

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**ORDER WR 2013-XXXX**

In the Matter of the Petition for Reconsideration by

Truckee-Carson Irrigation District, City of Fallon, and Churchill CountyRegarding Water Right Decision 1651

SOURCE: Little Truckee River, Independence Creek, Prosser Creek

COUNTY: Nevada and Sierra

ORDER DENYING RECONSIDERATION

BY THE BOARD:

1.0 INTRODUCTION

Truckee-Carson Irrigation District (TCID), City of Fallon, Nevada, and Churchill County, Nevada (collectively, Protestants)¹ jointly petition the State Water Resources Control Board (State Water Board or Board) for reconsideration of water right Decision 1651, adopted on October 16, 2012. In Decision 1651, the State Water Board conditionally approved two water right applications filed by the United States Bureau of Reclamation (Reclamation) and four change petitions filed by Washoe County Water Conservation District (Conservation District), Truckee Meadows Water Authority (TMWA), and Reclamation. The two applications and change petitions, which are for water rights in the Truckee River watershed, are intended to implement the Truckee River Operating Agreement (TROA). Protestants allege that Decision 1651 is not supported by substantial

¹ Parties petitioning for reconsideration, such as TCID, the City of Fallon, and Churchill County often would be identified as "Petitioners" in an order on reconsideration. Because the term "Petitioners" refers to other parties in Decision 1651, however, we will continue to use the terminology of Decision 1651 in referring to the parties to this proceeding to avoid confusion. Thus TCID, the City of Fallon, and Churchill County will be referred to as "Protestants" in this order on reconsideration. The term "Petitioners" will refer to the entities filing the change petitions that were the subject of the decision: Washoe County Water Conservation District, Truckee Meadows Water Authority, and the United States Bureau of Reclamation. (Decision 1651, p. 1.) We note, however, that in Decision 1651, the term "Protestants" included individual Newlands Reclamation Project water right owners (Ernest C. Schank, Richard Harriman, Ray Peterson, Don Travis, Jerry Blodgett, Lester deBraga, and Larry Miller). (*Id.*, at p. 10.) These individuals have not filed a petition for reconsideration and thus, the use of the term "Protestants" in this order does not refer to them.

evidence and contains error in law regarding the analysis of injury to other water right holders in connection with the change petitions and the availability of water for appropriation in the Truckee River watershed. They request the State Water Board to rescind Decision 1651 and to deny all of the water right applications and change petitions approved in the decision. The State Water Board finds that its decision was appropriate and proper and denies Protestants' request for reconsideration.

2.0 GROUNDS FOR RECONSIDERATION OF A DECISION OR ORDER

Any interested person may petition the State Water Board for reconsideration of a water right decision or order on any of the following grounds:

- (a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) The decision or order is not supported by substantial evidence;
- (c) There is relevant evidence that, in the exercise of reasonable diligence, could not have been produced;
- (d) Error in law.

(Cal. Code Regs., tit. 23, § 768.)

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the regulations. (*Id.*, § 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board may deny the petition upon a finding that the decision or order was appropriate and proper, set aside or modify the decision or order, or take other appropriate action.² (*Id.*, subd. (a)(2)(A)-(C).)

3.0 BACKGROUND OF PROCEEDING

In Decision 1651, the State Water Board conditionally approved water right Applications 31487 and 31488 filed by Reclamation to appropriate water from Independence Creek, the

² The State Water Board is directed to order or deny reconsideration on a petition within 90 days from the date on which the Board adopts the decision or order. (Wat. Code, § 1122.) If the State Water Board fails to act within that 90-day period, a petitioner may seek judicial review, but the Board is not divested of jurisdiction to act upon the petition simply because it failed to complete its review of the petition on time. (State Water Board Order WR 2009-0061 at p. 2, fn. 1; see *California Correctional Peace Officers Ass'n v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147-1148, 1150-1151; State Water Board Order WQ 98-05-UST at pp. 3-4.)

Little Truckee River, and Prosser Creek for beneficial use. The State Water Board also conditionally approved petitions to change License 3723 (Application 5169) of the Conservation District, License 4196 (Application 9247) of TMWA, and Permit 11605 (Application 15673) and License 10180 (Application 18006) of Reclamation. All sources are tributary to the Truckee River. The applications and change petitions are intended to accommodate implementation of TROA, an operating agreement for the Truckee River reservoirs, which has been negotiated among various parties (including the States of California and Nevada, the Pyramid Lake Paiute Tribe (Tribe), TMWA, the United States, and the Conservation District) pursuant to the 1990 Truckee-Carson-Pyramid Lake Water Rights Settlement Act (Pub.L. No. 101-618 (Nov. 16, 1990), Tit. II, 104 Stat. 3289).

