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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

IN THE MATTER OF THE DETERMINATION)
OF THE RELATIVE RIGHTS IN AND TO THE)
WATERS OF WARM SPRINGS VALLEY CREEK)
(AKA WINNEMUCCA VALLEY CREEK, AKA)
ISAAC MATHEWS CREEK) AND ITS)
TRIBUTARIES, WASHOE COUNTY, NEVADA,)

W. DALTON LA RUE and JUANITA S.)
LA RUE, dba WINNEMUCCA RANCH,)

Appellants-Petitioners,)

vs.)

PETER G. MORROS, STATE ENGINEER,)
STATE OF NEVADA; ROBERT E. DICKENSON)
and DOROTHY DICKENSON, and ROBERT W.)
MARSHALL and NANETTE MARSHALL, dba)
INTERMOUNTAIN LAND COMPANY)

Respondents.)

FINAL FINDINGS OF
FACT, CONCLUSIONS
OF LAW, JUDGEMENT
AND DECREE

INTRODUCTION

This matter came on regularly for hearing on August 27, 1987, in the above entitled Court before the Honorable Charles M. McGee, District Judge, presiding, pursuant to agreement by the parties. The hearing continued on September 1, 1987, and concluded on September 2, 1987. Warm springs Valley Creek and its tributaries, the subject of these proceedings, is within Washoe County, State of Nevada, and accordingly Judge McGee, as

the Second Judicial District Court Judge assigned to this matter, is the judge designated by Nevada Revised Statutes (hereinafter also indicated "NRS") 533.165 with jurisdiction to hear the above-entitled matter. The Order of Determination and all related documentary evidence was filed with the Clerk of said Court by the State Engineer on August 8, 1983. Notices of Appeal and Petitions for Judicial Review to the Order of Determination were filed by claimants W. Dalton LaRue, Sr., and Juanita S. LaRue, d/b/a Winnemucca Ranch; and Robert E. Dickenson, Dorothy Dickenson, Robert W. Marshall and Nanette Marshall, d/b/a Intermountain Land Company, on September 7, 1983.

Upon stipulation of the parties, Petitions for Judicial Review in Companion Case Nos. 83-7362 and 83-7398 were ordered dismissed without prejudice and a hearing on the Order of Determination was scheduled for June 21, 1984, and due notice was provided all claimants. To avoid further confusion of various case numbers assigned to this adjudication, Case Nos. 83-7362 and 83-7398 were ordered consolidated into Case No. 83-6641 for all further proceedings.

Hearing dates of June 21, 1984, February 7, 1985, May 6, 1985, and March 31, 1986, were subsequently vacated by agreement of the parties and the final setting, August 27, 1987, was subsequently agreed upon by counsel for the affected parties.

Under the provisions of NRS 533.170, Objections to the Order of Determination were timely filed by Robert W. Marshall and Nanette Marshall, d/b/a Intermountain Land Company, on August

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19, 1987. Other parties, including the Bureau of Land Management and Juanita S. and W. Dalton LaRue, Sr., chose not to lodge objections to the Order of Determination.

At the time set for hearing, George Benesch, Deputy Attorney General, appeared on behalf of the State Engineer. Also appearing were: Julian Smith, Esq., and Gene Barbegelata, Esq., representing the LaRues, with Juanita S. and W. Dalton LaRue, Sr. in attendance; and Ross deLipkau, Esq., representing the Marshalls with Robert Marshall in attendance.¹

At the hearing, the Court elected not to strike the LaRues' September 7, 1983, pleading entitled Petition for Judicial Review which was represented to be filed in lieu of the exceptions called for under NRS 533.170(1). However, the Court did note it would be of limited value due to its lack of specificity and the restrictions imposed by the aforementioned statute.

The Court on October 6, 1987, having considered the entire record, and all other testimony and evidence, rendered its decision entitled Decree Affirming In Part and Modifying In Part the Order of the State Engineer and these instant Final Findings of Fact, Conclusions of Law, Judgement and Decree are entered in accordance with NRS 533.185. Said intermediate Decree of October 6, 1987, is attached hereto as Exhibit "A" and is fully incorporated herein by reference.

¹ It should be noted that at an unspecified time after issuance of the Preliminary Order of Determination and the Order of Determination Robert and Nanette Marshall acquired Robert E. and Dorothy Dickensons' interests as set forth above.

Sometime after October 6, 1987, and prior to the date of this Decree, Washoe County, a political subdivision of the State of Nevada is purported to have acquired from W. Dalton LaRue, Sr. and Juanita S. LaRue their interest as set forth herein.

FINDINGS OF FACT

I.

The Court finds: That on August 27, 1976, Robert W. Marshall, Nanette Marshall, Robert E. Dickenson and Dorothy Dickenson, water users on Warm Springs Valley Creek, submitted a Petition to the State Engineer requesting the determination of the relative rights to the use of the waters of Warm Springs Valley Creek and its tributaries located in Washoe County, Nevada.

That as a result of the State Engineer's field investigation on December 15, 1976, it was found that the facts and conditions justified such determination and on January 3, 1977, an Order granting said Petition was entered.

That the State Engineer received and filed in the records of the Division of Water Resources, maps, statements of claims and supporting documents to the use of water from said stream system, required under the provisions of Chapter 533 of the Nevada Revised Statutes.

That there were three claimants upon said stream system, namely, Robert W. Marshall and Nanette Marshall, Robert E. Dickenson and Dorothy Dickenson, d/b/a Intermountain Land

Company; W. Dalton LaRue, Sr., and Juanita S. LaRue, d/b/a Winnemucca Ranch; and the U. S. Department of Interior, Bureau of Land Management, Carson City District Office.

That in accordance with the provisions of Chapter 533 of Nevada Revised Statutes, the State Engineer made and filed and caused to be entered on the records of its office, its Preliminary Order of Determination defining the rights of the claimants to the waters of Warm Springs Valley Creek stream system as hereinafter defined.

That due to objections to the Preliminary Order of Determination filed by Robert W. Marshall and Nanette Marshall, and W. Dalton LaRue, Sr., and Juanita LaRue, a hearing was held on September 8, 9 and 10, 1982, on the objections.

That as a result of the record and all evidence and testimony, the Order of Determination and all other orders, proceedings and notices, provided under Chapter 533, were duly entered, had, made and given as required by law and that, all and singular, the matters and things contained in the record were done, performed, given and made in strict compliance with the statutes and that this Court had and has jurisdiction to hear and determine this matter.

II.

The Court further finds: That Warm Springs Valley Creek and its tributaries, the subject of these proceedings, is situated wholly within Washoe County, Nevada.

III.

The Court further finds: That the names of the claimants and appropriators of the waters of Warm Springs Valley

Creek and its tributaries, the source of the water supply, the period of use, the duty of water, the diversion of water and the method of use, measurement of water, stockwatering and domestic use, change of place of use, and the rights of appropriation of the water, all as set forth in the Order of Determination as amended herein, are true, proper and correct and, all and singular, the same should be approved and confirmed.

That the waters of Warm Springs Valley Creek stream system, as hereinafter defined since prior to 1905, have been and are being placed to beneficial use by Robert W. Marshall and Nanette Marshall, W. Dalton LaRue, Sr., and Juanita LaRue, and their predecessors in interest.

That there are now only two appropriators, namely, Robert W. Marshall and Nanette Marshall, and W. Dalton LaRue, Sr., and Juanita LaRue, using all the flow of said Warm Springs Valley Creek stream system.

That deeds of record in the State Engineer's office show that the present claimants and appropriators, Robert W. Marshall and Nanette Marshall, and W. Dalton LaRue, Sr., and Juanita LaRue, are the successors in interest to the herein determined and adjudged vested rights to the waters of Warm Springs Valley Creek stream system initiated prior to 1905.

IV.

The Court further finds: That three areas of land, namely. 7.6 acres in the NW1/4 SW1/4 Section 13, 3.0 acres in the NW1/4 SE1/4 and 5.7 acres in the SW1/4 SE1/4 Section 12, T.24N., R.19E., M.D.B.&M., included in the Order of Determination for a vested right on the Winnemucca Ranch and included in Marshalls'

Exceptions to the Order of Determination, are not entitled to a vested right due to the lack of substantial evidence or a miscalculation of the area as shown on the supportive map.

V.

The Court further finds: The subirrigated meadow pasture that has been recognized by the State Engineer to have been subirrigated and utilized for grazing prior to 1905 has fulfilled the necessary prerequisites for vested use and shall not be disturbed.

VI.

The Court further finds: That Warm Springs Valley Creek was and is comprised of tributary flows from Winnemucca springs as well as from snow melt runoff through McKissick Creek. This allowed the Winnemucca and Settlemyer Ranches both to benefit from an extended stream flow and to maintain approximately the same amount of irrigated acreage before the turn of the century.

VII.

(SOURCE)

The headwaters of Warm Springs Valley Creek and its tributaries originate at an elevation of approximately 7,500 feet on the southwestern slope of the Virginia Mountains and also at approximately 6,500 feet on the northeastern slope of Dogskin Mountain located adjacent to Little Valley and Winnemucca Valley about 30 miles north of Reno in Washoe County, Nevada. Many perennial springs situated along the southwestern foot of the Virginia Mountains as well as the snow melt waters from both

mountain ranges contribute to the flow of the stream system. The subject creek flows in a southwesterly direction through Little Valley and southeasterly through Winnemucca Valley and terminates on the northwestern part of the valley floor of Warm Springs Valley.

VIII.

(PERIOD OF USE)

The irrigation season shall begin on January 1 and extend through December 31 of each year with the exception of Permit 13677, Certificate 4967, which remain unaffected by this Decree.

IX.

(DUTY OF WATER)

The seasonal duty of water on lands irrigated from Warm Springs Valley Creek and its tributaries is herein fixed and shall not exceed:

Class A . . . Harvest Crop 4.0 ac.ft./ac./season;
Class B . . . Meadow Pasture 3.0 ac.ft./ac./season;
and
Class C . . . Diversified Pasture. . 1.0 ac.ft./ac./season.

X.

(DIVERSION OF WATER AND METHOD OF USE)

The claimants shall have the right to divert 2.5 cubic feet per second of water per 100 acres of land irrigated, but not to exceed the seasonal duty as established herein below under Article XII, Rights of Appropriation.

The claimants or their successors in interest will not be required to take or use the amount of water allotted to them

in a continuous flow, but may cumulate the same or any part thereof in rotation or periodic turn within the seasonal limits with the approval of the water commissioner, should one become necessary, and subject to the ultimate control and direction of the State Engineer.

XI.

(RESERVOIRS)

Three reservoirs located on the Winnemucca Ranch are shown on the maps to accompany Proofs 02844. Sugar Cane Reservoir and Vicki's Reservoir were constructed sometime after 1905. The third reservoir commonly known as "Lorrie's Reservoir" and "Whiskey and Lorrie Canyon Reservoir" impounds water diverted from Winnemucca Spring (Proof 02629) and water from Whiskey Canyon and Lorrie Canyon.

