

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

IN THE MATTER OF APPLICATIONS 81246,)
81247 AND 81248 FILED TO CHANGE THE)
POINT OF DIVERSION, MANNER OF USE)
AND PLACE OF USE OF A PORTION OF)
THE PUBLIC WATERS OF THE TRUCKEE)
RIVER WITHIN THE TRACY SEGMENT)
HYDROGRAPHIC BASIN (83), STOREY)
COUNTY, NEVADA.)

RULING

#6190

GENERAL

I.

Application 81246 was filed on October 14, 2011, by the South Meadows Properties Limited Partnership to change the point of diversion and place of use of a portion of water previously appropriated from the Truckee River, under the *Orr Ditch Decree*,¹ being a portion of Permit 63620, not to exceed 30.42 acre-feet annually (afa) for municipal purposes. The proposed point of diversion is described as being located within the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 35, T.20N., R.22E., M.D.B.&M. The existing points of diversions are described as being located within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 31, T.19N., R.18E., M.D.B.&M. (Steamboat Canal/Hunter Creek Reservoir), the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 9, T.19N., R.18E., M.D.B.&M. (Highland Ditch/Highland Reservoir), the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 10, T.19N., R.19E., M.D.B.&M. (Idlewild Treatment Plant), the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 7, T.19N., R.20E., M.D.B.&M. (North Truckee Ditch/Glendale Treatment Plant), the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 17, T.19N., R.19E., M.D.B.&M. (Orr Ditch Pump Station/Chalk Bluff Treatment Plant), and the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 17, T.19N., R.19E., M.D.B.&M. (Orr Ditch/Chalk Bluff Treatment Plant). The proposed places of use are described as all of Sections 1, 2, 3, 10, 11, 12, 13, 14, 15, 22, 23 and 24, T.18N., R.22E., M.D.B.&M., all of Sections 1 through 8, portions north of Stagecoach GID of Sections 9 and 10, all of Sections 11, 12 and 13, portions north of Stagecoach GID of Sections 14 through 17, all of Sections 18 and 19, and portions north of Stagecoach GID of Sections 20 and 24, T.18N., R.23E., M.D.B.&M., all of Sections 1 through 18, portions north of Stagecoach GID of Section

¹ Final Decree, *United States v. Orr Water Ditch Co.*, In Equity Docket No. A-3 (D. Nevada 1944).

19, all of Sections 20 through 29, and all of Sections 32 through 36, T.18N., R.24E., M.D.B.&M., all of Sections 6, 7, 18, 19 and 29 through 32, T.18N., R.25E., M.D.B.&M., all of Sections 1 through 5, a portion south of the Truckee River of Section 6, all of Sections 7 through 30, and all of Sections 33 through 36, T.19N., R.22E., M.D.B.&M., all of Sections 1 through 36, T.19N., R.23E., M.D.B.&M., all of Sections 6, 7, 18, 19, 30 and 31, T.19N., R.24E., M.D.B.&M., portions south of the Truckee River of Sections 24 through 26, 28, 31 through 35, and all of Section 36, T.20N., R.22E., M.D.B.&M., portions south of the Truckee River of Sections 13, and 19 through 24 and all of Sections 25 through 36, T.20N., R.23E., M.D.B.&M., portions south of the Truckee River of Section 18 and all of Sections 19, 30 and 31, T.20N., R.24E., M.D.B.&M.

II.

Application 81247 was filed on October 14, 2011, by the South Meadows Properties Limited Partnership to change the point of diversion, place of use and manner of use of a portion of water previously appropriated from the Truckee River under the *Orr Ditch Decree*,² being portions of Claims 294 and 295, not to exceed 1.25 afa for quasi-municipal purposes. The existing manner of use is "as decreed." The proposed point of diversion is located within the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 35, T.20N., R.22E., M.D.B.&M. The existing point of diversion is described as being located within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 17, T.19N., R.19E., M.D.B.&M., (*Orr Ditch*). The proposed places of use are the same as that described under Application 81246.

III.

Application 81248 was filed on October 14, 2011, by the South Meadows Properties Limited Partnership to change the point of diversion and place of use of a portion of water previously appropriated under the *Orr Ditch Decree*,³ being all of Permit 63622, all of Permit 71740 along with a portion of Permit 71741. The proposed point of diversion is described as being located within the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 35, T.20N., R.22E., M.D.B.&M. The existing points of diversions are described as being located within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 31, T.19N., R.18E., M.D.B.&M., (*Steamboat Canal/Hunter Creek Reservoir*), the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 9, T.19N., R.18E., M.D.B.&M., (*Highland Ditch/Highland Reservoir*), the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 10,

² Final Decree, *United States v. Orr Water Ditch Co.*, In Equity Docket No. A-3 (D. Nevada 1944).

