

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

IN THE MATTER OF APPLICATIONS)
70947, 70948, 70949 AND 70950)
FILED TO CHANGE THE PLACE OF USE)
OF THE PUBLIC WATERS OF A SURFACE)
WATER SOURCE WITHIN THE CARSON)
DESERT HYDROGRAPHIC BASIN (101),)
CHURCHILL COUNTY, NEVADA.)

RULING

#5506

GENERAL

I.

Application 70947 was filed on March 16, 2004, by the United States of America, Fish and Wildlife Service to change the place of use of 85.22 acre-feet annually (28.50 acres at 2.99 acre-feet per acre), a portion of the water previously appropriated under Truckee-Carson Irrigation District (TCID) Serial No. 223-1-C, Claim No. 3 Orr Ditch Decree, and Alpine Decree.¹ The proposed point of diversion is described as being located at Lahontan Dam. The existing place of use is described as being located within the NW $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ and SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 8, T.18N., R.29E., M.D.B.&M. The proposed place of use is described as all lands within the approved boundary of the Stillwater National Wildlife Refuge, further described in Exhibit "1" attached to this ruling.² The proposed manner of use is described as the maintenance of wetlands for recreation and wildlife/storage with the existing manner of use being identified as being "as decreed." Under the remarks set forth in Item 15 of the application, the applicant indicates that it expressly reserves the right to transfer, in a later proceeding, the remaining 0.51 acre-feet per acre for each of the 28.50 acres from which the 2.99 acre-feet per acre are transferred under this application.

¹ Final Decree, U.S. v. Orr Water Ditch Co., In Equity A-3 (D.Nev. 1944) (*Orr Ditch Decree*); and Final Decree, U.S. v. Alpine Land and Reservoir Co., Civil No. D-183 (D.Nev. 1980) (*Alpine Decree*).

² File No. 70947, official records in the Office of the State Engineer.

which is generally high quality water. For water that is applied for irrigation, evapotranspiration consumes a large portion of the water leaving behind a buildup of salts. This salt is detrimental to the root zone of the crops; therefore, the farmer applies additional water to the crop to flush the salts from the root zone downward into the water table. Water seeping directly from the river or from canals is deeper and cooler and has a lower level of evaporation. Therefore, it is generally good quality water that migrates to the water table from these sources.⁵¹

The predicted reduction in salt concentration down gradient from fields where irrigation has ceased, but the delivery canals remain unchanged, was based on the groundwater models in *Conceptual Evaluation of Ground-Water Flow and Simulated Effects of Changing Irrigation Practices on the Shallow Aquifer in the Fallon and Stillwater Areas, Churchill County, Nevada*. Bolstering these predictions were actual monitoring well samples taken from wells down gradient from fields where irrigation has ceased. The data show a marked improvement in two wells in particular, Well 39 and Well 64, where 260 acres and 1,100 acres, respectively were removed from irrigation near the wells. Measurements of specific conductance, a measurement of salinity, show that Well 39 went from about 6,000 microsiemens per centimeter to about 1,500 microsiemens per centimeter and Well 64 went from about 20,000 microsiemens per centimeter to about 2,000 microsiemens per centimeter.⁵²

The State Engineer's authority in the review of water right applications is limited to considerations identified in Nevada's water policy statutes, *County of Churchill, et al. v. Ricci*, 341 F.3d 1172 (9th Circuit 2003) citing to *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 918 P.2d 697 (Nev. 1996), and the issue as to water quality is relegated to another agency of government.

⁵¹ Transcript, pp. 207-208.

⁵² Exhibit No. 26, Figure 8, p. 18.

The State Engineer finds that the protestant failed to provide substantial evidence to support protest claim 4 and the issue of water quality is relegated to another agency of government. The State Engineer further finds that in regards to salinity, the evidence shows water quality will improve below the fields taken out of production.

IV.