Frank Welch attested in an affidavit (Washoe County Recorder Document 321819 filed August 14, 1967) that he was born on February 22, 1884, and that some time in 1900 he was on the Winnemucca Ranch. He observed that springs were the sole source of water for the upper part of the Winnemucca Ranch and there were no reservoirs there at that time.

Existing reservoirs on the Winnemucca Ranch and the Settlemyer Ranch are determined to be regulatory in nature. Said reservoirs may be used to cumulate and to store the water adjudicated herein during any time of each year. Diversion of water to such reservoirs shall be consistent with quantities of water and priorities as herein stated. The aggregate amount of water diverted from a reservoir is not to exceed the total duty

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of water herein fixed for the lands served by said reservoir. Quantities of water being adjudicated, which are diverted into a reservoir, shall be used only on lands with vested rights as determined in this Decree.

XII.

(MEASUREMENT OF WATER)

All measurements of water diverted are to be made at a point where the main ditch enters or becomes adjacent to the land to be irrigated or as near thereto as practicable; the location, if not selected by the State Engineer, is to be approved by him. The claimants shall install and maintain at their own expense and subject to the approval of the Water Commissioner, should one become necessary, and the State Engineer, substantial and easily operated regulating headgates and measuring devices in the ditch or ditches or channel and reservoirs. Due allowance for losses in ditches may be made by the State Engineer.

Priorities are fixed by years and where the years are the same, the priorities are equal.

XIII.

(STOCKWATERING AND DOMESTIC)

The right to the diversion and use of water for stockwatering and domestic purposes shall be continued by the claimants named herein or their successors in interest at any time during the year that stock are grazing on the range, and such diversions shall be according to the dates of priorities of such users and limited to the quantity of water reasonably necessary for such use.

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The amount of water diverted for irrigation purposes shall not be increased by any amount to be used for stockwatering and domestic purposes, but the quantity allowed and diverted for irrigation during the irrigation season shall include water for stockwatering and domestic purposes.

XIV.

(DECLARATION OF FULL APPROPRIATION)

From the record of this adjudication proceeding and records of permits issued by the State Engineer, it is hereby determined that the waters of Warm Springs Valley Creek (aka Winnemucca Valley Creek, aka Isaac Mathews Creek) and its tributaries are fully appropriated.

CONCLUSIONS OF LAW

From the record on review and the evidence and testimony presented and received in this matter and from the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

I.

That the State Engineer had the right, authority and jurisdiction pursuant to Chapter 533 of the Nevada Revised Statutes to make the investigations made by him, receive the proofs and maps, enter and file in his office the Preliminary Order of Determination and Order of Determination, and file certified copies thereof in this Court and to determine the relative rights of the claimants and appropriators in and to the waters of Warm Springs Valley Creek and its tributaries in Washoe County, State of Nevada; that the State Engineer duly made all

orders necessary and proper in connection therewith and entered the same in his office as required by Chapter 533 of the Nevada Revised Statutes.

That each and every notice required by law to be given herein to the claimants and appropriators was duly served by the State Engineer in the manner and within the time required by statute and that the notices contained all the information required by law and that the claimants and appropriators of the waters of the above-named stream system and its tributaries duly received the information and notices as required by law.

II.

That the Second Judicial District Court of the State of Nevada in and for the County of Washoe had and has jurisdiction to hear and try this matter and has jurisdiction to make and enter the foregoing Findings of Fact and these Conclusions of Law and further enter its Decree set forth hereinafter.

III.

That the existing reservoirs on the Winnemucca and the Settlemeyer Ranches are determined to be regulatory in nature. Existing reservoirs may be used to cumulate and to store the water adjudicated herein during any time of each year. Diversion of water to such reservoirs shall be consistent with quantities of water and priorities as herein stated. The aggregate amount of water diverted from a reservoir is not to exceed the total duty herein fixed for the lands served by said reservoir.

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Quantities of water being adjudicated which are diverted to a reservoir shall be used only on lands with vested rights as determined in this Decree. Water cannot be cumulated or stored unless senior water rights have been satisfied.

IV.

That all measurements of water diverted are to be made at a point where the main ditch enters or becomes adjacent to the land to be irrigated or as near thereto as practicable, the location, if not selected by the State Engineer, must meet with his approval. The claimants shall install and maintain at their own expense substantial and easily operated regulating headgates and measuring devices in the ditch or ditches or channels and reservoirs. Due allowance for losses in ditches may be made by the State Engineer.

Priorities are fixed by years and where years are the same, the priorities are equal.

V.

That the right to the diversion and use of water for stockwatering and domestic purposes shall be continued by the claimants named herein or their successors in interest at any time during the year and that stock are grazing on the range and such diversions shall be according to the dates of priorities of such users and limited to the quantity of water reasonably necessary for such use.

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The amount of water diverted for irrigation purposes shall not be increased by any amount to be used for stockwatering and domestic purposes, but the quantity allowed and diverted for irrigation during the irrigation season shall include water for stockwatering and domestic purposes.

VI.

That all water allotted under this Decree shall be appurtenant to the place of use designated herein. Any water user desiring to change the point of diversion, manner of use or place of use of the waters allotted herein must make application to the State Engineer for permission to make the change pursuant to NRS 533.345.

VII.

That from the record of this adjudication proceeding and records of permits issued by the State Engineer, it is hereby determined that the waters of Warm Springs Valley Creek and its tributaries are fully appropriated.

VIII.

That the following tabulation lists the rights as determined in this proceeding:

PROOF NO.:	First Amended 02844
CLAIMANT:	W. Dalton LaRue, Sr., and Juanita S. LaRue, dba Winnemucca Ranch
SOURCE:	Warm Springs Valley Creek and tributaries
USE:	Irrigation, stockwatering and domestic
MEANS OF DIVERSION:	Dams, reservoirs, ditches and natural spring areas

POINTS OF DIVERSION

1. Winnemucca Springs - SW1/4 NE1/4 Section 12, T.24N., R.19E., M.D.B.&M., or at a point from which the SE corner of said Section 12 bears S. 42° 22' E., a distance of 3,688 feet.
2. Unnamed Springs - NE1/4 SW1/4 Section 7, T.24N., R.20E., M.D.B.&M., or at a point from which the SW corner of said Section 7 bears S. 46° 30' W., a distance of 2,235 feet.
3. Whiskey and Lorrie Canyons Reservoir - NE1/4 NE1/4 Section 14, T.24N., R.19E., M.D.B.&M., or at a point from which the NE corner of said Section 14 bears N. 45° 50' E., a distance of 595 feet.
4. NE1/4 NE1/4 Section 14, T.24N., R.19E., M.D.B.&M., or at a point from which the NE corner of said Section 14 bears N. 51° 40' E., a distance of 1,070 feet.
5. McKissick Creek No. 1 - SW1/4 NE1/4 Section 14, T.24N., R.19E., M.D.B.&M., or at a point from which the NE corner of said Section 14 bears N. 40° 30' E., a distance of 2,550 feet.
6. McKissick Creek No. 2 - SW1/4 NW1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the NW corner of said Section 13 bears N. 14° 08' W., a distance of 2,427 feet.
7. Winnemucca Valley Creek - SW1/4 NW1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the NW corner of said Section 13 bears N. 19° 15' W., a distance of 2,550 feet.
8. Winnemucca Valley Creek - NE1/4 SW1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the NW corner of said Section 13 bears N. 31° 10' W., a distance of 3,410 feet.
9. NW1/4 SW1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the SE corner of said Section 13 bears S. 66° 20' E., a distance of 4,950 feet.

10. NW1/4 SW1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the SE corner of said Section 13 bears S. 69° 20' E., a distance of 4,590 feet.
11. NW1/4 SW1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the SE corner of said Section 13 bears S. 70° 10' E., a distance of 4,270 feet.
12. SE1/4 SW1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the SE corner of said Section 13 bears S. 72° 20' E., a distance of 3,670 feet.
13. SW1/4 SE1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the SE corner of said Section 13 bears S. 76° 40' E., a distance of 2,680 feet.
14. SW1/4 SE1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the SE corner of said Section 13 bears S. 76° 40' E., a distance of 2,470 feet.
15. NW1/4 NE1/4 Section 24, T.24N., R.19E., M.D.B.&M., or at a point from which the NE corner of said Section 24 bears N. 73° 30' E., a distance of 2,570 feet.
16. Winnemucca Valley Creek - SW1/4 SE1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the SE corner of said Section 13 bears S. 59° 30' E., a distance of 1,935 feet.
17. Winnemucca Valley Creek - SE1/4 SE1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the SE corner of said Section 13 bears S. 72° 20' E., a distance of 1,045 feet.
18. Winnemucca Valley Creek - NE1/4 NE1/4 Section 24, T.24N., R.19E., M.D.B.&M., or at a point from which the NE corner of said Section 24 bears N. 77°
19. Winnemucca Valley Creek - NW1/4 NW1/4 Section 19, T.24N., R.20E., M.D.B.&M., or at a point from which the NW corner of said Section 19 bears N. 12° 35' W., a distance of 1,170 feet.

20. Winnemucca Valley Creek - NE1/4 SW1/4 Section 19, T.24N., R.20E., M.D.B.&M., or at a point from which the NW corner of said Section 19 bears N. 26° 50' W., a distance of 3,520 feet.
21. SW1/4 NW1/4 Section 19, T.24N., R.20E., M.D.B.&M., or at a point from which the NW corner of said Section 19 bears N. 14° 50' W., a distance of 2,460 feet.
22. SW1/4 NW1/4 Section 19, T.24N., R.20E., M.D.B.&M., or at a point from which the NW corner of said Section 19 bears N. 17° 30' W., a distance of 2,640 feet.
23. NE1/4 SW1/4 Section 19, T.24N., R.20E., M.D.B.&M., or at a point from which the NW corner of said Section 19 bears N. 22° 30' W., a distance of 3,660 feet.
24. NE1/4 NW1/4 Section 19, T.24N., R.20E., M.D.B.&M., or at a point from which the NE corner of said Section 19 bears N. 86° 40' E., a distance of 2,770 feet.
25. NW1/4 SE1/4 Section 18, T.24N., R.20E., M.D.B.&M., or at a point from which the SE corner of said Section 18 bears S. 45° 30' E., a distance of 2,440 feet.
26. SE1/4 NW1/4 Section 18, T.24N., R.20E., M.D.B.&M., or at a point from which the NW corner of said Section 18 bears N. 39° 10' W., a distance of 3,360 feet.
27. NE1/4 NW1/4 Section 18, T.24N., R.20E., M.D.B.&M., or at a point from which the NW corner of said Section 18 bears N. 82° 50' W., a distance of 1,675 feet.
28. NW1/4 NW1/4 Section 18, T.24N., R.20E., M.D.B.&M., or at a point from which the NW corner of said Section 18 bears N. 76° 10' W., a distance of 980 feet.
29. NW1/4 NW1/4 Section 18, T.24N., R.20E., M.D.B.&M., or at a point from which the NW corner of said Section 18 bears N. 33° 40' W., a distance of 470 feet.