On receiving protests filed by Protestants and individuals represented by TCID, the State Water Board held an adjudicative hearing in July 2010 on the water right applications and change petitions. A detailed summary of the water right applications and change petitions, protests filed, the 2010 water right hearing, and other factual and procedural background relevant to this adjudicative proceeding is set forth in Decision 1651.

On July 18, 2012, the State Water Board released the draft decision conditionally approving the water right applications and petitions and requested comments on the draft decision to be filed by August 30, 2012. Various persons, including Protestants, submitted timely comments. On August 21, 2012, the State Water Board issued a notice of public workshop to provide parties and the public with an opportunity to make oral presentations on the draft decision. The public workshop was held on September 17, 2012. On September 25, 2012, the State Water Board issued a revised draft decision and provided interested persons with an opportunity to comment on the revisions to the draft decision by October 8, 2012. The State Water Board adopted Decision 1651 on October 16, 2012 after having considered the evidence presented during the hearing, arguments, and written and oral comments presented on the draft decision. Protestants timely filed a petition for reconsideration.

4.0 PETITION FOR RECONSIDERATION

The arguments raised by Protestants in their petition for reconsideration are almost identical to the arguments they raised prior to adoption of Decision 1651. Protestants have not provided any new arguments, new information, or supporting authorities that materially

change any of the issues raised in their previous submittals to the State Water Board. The State Water Board addressed Protestants' allegations in the decision and it is unnecessary to address those allegations again in detail in this order. Similarly, we will not recite again the applicable principles of law supporting our conclusions in Decision 1651. Accordingly, only a brief discussion of Protestants' allegations follows.

4.1 Substantial Evidence Supports Decision 1651

Protestants argue that Decision 1651 is not supported by substantial evidence because the record does not support the water availability analysis and the "no injury" determination evaluated in the decision. Protestants' contentions are without merit.

4.1.1 *Unappropriated Water is Available for Appropriation in California*

When considering whether to approve an application to appropriate water, the State Water Board must determine whether unappropriated water is available to supply the applicant. (Wat. Code, § 1375, subd. (d); Cal. Code Regs., tit. 23, § 695.) In Decision 1651, the State Water Board approved water right Applications 31487 and 31488 of Reclamation, determining that unappropriated water was available for appropriation under the water right applications.

Protestants contend that they provided evidence at the hearing demonstrating that the Truckee River is fully appropriated in both California and Nevada. In particular, they cite to the fact that the Nevada State Engineer has issued Permits 48061 and 48494 to the Tribe, which they describe as rights to essentially all of the remaining water in the system that occurs in high water years. (Petition for Reconsideration of Decision 1651 (Petition), p. 6.) Protestants further allege that Decision 1651 inappropriately created additional unappropriated water when the State Water Board recognized that the Tribe consented to Reclamation's storage of water under Applications 31487 and 31488, to the extent such water is water subject to permits issued to the Tribe in Nevada.³ In sum, they argue that their evidence is the only substantial evidence before the State Water Board and that their

³ Protestants rely on California Code of Regulations, title 23, section 695, in support of their claim that water subject to the permits issued to the Tribe cannot be considered unappropriated water. (Petition, p. 11.) This reliance is misplaced. Section 695 provides, in part, that "[u]nappropriated water does not include water *being used* pursuant to an existing right." (Italics added.) To the extent that the water will not be used under the Tribe's right because the Tribe consents to storage of water by Reclamation, the water is not "being used" under the Tribe's rights and is available for appropriation.

evidence indicates that there is insufficient unappropriated water to supply Reclamation's applications.

The State Water Board has addressed similar contentions raised by Protestants. (See, e.g., Decision 1651, pp. 49 – 59.) Protestants proffer no new legal theories or evidence to support their arguments. In Decision 1651, the State Water Board considered evidence submitted by Reclamation regarding the availability of water in the Truckee River system and its tributaries, including Reclamation's water availability analyses for Stampede and Prosser Creek Reservoirs. (See, e.g., *id.*, at pp. 43-48.) Those analyses estimated the amount of water that could be stored in the reservoirs once prior rights and other obligations have been met. This evidence, together with other evidence in the record, provides a reasonable factual basis for the State Water Board's conclusion that unappropriated water is available to supply Reclamation's water right applications. (See, e.g., *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 763, citing *Bank of America v. State Water Resources Control Bd.* 42 Cal.App.3d 198, 213 ["To be substantial, evidence 'must be reasonable in nature, credible, and of solid value'"].) The fact that Protestants may disagree with the State Water Board's findings does not mean that the record lacks substantial evidence that supports the findings and requirements of Decision 1651.

