

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

IN THE MATTER OF PROTESTED)
APPLICATIONS 73783, 73791 THROUGH)
73797, 73799, 73800, 73849 THROUGH 73855,)
73863 THROUGH 73872, 73908 THROUGH)
73915, 73917, 73986, 73987, 74076 THROUGH)
74085, 74193 THROUGH 74202 AND RELATED)
SECONDARY APPLICATIONS (TMWA)
APPLICATIONS).)

**INTERIM ORDER NO. 3
AND HEARING NOTICE**

IN THE MATTER OF PROTESTED)
APPLICATION 78034 AND RELATED)
SECONDARY APPLICATIONS (CITY OF)
FERNLEY APPLICATIONS).)

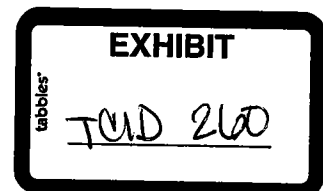
GENERAL

On July 27, 2009, the State Engineer held a pre-hearing conference in the matter of the above-referenced protested water right applications filed by the Truckee Meadows Water Authority (TMWA). The purpose of the pre-hearing conference was to reschedule the administrative hearing on the TMWA's change applications that had been previously scheduled for hearing and postponed. At the pre-hearing conference, the City of Fernley (Fernley) sought leave to consolidate any hearing that might be held on its protested Application 78034, and related secondary applications, with the hearing scheduled on the TMWA's applications. Fernley was instructed to file a written motion requesting such consolidation and to serve it on all parties. Those parties were provided the opportunity to reply to the motion in writing in accordance with the rules of practice and procedure in hearings on protested applications provided for in the Nevada Administrative Code Chapter 533 and recent amendments thereto.

FINDINGS OF FACT

I.

Nevada Administrative Code § 533.340 provides that the State Engineer may consolidate two or more proceedings if it appears that the issues are substantially the same and the interests of the parties will not be prejudiced by the consolidation. The State Engineer finds that all of the parties to the TMWA's hearing oppose consolidation of any issues regarding Fernley's applications with the TMWA's applications. The State Engineer finds Fernley has not requested to consolidate the entire proceeding on



its applications, but only a portion. The State Engineer finds Fernley's request would substantially complicate the proceeding and as found below does not present issues that are substantially the same and the interests of the parties to the TMWA hearing will be prejudiced by the consolidation.

II.

Fernley requests that the hearing on its applications be divided into two parts. In its motion, Fernley requests that the *legal* issues that are presented regarding the applications filed by the TMWA be considered together with similar or the same protest issues asserted in the protest to Application 78034. Fernley argues that the protests to its primary storage application and the TMWA primary storage applications, which both seek to store *Orr Ditch* water rights, present identical *legal* issues; therefore, the State Engineer's ruling on these issues in the TWMA's case will affect the decision on Fernley's application. It asserts that consolidating consideration of these issues will promote administrative efficiency because the State Engineer will not have to entertain argument or evidence on identical issues twice. It also argues that consolidation will promote fairness because Fernley will be afforded an opportunity to be heard before a ruling is issued affecting its applications. Fernley did not specifically state, but from the request to bifurcate the State Engineer assumes, that Fernley envisions a separate hearing would then be held regarding the protests to its Application 78034. The State Engineer does not believe this promotes administrative economy. The State Engineer finds that Fernley's motion does not address *legal* issues, but rather its argument is focused on issues that are factually specific.

III.

Fernley first asserts that the primary issue to be considered is the effect that the upstream storage of water rights that have historically been used downstream will have on other existing *Orr Ditch* decreed water rights. The Applicant TMWA argues that the issues in its applications are not substantially the same as those presented in the Fernley application. The TMWA seeks to move water rights that were individually decreed for use in the Truckee Meadows, while Fernley seeks to move water that was decreed for use by a group of farmers in the Newlands Reclamation Project. Another difference it asserts is that the TMWA seeks only to store the consumptive use portion of its water rights and Fernley seeks to store the full permitted duty of water including the consumptive use portion of the water right and this presents a different factual scenario. The Truckee Carson Irrigation District (TCID) argues that while the protest grounds may be the same or similar, the factually specific analysis is not and the parties are not the same as to Fernley's application and asserts there is no administrative economy to be achieved by granting

Fernley's request because the factual issues differ significantly. The TCID argues that since Fernley's rights are Newlands Project water rights, impacts on other Newlands Project water users and diversions at Derby Dam are markedly different than the TMWA proposed change applications. The State Engineer finds the TMWA's primary change applications are not substantially the same as the Fernley primary change application.