30. Sugar Cane Springs - NW1/4 NE1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the NE corner of said Section 13 bears N. 86° 25' E., a distance of 1,500 feet.
31. Vicki's Reservoir - NE1/4 NE1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the NE corner of said Section 13 bears N. 67° 20' E., a distance of 940 feet.
32. Vicki's Reservoir - NE1/4 NE1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the NE corner of said Section 13 bears N. 15° 40' E., a distance of 740 feet.
33. Sugar Cane Springs Reservoir - NE1/4 NW1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the NW corner of said Section 13 bears N. 82° 55' W., a distance of 2,320 feet.

PRIOR- ITY	CULTURAL ACREAGE			LOCATION				DUTY OF WATER		
	HARV.	MEAD. PAST.	DIVER. PAST.	SUBD.	SEC.	TWP.	N. RGE.	E.	C.F.S.	AC-FT
1867	4.30	*15.00		SW1/4SE1/4	12	24	19		0.625	62.20
1867		*15.73		SE1/4SE1/4	12	24	19		0.393	47.19
1867	* 4.50			NE1/4SW1/4	12	24	19		0.112	18.00
1867	30.20			SE1/4SW1/4	12	24	19		0.755	120.80
1867		* 4.10		NE1/4NE1/4	13	24	19		0.102	12.30
1867		* 9.20		NW1/4NE1/4	13	24	19		0.230	27.60
1867	* 7.50			NE1/4NW1/4	13	24	19		0.188	30.00
1867	*20.00			NW1/4NW1/4	13	24	19		0.500	80.00
1867	*19.00			SW1/4NW1/4	13	24	19		0.475	76.00
1867	*13.53			NE1/4SW1/4	13	24	19		0.340	54.52
1867	* 9.80			NW1/4SE1/4	13	24	19		0.245	39.20
1867	*15.00			SW1/4SE1/4	13	24	19		0.375	60.00
1867		11.80		SE1/4SE1/4	13	24	19		0.295	35.40
1867	*11.10			NE1/4NE1/4	14	24	19		0.278	44.40
1867	* 5.20			SE1/4NE1/4	14	24	19		0.130	20.80
1867		* 5.00		NE1/4NE1/4	24	24	19		0.125	15.00
1867		* 8.00		NW1/4NW1/4	19	24	20		0.200	24.00
1867		*11.20		SW1/4NW1/4	19	24	20		0.280	33.60

1867	* 4.40	SE1/4NW1/4 19	24	20	0.110	13.20
1867	*11.40	NE1/4SW1/4 19	24	20	0.285	34.20
1867	<u>2.94</u>	SW1/4SW1/4 7	24	20	<u>0.070</u>	<u>8.82</u>
TOTALS 140.23 98.77					6.113	857.23

*The acreages listed with an asterisk are also irrigated from Dry Creek or Matley Creek as set forth in Certificate of Appropriation 5021 issued under Permit 17830. The total amount of water placed on these lands from all sources shall not exceed the quantity in acre-feet tabulated above.

PROOF NO.: Second Amended 02844 and Third Amended 02844

CLAIMANT: W. Dalton LaRue, Sr., and Juanita S. LaRue, dba Winnemucca Ranch

SOURCE: Springs, tributary to Warm Springs Valley Creek

USE: Irrigation and stockwater

MEANS OF DIVERSION: Natural spring areas and ditches

POINTS OF DIVERSION:

24. NE1/4 NW1/4 Section 19, T.24N., R.20E., M.D.B.&M., or at a point from which the NE corner of said Section 19 bears N. 86° 40' E., a distance of 2,770 feet.
25. NW1/4 SE1/4 Section 18, T.24N., R.20E., M.D.B.&M., or at a point from which the SE corner of said Section 18 bears S. 45° 30' E., a distance of 2,440 feet.
26. SE1/4 NW1/4 Section 18, T.24N., R.20E., M.D.B.&M., or at a point from which the NW corner of said Section 18 bears N. 39° 10' W., a distance of 3,360 feet.
27. NE1/4 NW1/4 Section 18, T.24N., R.20E., M.D.B.&M., or at a point from which the NW corner of said Section 18 bears N. 82° 50' W., a distance of 1,675 feet.
28. NW1/4 NW1/4 Section 18, T.24N., R.20E., M.D.B.&M., or at a point from which the NW corner of said Section 18 bears N. 76° 10' W., a distance of 980 feet.
29. NW1/4 NW1/4 Section 18, T.24N., R.20E., M.D.B.&M., or at a point from which the NW corner of said Section 18 bears N. 33° 40' W., a distance of 470 feet.

PRIOR- ITY	CULTURAL ACREAGE			LOCATION				DUTY OF WATER	
	HARV.	MEAD. PAST.	DIVER. PAST.	SUBD.	SEC.	TWP. N.	RGE. E.	C.F.S.	AC-FT
1867		9.91		NW1/4NW1/4	18	24	20	0.247	29.73
1867		2.57		SW1/4SE1/4	18	24	20	0.064	7.71
TOTAL		*12.48						0.311	*37.44

*The acreages listed herein also are irrigated from Dry or Matley Creek as set forth in Certificates of Appropriation 7649 and 7654 issued under Permits 24002 and 24213, respectively. The total amount of water placed on these lands from all sources shall not exceed the quantity in acre-feet tabulated above.

PROOF NO.: Second Amended 02737

CLAIMANT: Robert W. Marshall and Nanette Marshall,
and Robert Dickenson and Dorothy
Dickenson, dba Intermountain Land Co.

SOURCE: Warm Springs Valley Creek and
tributaries

USE: Irrigation, stockwatering and domestic

MEANS OF DIVERSION: Dams and ditches

POINTS OF DIVERSION:

1. NW1/4 NE1/4 Section 30, T.24N., R.20E.,
M.D.B.&M., or at a point from which the
E1/4 corner of Section 4, T.23N.,
R.20E., M.D.B.&M., bears S. 44° 50' 58"
E., a distance of 17,860.69 feet.
2. SE1/4 NE1/4 Section 30, T.24N., R.20E.,
M.D.B.&M., or at a point from which the
E1/4 corner of Section 4, T.23N.,
R.20E., M.D.B.&M., bears S. 44° 18' E.,
a distance of 15,635.0 feet.

PRIOR- ITY	CULTURAL ACREAGE			LOCATION				DUTY OF WATER	
	HARV.	MEAD. PAST.	DIVER. PAST.	SUBD.	SEC.	TWP. N.	RGE. E.	C.F.S.	AC-FT
1867	4.5			SW1/4NW1/4	29	24	20	0.112	18.0
1867	26.6	* 5.0		NW1/4SW1/4	29	24	20	0.790	121.4
1867	* 0.5	* 1.1		NE1/4SW1/4	29	24	20	0.040	5.3

1867	6.2		SW1/4SW1/4	29	24	20	0.155	24.8
1867	* 7.4		SW1/4SW1/4	29	24	20	0.185	29.6
1867	* 0.7	* 3.6	SE1/4SW1/4	29	24	20	0.107	13.6
1867		9.5	SE1/4SW1/4	29	24	20	0.237	28.5
1867	1.1	0.8	SW1/4SE1/4	29	24	20	0.047	6.8
1867		3.6	NW1/4NE1/4	30	24	20	0.090	10.8
1867		1.6	SW1/4NE1/4	30	24	20	0.040	4.8
1867	22.0	3.4	SE1/4NE1/4	30	24	20	0.635	98.2
1867	14.5		NE1/4SE1/4	30	24	20	0.362	58.0
1867	1.2		SE1/4SE1/4	30	24	20	0.030	4.8
1867		2.0	NE1/4NW1/4	32	24	20	0.050	6.0
1867	15.6	0.2	NW1/4NE1/4	32	24	20	0.395	62.6
1867		2.1	NE1/4NE1/4	32	24	20	0.052	6.3
1867	11.0	7.1	SE1/4NE1/4	32	24	20	0.452	51.1 65.3
1867	* 7.8	3.0	SW1/4NW1/4	33	24	20	0.270	34.2 40.2
1867	* 2.3	3.0	NW1/4SW1/4	33	24	20	0.133	12.2 18.2
1867		* 2.1	NE1/4SW1/4	33	24	20	0.053	2.1
1867		* 8.0	SE1/4SW1/4	33	24	20	0.200	24.0
1867		* 3.0	SW1/4SE1/4	33	24	20	0.075	3.0
1867		* 4.1	NW1/4NE1/4	4	23	20	0.102	12.3
TOTALS	121.4	57.9	5.3				4.612	*638.4 664.6

*The lands indicated with an asterisk also receive water from other sources (Proofs 02738 and 02739). The total quantity of water placed on these lands from all sources shall not exceed the quantity in acre-feet tabulated above.

PROOF NO.: Second Amended 02738

CLAIMANT: Robert W. Marshall and Nanette Marshall,
and Robert Dickenson and Dorothy
Dickenson, dba Intermountain Land Co.

SOURCE: Dewey Springs, tributary to Warm Springs
Valley Creek

USE: Irrigation, stockwatering and domestic

MEANS OF DIVERSION: Dams, reservoir and ditches

POINTS OF DIVERSION:

1. SW1/4 NW1/4 Section 29, T.24N., R.20E., M.D.B.&M., or at a point from which the E1/4 corner of Section 4, T.23N., R.20E., M.D.B.&M., bears S. 41° 18' 11" E., a distance of 14,599.43 feet.
2. SW1/4 NW1/4 Section 29, T.24N., R.20E., M.D.B.&M., or at a point from which the E1/4 corner of Section 4, T.23N., R.20E., M.D.B.&M., bears S. 43° 01' 16" E., a distance of 14,768.78 feet.

PRIOR- ITY	CULTURAL ACREAGE			LOCATION				DUTY OF WATER		
	HARV.	MEAD. PAST.	DIVER. PAST.	SUBD.	SEC.	TWP.	N. RGE.	E.	C.F.S.	AC-FT
1867	* 4.5			SW1/4NW1/4	29	24	20		0.112	18.0
1867	* 9.9	* 5.0		NW1/4SW1/4	29	24	20		0.372	54.6
1867	* 0.5	* 1.1		NE1/4SW1/4	29	24	20		0.040	5.3
1867	* 7.4			SW1/4SW1/4	29	24	20		0.185	29.6
1867	* 0.7	* 3.6		SE1/4SW1/4	29	24	20		0.108	13.6
TOTALS	23.0	9.7							0.817	*121.1

*The lands indicated with an asterisk also receive water from Warm Springs Valley Creek (Proof 02737). The total quantity of water placed on these lands from both sources shall not exceed the quantity in acre-feet tabulated above.

PROOF NO.: Second Amended 02739

CLAIMANT: Robert W. Marshall and Nanette Marshall, and Robert Dickenson and Dorothy Dickenson, dba Intermountain Land Co.