4.1.2 Approval of the Change Petitions Will Not Result in Injury to Any Legal User of Water

Before the State Water Board can grant permission to make a change in an appropriative water right, it must find that the change will not operate to the injury of any legal user of the water involved. (Wat. Code, §§ 1702, 1701.2, subd. (d).) In Decision 1651, the State Water Board concluded that the entities seeking changes to their water rights had provided sufficient information to demonstrate a reasonable likelihood that the proposed change will not injure any other legal user of water. (See, e.g., Decision 1651, pp. 21-26.)

Protestants contend, however, that the entities seeking the changes failed to meet their burden of demonstrating that injury would not occur. Protestants further allege that they are the only ones who presented any substantive evidence regarding injury by showing that TROA operations would cause shortage to the Newlands Reclamation Project (Newlands Project) based on modeling results in the TROA Environmental Impact

Statement/Environmental Impact Report/ (EIS/EIR). They contend that Decision 1651 disregards this evidence.

In Decision 1651, the State Water Board addressed similar contentions raised by Protestants. The State Water Board concluded that Petitioners had demonstrated a reasonable likelihood that no injury would occur because, in part, the petitioned changes involved previously stored water to which Protestants had no right. “[I]f previously stored water is not available to a water right holder, the water right holder cannot be injured if the water does not arrive at the water right holder’s point of diversion due to a change in the use of the stored water.” (*Id.*, at p. 24.) Moreover, the State Water Board evaluated the shortages identified in the EIS/EIR, concluding that modeling of shortages “does not necessarily equate to evidence of legal injury under Water Code section 1702” and that Protestants failed to correlate the shortages described in the EIS/EIR with injury to their legal rights. (*Id.*, at pp. 30-31.) Protestants proffer no new legal theories or evidence to support their arguments. The record supporting Decision 1651 contains a reasonable factual basis for the State Water Board’s conclusion that the petitioned changes would not result in injury to a legal user of water.

4.2 Decision 1651 Correctly Applies Applicable Law

Protestants argue that Decision 1651 contains error in law, alleging that the decision improperly shifted the burden of proving no injury to Protestants and that the State Water Board improperly applied California law in considering the potential injury resulting from approval of the change petitions.⁴ Protestants’ contentions are without merit.

4.2.1 The State Water Board Properly Evaluated Injury to Legal Users of Water

Protestants contend that the State Water Board improperly cited to *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674 [hereinafter referred to *SWRCB Cases*] for the principle that a downstream appropriator cannot require the owner of an upstream reservoir to release previously appropriated water. Protestants argue that the *SWRCB Cases* has no application in this matter because it involves contract water rights while Protestants have

⁴ In addition, Protestants contend that the State Water Board erred as a matter of law by considering water appropriated in Nevada to be water available for appropriation in California. This contention has been addressed in Decision 1651 and in section 4.1.1 of this Order, and it need not be addressed further.

relied on the “long standing diversion pattern and releases on the Truckee River” that they allege are guaranteed by the Truckee River Agreement (TRA). (Petition, p. 9.)

The 1935 TRA is an operations agreement between the United States, TCID, the Conservation District, and TMWA’s predecessor, the Sierra Pacific Power Company, which provides for the storage of Truckee River waters, among other things. (Decision 1651, p. 5; App./Pet. Joint-6.)⁵ Through the incorporation of the TRA into the Orr Ditch Decree (*United States of America vs. Orr Ditch Water Company, et al.*) reduced rates of flow, known as “Reduced Floriston Rates,” may be met to conserve water during certain months of the year. (Decision 1651, p. 5.) Protestants argue, in part, that they have an interest in the water released under the TRA to make Floriston Rates and that operation of the applications and change petitions approved in Decision 1651 will alter the historic flow pattern on the Truckee River, resulting in shortages to the Newlands Project.

