

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

IN THE MATTER OF APPLICATION 77221)
FILED TO APPROPRIATE THE PUBLIC)
WATERS OF CHALK CREEK LOCATED)
WITHIN THE TRUCKEE MEADOWS)
HYDROGRAPHIC BASIN (87), WASHOE)
COUNTY, NEVADA.)

RULING
5972

GENERAL

I.

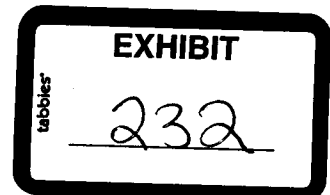
Application 77221 was filed on July 11, 2008, by the City of Reno to appropriate 1 cubic foot per second (cfs), of water from Chalk Creek for municipal purposes. The proposed point of diversion is described as being located within the SW¼ NE¼ of Section 17, T.19N., R.19E., M.D.B.&M. The proposed place of use is described as the Truckee Meadows Water Authority Service Area.¹

II.

Application 77221 was timely protested by Churchill County on the following grounds:¹

1. Application 77221, seeks a new appropriation of 1.0 cfs for municipal purposes from Chalk Creek which is tributary to the Truckee River. Applicant seeks to appropriate urban runoff return flow waters which have previously been appropriated and delivered through Truckee Meadows Water Authority (TMWA's) municipal system. When TMWA's Orr Ditch rights were originally converted from Decreed to Municipal they were permitted at full duty recognizing return flows from the municipal system would help satisfy downstream water rights. Permitting this application would allow additional appropriation on a fully appropriated stream system for which all un-appropriated waters have been granted. Protestants own and rely upon Orr Ditch Claim #3 water rights having a 1902 priority, therefore granting a new appropriation on a tributary to the Truckee River having a 2008 priority would affect existing rights and not be in the public interest.

¹ File No. 77221, official records in the Office of the State Engineer.



2. Protestant acknowledges the purpose of the application is to reduce the Total Maximum Daily Load (TMDL) for TDS, N & P and is supportive of those efforts since they are the recipients of this 'Loaded' water at their Derby Dam point of diversion. Protestants would consider withdrawing protest if applicant would agree or State Engineer requires a matched in-stream flow permit which would move a like amount of drought adjusted Orr Ditch water rights to the river. Permit would need to provide for in-stream flows through the Truckee Meadows and then become available for diversion below Vista.

III.

Application 77221 was timely protested by the Truckee Meadows Water Authority on the following grounds:¹

- (1) There is no unappropriated water on the proposed source of supply as a result of State Engineer Ruling No. 4683.
- (2) The proposed use conflicts with existing water rights, including those granted in State Engineer Ruling No. 4683 and with other Truckee River water rights, in that it seeks to appropriate water which should be allowed to return to the Truckee river;
- (3) There is no reasonable expectation that the Applicant can construct the work and apply the water to its intended beneficial use with reasonable diligence; and
- (4) The proposed use threatens to prove detrimental to the public interest in that it is inconsistent with the Truckee River Operating Agreement, to which the Applicant is a party, and if granted, it will prevent implementation of that Agreement and the benefits to the public which are dependent on that Agreement entering into effect.

IV.

Application 77221 was timely protested by the Truckee-Carson Irrigation District (TCID) on the following grounds:¹

1. The Applicant seeks a new appropriation in the amount of 1.0 second foot of water from Chalk Creek, which is a tributary of the Truckee River. The State Engineer shall reject an application where there is no unappropriated water in the proposed source of supply. NRS 533.370(5). According to the Application, water contributing to the flow in Chalk Creek is "storm water flowing over impervious surfaces." See Application Attachment A. On November 24, 1998 the Nevada State Engineer entered State Engineer's Ruling 4683 granting the Pyramid Lake Paiute Tribe of Indian's ("Tribe") applications 48061 and 48494

for 477,851 acre feet of unappropriated water in the Truckee River. This determination was upheld on appeal by the Nevada Third Judicial District Court, finding that the water sought by the Tribe was storm waters available only in certain years. [Citation omitted] TCID's [sic] currently has pending a competing application 9330 to appropriate 100,000 acre-feet annually of the unappropriated water of the Truckee River for use in the Newlands Project. Application 9330, which was rejected by the State Engineer in Ruling No. 4659, has been remanded back to the State Engineer by the Third Judicial District Court (Case No. 25004) to conduct further hearings in consideration of the Truckee River Operating Agreement ("TROA"). The Truckee River and its tributaries are fully appropriated, and there are senior pending applications for additional "storm water." It would prove detrimental to the public interest and injure existing water rights to allow further appropriation of Truckee River water.

