can be reestablished, and the duty received thereby can be quantified, the Application is premature. Otherwise, as explained above, the proposed change, if granted, would make the supplemental right the functional equivalent of a primary right and threaten to prove detrimental to the public interest.

XII.

Application 77678 was timely protested by Richard Taras, Merle Erickson, Ox-Yoke Land & Cattle, LLC, and Michael Marigold on the following grounds:⁷

The proposed change, if granted, will conflict with existing rights, or with protectible interests in domestic wells, or will threaten to prove detrimental to the public interest for the following reasons.

The Truckee River decreed surface water rights (Claims 696, 696.5 and 697) appurtenant to the proposed place of use, APN 017-310-21, as shown on Nevada Division of Water Resources Drawing No. TR-021 approved February 5, 2008 **are physically incapable of delivery.** The Big Ditch rights indicated by the Drawing (.69 afa) have no physical connection to or means of conveyance from the Big Ditch. The Meadow Ditch as shown in the drawing has been completely severed by the water ski lake and other impediments to historical flow situated southwest of the proposed place of use. Thus, the Meadow Ditch is also physically incapable of delivering the corresponding decree rights (8.25 afa) to the proposed place of use.

The proposed place of use now receives a varying and unquantifiable amount of surface water solely as waste water, or tail water, by way of gravity flow resulting from surface water irrigation by upstream Big Ditch water rights users. This water is received coincidentally, or by default, but not pursuant to decree. As a result of the circumstances described above, the proposed place of use **does not receive any of its decreed duty of surface water rights.**

Therefore, the granting of the proposed change would, in effect, elevate the supplemental groundwater in issue to the status of a primary source of supply and stand alone right (because zero duty of surface water is being delivered), and allow, both in theory and practice, the pumping of 15 afa of groundwater on a **permanent, regular, and continuing basis.**

Supplemental groundwater rights are not intended for use as a substitute for surface water rights, or as an annual source of supply. Such rights are intended for intermittent use on an irregular basis, and only to supplement or fill a void in duty of surface rights not received. As stated above, the void in this case on a continuing annual basis is the entire duty of appurtenant decreed surface water rights.

The proposed place of use is surrounded by existing domestic wells, or parcels with existing rights to domestic wells. The pumping of 15 afa of groundwater, an amount equal to the allowed annual consumption of 7.5 domestic wells, at the proposed point of diversion in a designated basin, will conflict with existing rights and protectible interests in nearby domestic wells.

Until such time as a means of conveyance and delivery of the decreed appurtenant surface water rights can be reestablished, and the duty received thereby can be quantified, the Application is premature. Otherwise, as explained above, the proposed change, if granted, would make the supplemental right the functional equivalent of a primary right and threaten to prove detrimental to the public interest.

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 sufficient information is available in the Office of the State Engineer and an administrative hearing to obtain additional evidence is not necessary.

II.

The protest filed by Virginia (Ginger) Pierce on Application 77077 only makes a statement regarding the nature of Steamboat Creek and Tributaries and its relationship to Pleasant Valley and Steamboat Valley. Any person interested may file a written protest against the granting of an application, but such protest must set forth with reasonable certainty the grounds of such protest.⁸ The State Engineer finds that this is not a ground for protest; therefore, it is dismissed.

III.

Big Ditch Company's protest claim 1 for Application 76111 states that there is insufficient capacity in Big Ditch to allow additional water rights to be diverted through it. Big Ditch Company's protest claim 1 for Application 77077 states that all water allowed for diversion into Big Ditch must be kept in the ditch in order to maintain an adequate head.

Approval of Applications 76111 and 76112 would increase the amount of water allowed to be diverted through Big Ditch by 74.08 acre-feet per season at a diversion rate of 0.412 cubic feet per second (cfs). Approval of Application 77077 would decrease the amount of water allowed to be diverted through Big Ditch by approximately 47.71 acre-feet per season at a diversion rate of 0.2327 cfs. This will be a net increase of about 26 acre-feet per season at a diversion rate of 0.1793 cfs.