The protestant suggested in its closing brief that in the alternative to denying the applications outright the State Engineer should invoke NRS § 533.368 and require the applicant to conduct a study. Expressed in protest claim 5, the protestant has stated that "... Nevada law at NRS § 533.368, requires hydrologic and environmental studies to determine the cumulative consequences of this application and those applications related thereto to the City's existing public water system and the City's existing water rights and Nevada's public interest."^{2,4,6,8}

Nevada Revised Statute § 533.368 provides that if the State Engineer determines that a hydrological study, environmental study or any other study is necessary before he makes a final determination on an application pursuant to NRS § 533.370 and the applicant, a governmental agency or other person has not conducted such a study or the required study is not available, the State Engineer shall advise the applicant of the need for the study and the type of study required.

In examining NRS § 533.368, it is apparent that protest claim 5 clearly misstates NRS § 533.368 when stating, "... Nevada law at NRS § 533.368, requires [emphasis added] hydrologic and environmental studies..." The discretionary authority to order a study is provided in the plain reading of the statute which begins "...If the State Engineer determines..." [emphasis added]

Upon examination of the evidence, in particular Exhibit Numbers 20, 25, 26, 27, 28, 29, 30 and 31, the State Engineer finds that, in his determination, additional hydrological, environmental or other studies are not necessary to make a final determination on Applications 70947, 70948, 70949 and 70950.

The State Engineer finds that the protestant's argument has no basis in Nevada water law and surface water irrigators that are a part of the Newlands Project have no obligation to irrigate their land for the purpose of providing secondary recharge to the City of Fallon.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁶⁸

II.

The State Engineer is prohibited by law from granting a permit under an application to change the public waters where:⁶⁹

- 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 the protestant did not prove its protest claims that the applications if granted would conflict with, injure, and impair existing permitted water rights owned by the City of Fallon.

IV.

The State Engineer concludes the protestant did not prove its protest claim that the applications if granted would be detrimental to the public interest.

V.

The State Engineer concludes the protestant did not prove its protest claim that the applications if granted would present a hazard and danger to the health, safety and welfare of the

⁶⁸ NRS chapter 533.

⁶⁹ NRS § 533.370(4).

residents of the City of Fallon and the surrounding community at large.

VI.

The State Engineer concludes the protestant did not prove its protest claim that the applications if granted would violate the Safe Drinking Water Act and such review is not a matter for consideration under the State Engineer's statutory duties.

VII.

The State Engineer concludes the protestant did not prove its protest claim that Nevada Revised Statute § 533.368 requires hydrologic and environmental studies, and the determination of whether a study is needed is discretionary with the State Engineer.

VIII.

The State Engineer concludes that Order No. 1116 does not apply to surface water change applications and was issued to curtail new appropriations of ground water because existing groundwater rights exceed the natural recharge of the basin. The State Engineer concludes that while in 1995 recharge from irrigation was a concern, evidence is indicating that the recharge from the canals is more important than that from irrigated fields. The State Engineer further concludes that the cumulative impacts of hypothetical change applications cannot be considered in this ruling; only Applications 70947, 70948, 70949 and 70950 can be considered. The State Engineer concludes the moratorium on new groundwater appropriations is not inconsistent with approval of these applications. The State Engineer concludes that groundwater flow in the shallow aquifer, at the existing places of use of Applications 70947, 70948, 70949 and 70950, flows away from the basalt aquifer. In addition, any reduction in recharge to the shallow aquifer will be offset by increased recharge of better quality water from existing canals.

IX.

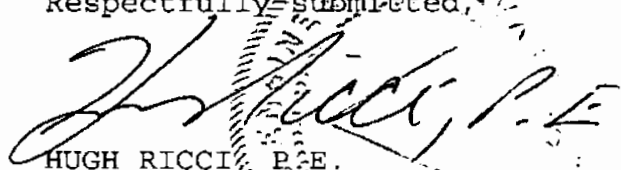
The State Engineer concludes that the granting of these applications will not conflict with existing rights or threaten to prove detrimental to the public interest.

RULING

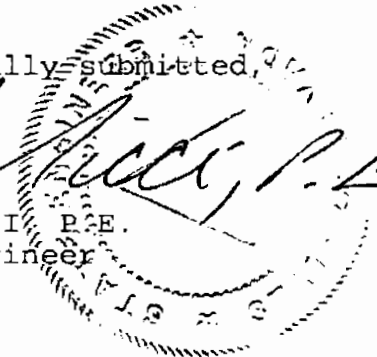
The protests to Applications 70947, 70948, 70949 and 70950 are hereby overruled and the applications are granted subject to:

1. the payment of statutory permit fees;
2. existing water rights.