SOURCE: Pradere Springs, tributary to Warm Springs Valley Creek

USE: Irrigation, stockwatering and domestic

MEANS OF DIVERSION: Dams, reservoir and ditches

POINTS OF DIVERSION 1. NW1/4 SW1/4 Section 27, T.24N., R.20E., M.D.B.&M., or at a point from which the E1/4 corner of Section 4, T.23N., R.20E., M.D.B.&M., bears S. 1° 56' 22" E., a distance of 10,453.50 feet.

2. SE1/4 NW1/4 Section 33, T.24N., R.20E., M.D.B.&M., or at a point from which the E1/4 corner of Section 4, T.23N., R.20E., M.D.B.&M., bears S. 28° 22' 28" E., a distance of 7,293.78 feet.
3. SE1/4 NW1/4 Section 33, T.24N., R.20E., M.D.B.&M., or at a point from which the E1/4 corner of Section 4, T.23N., R.20E., M.D.B.&M., bears S. 31° 05' E., a distance of 6,865.0 feet.

PRIOR- ITY	CULTURAL ACREAGE			LOCATION				DUTY OF WATER		
	HARV.	MEAD. PAST.	DIVER. PAST.	SUBD.	SEC.	TWP.	N. RGE.	E.	C.F.S.	AC-FT
1867	5.9			SW1/4NW1/4	33	24	20		0.148	23.6
1867	* 7.8			SW1/4NW1/4	33	24	20		0.195	31.2
1867	* 2.3	* 3.0		NW1/4SW1/4	33	24	20		0.133	18.2
TOTALS	16.0	9.0							0.476	*73.0

*The lands indicated with an asterisk also receive water from Warm Springs Valley Creek (Proof 02737). The total quantity of water placed on these lands from both sources shall not exceed the quantity in acre-feet tabulated above.

PERMIT NO.: 13677

CERTIFICATE OF APPROPRIATION NO.: 4967

OWNER OF RECORD: W. Dalton LaRue, Sr., and Juanita S. LaRue

SOURCE: Sugar Cane Springs, a tributary to Warm Springs Valley Creek

USE: Irrigation

MEANS OF DIVERSION: Reservoirs and ditches system

POINTS OF DIVERSION: NE1/4 NW1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the NE corner of said Section 13 bears N. 81° 58' E., a distance of 2,903 feet.

PERIOD OF USE: April 1st to October 31st of each year

PRIORITY: April 10, 1951

**AMOUNT OF APPROPRIATION: 456.4 acre-feet annually (storage)
DESCRIPTION OF LAND TO WHICH WATER IS APPURTENANT:**

7.5 acres in NE1/4 NW1/4 Section 13, T.24N., R.19E.,
M.D.B.&M.
20.0 acres in NW1/4 NW1/4 Section 13, T.24N., R.19E.,
M.D.B.&M.
19.5 acres in SW1/4 NW1/4 Section 13, T.24N., R.19E.,
M.D.B.&M.
7.6 acres in NW1/4 SW1/4 Section 13, T.24N., R.19E.,
M.D.B.&M.
13.6 acres in NE1/4 SW1/4 Section 13, T.24N., R.19E.,
M.D.B.&M.
9.8 acres in NW1/4 SE1/4 Section 13, T.24N., R.19E.,
M.D.B.&M.
15.0 acres in SW1/4 SE1/4 Section 13, T.24N., R.19E.,
M.D.B.&M.
16.1 acres in SE1/4 SE1/4 Section 13, T.24N., R.19E.,
M.D.B.&M.
5.0 acres in NE1/4 NE1/4 Section 24, T.24N., R.19E.,
M.D.B.&M.
114.1 TOTAL

*Quantities of water diverted from Sugar Cane Springs which are conveyed to Sugar Cane Reservoir shall not be stored in said reservoir during the irrigation season when there is insufficient quantities of water in Winnemucca Valley Creek to irrigate the lands served by Proof of Appropriation 02737 in this Order under Article XII, Rights of Appropriation.

DECREE

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the relative rights of the users in and to the waters of Warm Springs Valley Creek (aka Winnemucca Valley Creek, aka Isaac Mathews Creek) and its tributaries be, and the same hereby are, determined as stated hereinabove.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each and every water user and claimant to the Warm Springs Valley stream system and its tributaries and each of their agents, attorneys, servants and employees, and their successors in

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interest and each and every person or persons acting in aid or assistance of the said parties or either of or any of them be, and that each of them is, hereby perpetually enjoined and restrained as follows:

(a) From at any time diverting or using any of the water of the Warm Springs Valley Creek stream system and its tributaries hereinabove mentioned, except to the extent and in the amount and in the manner and at the time or times set by this Decree to such respective party hereto allotted, allowed, prescribed and determined, or allowed by permits which have been or may hereafter be granted by the State Engineer of the State of Nevada.

(b) From diverting from the natural channel and from using any of the said water for irrigation or for any other purpose, in excess of the specific allotment herein set by this Decree, or in excess of the specific allotment under permits granted or that may hereafter be granted by the State Engineer.

(c) From diverting from the natural channel and from using any of the said water in any other manner or for any other purpose or purposes or upon any other land or lands than as provided and prescribed by the terms of this Decree or by a permit granted or that may hereafter be granted by the State Engineer.

(d) From diverting from the natural channel and from using any of the said water at any other time or times than as

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specified and provided by the terms of this Decree or by permits granted or that may hereafter be granted by the State Engineer of the State of Nevada.

(e) From, in any manner, meddling with, opening, closing, changing, injuring or otherwise interfering with any headgates, weirs, water box, flume, or other measuring device, placed, installed or established by the State Engineer or under his authority or direction, unless such act be done by the permission or authority of the Water Commissioner or the State Engineer, if during the period of his regulation or control of said water, or if not done during such period, then by virtue of the allowances, authority, terms and provisions of this Decree or by a permit granted or that may hereafter be granted by the State Engineer.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all enforcement rights set forth in this Court's Decree Affirming in Part and Modifying in Part the Order of the state Engineer dated October 6, 1987, are fully incorporated herein.

Dated this 30 day of March, 1988.

CERTIFIED COPY

The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

DATE: April 4, 1988
JUDI BAILEY, Clerk of the Second Judicial District Court, in and for the County of Washoe, State of Nevada.

By [Signature] Deputy.

Charles M. McGee
DISTRICT JUDGE

Case No. 83-7362

Dept. No. 2

FILED

October 6, 1987
JUDITH BAILEY, CLERK

By Julian Smith
Barry Clerk

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

IN THE MATTER OF THE DETERMINATION OF
THE RELATIVE RIGHTS IN AND TO THE WATERS
OF WARM SPRINGS VALLEY CREEK (AKA
WINNEMUCCA VALLEY CREEK, AKA ISAAC MATHEWS
CREEK) AND ITS TRIBUTARIES, WASHOE COUNTY,
NEVADA,

W. DALTON LA RUE, SR. AND JUANITA S.
LA RUE, dba WINNEMUCCA RANCH,

Appellants-Petitioners,

vs.

DECREE AFFIRMING IN PART
AND MODIFYING IN PART THE
ORDER OF THE STATE
ENGINEER

PETER G. MORROS, STATE ENGINEER,
STATE OF NEVADA, ROBERT E. DICKENSON
AND DOROTHY DICKENSON, and ROBERT W.
MARSHALL and NANETTE MARSHALL, dba
INTERMOUNTAIN LAND COMPANY,

Respondents.

INTRODUCTION

The pleadings which initiated this adjudicatory hearing challenge the final Order of Determination of Peter G. Morros, State Engineer, in the Matter of the Determination of the Relative Rights In and To the Waters of Warm Springs Valley Creek, (which is also known as Winnemucca Valley Creek and Isaac Mathews Creek). Present at the hearing which covered three days were Julian Smith, Esq. and Gene Barbegolata, Esq., representing

1 the LaRues, who were present, George Benesch, Esq., representing
2 the State of Nevada and the State Engineer, with Chief Engineer
3 and Adjudication Officer Larry Reynolds in attendance; and Ross
4 deLipkau, Esq., representing the Marshalls, with Robert Marshall
5 in attendance.

6 The Order of the State Engineer determined the vested
7 (pre-1905) water rights of the owners of two Washoe County
8 ranches concerning a surface water system. Both ranches enjoy
9 the same year of priority. The Settelmeyer Ranch, which is also
10 known more recently as the Marshall Ranch (and whose owners will
11 be referred to as "Marshall"); and the Winnemucca Ranch (and to
12 an extent the Olds Ranch), more modernly referred to as the La
13 Rue Ranch (the owners of which will hereinafter be referred to as
14 "La Rue"), both have a priority dating back to 1867. Both
15 parties find fault with the State Engineer's Order of
16 Determination.

17 On September 7, 1983, approximately one month after the
18 Order of Determination was prepared, but before it was filed with
19 the Court, the La Rues filed a pleading styled "Petition for
20 Judicial Review from the State Engineer's Order of Determination"
21 in case no. 83-7362, which was subsequently consolidated with
22 case no. 83-6641 and case no. 83-7398, the former case being
23 later dismissed.

24 The Marshalls filed a similar document which was
25 stricken at the time of the hearing since a more appropriate
26 pleading, "Objections to the Order of Determination", was filed
on August 19, 1987, under the provisions of NRS 533.170. The

1 LaRue petition contains a broadside attack on the Order of
2 Determination, while the Marshall Objections more specifically
3 enumerate the acreage alleged to have been wrongfully deemed as
4 appurtenant to "vested" or "decreed" water rights.

5 The Marshall Objections concern eleven (11) parcels on
6 the Winnemucca Ranch comprising 79.92 acres and 257.26 acre feet
7 of water rights.

8 The LaRue's Petition concerns itself with certain
9 alleged procedural deficiencies; inaccuracies in the Order of
10 Determination and other unspecified deficiencies. The main point
11 argued in the hearing, however, was the finding that the unnamed
12 springs in the northeast quarter of the southwest quarter of
13 Section 7 and the southwest quarter of the northeast quarter of
14 Section 12 are tributary to Winnemucca Valley Creek. The LaRues
15 contend that the only tributaries which contributed to downstream
16 water available to Marshall are the seasonal flows from McKissick
17 Creek, run off from Dog Skin Mountain and perennial springs on
18 the slope of Dog Skin Mountain.

19 PROCEDURAL AND JURISDICTIONAL ISSUES

20 Before turning to the substantive issues, there are a
21 couple of procedural issues raised by the pleadings and by
22 counsel at the adjudicatory hearing which merit threshold
23 attention.

24 The first of those issues is whether the La Rue's
25 pleading (styled "Petition for Judicial Review"), filed
26 September 7, 1983, can be considered by the Court as a substitute
for the exceptions called for by NRS 533.170(1).

1 Marshalls' counsel claims that this issue is
2 jurisdictional and must be determined against LaRue under the
3 authority of G & M Properties v. District Court, 95 Nev. 301, 594
4 P.2d 714 (1979), where the Nevada Supreme Court held that late
5 filed exceptions deprive the District Court of jurisdiction to
6 consider their content.

7 The difference between the circumstances of G & M and
8 those in the present case, however, are that in G & M nothing was
9 filed on time, where in the case at Bench the LaRues' counsel
10 endeavored to file a Petition for Judicial Review, which is
11 timely, if given any effect.

