

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

IN THE MATTER OF APPLICATIONS)
78985, 79198, 79965, 80066, 80067, 80068,)
80069, 80070, 80071, 80072, 80296, 80811,)
80812, 81296, AND 81597 FILED TO)
CHANGE THE PLACE AND MANNER OF)
USE OF WATER OF THE TRUCKEE RIVER)
PREVIOUSLY APPROPRIATED WITHIN)
THE TRACY SEGMENT HYDROGRAPHIC)
BASIN (83), STOREY COUNTY, NEVADA.)

RULING

#6214

GENERAL

I.

Application 78985 was filed on October 22, 2009, by the City of Fernley (Fernley) to change the manner and place of use of 446.045 acre-feet annually (afa), a portion of the water previously appropriated under Claim No. 3 of the *Orr Ditch* Decree. The proposed manner of use is municipal and domestic within the place of use served by the City of Fernley. The existing places of use are described as 41 separate parcels of land totaling 108.3778 acres of land.¹

Application 79198 was filed on January 12, 2010, by Fernley to change the manner and place of use of 37.44 afa, a portion of the water previously appropriated under Claim No. 3 of the *Orr Ditch* Decree. The proposed manner of use is municipal and domestic within the place of use served by the City of Fernley. The existing places of use are described as 3 separate parcels of land totaling 8.32 acres of land.²

Application 79965 was filed on June 30, 2010, by Fernley to change the manner and place of use of 271.755 afa, which is a portion of the water previously appropriated under Claim No. 3 of the *Orr Ditch* Decree. The proposed manner of use is municipal and domestic within the place of use served by the City of Fernley. The existing places of use are described as 20 parcels of land totaling 75.5367 acres of land.³

¹ File No. 78985, official records in the Office of the State Engineer.

² File No. 79198, official records in the Office of the State Engineer.

³ File No. 79965, official records in the Office of the State Engineer.

Application 80066 was filed on August 6, 2010, by Fernley to change the manner and place of use of 20.115 afa, which is a portion of the water previously appropriated under Claim No. 3 of the *Orr Ditch* Decree. The proposed manner of use is municipal and domestic within the place of use served by the City of Fernley. The existing places of use are described as 5 parcels of land totaling 4.47 acres of land.⁴

Application 80067 was filed on August 6, 2010, by Fernley to change the manner and place of use of 31.86 afa, which is a portion of the water previously appropriated under Claim No. 3 of the *Orr Ditch* Decree. The proposed manner of use is municipal and domestic within the place of use served by the City of Fernley. The existing places of use are described as 4 parcels of land totaling 7.08 acres of land.⁵

Application 80068 was filed on August 6, 2010, by Fernley to change the manner and place of use of 1.12 afa, which is a portion of the water previously appropriated under Claim No. 3 of the *Orr Ditch* Decree. The proposed manner of use is municipal and domestic within the place of use served by the City of Fernley. The existing place of use is described as 1 parcel of land totaling 0.2489 acres of land.⁶

Application 80069 was filed on August 6, 2010, by Fernley to change the manner and place of use of 81.225 afa, which is a portion of the water previously appropriated under Claim No. 3 of the *Orr Ditch* Decree. The proposed manner of use is municipal and domestic within the place of use served by the City of Fernley. The existing places of use are described as 6 parcels of land totaling 18.05 acres of land.⁷

Application 80070 was filed on August 6, 2010, by Fernley to change the manner and place of use of 3.465 afa, which is a portion of the water previously appropriated under Claim No. 3 of the *Orr Ditch* Decree. The proposed manner of use is municipal and domestic within the place of use served by the City of Fernley. The existing places of use are described as 3 parcels of land totaling 0.77 acres of land.⁸

⁴ File No. 80066, official records in the Office of the State Engineer.

⁵ File No. 80067, official records in the Office of the State Engineer.

⁶ File No. 80068, official records in the Office of the State Engineer.

⁷ File No. 80069, official records in the Office of the State Engineer.

⁸ File No. 80070, official records in the Office of the State Engineer.