³ Final Decree, *United States v. Orr Water Ditch Co.*, In Equity Docket No. A-3 (D. Nevada 1944).

T.19N., R.19E., M.D.B.&M. (Idlewild Treatment Plant), the SW¼ NE¼ of Section 7, T.19N., R.20E., M.D.B.&M. (North Truckee Ditch/Glendale Treatment Plant), the NE¼ SE¼ of Section 17, T.19N., R.19E., M.D.B.&M. (Orr Ditch Pump Station/Chalk Bluff Treatment Plant), and the NE¼ SW¼ of Section 17, T.19N., R.19E., M.D.B.&M., (Orr Ditch/Chalk Bluff Treatment Plant). The proposed places of use are the same as that described under Application 81246.

IV.

The remarks section of the applications indicate that the water will be used to provide service to customers within the Applicant's service area, the Tahoe Reno Industrial Center within Storey County and served by the Tahoe Reno Industrial General Improvement District.

V.

Applications 81246, 81247 and 81248 were timely protested by the Pyramid Lake Paiute Tribe, Churchill County and the Truckee-Carson Irrigation District on grounds as summarized below:

1. The Applicant is seeking to change Truckee River decreed rights that have previously been converted to municipal use at full duty. Due to the Applicant treating and using its generated effluent water, there is no return flow back to the Truckee River. The Applicant should be limited to the consumptive use fraction of the original decreed rights.
2. The applications seek to divert surface water using an induction well adjacent to the Truckee River near Tracy, which is problematic. Induction wells do not immediately draw surface water as a surface water diversion does; nor do they immediately cease drawing surface water once the well is shut off. Depending on the aquifer properties, there would be lag times and diversion from aquifer storage before the river or surface water body is captured. This will create diversion timing issues and potential additional losses from the surface water bodies when the diversions are not in priority to divert. The Applicant should be required to construct a well calibrated groundwater model to account and manage surface/groundwater diversion such that they are only occurring when in priority.
3. The applications should be denied on the basis that they are necessarily dependent on the approval of its companion Applications 81247, 81248, 80941, 80942, 80943 and

80944 and is therefore subject to the deficiencies and contradictions on those applications.

4. The applications are seeking new diversions from the Truckee River, which is fully appropriated.

5. It is believed that the base water rights sought for change by three change applications (81246, 81247 and 81248) have been forfeited and/or abandoned; therefore, the applications should be denied and the base right permits cancelled.

6. The manner of use specified by the change applications is municipal. The applications should be rejected pursuant to NRS § 533.340 for the lack of information regarding the number of person to be served and the approximate future requirement.

7. The Applicant's answer to Question 15 on the applications does not provide sufficient detail on proposed project or water usage. Based on the perceived scope of the water exportation project contemplated by Applications 81246, 84247, 84248, 80941, 80942, 80943 and 80944, the Applicant should be required to conduct the hydrologic and environmental studies specified by NRS § 533.368 before the State Engineer makes a final determination on any of the applications involved with the Applicant's water exportation scheme.

8. The applications should be denied because they will increase the diversion of Truckee River water. The proposed changes in points of diversion would result in increased diversions because the water rights at existing points of diversion are subject to shortages in Truckee River supply under the regime of Floriston Rates. Whereas, the proposed change in point of diversions would benefit from the perennial supply of water from the Truckee Meadows Water Reclamation Facility.

9. The applications involve an inter-basin transfer and should be denied pursuant to NRS § 533.370(6) because of the Applicant's failure to: justify the need to import water to the other basin(s); demonstrate that a conservation plan(s) has been adopted and effectively carried out for the other basin(s); demonstrate that the proposed export of water from the basin is environmentally sound; demonstrate that the proposed action is an appropriate long-term use, which will not limit growth and development in the basin; and identify the specifics of the proposed project, including the basin(s) into which water will be imported.

10. The applications should be denied pursuant to NRS § 533.370 due to lack of information regarding: access to the use of public/private lands necessary for the construction of the works of diversion and the means of conveyance; financial ability to construct the works and apply the water to the intended use with reasonable diligence; technical feasibility to construct the works and apply the water to the intended use with reasonable diligence; and justification for the quantity of water required for the proposed project.

11. Granting the applications would threaten to prove detrimental to the public interest.

12. Granting the applications would threaten to prove detrimental to the public interest in ways that are not yet known to this Protestant (the Pyramid Lake Paiute Tribe), but which may arise or first become known to this Protestant in the period between the date of filing of the Application and the hearing of the protested applications.