Protestants’ attempt to distinguish *SWRCB Cases* is unavailing. In *SWRCB Cases, supra*, 136 Cal.App.4th at 797-806, the Court of Appeal considered the application of the no injury rule and the interpretation of the phrase “legal user of the water involved” found in Water Code section 1702. The court examined certain Central Valley Project contractors’ claim that they had a legally protectable right to use the water that was the subject of the proposed change, and concluded that a legal user includes those who lawfully use water under a contract with the appropriator. (*Id.*, at p. 804.) The court determined, however, that “a person who claims injury from a change in the terms of a permit to appropriate water must show the change will interfere with his or her right to use the water, *whatever the source of that right may be.*” (*Id.*, at p. 805 (italics added).) Thus, the injury evaluation set forth in *SWRCB Cases* applies broadly, whatever the source of a particular water right may be.

Moreover, Protestants’ attempt to dismiss *SWRCB Cases* as having no application to the issue of legal injury beyond contract-related matters ignores the fact that the case includes an extensive discussion of the “no injury” rule, and reaches the same conclusion, in the context of claims not involving contracts, but instead made by holders of riparian and appropriative water rights. (*SWRCB Cases, supra*, at pp. 737-743.) Specifically

⁵ “App./Pet. Joint” refers to the exhibits filed jointly by Reclamation, TMWA, and the Conservation District.

addressing the issue of impacts on downstream users as a result of changes involving previously stored water, the Court of Appeal rejected the argument that the downstream owners could show “injury” by a showing that changes in releases would adversely affect them, without showing that the change infringed on any right of those downstream users:

According to them, in these statutes “the Legislature directs the [State Water] Board to look into how the consequences of changes to permit conditions might affect others, *not* whether others have water rights to the water which is affected by the requested permit changes.” But “injury” can mean “[t]he invasion of a [] legally protected interest” (Black’s Law Dict. (5th ed.1979) p. 706, col. 2), and this meaning would require a determination of the extent of a downstream riparian’s “legally protected interest” in the water that is the subject of the change petition to determine if that interest will be invaded by the change.

(*Id.* at p. 738 [italics in original].) After an extensive review of the legislative history of the statutes, the court concluded:

[I]n determining whether the petitioned changes . . . would cause “substantial injury” to or would “unreasonably affect” riparian and appropriative users in the Delta, the [State Water] Board properly focused on the effect of those changes on the rights of those users. Since Delta riparians and appropriators have no right to water stored by the [districts petitioning for the changes], the [State Water] Board properly concluded they cannot be injured.

(*Id.* at p. 743.)

As discussed, in part, in pages 21 – 31 of Decision 1651, Protestants have not made any showing that they would fail to receive any water that they have a right to receive. Protestants cite to testimony presented in the hearing regarding TCID’s reliance on Floriston Rate water provided by the TRA and the negative impact that would result to the Newlands Project from shortages projected in the EIR/EIS. This information, however, does not support a conclusion that Protestants have a legal right to use the previously stored water at issue in this proceeding.

Protestants appear to attempt to analogize their reliance on Floriston Rates to the creation of an artificial condition that has become permanent. Without analysis, they cite to *Chowchilla Farms, Inc. v. Martin* (*Chowchilla Farms*) (1933) 213 Cal. 1, in which the California Supreme Court considered whether an artificial channel could attain the characteristics of a natural channel to which riparian rights could attach. The court

concluded that riparian rights may attach to an artificial channel where the channel has existed for such a length of time that its manner of creation is not material, it has attained the attributes of a natural channel, and interested persons have acquiesced to its use in that state. (*Chowchilla Farms, supra*, (1933) 219 Cal. at p.18.) The case involved the issue of when an artificial channel should be treated as a watercourse subject to the California water law of water rights. The case does not establish a requirement that any party must provide artificial flows, through releases of stored water, in either a natural or artificial water body, and thus the case has no applicability in this proceeding. Protestants' purported reliance on excess flows made available from previously stored water does not equate to a legal right to such flows.⁶

Protestants appear to argue that they have a legal right to the water that is the subject of the change petitions. An appropriative water right or legal interest in a water right, however, does not arise merely from reliance on historic streamflows. Protestants' rights to the water of the Truckee River are derived under Claim No. 3 of the Orr Ditch Decree. They point to no other claim of right under California law. For the most part, the water that is the subject of the change petitions is previously stored water that is junior in priority to Claim No. 3. As discussed in Decision 1651, "if previously stored water is not available to a water right holder, the water right holder cannot be injured if the water does not arrive at the water right holder's point of diversion due to a change in the use of the stored water." (Decision 1651, p. 24.) Although Protestants claim that this conclusion is legally incorrect, they cite to no persuasive applicable authority to the contrary. The fact that Protestants may have historically diverted water made available through the Floriston Rates does not mean that they have a legal right to the other parties' previously stored water.⁷

⁶ Protestants also rely on *Natural Soda Products Co. v. City of Los Angeles (Natural Soda)* (1943) 23 Cal.2d 193 to support their argument that they are entitled to continuation of the existing flow regime. *Natural Soda* involved an action for damages and injunctive relief by a property owner who was subjected to flooding when the City of Los Angeles flooded a portion of a previously dry lake bed. *Natural Soda* is a torts case, not a water rights case, and the property owner was not claiming a right to or protectable interest in the water involved. The case has no bearing on the meaning of the "no injury" rule.