Application 80071 was filed on August 6, 2010, by Fernley to change the manner and place of use of 232.62 afa, which is a portion of the water previously appropriated under Claim No. 3 of the *Orr Ditch* Decree. The proposed manner of use is municipal and domestic within the place of use served by the City of Fernley. The existing places of use are described as 37 parcels of land totaling 51.69 acres of land.⁹ The State Engineer notes that the list of parcels of land presents confusion as there are 38 lines identified, but one is left blank. By letter dated October 25, 2012, the Applicant withdrew 1.0189 acres, 4.59 acre-feet, from the application (ID No. 15, 16, 17, 20, 20A and 34).

Application 80072 was filed on August 6, 2010, by Fernley to change the manner and place of use of 144.583 afa, which is a portion of the water previously appropriated under Claim No. 3 of the *Orr Ditch* Decree. The proposed manner of use is municipal and domestic within the place of use served by the City of Fernley. The existing places of use are described as 32 parcels of land totaling 32.1279 acres of land.¹⁰ By letter dated October 25, 2012, the Applicant withdrew 0.24 acres, 1.080 acre-feet, from the application (ID No. 1).

Application 80296 was filed on November 10, 2010, by Fernley to change the manner and place of use of 2.475 afa, which is a portion of the water previously appropriated under Claim No. 3 of the *Orr Ditch* Decree. The proposed manner of use is municipal and domestic within the place of use served by the City of Fernley. The existing places of use are described as 3 parcels of land totaling 0.55 acres of land.¹¹

Application 80811 was filed on April 29, 2011, by Fernley to change the manner and place of use of 5.705 afa, which is a portion of the water previously appropriated under Claim No. 3 of the *Orr Ditch* Decree. The proposed manner of use is municipal and domestic within the place of use served by the City of Fernley. The existing place of use is described as 1 parcel of land totaling 1.63 acres of land.¹²

Application 80812 was filed on April 29, 2011, by Fernley to change the manner and place of use of 2.925 afa, which is a portion of the water previously appropriated under Claim No. 3 of the *Orr Ditch* Decree. The proposed manner of use is municipal and domestic within the place of

⁹ File No. 80071, official records in the Office of the State Engineer.

¹⁰ File No. 80072, official records in the Office of the State Engineer.

¹¹ File No. 80296, official records in the Office of the State Engineer.

¹² File No. 80811, official records in the Office of the State Engineer.

use served by the City of Fernley. The existing place of use is described as 1 parcel of land totaling 0.65 acres of land.¹³

Application 81296 was filed on November 8, 2011, by Fernley to change the manner and place of use of 308.565 afa, which is a portion of the water previously appropriated under Claim No. 3 of the *Orr Ditch* Decree. The proposed manner of use is municipal and domestic within the place of use served by the City of Fernley. The existing places of use are described as 33 parcels of land totaling 68.57 acres of land.¹⁴

Application 81597 was filed on February 21, 2012, by Fernley to change the manner and place of use of 95.63 afa, which is a portion of the water previously appropriated under Claim No. 3 of the *Orr Ditch* Decree. The proposed manner of use is municipal and domestic within the place of use served by the City of Fernley. The existing places of use are described as 2 parcels of land totaling 21.25 acres of land.¹⁵

II.

All the applications were timely protested by the Pyramid Lake Paiute Tribe of Indians (Tribe). The Tribe's protests first assert "conditional protest grounds" 1 through 3 indicating that they are "asserted only in the event and if for any reason the State Engineer does not continue to require the Applicant to comply with all applicable laws and regulations of other jurisdictions, including, but not limited to, the Secretary of the Interior." The protest grounds asserted are as follows:

1. Conditional - The proposed use of Newlands Project water rights for municipal and domestic purposes is subject to the regulator authority and approval of the Secretary of the Interior, which has not been obtained.
2. Conditional - The proposed transfer of decreed agricultural water rights for municipal use, using irrigation facilities for the conveyance of municipal water, and extending water deliveries outside of the irrigation season, is not contemplated and is not allowed under the existing Operating Criteria and Procedures (OCAP) for the Newlands Project.
3. Conditional - The applicant has not obtained permission or contracts to use federal facilities for the transportation of the water it is seeking to transfer.

¹³ File No. 80812, official records in the Office of the State Engineer.

¹⁴ File No. 80296, official records in the Office of the State Engineer.

¹⁵ File No. 81597, official records in the Office of the State Engineer.

4. The proposed period of use is from January 1 to December 31 of each year whereas the prior use was limited to the irrigation season. The new period of use will be less efficient and will adversely affect other water users including the Protestant, and will violate NRS 533.370(1)(b).