IV.

The State Engineer finds that Nevada Revised Statute § 533.3703 provides that the State Engineer may consider the consumptive use of a water right and the consumptive use of the water under the proposed change. The TCID asserts that the evidence of consumptive use for irrigation in the Truckee Meadows is markedly different than the consumptive use in the Truckee Division of the Newlands Project. Churchill County asserts that it believes that the quantification of consumptive use is one of the most important considerations to be made regarding the TMWA's change applications, but it did not raise this issue in its protest to Fernley's primary change application and it asserts that Fernley is attempting to gain room at the table for the presentation of evidence not even related to Churchill County's protest issues specific to Fernley's application.

The State Engineer finds that Fernley will have its own opportunity to address this issue and does not need to be a party to the TMWA's hearing to have a full and fair opportunity to address the merits of this factually specific area. The State Engineer finds that every different applicant that seeks to change water from one manner of use to another manner of use may have the consumptive use analysis considered by the State Engineer, but that does not mean they need to be a party to every hearing in which the issue might be considered. The State Engineer finds it is likely that the consumptive use for the principal crop in the Truckee Meadows is different than the consumptive use for the principal crop in the Truckee Division of the Newlands Project. The State Engineer finds the parties to the TMWA hearing were instructed to proceed with work on this issue months ago, and it is unlikely they can do another complete consumptive use analysis for a different area by the first evidentiary exchange date that is set for September 18, 2009, and it would be prejudicial to ask them to do so at this late date.

V.

Fernley argues that Churchill County raises the identical season of use issue in its protest to Fernley's application as in its protests to the TMWA's applications, which is the effect of the year-round upstream storage of water on downstream rights. The TMWA argues that the *Orr Ditch Decree* does not limit the use of its rights to a particular season, which is a question of law subject to de novo review by the Decree Court, and if the issue is heard by the Decree Court, Fernley may participate as an amicus. Additionally, the TMWA asserts that if the State Engineer decides to compare storage outside of what may be termed a traditional irrigation season to storage within it, that comparison involves the analysis of facts which will most certainly involve storage schedules unique to the TMWA and different storage schedules unique to Fernley and notes there will likely be a difference because of the consumptive use component that varies between the applications. Thus, the TMWA argues these factual issues are not substantially similar and should not be consolidated. Churchill County asserts there is no authority under either NRS Chapter 533 or NAC Chapter 533 that allows for bifurcation and consolidation of matters on grounds of similar issues. If otherwise, the County asserts it can only imagine the procedural morass of conducting a hearing within a hearing. The State Engineer agrees.

The State Engineer finds that adding Fernley's factually specific use of its water to the hearing on the TMWA's applications will unnecessarily complicate the hearing. Adding too many parties with factually distinct cases makes for hearings and rulings that are unwieldy. The State Engineer finds that Fernley will have its opportunity to present evidence on this issue and if some of the evidence or arguments are duplicative so be it; that is better than hearings that become too complicated and unmanageable.

VI.

Churchill County has asserted in its protest to Fernley's Application 78034 that Fernley has no right to divert and use water at points of diversion outside of the *Truckee Meadows*. As noted by the TMWA, Churchill County appears to have made an error in its protest, as the State Engineer can only assume it meant to say that Fernley has no right to divert and use water outside of its service area. Fernley argues that it should be allowed to present argument or evidence in the TMWA's hearing to prevent duplicative arguments or evidence. The TMWA's response asserts that the question of the TMWA's authority as a municipal purveyor is not an issue within the jurisdiction of the State Engineer and that Fernley's authority does not flow from the same place as the TMWA's authority. The State Engineer has

already ordered briefing on this issue and Fernley will not be prejudiced by having to present evidence in the context of its own case.

The State Engineer finds that the TMWA and Fernley are distinct and separate entities and the authority of one is not derived from the authority of the other and they are not interconnected; therefore, there is no reason the matter should be consolidated for consideration of that issue.

VII.