Respectfully submitted,



HUGH RICCI, P.E.
State Engineer



HR/TW/jm

Dated this 9th day of
September, 2005.

EXHIBIT No. 1

Exhibit 1 describes the Stillwater National Wildlife Refuge, as consisting of all Federally-owned or Federally-controlled lands within:

In T.21N., R.32E., M.D.B.& M. - Sections 2 through 11, Sections 14 through 22, Sections 27 through 34.

In T.21N., R.31E., M.D.B.& M. - all Sections.

In T.20N., R.32E., M.D.B.& M. - Sections 3 through 10, Sections 16 through 21, Sections 29 and 30.

In T.20N., R.31E., M.D.B.& M. - all Sections.

In T.19N., R.31E., M.D.B.& M. - Sections 2 through 11, Sections 14 through 22, Sections 27 through 33.

In T.19N., R.30E., M.D.B.& M. - Section 13 - all those portions of the NE $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$ and SE $\frac{1}{4}$ SE $\frac{1}{4}$ lying east of Stillwater Slough; Section 24 - NE $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$ and SW $\frac{1}{4}$ NE $\frac{1}{4}$.

Exhibit No. 2

Exhibit 2 describes the Carson Lake Area as consisting of:

In T.16N., R.29E., M.D.B.& M. - tract 37; Section 1 lots 3 to 6, inclusive, S $\frac{1}{2}$ SW $\frac{1}{4}$ and SE $\frac{1}{4}$; Section 2 lots 1, 2 and 5 to 10, inclusive, S $\frac{1}{2}$ SE $\frac{1}{4}$; Section 3 lots 3, 4, and 6 to 9, inclusive, S $\frac{1}{2}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ and SE $\frac{1}{4}$; Section 4 lots 1, 2 and 5 to 7, inclusive, NE $\frac{1}{4}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ SW $\frac{1}{4}$ and SE $\frac{1}{4}$; Section 5 lots 1 to 4, inclusive, S $\frac{1}{2}$ SW $\frac{1}{4}$ and S $\frac{1}{2}$ SE $\frac{1}{4}$; Section 6 lots 1 to 3, inclusive, and lots 8, 11, 12, 14 and 17, S $\frac{1}{2}$ SE $\frac{1}{4}$.

In T.17N., R.29E., M.D.B.& M. - tract 37; tract 38; tract 40; Section 9 lots 4, 6, 8 and 10; Section 19 lots 1 to 4, inclusive.

In T.18N., R.29E., M.D.B.& M. - Section 35, S $\frac{1}{2}$ SE $\frac{1}{4}$.

In T.16N., R.30E., M.D.B.& M. - Section 5 lots 3 to 6, inclusive, and lots 11 and 12, SW $\frac{1}{4}$; Section 6, lots 1 to 21, inclusive, and SE $\frac{1}{4}$.

In T.17N., R.30E., M.D.B.& M. - tract 37; Section 5 lots 3 and 4, S $\frac{1}{2}$ NW $\frac{1}{4}$ and SW $\frac{1}{4}$; Section 6 lots 1 to 5, inclusive, and lots 9 to 12, inclusive, S $\frac{1}{2}$ NE $\frac{1}{4}$ and SE $\frac{1}{4}$; Section 7 lot 4, and lots 7 to 12, inclusive, NW $\frac{1}{4}$ NE $\frac{1}{4}$ and E $\frac{1}{2}$ NE $\frac{1}{4}$; Section 8 W $\frac{1}{2}$; Section 17 W $\frac{1}{2}$; Section 18 lots 1 to 4, inclusive; Section 19 lot 1; Section 20 lots 1 to 4, inclusive; E $\frac{1}{2}$ NW $\frac{1}{4}$ and E $\frac{1}{2}$ SW $\frac{1}{4}$; Section 29 lots 1 to 4, inclusive, E $\frac{1}{2}$ NW $\frac{1}{4}$ and E $\frac{1}{2}$ SW $\frac{1}{4}$; Section 30 lot 1; Section 31 lots 1, 2, and 6 to 9, inclusive; Section 32 W $\frac{1}{2}$.