5. The application should not be approved because it involves the proposed transfer of alleged water rights which were under challenge in a legal proceeding that was pending on or before April 1, 1999, and which have been forfeited and/or abandoned. Specifically, forfeiture and/or abandonment is asserted against:

Application 78985 - Parcels 1 through 41;

Application 79198 - Parcel 1;

Application 79965 - Parcels 1, 2, and portions of 3, 4, 5;

Application 80066 - Parcels 5, 6, 7, 8, 9;

Application 80071 - Parcels 8, 9, 10, 11, 21, 24, 25, 26, 34, 37 38;

Application 80072 - Parcels 12 forfeiture and abandonment, Parcels 28, 29 abandonment;

Application 80811 - Parcel 1;

Application 81296 - The application should not be approved because it proposes to transfer alleged water rights which are identified in the application as appurtenant to roads, and the roads have been in existence for at least 30 years. The water rights sought for transfer have therefore been abandoned and/or forfeited;

Application 81597 - portion of Parcel 1.

6. Granting the application will threaten to prove detrimental to the public interest in light of the declining quantity and quality of the groundwater available in the Fernley hydrographic basin to serve existing permits and commitments, and in light of the obligations of the State Engineer pursuant to NRS Chapters 534 and 278 to require that there be adequate plans to protect existing uses and commitments of ground water and to require that the subject rights, or an appropriate portion of them, be devoted to ground water recharge to protect existing users and customers before any additional rights are allocated to new development.

7. This Protestant incorporates in this 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 this application.

8. Application 81296 - The manner of use specified for Application 81296 is municipal. The application should be rejected pursuant to NRS 533.240 [sic] for the lack of information regarding the number of persons to be served and the approximate future requirement.

FINDINGS OF FACT

I.

PREVIOUS AGREEMENT WITH PROTESTANT

In its answer to protests, the Applicant asserts that the State Engineer should overrule all protest grounds except for the fifth and sixth protest grounds because they are impermissible pursuant to an agreement to stay litigation entered into between the Tribe and Fernley in 2009. The State Engineer finds it is not within his jurisdiction to enforce private agreements between the Applicant and Protestant. If the Tribe has breached that agreement, it is a matter between the Tribe and Fernley and the State Engineer will not involve himself in that matter.

II.

CONDITIONAL PROTEST GROUNDS

The Tribe's protests first assert "conditional protest grounds" 1 through 3 indicating that they are "asserted only in the event and if for any reason the State Engineer does not continue to require the Applicant to comply with all applicable laws and regulations of other jurisdictions, including, but not limited to, the Secretary of the Interior." The State Engineer finds he has no authority to waive the requirements of other governmental entities; therefore, these protest grounds are without merit and overruled.

III.

SEASON OF USE

The Tribe's protests assert that the proposed period of use is from January 1st to December 31st of each year, whereas the prior use was limited to the irrigation season and that the new period of use will be less efficient and will adversely affect other water users including the Protestant, and will violate NRS 533.370(1)(b). The State Engineer has previously determined that when water is permitted for use "as decreed," or is subject to the terms and conditions set forth in the *Orr Ditch Decree*, it is limited to the time of use when Claim 3 water rights would be in priority to receive water. In State Engineer's Ruling No. 6102, which addressed change applications filed by the City of Fernley to store Truckee River water in upstream reservoirs, the State Engineer held that Claim No. 3 water is not permitted for year-round use for irrigation, but rather is limited to the irrigation season. The State Engineer finds in this case he will not allow for expansion of Claim No. 3 water for use beyond the irrigation season. Fernley argues that the *Orr Ditch Decree* provides for more than irrigation uses and that Claim No. 3 water is also "for supplying the inhabitants and cities and towns on the project and for domestic and other purposes...." *Orr Water Ditch Co.*, Equity No. A3,