The parties to the TMWA proceeding are not the same as the parties to the Fernley proceeding. The TMWA applications were protested by the TCID, Churchill County and the City of Fallon. The Fernley application was protested by Churchill County and the Pyramid Lake Paiute Tribe of Indians (Tribe). It is not clear how the State Engineer could bifurcate the proceedings with different and divergent protestants and administrative economy will not be achieved if time is spent in argument about who is allowed to ask questions of whose witnesses.

The State Engineer finds Fernley is not a party to the hearing on the TMWA's change applications and it would be unfair and prejudicial to the TMWA to allow Fernley to cross-examine the TMWA's witnesses on this issue or to even assert that it can cross-examine the Applicant's or the Protestants' witnesses on this issue. Additionally, the Tribe is a protestant to Fernley's application and it should not be made a party to the hearing on the TMWA's applications since it did not protest those applications. The State Engineer finds allowing Fernley to participate in this portion of the hearing unnecessarily complicates the hearing rather than makes it more efficient.

The State Engineer finds while the applications and protests may present some common protest claims and issues, they are not substantially similar to warrant consolidation of the City of Fernley's applications with the hearing on the TMWA's applications and the addition of several additional parties will only make the hearing on the TMWA's more complicated and difficult to manage. Therefore, the motion to bifurcate and consolidate is denied.

VI.

NOTICE OF HEARING

PLEASE TAKE NOTICE, pursuant to the authority set forth in Nevada Revised Statutes § 533.365, 533.370 and 533.375, the State Engineer hereby sets an administrative hearing to consider the matter of protested Applications 73783, 73791 through 73797, 73799, 73800, 73849 through 73855, 73863 through 73872, 73908 through 73915, 73917, 73986, 73987, 74076 through 74085, 74193 through 74202 and related secondary applications.

Accordingly, the hearing will begin promptly at **9:00 a.m., on Monday, December 14, 2009, continuing through Friday, December 18, 2009, to be held at the Tahoe Hearing Room, Nevada Division of Water Resources, 901 South Stewart Street, Second Floor, Carson City, Nevada.**

The exchange of documents, witness lists and descriptions of witness testimony will take place in two simultaneous exchanges and are to specifically address the issues identified by the State Engineer below.

Initial Evidentiary Exchange: The parties are hereby ordered to serve on each other and the State Engineer in Carson City, service meaning received by the party served, no later than Friday, September 18, 2009, an exhibit list, a witness list, a reasonably detailed summary of the testimony of each witness, and copies of any documentary evidence intended to be introduced into the hearing record. If a witness is not identified in the exchanges as testifying on direct as to a certain topic, the witness may not be allowed to testify to the unidentified topic in his or her direct testimony. If a witness is to be presented to provide expert testimony, the evidentiary exchange shall include a written report prepared and signed by the witness, which shall contain a complete statement of all opinions to be expressed and the basis and reasons for those opinions, identification of the data or other information considered by the witness in forming the opinions, any exhibits to be used as a summary of or in support of the opinions and a statement of qualifications of the witness. The parties may choose to exchange documents via computer compact disk in PDF 20 x 20 dpi format. Notebooks over 3 inches in width will not be accepted.

Second Evidentiary Exchange: The parties are hereby ordered to serve on each other and the State Engineer in Carson City, service meaning received by the party served, no later than Friday, November 20, 2009, an additional exhibit list, witness list, witness testimony summaries

or documentary evidence intended to be introduced at the administrative hearing that may be necessary in response to the other parties' first evidentiary exchange. This exchange is meant only to provide evidence that becomes necessary in rebuttal to the original exchange. It is not intended to be the first time a party presents evidence as to their case-in-chief. Again, the parties may choose to exchange documents via computer compact disk in PDF format. There will be no additional evidentiary exchanges or rebuttal cases allowed. If the parties choose to exchange documents via computer compact disk, those arrangements are to be made between the parties themselves.

Nevada Administrative Code § 533.290 requires that exhibits introduced into evidence must be in a readily reproducible form, on paper that is 8½" x 11" or foldable to that size. Larger charts, maps, drawings and other material will not be admitted into evidence, but may be used for demonstrative purposes. The submission of exhibits submitted on computer compact disks or any other media, other than paper that is 8½" x 11" or foldable to that size, will be considered on a case-by-case basis. An original and one copy of each exhibit must be submitted to the State Engineer with exhibit numbers identified as provided below. Computer presentations, such as power-point slides, must be copied on paper that is 8½" x 11" and offered into evidence. Facilities are not available for copying documents during the hearing.