12 The State Engineer's attorney has joined with the
13 Marshalls' attorney in asking the Court to strike the LaRue
14 pleading. The Court has determined, however, not to strike this
15 pleading and to allow limited evidence to be adduced by LaRue at
16 the hearing in support of his appeal. Thus, his Petition has
17 been considered, but only to the extent of its content which, as
18 earlier noted, has a shortcoming in its lack of specificity
19 relative to The Order. Pursuant then to the provisions of
20 subsection (3) of NRS 533.170, the Court allowed LaRue's counsel
21 to present and argue objections. The scope of this judicial
22 review, however, is further limited by the second procedural
23 ruling, which follows.

24 The Nevada statute is not crystal clear with respect to
25 the scope of judicial review in water rights cases, but the
26 holding of the Nevada Supreme Court in Revert v. Ray, 95 Nev.
782, 603 P.2d 262 (1979) is plain enough. The District Court is

1 not to substitute it's judgment for that of the State Engineer's
2 and the Courts are generally to look only to whether or not the
3 record of evidence, together with any supplemental materials,
4 contain substantial evidence supporting the State Engineer's
5 decision. The Court has reviewed the pleadings, the exhibits,
6 and the transcript and concludes that except for a couple of
7 relatively minor findings, there is substantial evidence to
8 support the Order of Determination. The analysis will first turn
9 to the Marshall objections.

10 THE MARSHALL OBJECTIONS

11 Even though the Marshall objections refer to eleven
12 separate areas, the objections qualitatively fall into one of
13 three categories, as follows:

14 1. The first category claims that the record is simply
15 devoid of substantial evidence which would support the Engineer's
16 Findings of Fact as to certain conditions on the Winnemucca Ranch
17 in 1867. The primary geographical area included in this category
18 is the determination of meadow pasture for a 7.6 acre parcel
19 which extends as a finger below the corrals off of the "back" of
20 the seahorse-shaped parcel in the northwest quarter of the
21 southwest quarter of Section 13, Township 24 North, Range 19
22 East.

23 2. The second category of Marshall's objections are
24 Engineering calculations by Marshall's expert, Richard Arden,
25 which differ from the State Engineer's calculations accomplished
26 in-house, principally by Mr. Clock. Included in this category
are area #1 and a portion of area #2 on Marshall's Amended

1 Schedule A, which immediately abut the "mouth" of the seahorse-
2 shaped parcel depicted in green on Marshall's Exhibit A. Also
3 included is area #6 which is a 3.2 acre parcel along the "throat"
4 of the seahorse-shaped parcel depicted in Marshall's exhibit A-1.

5 3. The final Marshall category might be termed the
6 "Walsh" exceptions, referring to the decision of the Nevada
7 Supreme Court in the case of Walsh v. Wallace, 26 Nev. 299
8 (1902). Marshall argues that under this doctrine there must be
9 actual mechanical diversion of water prior to 1905 for vested
10 rights to arise, that the mere cutting or use of wild grass
11 production by overflow (or in our case, subirrigated seepage from
12 a spring), is not a valid appropriation of water such as would
13 allow vesting. The land primarily covered by this category are
14 the remainder of area #2 on Marshall's Schedule A, #3, #4, #5 and
15 #9, and together they form what was referred to as the "ladle-
16 shaped" parcel and the "railroad spike-shaped" parcel depicted on
17 Marshall's Exhibit A-1.

18 Turning now to the first category-- the failure of
19 evidence category-- the Court's examination supports the
20 contention that there is substantial evidence for the Order of
21 Determination, except with respect to the 7.6 acre parcel. The
22 State Engineer's Office based its Decision to include this 7.6
23 area because they felt that there is evidence that a ditch, later
24 extended by the Matleys in 1929, had run along the western border
25 of this parcel prior to 1929. That conclusion can legitimately
26 be drawn from the record, especially in reference to John
Marshall's Affidavit, Exhibit #26. However, the inference that

1 the land was cultivated or irrigated from the application of Warm
2 Springs or McKissick Creek water as of 1867 seems to be rebutted
3 fully by the "old-timer's" testimony, that there was no
4 irrigation or use of the field until the Matleys placed it in
5 irrigation for growing alfalfa, [please refer to the Marshall
6 Matley testimony in the transcript at pages 324 through 354; that
7 of Leslie Zurfluch in the transcript at page 234 and Joe
8 Capurro's statement, Marshall Exhibit 27, at page 4]. Thus, the
9 substantial weight of the testimony favors the Marshall exception
10 and not the Engineer's conclusion. 30.4 acre feet should be
11 subtracted from the final Order of Determination in the final
12 Court Decree. All of the rest of the acreage in this category is
13 supported by substantial evidence and the Engineer's
14 Determination will not be interfered with.

15 Turning to the second category of Marshall's exceptions
16 -- engineering miscalculations -- the Court once again finds,
17 with one minor exception, that the Engineer's judgment is
18 supported by substantial evidence and that his calculations
19 should not be disturbed for most of area 2 and all of area 6.

20 As to area #1, however, a 3.0 parcel and a portion of
21 area 2 (5.7 acres) along the "mouth" of the seahorse-shaped
22 parcel, Mr. Clock conceded in cross-examination that it wasn't
23 until the post-1905 installation of ditches that irrigation
24 reaching these uphill areas would have been possible. The Court
25 determines that substantial evidence favors the Arden calculation
26 for these areas, reducing the Clock calculations, and the Decree,
by another 31.8 acre feet.

Turning finally to the third category of Marshall exceptions -- the Walsh exception -- the Court is faced not so much with a review of the Engineer's discretion, as with a ruling of law. The 1902 Walsh decision has been accurately quoted for the cited proposition by Marshall's attorney, Ross deLipkau. The State Engineer's position (joined in by LaRue's attorneys Smith and Barbagelata) take a much broader view. Their theory is that the litmus test is not mechanical diversion, despite the holding in Walsh, supra. Instead, the only test should be beneficial use. Diversion to achieve beneficial use, they say, is unnecessary for recognition of an appropriation, citing as authority Steptoe Livestock Co. v. Gully, 53 Nev. 163, 295 P.2d 772 (1931), and Waters of Horse Springs v. State Engineer, 99 Nev. 780, 672 P.2d 37 (1983), which quotes Steptoe with approval, using the following condensed statement:

"It is not always essential, however, that the water actually be diverted 'to constitute an appropriation...where it could be put to a beneficial use without such diversion, where there was a practice of appropriating the waters of the streams to a beneficial use without such diversion,..."

The Walsh decision and even to an extent the Steptoe decision assume that appropriation for agricultural use necessarily or at least normally requires diversion. In our case the State Engineer has determined that meadow pasture, as distinct from harvested grounds, is a use not necessarily requiring diversion, especially when the water irrigates the ground by subsurface seeping, a factual situation not present either in the Reese River Valley in the late 1800's (Walsh), or in the livestock watering areas of Canyon Creek, Stag Creek and

Cottonwood Creek in Elko County (Steptoe).

1 The term "mechanical means of diversion" is neither
2 synonomous with the term "appropriation" nor "beneficial use" in
3 the State of Nevada. Our case stands on its own unique
4 circumstances. The Court concludes, perhaps as a matter of first
5 impression,¹ that a pre-1905 appropriation for meadow pasture may
6 occur without actual mechanical diversion. Put another way, the
7 Court sustains the findings by the State Engineer that the use by
8 LaRues' predecessor of the subirrigation meadow pasture was an
9 actual application of water to beneficial use coupled with the
10 intent to apply the water to beneficial use. Under such
11 circumstances, actual diversion is not a necessary prerequisite
12 to accomplish irrigation between 1867 and 1905 giving rise to a
13 vested water right.

14 Marshall's counsel argues that even if the Court were
15 to find that "modern" law favors such an interpretation, that
16 "...the law in existence at the inception of a right must be
17 followed for the life of that water right", [post-trial brief,
18 page 5, citing In Re Waters of Manse Springs, 60 Nev. 280, 180
19 P.2d 311 (1980)]. He insists that the 1902 "Walsh doctrine",
20 therefore, must be the law of a case dating from 1867.

21 From a comparison of the authorities, the crucial
22

23
24 ¹On behalf of the State Engineer, Deputy Attorney General
25 Benesch suggests that the precedent has already been established
26 in this State by affirmance of a District Court decree upholding
a 1915 Order of Determination confirming vested rights to water
in swamplands, see, Scossa v. Church, 46 Nev. 254 (1923). But
the obliqueness of the reference and the incompleteness of the
record raise genuine doubt about the precedential value of this
decision to this case.

1 determination seems to involve a subjective intent manifested by
2 objective signs to "the world" [c.f. Ophir Silver Mining Co. v.
3 Carpenter, 4 Nev. 534, (1868)] that a lasting appropriation has
4 taken place. In this sense, there is a genuine difference
5 between a rancher seizing upon an irregular opportunity to cut or
6 use wild grasses nourished from overflows (Walsh) and the regular
7 exploitation of subirrigated meadows for which diversion is a
8 meaningless act (our case).

9 As Mr. LaRue's counsel points out, another truly
10 distinguishing feature is that application of the Walsh doctrine
11 to subirrigated land would seemingly require an irrigator to
12 "...bring[ing] the water to the surface and then reapply it in
13 order to obtain a vested water right" [post-trial brief, p. 18,
14 lines 14, 15]. Such a requirement would clearly be
15 nonsensical. It is also significant that the Warm Springs
16 drainage concerns a small water course capable of furnishing
17 water for these ranches only, since the State Engineer has
18 declared that the waters and tributaries are fully
19 appropriated. That is factually dissimilar from the Reese River
20 Valley where channels and forks of the stream system run for more
21 than a hundred miles through ranching areas and serve numerous
22 ranching and grazing operations. The findings of the State
23 Engineer in favor of a completed appropriation will not be
24 disturbed.

25 LARUE OBJECTIONS

26 Though the scope of his objections is constricted by his
predecessor's pleadings, attorney Smith advances a number of

1 objections and arguments on behalf of Mr. and Mrs. LaRue (many of
2 which are improperly before the Court because they are being
3 raised for the first time). Clearly though, foremost among the
4 claims, is the contention that the State Engineer committed
5 reversible error by determining that Winnemucca Springs is
6 tributary to Warm Springs Valley Creek (which LaRue would prefer
7 to be called Winnemucca Valley Creek).

8 Some of the arguments advanced by Mr. Smith cut both
9 ways. For example, he is critical of the deductive reasoning
10 used by the State Engineer's hearing officer who, he alleges at
11 page 7 of the post-trial brief, "backed into" his conclusion that
12 Winnemucca Springs was in 1867, a tributary to the Creek.

13 In order to contextualize this issue, Mr. Reynold's
14 syllogism goes something like this:

15 (a) Both ranches at all material times had very roughly
16 the same amount of irrigated acreage.