at 10. It asserts since Claim No. 3 water is authorized for use for domestic and other purposes, and those purposes require year-round use, that if the State Engineer permits the use of the water to “as decreed,” it can use the water on a year-round basis. The State Engineer finds that Claim No. 3 water has historically only been delivered and used during the irrigation season since the start of the Newlands Reclamation Project over 100 years ago. Water not diverted to irrigation has either been diverted to storage in Lahontan Reservoir for the Carson Division users on the Newlands Reclamation Project during the irrigation season or has flowed to Pyramid Lake. If the State Engineer were to allow Fernley to divert the water to municipal use during the non-irrigation season and then a water-short year was declared on the Newlands Reclamation Project, then water that would have been in storage and shared by all would already have been diverted to Fernley. Thus, Fernley would have obtained more water than it may have been entitled to when Claim No. 3 water is shared by multiple users. The Federal Water Master for the Truckee River may at some times allow for year-round diversion for irrigation, and if he does, then Fernley would be allowed to divert year round. However, the State Engineer cannot and will not usurp the authority of the Federal Water Master by holding that Fernley may divert Claim No. 3 water year round when there is no precedent for year-round use of Claim No. 3 water. The State Engineer finds that to authorize that year-round use may conflict with the rights of others who share in that water right.

IV. FORFEITURE

The Tribe’s protests assert that certain applications or portions of applications should not be approved because they involve the proposed transfer of alleged water rights that were under challenge in a legal proceeding that was pending on or before April 1, 1999, and which have been forfeited. Fernley asserts that these rights were not subject of a legal proceeding that was pending on or before April 1, 1999, and that Nevada’s Legislature directly addressed the forfeiture of municipal water rights when it passed Assembly Bill 380 in 1999. Nevada Revised Statute § 533.060(2) provides that “[r]ights to the use of surface water shall not be deemed lost or otherwise forfeited for the failure to use the water therefrom for a beneficial purpose.” The Tribe did not provide any information or documentation in its protest that shows these specific water rights were the subject of a legal proceeding that was pending on or before April 1, 1999. However, Fernley provided information in its answers to protests, which showed that the *Orr Ditch* Court has previously held that the water rights acquired by Fernley for municipal use are not subject to claims

of forfeiture or abandonment.¹⁶ Therefore, the State Engineer finds there is no information that supports the protest allegation that the water rights sought to be changed under these change applications were the subject of a legal proceeding that was pending on or before April 1, 1999. The State Engineer finds that doctrine of forfeiture does not apply and the protest claim is overruled.

V.
ABANDONMENT

The Tribe's protests assert that certain applications or portions of applications should not be approved because they involve the proposed transfer of alleged water rights that were under challenge in a legal proceeding that was pending on or before April 1, 1999, and which have been abandoned. Nevada Revised Statute § 533.060(3) provides that a surface water right that is appurtenant to land formerly used primarily for agricultural purposes is not subject to a determination of abandonment if the surface water right: (a) is appurtenant to land that has been converted to urban use; or (b) has been dedicated to or acquired by a water purveyor, public utility or public body for municipal use. As noted, in Finding of Fact IV, Fernley provided information in its answers to protests, which showed that the *Orr Ditch* Court has previously held that the water rights acquired by Fernley for municipal use are not subject to claims of forfeiture or abandonment.¹⁷ In response to the Tribe's protests, Fernley asserts that all the water rights it seeks to change under these applications are surface-water rights that are appurtenant to land that was formerly used for agricultural purposes and dedicated to the City of Fernley, which is a public body, for municipal use. The State Engineer finds there is no information that supports the protest allegation that the water rights sought to be changed under these change applications were the subject of a legal proceeding that was pending on or before April 1, 1999. The State Engineer finds under NRS § 533.060, they are not subject to a determination of abandonment.

¹⁶ Attachment 3 to Answer to Protest, File No. 78985, official records in the Office of the State Engineer.

¹⁷ Attachment 3 to Answer to Protest, File No. 78985, official records in the Office of the State Engineer.

VI. GROUNDWATER

The Tribe alleges in its protests that the granting the applications will threaten to prove detrimental to the public interest in light of the declining quantity and quality of the groundwater available in the Fernley hydrographic basin to serve existing permits and commitments. Additionally, it alleges that in light of the obligations of the State Engineer pursuant to NRS Chapters 534 and 278 to require that there be adequate plans to protect existing uses and commitments of groundwater, that the State Engineer should require that the subject rights, or an appropriate portion of them, be devoted to groundwater recharge to protect existing water users and customers before any additional rights are allocated to new development.