For the presentation of excerpts from large documents, the State Engineer will allow the submission of excerpts, but upon request, the person or entity serving such document must make the entire document available to whomever requests it. If excerpts from a larger document are served and the person upon whom it is served requests to have the entire document in either a hard copy or in a PDF format on a computer compact disk, the person serving said document has 10 days from the date of receipt of the request to place the requested copy in the U.S. Mail.

The parties can agree to document receipt in a digital format and the digital standard will be PDF 20 x 20 dpi files. Any document, report, etc. that any participant intends to refer to must be provided as an exhibit during the administrative hearing and served upon the other participants and the State Engineer in advance.

If any computer models are presented as evidence, the parties must provide the electronic data files necessary to run the model during the initial evidentiary exchange and the models must be completed in freely available codes, for example MODFLOW. Failure to provide this information will render any such evidence inadmissible. The use of any computer, projector or other type of

equipment in the hearing room must be arranged at least one week in advance of the hearing with the information technology staff with the Office of the State Engineer.

The order for the administrative hearing will be as follows, noting that the order is subject to change as may be necessary during the course of the administrative hearing or if settlement is reached with any of the parties prior to the administrative hearing. The Protestant TCID will present its case first followed by Protestant Churchill County and then City of Fallon. The Protestants will present their cases on Monday, Tuesday and Wednesday, December 14th, 15th and 16th. The Applicant will present its case on Thursday and Friday December 17th and 18th. The State Engineer hereby orders the administrative hearing is to focus on the following issues:

1. Injury to existing rights.
2. Quantification of consumptive use.
3. Requested change in season of use.
4. Abandonment.

The Protestants are hereby ordered to file a brief by **Friday, October 2, 2009**, on the protest claim that the TMWA does not have the authority to have points of diversion and places of use outside of the Truckee Meadows. The Applicant may file a response to the Protestants' brief by **Friday, October 23, 2009**.

Pursuant to NRS 533.365(4), the technical rules of evidence do not apply to administrative hearings before the State Engineer.

The parties are assigned the following exhibit numbers for the initial evidentiary exchange:

State Engineer	001 - 100
TMWA	101 - 600
City of Fallon	601 - 800
TCID	801 - 1000
Churchill County	1001 - 1200

The Applicant TMWA is to provide copies of the Primary Applications, Secondary Applications and Protests as part of its initial evidentiary submission.

The parties are assigned the following exhibit numbers for the secondary evidentiary exchange:

TMWA	2000 - 2100
City of Fallon	2101 - 2200

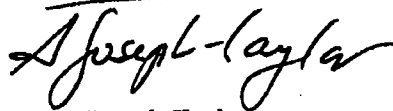
TCID	2201 - 2400
Churchill County	2401 - 2600

As set forth in Nevada Administrative Code 533.220, the hearing will be reported by a certified court reporter. The court reporter will file an original and one copy of the transcripts with the State Engineer. Anyone wanting a copy of the transcript should make arrangements with the court reporter. The costs of the transcript will be borne by the Applicant and Protestants as set forth in the Nevada Administrative Code.

You or your designated representative should plan to attend the hearing for the purposes of presenting evidence or testimony in support of your position concerning the protested applications. Legal counsel not licensed to practice law in the State of Nevada or licensed, is required to comply with Supreme Court Rules 42 and 42.1. The Verified Application to Associate form that needs to be filed with the Nevada State Bar can be found on the Nevada Division of Water Resources website at www.water.nv.gov Forms Room - Miscellaneous Forms. Nevada Supreme Court Rule 43 provides an exception for lawyers employed by or representing the United States Government.

We are pleased to make reasonable accommodations for members of the public who are disabled and wish to attend the hearing. If special arrangements for the hearing are necessary, please notify the Hearings Section of the Nevada Division of Water Resources, 901 South Stewart, Second Floor, Carson City, Nevada, 89701, or by calling (775) 684-2800.

Respectfully submitted,



Susan Joseph-Taylor
Chief, Hearings Section

Dated this 24th day of
August, 2009.

CERTIFICATE OF SERVICE

I hereby certify that a copy of Interim Order No. 3 and Notice of Hearing was served

By U.S. mail, postage prepaid, on August 24, 2009, on the following:

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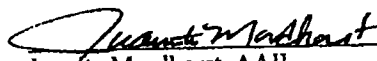
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