13. The Pyramid Lake Paiute Tribe alleges that it incorporates in its Protest by reference as if fully set forth herein every relevant protest ground set forth in any other protest filed by any other protestant regarding these applications, and /or any other protest filed by any other protestant regarding any other application related to water exportation scheme contemplated in Applications 81246, 81247 and 81248.

Therefore, the Protestants request that the State Engineer condition the permit to address the above criteria as stated or deny the applications.

FINDINGS OF FACT

I.

Nevada Revised Statute § 533.365(4) 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 in the case of protested Applications 81246, 81247 and 81248, 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 these matters is not required.

II.

The Applicant is seeking to change Truckee River water appropriated under the *Orr Ditch* Decree. Some of these decreed rights were previously converted to municipal use at full duty because treated effluent was returned to the Truckee River system accounting for the non-consumptive portion of the decreed right. In this instance, the Applicant is treating and using its generated effluent water and as a result there is no return flow back to the Truckee River system. The protests imply a 50% return flow should be used as a basis for determining consumptive use. Accounting for return flows is important to protect downstream water rights on the system. The State Engineer finds that, if the applications are approved, they will be limited based on a 2.5 acre-feet per acre calculation to account for return flows.

III.

The applications seek to divert surface water using an induction well adjacent to the Truckee River near Tracy, which the Protestants assert is problematic. They claim that induction wells do not immediately draw surface water as a surface water diversion does and they do not immediately cease drawing surface water once the well is shut off. They claim that depending on the aquifer properties, there would be lag times and diversion from aquifer storage before the river or surface water body is captured. They assert this will create diversion timing issues and potential additional losses from the surface water bodies when the diversions are not in priority. They want the State Engineer to require the Applicant to construct a well calibrated groundwater model to account and manage surface/groundwater diversion such that they are only occurring when in priority. The State Engineer does not agree with the Protestants' contention and finds that groundwater modeling is not needed. The Applicant will be required to construct the induction well in accordance to specifications approved by the State Engineer to ensure that Truckee River water is being captured and taken in priority. The State Engineer and Federal Water Master can work in conjunction to insure the well is being pumped properly to allow time for the water to be captured, along with maintaining the surface source's decreed date of priority. The State Engineer finds that an induction well can be constructed and operated to divert the water requested and these protest issues may be overruled.

IV.

The Protestants request the applications be denied on the basis that each of them are necessarily dependent on the approval of its companion Applications 81247, 81248, 80941, 80942, 80943 and 80944 and is therefore subject to the deficiencies and contradictions on those applications. The State Engineer finds that each application can stand on its own merits; and although additive in water rights acre-footage, none of these applications depend on the approval of the other applications to allow continuance of developing the water to beneficial use.

V.

The Protestant states that the applications are seeking new diversions from the Truckee River, which is fully appropriated. The State Engineer finds that these are not new appropriations but are changes of existing *Orr Ditch Decree* water rights.

VI.

The Protestants believe that the base water rights sought for change by Applications 81246, 81247 and 81248 have been forfeited and/or abandoned; therefore, the applications should be denied and the base right permits cancelled. The State Engineer finds that all water rights requested for transfer pursuant to these applications are changes to pre-1913 water rights established under the *Orr Ditch Decree*. Nevada Revised Statute § 533.060(2) provides that a surface water right shall not be deemed lost, or otherwise forfeited for the failure to use the water therefrom for a beneficial purpose. However, the Reviser's note indicates that this provision of the law does not apply to a water right that was under legal challenge on or before April 1, 1999. There is no indication that any of the rights sought to be changed was under a legal challenge on or before April 1, 1999. The State Engineer finds the forfeiture allegation can be dismissed.

Nevada Revised Statute § 533.365(1) requires that a protest must set forth with reasonable certainty the grounds of a protest, which must be verified by affidavit. The State Engineer finds not one fact was provided to support the allegation of abandonment; therefore, the claim was not argued with reasonable certainty and can be dismissed. The State Engineer finds that the holders of those water rights by either reserving them out of deeds or transferring them to new owners evidenced the intent not to abandon those rights.

VII.

The manner of use specified by the change applications is municipal. The Protestants believe the applications should be rejected pursuant to NRS § 533.340 for the lack of information

regarding the number of persons to be served and the approximate future requirement. Based on future demand information submitted on behalf of the Applicant, showing a need for approximately 45,000 acre-feet of water total for the project(s), the State Engineer finds that the water requested by the proposed change applications will aid in the obtaining of this amount and allow for continued development of the business park.