2. The Applicant claims that irrigation and over watering has contributed to making the flow in Chalk Creek continuous. See Application, Attachment A. Surplus water consisting of water not consumed by irrigation and water running from irrigated grounds constitutes "waste water." *Gallio v. Ryan*, 52 Nev. 330, 344 (1930). No permanent right to[sic] can be acquired to waste water by appropriation, therefore the Application must be denied *Id.* at 344-345.
3. The Application will conflict and interfere with existing water rights of water right owners in the Newlands Project. Return flows from water use in Truckee Meadows, both irrigation and municipal use, are relied on by down stream[sic] water users in the Newlands Project. Application 77221 will interfere and conflict with existing senior vested water rights in violation of NRS 533.370(5) and the Orr Ditch Decree.
4. The waters sought under Application 77221 are already appropriated under the *Orr Ditch* Decree, and the Applicant may not make a second appropriation of the return flows.
5. The purpose of Application 77221 is unclear. It states that the "City is exploring ways in which flows from this creek can be treated to mitigate the loading to the Truckee river[sic]." Thus, it appears the purpose is for treatment of water and release back to the river without consumption. However, the Application proposes to divert water for municipal use indicating a place of beneficial use in Truckee Meadows (see accompanying map 71606). To the extent that the Application contemplates a municipal consumptive use of this water, it will conflict with existing rights and threaten to prove detrimental to the public interest as discussed above. If the Application is approved, it should be issued subject to the specific condition that there be no consumptive use of the water, and the diversion and use of water shall be for the sole purpose of treatment, after which the water shall be returned to the

source or the Truckee River at the confluence of Chalk Creek and the Truckee River.

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.

Protestants Churchill County, TMWA and TCID all cite grounds that there is no unappropriated water at the source. State Engineer's Ruling No. 4683 approved Applications 48061 and 48494 to appropriate those flows in the river from storm and flood events in excess of the senior water rights.² Chalk Creek is a tributary to the Truckee River and was therefore subject to the adjudication of the Truckee River stream system and to Ruling No. 4683. The State Engineer finds that there is no unappropriated water at the source.

III.

On November 14, 1989, a public administrative hearing was held by the State Engineer concerning two prior applications to transfer Orr Ditch decreed water rights from below Derby Dam in the vicinity of Wadsworth and on prior application to change the point of diversion from below Vista and above Wadsworth to Westpac Utilities' water treatment plants for utilization within the proposed place of use of Westpac Utilities' certificated water service area. The two applications below Derby Dam were also protested by TCID who presented their case in support of their protests at the hearing. The other application, which was not protested, was also discussed at the hearing. Further

² State Engineer's Ruling No. 4683, dated November 24, 1998, official records in the Office of the State Engineer.

possible change applications were discussed at the hearing, and the cumulative effect of such changes was analyzed.³

Ultimately, these applications were approved for full duty, rather than for only the consumptive use portion of the irrigation, under the reasoning that there would remain return flows to the river under the municipal uses. It is these non-consumptive portions of the upstream rights returning to the river that help serve those rights downstream.

TCID and Churchill County both identify Claim #3 of the Truckee River Decree, which serves the Newlands Project, as the downstream water right that would be impacted by a new appropriation on the Truckee River.

The State Engineer finds that approval of the application would conflict with existing rights.

CONCLUSIONS

I.

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

II.

The State Engineer is prohibited by law from granting a permit for an application 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 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 there is no unappropriated water at the source, since the water being sought for appropriation is either storm and flood water subject to

³ Transcript, public administrative hearing before the State Engineer, November 14, 1989, concerning Applications 53092, 53093 and 53369, official records in the Office of the State Engineer.

⁴ NRS chapter 533.

⁵ NRS § 533.370(5).

State Engineer's Ruling No. 4683 or return flows resulting from the municipal use of waters previously appropriated.

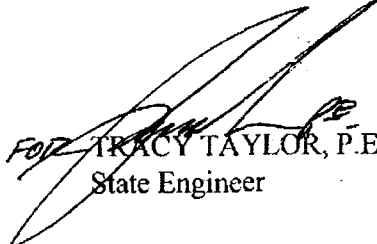
IV.

The State Engineer concludes that approval of Application 77221 would be an additional appropriation on the Truckee River stream system, and such an appropriation would conflict with existing rights.

RULING

The protests are upheld in part and Application 77221 is hereby denied on the grounds that there is no unappropriated water at the proposed source, that approval would conflict with existing rights, and thereby would threaten to prove detrimental to the public interest.

Respectfully submitted,


FOIA TRACY TAYLOR, P.E.
State Engineer

TT/MJW/jm

Dated this 17th day of

April, 2009.