The State Engineer has already addressed this protest ground and rejected it and finds that Fernley through these types of applications is doing exactly what the Tribe asserts it should be doing. By developing the surface-water source, it is protecting the groundwater users.¹⁸ The State Engineer finds there is no legal authority by which the State Engineer can force a municipality to institute a groundwater recharge program and overrules the protest claim. The State Engineer finds that he is acting on the applications before him and not addressing whether or not Fernley should be taking dedicated surface water and applying it to a groundwater recharge program. The State Engineer finds that the *Orr Ditch* decree court has recently affirmed the State Engineer overruling this protest ground in an order it issued related to State Engineer's Ruling No. 5826.

VII. INCORPORATION OF OTHER PROTEST GROUNDS

The Tribe once again asserts a protest ground that the State Engineer has repeatedly ruled is an invalid ground of protest. The Tribe asserts that it incorporates in its protests 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. Nevada Revised Statute § 533.365(1) provides that “[a]ny person interested may, within 30 days after the date of last publication of the notice of application, file with the State Engineer a written protest against the granting of the application, setting forth with reasonable certainty the grounds of such protest, which, ... must be verified by the affidavit of the protestant, or an agent or attorney thereof.” An affidavit is a signed statement

¹⁸ State Engineer's Ruling No. 5826, p. 18 dated April 4, 2008, official records in the Office of the State Engineer.

under oath and a voluntary declaration of facts that the affiant swears to the best of its knowledge are true. The State Engineer finds there is no way the Tribe can attest that the facts provided by another are true, particularly when it does not even know what those protest claims are at the time it files its protests. The State Engineer finds this protest claim without merit and dismisses it.

**VIII.
FAILURE TO PROVIDE INFORMATION**

The Tribe asserts that Application 81296 should be rejected for lack of information. It asserts that since the manner of use specified in Application 81296 is municipal, that the application 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. Nevada Revised Statute § 533.340 provides for additional requirements for the contents of an application to appropriate water for certain specific uses. When an application is filed to appropriate water for a municipal supply, the statute provides that the application must also approximate the number of persons to be served and the approximate future requirement. Nevada Revised Statute § 533.325 distinguishes between the initial appropriation of water and changing the point of diversion, place of use or manner of use of water already appropriated. The State Engineer has not interpreted the requirements of NRS § 533.340 to provide information regarding the number of persons to be served and the approximate future municipal requirements to apply to change applications, but rather only new appropriations of water. Additionally, the City of Fernley has provided the State Engineer with a copy of its Water Conservation Plan revised February 29, 2008, in which it shows a demand by 2016 that will exceed the groundwater rights it held at that time.¹⁹ The State Engineer finds the NRS § 533.340 is not applicable to change applications, that the Applicant has provided information regarding its water demand and overrules this protest ground.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and of the subject matter of this action and determination.²⁰

¹⁹ City of Fernley, Water Conservation Plan, Revised February 29, 2008, official records in the Office of the State Engineer, pp. 6-13.

²⁰ NRS Chapter 533.

II.

The State Engineer is prohibited by law from granting a permit under an application or change application to appropriate the public waters where:²¹

- 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.

Churchill County and the City of Fernley areas are changing from rural agriculture to more residential areas and the State Engineer cannot say that artificial recharge from surface-water sources must continue to support existing groundwater rights. Denial of the change applications will not change the situation on the ground. Existing places of use will not be irrigated even if these applications are denied because these water rights have been dedicated for municipal use. Areas previously irrigated with Newlands Project water are urbanizing and farmers are ceasing to irrigate and are selling their water rights. To deny change applications will not change the fact that less and less land is being irrigated with surface water in the area. When large quantities of surface water were brought in to irrigate land an unnatural system of recharge to the groundwater aquifer was created and wetlands were created that did not naturally exist. The State Engineer concludes that he cannot compel the continuation of that situation to create that groundwater recharge and wetlands and the removal of the recharge is not the type of injury to existing rights contemplated under the water law. On this basis, the State Engineer concludes that the granting of the change applications will not conflict with, injure or impair the Protestant's water rights or protectable interests in existing domestic wells nor will granting the change applications threaten to prove detrimental to the public interest.

²¹ NRS § 533.370(2).

RULING

The protests to Applications 78985, 79198, 79965, 80066, 80067, 80068, 80069, 80070, 80071, 80072, 80296, 80811, 80812, 81296, and 81597 are overruled and the applications granted subject to:

1. The payment of the statutory permit fees;
2. Existing rights; and
3. Continuing jurisdiction of the Federal Water Master.

Respectfully submitted,



JASON KING, P.E.
State Engineer

Dated this 14th day of

February, 2013.