⁸ NRS § 533.365(1).

The diversion rate allowed for Big Ditch under the claims listed in the *Orr Ditch Decree* total 166 miner's inches or 4.15 cfs.¹ Permit 49666, Certificate 13646 changes the point of diversion of 0.009 cfs, 1.58 acre-feet per season from Hillside Ditch to Big Ditch.⁹ Permits 52316 and 52317 changed a total of 0.055 cfs and 9.73 acre-feet per season from Big Ditch to Crane Ditch.^{10,11} These changes to water rights on the Big Ditch reduce the diversion rate for Big Ditch to 4.114 cfs. On June 29, 2004, an Informal Field Investigation was conducted by staff of the Division of Water Resources. The capacity measured near the diversion point during this Informal Field Investigation was 8 cfs, and the records provided by the Federal Water Master showed a maximum of about 10 to 11 cfs.¹²

The State Engineer finds that two to three times the allowed diversion rate has been passed through to Big Ditch and that there is sufficient capacity to divert the additional 0.1793 cfs of water into Big Ditch. However, the State Engineer also finds that how the Ditch Company operates its ditches is not within the State Engineer's jurisdiction and that operational disputes between the Ditch Company and its members is not within the State Engineer's jurisdiction.

IV.

Big Ditch Company's protest claim 2 for Application 76111 states that the Big Ditch Company members receive their water through flood irrigation and that pumping is not allowed per the Big Ditch Company bylaws. Per the June 24, 2009, Informal Field Investigation, the Applicants for Applications 76111 and 76112 are making an effort to secure easements for ditch diversion from the Big Ditch to their lands.¹¹ The State Engineer includes the term in permits, "This Permit does not extend the permittee the right of ingress and egress on public, private or corporate lands." The State Engineer finds that it is the responsibility of the water right holder to secure such easements and construct such works as necessary to file the requisite proof of completion under any water right issued and that the Applicants indicate an intention to secure such easements and construct such works. The State Engineer further finds that it is not within his jurisdiction to determine how a ditch company will operate or how it will deliver the water.

⁹ File No. 49666, official records in the Office of the State Engineer.

¹⁰ File No. 52316, official records in the Office of the State Engineer.

¹¹ File No. 52317, official records in the Office of the State Engineer.

¹² File No. 76111, Informal Field Investigation No. 1114, June 24, 2009, official records in the Office of the State Engineer.

V.

Big Ditch Company's protest claim 2 for Applications 77077 and 77576 states that by maintaining this water in the valley it helps to recharge the ground water. The existing manner of use of the water rights is irrigation. While there may be incidental secondary recharge from such use, the holder of that irrigation water right is under no obligation to put his water to use and thereby provide that secondary recharge. The State Engineer finds that a change of the water right from irrigation purposes to in-stream flow purposes would have the same effect as the water right user simply not irrigating their place of use.

VI.

Big Ditch Company's protest claim 1 for Application 77576 states that all water allowed for diversion into Big Ditch must be kept in the ditch in order to maintain an adequate head. Application 77576 proposes to change a portion of Permit 52316, whose point of diversion is the Crane Ditch. A point of diversion change from Crane Ditch will not reduce the allowable diversion under Big Ditch; therefore, the State Engineer finds that this protest claim is moot and it is dismissed.

VII.

The protest claims for Applications 77677 and 77678 by Richard Taras, Merle Erickson, Ox-Yoke Land & Cattle, LLC, and Michael Marigold state that, due to the inability of the Applicants to receive the surface water to which these applications would be supplemental, approval of these applications would essentially create a new appropriation of ground water and therefore the proposed change conflicts with existing rights and with protectible interests in existing domestic wells, and would therefore threaten to prove detrimental to the public interest.