VIII.

The Protestants believe the Applicant should be required to conduct the hydrologic and environmental studies specified by NRS § 533.368 before the State Engineer makes a final determination on any of the applications involved with the Applicant's water exportation scheme. The State Engineer finds that no substantial evidence is presented in the protests that would support the need for NRS § 533.368 studies and he determines that no such studies will be ordered.

IX.

The Protestants believe the applications should be denied because they will increase the diversion of Truckee River water. They assert that the proposed changes in points of diversion would result in increased diversion because the water rights at existing points of diversion are subject to shortages in Truckee River supply under the regime of Floriston Rates; whereas, the proposed points of diversion would benefit from the perennial supply of water from the Truckee Meadows Water Reclamation Facility. The State Engineer finds that there will be no increase to the diversions with the water being taken out at a different location and the amount of water being diverted will still be subject to regulation by the Federal Water Master. If any permits are issued, there will be a requirement that a measuring device be installed to accurately gage how much water is being diverted from the river via the induction well.

X.

The Protestants believe the applications should be denied due to lack of information regarding access to the use of public/private lands necessary for the construction of the works of diversion and the means of conveyance. The State Engineer finds that any required access to public/private lands must be secured by the Applicant through the various city, county and state entities concerned and there is no evidence at this time that the Applicant is restricted from obtaining any necessary access permissions.

XI.

The Protestants believe the applications should be denied due to lack of information regarding financial ability to construct the works and apply the water to the intended use with reasonable diligence. The State Engineer finds that the Tahoe Reno Industrial Center served by the Tahoe Reno Industrial Center General Improvement District is already in existence and the water is for future expansion. Since the park is already in existence and water is currently being delivered to existing customers, there is a reasonable expectation that the Applicant will continue its project and construct any additional works necessary to deliver the water requested under the change applications with reasonable diligence.

XII.

The Protestants believe granting the applications would threaten to prove detrimental to the public interest. The State Engineer finds that the change applications would not threaten to prove detrimental to the public interest as these are not additional diversions from the river but changes in points of diversion and places of use of existing water rights and therefore, will not harm any downstream users.

XIII.

Protestant Pyramid Lake Paiute Tribe believes granting the applications would threaten to prove detrimental to the public interest in ways that are not yet known to this Protestant, but which may arise or first become known to this Protestant in the period between the date of filing of the Application and the hearing of the protested applications. The State Engineer finds no merit in this protest allegation.

XIV.

Protestant Pyramid Lake Paiute Tribe incorporates in their protest by reference as if fully set forth herein every relevant protest ground set forth in any other protest filed by any other protestant regarding these applications, and /or any other protest filed by any other protestant regarding any other application related to water exportation scheme contemplated in Applications 81246, 81247 and 81248. Nevada Revised Statute § 533.365 requires protests be verified by affidavit and to set forth the grounds of the protest with reasonable certainty; therefore, the State Engineer finds no merit in this protest allegation.

XV.

The protests state that the applications involve an interbasin transfer and should be denied pursuant to NRS § 533.370(6) [now NRS § 533.370(3)]. In Nevada water law, interbasin transfer is where the point of diversion of a groundwater source is in a different hydrographic basin than the place of use and specific statutes apply to these types of transfers. Applications 81246, 81247 and 81248 seek to change the point of diversion and place of use of Truckee River surface water via an induction well. The State Engineer finds that there is no interbasin transfer of groundwater; therefore, there is no merit to this protest allegation.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁴

II.

The State Engineer is prohibited by law from granting a permit under a change application that requests to appropriate the public waters where:⁵

- 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 protectable 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.

Based on the findings, the State Engineer concludes the protests are without merit. The applications will be limited to a duty of 2.5 acre-feet per acre to account for return flow and an approved construction plan for the induction well will be required to ensure the capture of Truckee River water in priority; therefore, the State Engineer further concludes that the proposed change applications will not conflict with existing rights and will not threaten to prove detrimental to the public interest.

⁴ NRS Chapter 533.

⁵ NRS § 533.370(2).

RULING

The protests to Applications 81246, 81247 and 81248 are hereby overruled and the applications are granted subject to:

1. Payment of the statutory permit fees;
2. Existing rights;
3. 2.5 acre-feet per acre duty;
4. Continuing jurisdiction by the Federal Water Master; and
5. An approved construction plan for the induction well.

Respectfully submitted,

 P.E.
JASON KING, P.E.
State Engineer

Dated this 3rd day of

August, 2012.