⁷ Protestants appear to argue that TROA will affect the delivery of water by allowing the most junior user (the Tribe in Nevada) to divert the water even though a more senior priority right holder (presumably, Protestants) is entitled to divert the water. (Petition, p. 11.) They further argue that this is unreasonable and does not provide the fullest beneficial use of water under Water Code section 100. (*Ibid.*) But a use cannot be considered unreasonable simply because the use is being made by a junior water right holder, under circumstances where there is no legal injury to other legal users of water.

4.2.2 Decision 1651's Other Conclusions Regarding the Change Petitions Were Appropriate and Proper

Protestants continue to allege that water users in the Newlands Project will receive no notice of changed operations under the permits and licenses to implement TROA. They contend that the State Water Board's statement that additional notice is not generally required when operations are conducted in accordance with the terms of a permit or license is in "direct contravention of the requirement to provide notice when there is a change in the point of diversion, place of use, or purpose of use, and is a clear violation of California water law." (Petition, pp. 13-14.) We have already explained in Decision 1651 that proposed changes to water rights must comply with any applicable procedures and substantive requirements. (Decision 1651, p. 27.) We have also imposed conditions to ensure that the water operations will be conducted in accordance with the terms of the permits and licenses. Protestants cite to no authority to support their contention and further consideration of this issue is unnecessary.

Protestants also contend that the State Water Board violated Water Code section 1700, apparently by allowing for common purposes of use among the water right applications and change petitions. In approving Applications 31487 and 31488, the State Water Board explained that because "TROA allows for the coordinated operations of Boca, Stampede, Prosser Creek, and Independence Reservoirs, discussed above with respect to the change petitions, the water diverted under the two applications may be used for any of the common purposes of use requested in the applications and petitions." (*Id.*, at p. 60.) Without explanation, Protestants contend that this statement violates Water Code section 1700 and cite the statute as follows: "Water appropriated under the Water Commission Act or this code for one specific purpose shall not be deemed to be appropriated for any other or different purpose." (Petition, p. 14.)

Protestants' citation, however, is incomplete and potentially misleading. In full, Water Code section 1700 states:

Water appropriated under the Water Commission Act or this code for one specific purpose shall not be deemed to be appropriated for any other or different purpose, *but the purpose of the use of such water may be changed as provided in this code.* (Italics added.)

Thus, Water Code section 1700 specifically provides that water appropriated for one purpose cannot be used for another purpose, but also that a purpose of use may be changed. Protestants neither fully articulate their argument nor cite any supporting legal authority to support their contention. In keeping with applicable law and long-standing administrative interpretation of section 1700, the State Water Board properly approved the requests to add or change purposes of use in this proceeding. Protestants' claim is unfounded.⁸

5.0 CONCLUSION

For the reasons discussed above, the State Water Board finds that Decision 1651 conditionally approving the water right applications and change petitions was appropriate and proper. The decision is supported by substantial evidence and does not contain error in law. To the extent that this order does not address all of the issues raised in the petition for reconsideration, the State Water Board finds that these issues are insubstantial or are appropriately addressed in Decision 1651. The petition for reconsideration of Decision 1651 submitted by TCID, City of Fallon, and Churchill County is denied.

⁸ Further, to the extent that Protestants may argue that a water right permit or license may not include more than one purpose, they offer no support for this argument. To the contrary, Water Code section 13 provides that a singular number includes the plural and the plural includes the singular. Thus, Water Code section 1700 is properly interpreted to mean that water appropriated for one or more specific purposes cannot be appropriated for any other or different purposes, except where those changes are changes authorized in accordance with the Water Code.

ORDER

IT IS HEREBY ORDERED THAT the petition of TCID, City of Fallon, and Churchill County is denied for the foregoing reasons.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Board held on _____, 2013.

AYE:

NO:

ABSENT:

ABSTAIN:

Jeanine Townsend
Clerk to the Board