The purpose of supplemental underground water rights for lands irrigated by a surface water source is to make up the difference in duty when the surface water becomes unavailable due to insufficient flows. The proposed change under Applications 77677 and 77678 is to move supplemental underground water rights from land served by the same surface water source (Steamboat and Galena Creeks) as the land under the proposed place of use. The existing place of use is covered by Claim 684 of the *Orr Ditch* Decree, which has a priority date of March 1, 1862. The proposed place of use is covered almost entirely by Claim 696 of the *Orr Ditch* Decree, which also has a priority date of March 1, 1862. A small portion of the proposed place of use under the

applications are covered by Claims 696½ and 697 of the *Orr Ditch* Decree, which have a priority date of March 1, 1863, and April 1, 1865.¹³ The protest claims for Applications 77677 and 77678 by Richard Taras, Merle Erickson, Ox-Yoke Land & Cattle, LLC, and Michael Marigold state that there is only “0.41 afa” and “0.69 afa” from the Big Ditch under these rights, but the Truckee River Map TR-021 depicts these parcels with 0.41 acres and 0.69 acres respectively, which at the duty for Claims 696½ and 697 of the *Orr Ditch* Decree would correspond to 1.85 acre-feet per season and 3.11 acre-feet per season, respectively.¹³

Per the June 24, 2009, Informal Field Investigation, the Applicants for Applications 76111 and 76112 are making an effort to secure easements for ditch diversion from the Big Ditch to their lands.¹¹ The State Engineer finds that the proposed place of use will have the same likelihood of exercising supplemental ground water as would occur under the existing place of use if the place of use under these applications are restricted to that area covered by Claim 696 of the *Orr Ditch* Decree. The State Engineer further finds that use of the supplemental underground water right should only occur due to the source of the surface water being placed on regulation due to limitations of supply, and not due to a failure to secure the works, easements, and permits needed to physically receive the water from the surface source.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the subject matter of this determination.¹⁴

II.

The State Engineer is prohibited by law from granting a permit for an application to change the public waters where:¹⁵

- 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.

¹³ Truckee River Map TR-021, official records of the Office of the State Engineer.

¹⁴ NRS Chapters 533 and 534.

¹⁵ NRS § 533.370(5).

III.

The State Engineer concludes that there is sufficient capacity in the Big Ditch to carry the additional diversion from Applications 76111 and 76112, but cannot compel the Big Ditch Company to divert and deliver such water.

IV.

The State Engineer concludes that it is the responsibility of the water right holder to secure such easements and construct such works as necessary to file the requisite proof of completion under any water right issued and that issues regarding compliance with Big Ditch Company bylaws is not within the State Engineer's jurisdiction.

V.

The State Engineer concludes that a change of the water right subject to Applications 77077 and 77576 from irrigation purposes to in-stream flow purposes will not threaten to be detrimental to the public interest or conflict with existing rights or protectible interests in domestic wells.

VI.

The State Engineer concludes that approval of Applications 77677 and 77678 will not result in additional appropriation of ground-water if the place of use is limited to the area within the place of use covered by Claim 696 of the *Orr Ditch* Decree and that no pumping of ground-water occur until such time as works are completed that can convey the surface water to the place of use; therefore, the proposed use under these conditions will not threaten to be detrimental to the public interest or conflict with existing rights or protectible interests in domestic wells.

RULING

The protests to Applications 76111, 77077, and 77576 are hereby overruled and Applications 76111, 76112, 77077, and 77576 are 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.

The protests to Applications 77677 and 77678 are hereby overruled and Applications 77677 and 77678 are approved subject to:

1. payment of statutory fees;
2. existing rights on the source;

3. the condition that the place of use is limited to that land covered by Claim 696 of the *Orr Ditch* Decree within the proposed place of use; and
4. the condition that no water may be diverted under these supplemental ground-water permits until a satisfactory proof of completion is filed for their respective underlying surface water rights.

Respectfully submitted,



TRACY TAYLOR, P.E.
State Engineer

Dated this 12th day of

November, 2009.