17 (b) The Dogskin Mountain drainage usually dries up in
18 the early Spring;

19 (c) Therefore, in all probability some of the year-
20 around spring water from Winnemucca Springs found its
21 way to the creekbed and downstream to the Settlemeyer
22 (Marshall) ranch;

23 Not so, LaRue claims. He feels that because the State
24 Engineer could not find physical evidence of a gorge or tributary
25 channel, there is insufficient record evidence to support the
26 conclusion that the spring is tributary to the Creek. Moreover,
he claims, Mr. Reynolds ignored the possibly resurfacing

1 watersprings arising at the south end of the Winnemucca (LaRue)
2 ranch.

3 Yet, what Mr. Reynolds didn't ignore is the same
4 proposition urged by Mr. Smith in support of other LaRue
5 contentions:

6 "Common sense would dictate that a man tilling the soil
7 to feed himself and his family would till to the limit
8 of the natural resources available". [LaRue post-trial
9 brief, page 4, lines 2-4.]

10 While it is not now possible to reconstruct with
11 exactitude the condition and the location of waters travelling
12 through this drainage in 1867, it is a legitimate presumption
13 that both ranches put to optimum use the available water for the
14 size of their operations at the time. And if both ranches of
15 similar size were operating in 1867 for the most part off the
16 same water system with the same summer growing conditions and
17 similar crop yield, Marshall's ranch logically must now be being
18 deprived of water from vested rights. Over the last few years
19 the summer flows have so dwindled, (or altogether stopped) that
20 Marshall can no longer irrigate some of the fields which were
21 historically irrigated by his predecessors.

22 LaRue also asks the Court to give great weight to some
23 early geographical survey maps which seem to indicate in some
24 areas that spring water doesn't reach the channel in the valley,
25 but since the streams are either intermittent, unsurveyed, or
26 obscured by a road, the maps aren't very illuminating for either
side.

In summary, despite LaRue's claims that Marshall simply

1 doesn't know what he's doing, the Court finds that it is not
2 Marshall's imprudent water management practices -- but that it is
3 LaRue's rather impudent water management practices -- which
4 created the situation giving rise to this controversy.

5 The State Engineer's finding that the so-called
6 Winnemucca Springs is tributary to Warm Springs Valley Creek is
7 sustained.

8 Most of the rest of LaRue's objections are either
9 outside the scope of his "Petition for Judicial Review," or
10 weren't even addressed by the hearing officer in the first
11 place. Although a remand is suggested to determine other vested
12 rights, the suggestion will have to form the basis for a new
13 proceeding, since the pleadings and evidence in this case are
14 "closed".

15 Finally, the LaRue's argue that even if the finding
16 that the unnamed (or springs referred to as Winnemucca Springs)
17 are tributary to the valley creek, the Court should nonetheless
18 conclude that Marshall's predecessors abandoned the rights when
19 they failed to object to diversion and impounding of the
20 springwater in one or more of three dams, and also the diversion
21 and use of water through various ditches on the Winnemucca Ranch.

22 LaRue argues a de facto forfeiture pursuant to NRS
23 533.060(2). Yet the law is clear that this forfeiture provision
24 is neither self-executing or automatic. There must be a
25 proceeding to establish forfeiture, see, United States v.
26 Cappaert, 508 F.2d 313 (9th Cir. 1974), aff'd. U.S. R8 128, 96
S.Ct. 2062; In re Filippini, 66 Nev. 17, 202 P.2d 535 (1949);

1 Bergman v. Kearney, 241 F.884 (D. Nev. 1917), and there must be
2 proof of intent to abandon, see, Franktown Creek Irrigation Co.
3 v. Marlette Lake Co., 77 Nev. 348, 364 P.2d 1069 (1961); In Re
4 Manse Springs and its Tributaries, 60 Nev. 280, 108 P.2d 311
5 (1940). The record is devoid of both.

6 All other LaRue claims have similar infirmities since
7 they primarily rest on arguments and evidence outside the
8 pleadings and outside the record.

9 ENFORCEMENT ISSUES

10 The single most difficult task in this matter relates to
11 the enforcement of Marshall's water rights. Those rights involve
12 a complex stream system made more complex by weather and
13 environmental conditions and by LaRue's transportation,
14 commingling and regulation of water from another watershed.

15 As Mr. Reynolds so forcefully made clear, a water right
16 gives the owner or the permit holder the authority to use water;
17 it surely does not guarantee the presence of water for use. The
18 evidence shows that in this Valley, as in so many arid desert
19 areas of Nevada, the availability of water fluctuates
20 dramatically from season to season. Accordingly, the water right
21 as finally adjudicated, in certain seasons becomes little more
22 than a mathematical reference point from which the State Engineer
23 develops a formula to apportion and allocate available water,
24 assuming his office has the time capacity and inclination to
25 perform those services.

26 And if not, the task is left to a watermaster, the
expense for which is often, as here, prohibitive. The reason for

1 discouragement in this case is that the evidence suggests that
2 LaRue has systematically construed the imperfections and
3 ambiguities of the system in such a way as to deprive Marshall of
4 receiving his share of the downstream flow. LaRue's counsel
5 hastens appropriately to point out that LaRue operates his ranch
6 in 1987 -- not 1867, conditions. The principal stream channel
7 into the Warm Springs Creek which the State Engineer found to
8 exist in 1867 does not now exist. But it is clear that with
9 LaRue being allowed the de facto discretion to determine that the
10 water he is regulating and using on a given day is his Spanish
11 Flat drainage water and not his and Marshall's Warm Springs
12 water, the discretionary decision that this fiercely independent
13 rancher comes to is really no surprise to anybody. LaRue has
14 protected his own interests first, every time.

15 Marshall's counsel suggests that the court should
16 simply order the three (3) LaRue dams be breached, but the Court
17 finds that solution is both an overkill and perhaps in the long
18 run, unduly punitive to the LaRues and their successors in
19 interest. The complexity and fluidity of the situation commends
20 giving a procedural solution a try.

21 There is a peculiar dichotomy presented by the
22 circumstances of this case which the Court will first attempt to
23 describe, then to mitigate. Few Courts are equipped to monitor a
24 dynamic situation involving water rights interpreted in the
25 context of changing conditions. Indeed, few Courts have the
26 calendar and/or the skill to perform the frequent small
adjudications necessary to justly regulate the controversy. This

1 may be at least one of the reasons the legislature wisely
2 invested the State Engineer with such broad adjudicatory and
3 regulatory powers.

4 Yet the Court senses an apprehension on the part of the
5 State Engineer's representatives when it comes to exerting power
6 over matters traditionally reserved only to the Courts. For
7 example, Mr. Reynolds seemed to feel that matters such as
8 ordering payments not stipulated to, or the breaching of dams, or
9 the use of ditches privately owned by LaRue, or the
10 reconstruction of the old water course to name a few -- to be
11 simply outside the State Engineer's enabling authority. And
12 perhaps his reluctance to overstep administrative authority is to
13 be commended.

14 The jurisdictional ambiguity that may exist in the
15 boundary area between Court and agency will no longer exist in
16 this case, however.

17 The State Engineer's office is sua sponte appointed a
18 Special Master under the authority of Rule 53 of the Nevada Rules
19 of Civil Procedure. This broad grant of authority enhances all
20 of the enumerated powers already held by the office of the State
21 Engineer.

22 The authority thus delegated or confirmed will fall
23 into two categories, as follows:

24 A. Matters which can be implemented without prior Court
25 approval. These powers shall include but not be limited
26 to the following: the power to...

(1) Order the installation of continuous recording
devices, headgates and any other measuring or regulating

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devices on any waters coming into the Warm Springs drainage area from the Spanish Flat drainage area and in addition, waters anywhere inside the Warm Springs drainage area, as deemed suitable by the State Engineer's office. Unless otherwise determined, the cost of implementing this plan will be equally borne by the landowners;

(2) To order transportation of water through existing LaRue ditches, channels, pipelines or streambeds;

(3) To order the release of dammed or regulated water in quantities deemed consistent with the Order of Determination as modified; and

(4) To order a rotation irrigation schedule consistent with the Order of Determination, as modified.

B. Matters which require a hearing held after a Notice period of at least five (5) days. The parties will be advised that they will be given the opportunity at the hearing to produce evidence in support of, or in opposition to, a recommendation to the Court for an Order:

(1) To breach dams and/or create major new points of diversion and means of transportation of water, including the restoration of historic channels;

(2) To unequally allocate expenses of enforcement or regulation in order to discourage non-compliance and assure compliance with the Order of Determination as modified;

(3) To order the installation of pipelines, channels, or ditches directly from source waters to Marshall's place of diversion or use;

(4) To hold a party adjudicated to be failing to act in good faith in connection with the fulfillment of the Order of Determination, as modified, in contempt of Court.

The Special Master's recommendations will be ratified, adopted and approved by the Court unless there is not substantial

1 evidence on the record to support the recommendation, or if the
2 Special Master's recommendation is clearly erroneous.

3 If the State Engineer finds the appointed tasks unduly
4 burdensome or cumbersome, he may appoint a watermaster under the
5 authority of NRS 533.220 and 533.270, and if confirmed by the
6 Court, the watermaster will have all of the powers of the Special
7 Master enumerated above.

8 CONCLUSION:

9 Out of the hundreds and hundreds of acre feet of water
10 rights adjudicated by the State Engineer in his final Order of
11 Determination filed over four years ago (upon a petition filed
12 over eleven years ago), error was made as to only 62.2 acre
13 feet. Meanwhile, apparently Dalton LaRue lies sick, and Robert
14 and Nanette Marshall's ranchlands lie fallow. It may be that the
15 law and its procedures contribute substantially to the tortuous
16 path these parties have had to follow. In any event, it is
17 finally over. Judgment shall enter in accordance with this
18 decree and the parties shall abide by the terms thereof.

19 DATED this 6th day of October, 1937.

20
21 **CERTIFIED COPY**

22 The document to which this certificate is at-
23 tached is a full, true and correct copy of the
24 original on file and of record in my office.

25 DATE: October 11, 1937
26 JUDI BAILEY, Clerk of the Second Judicial
District Court, in and for the County of
Washoe, State of Nevada.

By [Signature] Deputy.

Charles M. McQueen
DISTRICT JUDGE
△

discouragement in this case is that the evidence suggests that LaRue has systematically construed the imperfections and ambiguities of the system in such a way as to deprive Marshall of receiving his share of the downstream flow. LaRue's counsel hastens appropriately to point out that LaRue operates his ranch in 1987 -- not 1867, conditions. The principal stream channel into the Warm Springs Creek which the State Engineer found to exist in 1867 does not now exist. But it is clear that with LaRue being allowed the de facto discretion to determine that the water he is regulating and using on a given day is his Spanish Flat drainage water and not his and Marshall's Warm Springs water, the discretionary decision that this fiercely independent rancher comes to is really no surprise to anybody. LaRue has protected his own interests first, every time.

Marshall's counsel suggests that the court should simply order the three (3) LaRue dams be breached, but the Court finds that solution is both an overkill and perhaps in the long run, unduly punitive to the LaRues and their successors in interest. The complexity and fluidity of the situation commends giving a procedural solution a try.

There is a peculiar dichotomy presented by the circumstances of this case which the Court will first attempt to describe, then to mitigate. Few Courts are equipped to monitor a dynamic situation involving water rights interpreted in the context of changing conditions. Indeed, few Courts have the calendar and/or the skill to perform the frequent small adjudications necessary to fairly regulate the controversy. This

STATE ENGINEERS BOARD

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Case No. 83-6641

Dept. No. 2

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

IN THE MATTER OF THE DETERMINATION)
OF THE RELATIVE RIGHTS IN AND TO THE)
WATERS OF WARM SPRINGS VALLEY CREEK)
(AKA WINNEMUCCA VALLEY CREEK, AKA)
ISAAC MATHEWS CREEK) AND ITS)
TRIBUTARIES, WASHOE COUNTY, NEVADA,)

W. DALTON LA RUE and JUANITA S.)
LA RUE, dba WINNEMUCCA RANCH,)

Appellants-Petitioners,)

vs.)

PETER G. MORROS, STATE ENGINEER,)
STATE OF NEVADA; ROBERT E. DICKENSON)
and DOROTHY DICKENSON, and ROBERT W.)
MARSHALL and NANETTE MARSHALL, dba)
INTERMOUNTAIN LAND COMPANY)

Respondents.)

PROPOSED FINAL
FINDINGS OF FACT,
CONCLUSIONS OF
LAW, JUDGEMENT
AND DECREE

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vs.)

PETER G. MORROS, STATE ENGINEER,)
STATE OF NEVADA; ROBERT E. DICKENSON)
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MARSHALL and NANETTE MARSHALL, dba)
INTERMOUNTAIN LAND COMPANY)

Respondents.)

FINAL FINDINGS OF
FACT, CONCLUSIONS
OF LAW, JUDGEMENT
AND DECREE

INTRODUCTION

This matter came on regularly for hearing on August 27, 1987, in the above entitled Court before the Honorable Charles M. McGee, District Judge, presiding, pursuant to agreement by the parties. The hearing continued on September 1, 1987, and concluded on September 2, 1987. Warm springs Valley Creek and its tributaries, the subject of these proceedings, is within Washoe County, State of Nevada, and accordingly Judge McGee, as

the Second Judicial District Court Judge assigned to this matter, is the judge designated by Nevada Revised Statutes (hereinafter also indicated "NRS") 533.165 with jurisdiction to hear the above-entitled matter. The Order of Determination and all related documentary evidence was filed with the Clerk of said Court by the State Engineer on August 8, 1983. Notices of Appeal and Petitions for Judicial Review to the Order of Determination were filed by claimants W. Dalton LaRue, Sr., and Juanita S. LaRue, d/b/a Winnemucca Ranch; and Robert E. Dickenson, Dorothy Dickenson, Robert W. Marshall and Nanette Marshall, d/b/a Intermountain Land Company, on September 7, 1983.

Upon stipulation of the parties, Petitions for Judicial Review in Companion Case Nos. 83-7362 and 83-7398 were ordered dismissed without prejudice and a hearing on the Order of Determination was scheduled for June 21, 1984, and due notice was provided all claimants. To avoid further confusion of various case numbers assigned to this adjudication, Case Nos. 83-7362 and 83-7398 were ordered consolidated into Case No. 83-6641 for all further proceedings.

Hearing dates of June 21, 1984, February 7, 1985, May 6, 1985, and March 31, 1986, were subsequently vacated by agreement of the parties and the final setting, August 27, 1987, was subsequently agreed upon by counsel for the affected parties.

Under the provisions of NRS 533.170, Objections to the Order of Determination were timely filed by Robert W. Marshall and Nanette Marshall, d/b/a Intermountain Land Company, on August

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19, 1987. Other parties, including the Bureau of Land Management and Juanita S. and W. Dalton LaRue, Sr., chose not to lodge objections to the Order of Determination.

At the time set for hearing, George Benesch, Deputy Attorney General, appeared on behalf of the State Engineer. Also appearing were: Julian Smith, Esq., and Gene Barbegelata, Esq., representing the LaRues, with Juanita S. and W. Dalton LaRue, Sr. in attendance; and Ross deLipkau, Esq., representing the Marshalls with Robert Marshall in attendance.¹

At the hearing, the Court elected not to strike the LaRues' September 7, 1983, pleading entitled Petition for Judicial Review which was represented to be filed in lieu of the exceptions called for under NRS 533.170(1). However, the Court did note it would be of limited value due to its lack of specificity and the restrictions imposed by the aforementioned statute.

The Court on October 6, 1987, having considered the entire record, and all other testimony and evidence, rendered its decision entitled Decree Affirming In Part and Modifying In Part the Order of the State Engineer and these instant Final Findings of Fact, Conclusions of Law, Judgement and Decree are entered in accordance with NRS 533.185. Said intermediate Decree of October 6, 1987, is attached hereto as Exhibit "A" and is fully incorporated herein by reference.

1 It should be noted that at an unspecified time after issuance of the Preliminary Order of Determination and the Order of Determination Robert and Nanette Marshall acquired Robert E. and Dorothy Dickensons' interests as set forth above.

Sometime after October 6, 1987, and prior to the date of this Decree, Washoe County, a political subdivision of the State of Nevada is purported to have acquired from W. Dalton LaRue, Sr. and Juanita S. LaRue their interest as set forth herein.

FINDINGS OF FACT

I.

The Court finds: That on August 27, 1976, Robert W. Marshall, Nanette Marshall, Robert E. Dickenson and Dorothy Dickenson, water users on Warm Springs Valley Creek, submitted a Petition to the State Engineer requesting the determination of the relative rights to the use of the waters of Warm Springs Valley Creek and its tributaries located in Washoe County, Nevada.

That as a result of the State Engineer's field investigation on December 15, 1976, it was found that the facts and conditions justified such determination and on January 3, 1977, an Order granting said Petition was entered.

That the State Engineer received and filed in the records of the Division of Water Resources, maps, statements of claims and supporting documents to the use of water from said stream system, required under the provisions of Chapter 533 of the Nevada Revised Statutes.

That there were three claimants upon said stream system, namely, Robert W. Marshall and Nanette Marshall, Robert E. Dickenson and Dorothy Dickenson, d/b/a Intermountain Land

Company; W. Dalton LaRue, Sr., and Juanita S. LaRue, d/b/a Winnemucca Ranch; and the U. S. Department of Interior, Bureau of Land Management, Carson City District Office.

That in accordance with the provisions of Chapter 533 of Nevada Revised Statutes, the State Engineer made and filed and caused to be entered on the records of its office, its Preliminary Order of Determination defining the rights of the claimants to the waters of Warm Springs Valley Creek stream system as hereinafter defined.

That due to objections to the Preliminary Order of Determination filed by Robert W. Marshall and Nanette Marshall, and W. Dalton LaRue, Sr., and Juanita LaRue, a hearing was held on September 8, 9 and 10, 1982, on the objections.

That as a result of the record and all evidence and testimony, the Order of Determination and all other orders, proceedings and notices, provided under Chapter 533, were duly entered, had, made and given as required by law and that, all and singular, the matters and things contained in the record were done, performed, given and made in strict compliance with the statutes and that this Court had and has jurisdiction to hear and determine this matter.

II.

The Court further finds: That Warm Springs Valley Creek and its tributaries, the subject of these proceedings, is situated wholly within Washoe County, Nevada.

III.

The Court further finds: That the names of the claimants and appropriators of the waters of Warm Springs Valley

Creek and its tributaries, the source of the water supply, the period of use, the duty of water, the diversion of water and the method of use, measurement of water, stockwatering and domestic use, change of place of use, and the rights of appropriation of the water, all as set forth in the Order of Determination as amended herein, are true, proper and correct and, all and singular, the same should be approved and confirmed.

That the waters of Warm Springs Valley Creek stream system, as hereinafter defined since prior to 1905, have been and are being placed to beneficial use by Robert W. Marshall and Nanette Marshall, W. Dalton LaRue, Sr., and Juanita LaRue, and their predecessors in interest.

That there are now only two appropriators, namely, Robert W. Marshall and Nanette Marshall, and W. Dalton LaRue, Sr., and Juanita LaRue, using all the flow of said Warm Springs Valley Creek stream system.

That deeds of record in the State Engineer's office show that the present claimants and appropriators, Robert W. Marshall and Nanette Marshall, and W. Dalton LaRue, Sr., and Juanita LaRue, are the successors in interest to the herein determined and adjudged vested rights to the waters of Warm Springs Valley Creek stream system initiated prior to 1905.

IV.

The Court further finds: That three areas of land, namely. 7.6 acres in the NW1/4 SW1/4 Section 13, 3.0 acres in the NW1/4 SE1/4 and 5.7 acres in the SW1/4 SE1/4 Section 12, T.24N., R.19E., M.D.B.&M., included in the Order of Determination for a vested right on the Winnemucca Ranch and included in Marshalls'

Exceptions to the Order of Determination, are not entitled to a vested right due to the lack of substantial evidence or a miscalculation of the area as shown on the supportive map.

V.

The Court further finds: The subirrigated meadow pasture that has been recognized by the State Engineer to have been subirrigated and utilized for grazing prior to 1905 has fulfilled the necessary prerequisites for vested use and shall not be disturbed.

VI.

The Court further finds: That Warm Springs Valley Creek was and is comprised of tributary flows from Winnemucca springs as well as from snow melt runoff through McKissick Creek. This allowed the Winnemucca and Settlemeyer Ranches both to benefit from an extended stream flow and to maintain approximately the same amount of irrigated acreage before the turn of the century.

VII.

(SOURCE)

The headwaters of Warm Springs Valley Creek and its tributaries originate at an elevation of approximately 7,500 feet on the southwestern slope of the Virginia Mountains and also at approximately 6,500 feet on the northeastern slope of Dogskin Mountain located adjacent to Little Valley and Winnemucca Valley about 30 miles north of Reno in Washoe County, Nevada. Many perennial springs situated along the southwestern foot of the Virginia Mountains as well as the snow melt waters from both

mountain ranges contribute to the flow of the stream system. The subject creek flows in a southwesterly direction through Little Valley and southeasterly through Winnemucca Valley and terminates on the northwestern part of the valley floor of Warm Springs Valley.

VIII.

(PERIOD OF USE)

The irrigation season shall begin on January 1 and extend through December 31 of each year with the exception of Permit 13677, Certificate 4967, which remain unaffected by this Decree.

IX.

(DUTY OF WATER)

The seasonal duty of water on lands irrigated from Warm Springs Valley Creek and its tributaries is herein fixed and shall not exceed:

Class A . . . Harvest Crop 4.0 ac.ft./ac./season;

Class B . . . Meadow Pasture 3.0 ac.ft./ac./season;

and

Class C . . . Diversified Pasture. . 1.0 ac.ft./ac./season.

X.

(DIVERSION OF WATER AND METHOD OF USE)

The claimants shall have the right to divert 2.5 cubic feet per second of water per 100 acres of land irrigated, but not to exceed the seasonal duty as established herein below under Article XII, Rights of Appropriation.

The claimants or their successors in interest will not be required to take or use the amount of water allotted to them

in a continuous flow, but may cumulate the same or any part thereof in rotation or periodic turn within the seasonal limits with the approval of the water commissioner, should one become necessary, and subject to the ultimate control and direction of the State Engineer.

XI.

(RESERVOIRS)

Three reservoirs located on the Winnemucca Ranch are shown on the maps to accompany Proofs 02844. Sugar Cane Reservoir and Vicki's Reservoir were constructed sometime after 1905. The third reservoir commonly known as "Lorrie's Reservoir" and "Whiskey and Lorrie Canyon Reservoir" impounds water diverted from Winnemucca Spring (Proof 02629) and water from Whiskey Canyon and Lorrie Canyon.

Frank Welch attested in an affidavit (Washoe County Recorder Document 321819 filed August 14, 1967) that he was born on February 22, 1884, and that some time in 1900 he was on the Winnemucca Ranch. He observed that springs were the sole source of water for the upper part of the Winnemucca Ranch and there were no reservoirs there at that time.

Existing reservoirs on the Winnemucca Ranch and the Settlemeyer Ranch are determined to be regulatory in nature. Said reservoirs may be used to cumulate and to store the water adjudicated herein during any time of each year. Diversion of water to such reservoirs shall be consistent with quantities of water and priorities as herein stated. The aggregate amount of water diverted from a reservoir is not to exceed the total duty

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of water herein fixed for the lands served by said reservoir. Quantities of water being adjudicated, which are diverted into a reservoir, shall be used only on lands with vested rights as determined in this Decree.

XII.

(MEASUREMENT OF WATER)

All measurements of water diverted are to be made at a point where the main ditch enters or becomes adjacent to the land to be irrigated or as near thereto as practicable; the location, if not selected by the State Engineer, is to be approved by him. The claimants shall install and maintain at their own expense and subject to the approval of the Water Commissioner, should one become necessary, and the State Engineer, substantial and easily operated regulating headgates and measuring devices in the ditch or ditches or channel and reservoirs. Due allowance for losses in ditches may be made by the State Engineer.

Priorities are fixed by years and where the years are the same, the priorities are equal.

XIII.

(STOCKWATERING AND DOMESTIC)

The right to the diversion and use of water for stockwatering and domestic purposes shall be continued by the claimants named herein or their successors in interest at any time during the year that stock are grazing on the range, and such diversions shall be according to the dates of priorities of such users and limited to the quantity of water reasonably necessary for such use.

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The amount of water diverted for irrigation purposes shall not be increased by any amount to be used for stockwatering and domestic purposes, but the quantity allowed and diverted for irrigation during the irrigation season shall include water for stockwatering and domestic purposes.

XIV.

(DECLARATION OF FULL APPROPRIATION)

From the record of this adjudication proceeding and records of permits issued by the State Engineer, it is hereby determined that the waters of Warm Springs Valley Creek (aka Winnemucca Valley Creek, aka Isaac Mathews Creek) and its tributaries are fully appropriated.

CONCLUSIONS OF LAW

From the record on review and the evidence and testimony presented and received in this matter and from the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

I.

That the State Engineer had the right, authority and jurisdiction pursuant to Chapter 533 of the Nevada Revised Statutes to make the investigations made by him, receive the proofs and maps, enter and file in his office the Preliminary Order of Determination and Order of Determination, and file certified copies thereof in this Court and to determine the relative rights of the claimants and appropriators in and to the waters of Warm Springs Valley Creek and its tributaries in Washoe County, State of Nevada; that the State Engineer duly made all

orders necessary and proper in connection therewith and entered the same in his office as required by Chapter 533 of the Nevada Revised Statutes.

That each and every notice required by law to be given herein to the claimants and appropriators was duly served by the State Engineer in the manner and within the time required by statute and that the notices contained all the information required by law and that the claimants and appropriators of the waters of the above-named stream system and its tributaries duly received the information and notices as required by law.

II.

That the Second Judicial District Court of the State of Nevada in and for the County of Washoe had and has jurisdiction to hear and try this matter and has jurisdiction to make and enter the foregoing Findings of Fact and these Conclusions of Law and further enter its Decree set forth hereinafter.

III.

That the existing reservoirs on the Winnemucca and the Settlemeyer Ranches are determined to be regulatory in nature. Existing reservoirs may be used to cumulate and to store the water adjudicated herein during any time of each year. Diversion of water to such reservoirs shall be consistent with quantities of water and priorities as herein stated. The aggregate amount of water diverted from a reservoir is not to exceed the total duty herein fixed for the lands served by said reservoir.

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Quantities of water being adjudicated which are diverted to a reservoir shall be used only on lands with vested rights as determined in this Decree. Water cannot be cumulated or stored unless senior water rights have been satisfied.

IV.

That all measurements of water diverted are to be made at a point where the main ditch enters or becomes adjacent to the land to be irrigated or as near thereto as practicable, the location, if not selected by the State Engineer, must meet with his approval. The claimants shall install and maintain at their own expense substantial and easily operated regulating headgates and measuring devices in the ditch or ditches or channels and reservoirs. Due allowance for losses in ditches may be made by the State Engineer.

Priorities are fixed by years and where years are the same, the priorities are equal.

V.

That the right to the diversion and use of water for stockwatering and domestic purposes shall be continued by the claimants named herein or their successors in interest at any time during the year and that stock are grazing on the range and such diversions shall be according to the dates of priorities of such users and limited to the quantity of water reasonably necessary for such use.

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The amount of water diverted for irrigation purposes shall not be increased by any amount to be used for stockwatering and domestic purposes, but the quantity allowed and diverted for irrigation during the irrigation season shall include water for stockwatering and domestic purposes.

VI.

That all water allotted under this Decree shall be appurtenant to the place of use designated herein. Any water user desiring to change the point of diversion, manner of use or place of use of the waters allotted herein must make application to the State Engineer for permission to make the change pursuant to NRS 533.345.

VII.

That from the record of this adjudication proceeding and records of permits issued by the State Engineer, it is hereby determined that the waters of Warm Springs Valley Creek and its tributaries are fully appropriated.

VIII.

That the following tabulation lists the rights as determined in this proceeding:

PROOF NO.:	First Amended 02844
CLAIMANT:	W. Dalton LaRue, Sr., and Juanita S. LaRue, dba Winnemucca Ranch
SOURCE:	Warm Springs Valley Creek and tributaries
USE:	Irrigation, stockwatering and domestic
MEANS OF DIVERSION:	Dams, reservoirs, ditches and natural spring areas

POINTS OF DIVERSION

1. Winnemucca Springs - SW1/4 NE1/4 Section 12, T.24N., R.19E., M.D.B.&M., or at a point from which the SE corner of said Section 12 bears S. $42^{\circ} 22'$ E., a distance of 3,688 feet.
2. Unnamed Springs - NE1/4 SW1/4 Section 7, T.24N., R.20E., M.D.B.&M., or at a point from which the SW corner of said Section 7 bears S. $46^{\circ} 30'$ W., a distance of 2,235 feet.
3. Whiskey and Lorrie Canyons Reservoir - NE1/4 NE1/4 Section 14, T.24N., R.19E., M.D.B.&M., or at a point from which the NE corner of said Section 14 bears N. $45^{\circ} 50'$ E., a distance of 595 feet.
4. NE1/4 NE1/4 Section 14, T.24N., R.19E., M.D.B.&M., or at a point from which the NE corner of said Section 14 bears N. $51^{\circ} 40'$ E., a distance of 1,070 feet.
5. McKissick Creek No. 1 - SW1/4 NE1/4 Section 14, T.24N., R.19E., M.D.B.&M., or at a point from which the NE corner of said Section 14 bears N. $40^{\circ} 30'$ E., a distance of 2,550 feet.
6. McKissick Creek No. 2 - SW1/4 NW1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the NW corner of said Section 13 bears N. $14^{\circ} 08'$ W., a distance of 2,427 feet.
7. Winnemucca Valley Creek - SW1/4 NW1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the NW corner of said Section 13 bears N. $19^{\circ} 15'$ W., a distance of 2,550 feet.
8. Winnemucca Valley Creek - NE1/4 SW1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the NW corner of said Section 13 bears N. $31^{\circ} 10'$ W., a distance of 3,410 feet.
9. NW1/4 SW1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the SE corner of said Section 13 bears S. $66^{\circ} 20'$ E., a distance of 4,950 feet.

10. NW1/4 SW1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the SE corner of said Section 13 bears S. 69° 20' E., a distance of 4,590 feet.
11. NW1/4 SW1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the SE corner of said Section 13 bears S. 70° 10' E., a distance of 4,270 feet.
12. SE1/4 SW1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the SE corner of said Section 13 bears S. 72° 20' E., a distance of 3,670 feet.
13. SW1/4 SE1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the SE corner of said Section 13 bears S. 76° 40' E., a distance of 2,680 feet.
14. SW1/4 SE1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the SE corner of said Section 13 bears S. 76° 40' E., a distance of 2,470 feet.
15. NW1/4 NE1/4 Section 24, T.24N., R.19E., M.D.B.&M., or at a point from which the NE corner of said Section 24 bears N. 73° 30' E., a distance of 2,570 feet.
16. Winnemucca Valley Creek - SW1/4 SE1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the SE corner of said Section 13 bears S. 59° 30' E., a distance of 1,935 feet.
17. Winnemucca Valley Creek - SE1/4 SE1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the SE corner of said Section 13 bears S. 72° 20' E., a distance of 1,045 feet.
18. Winnemucca Valley Creek - NE1/4 NE1/4 Section 24, T.24N., R.19E., M.D.B.&M., or at a point from which the NE corner of said Section 24 bears N. 77°
19. Winnemucca Valley Creek - NW1/4 NW1/4 Section 19, T.24N., R.20E., M.D.B.&M., or at a point from which the NW corner of said Section 19 bears N. 12° 35' W., a distance of 1,170 feet.

20. Winnemucca Valley Creek - NE1/4 SW1/4 Section 19, T.24N., R.20E., M.D.B.&M., or at a point from which the NW corner of said Section 19 bears N. $26^{\circ} 50'$ W., a distance of 3,520 feet.
21. SW1/4 NW1/4 Section 19, T.24N., R.20E., M.D.B.&M., or at a point from which the NW corner of said Section 19 bears N. $14^{\circ} 50'$ W., a distance of 2,460 feet.
22. SW1/4 NW1/4 Section 19, T.24N., R.20E., M.D.B.&M., or at a point from which the NW corner of said Section 19 bears N. $17^{\circ} 30'$ W., a distance of 2,640 feet.
23. NE1/4 SW1/4 Section 19, T.24N., R.20E., M.D.B.&M., or at a point from which the NW corner of said Section 19 bears N. $22^{\circ} 30'$ W., a distance of 3,660 feet.
24. NE1/4 NW1/4 Section 19, T.24N., R.20E., M.D.B.&M., or at a point from which the NE corner of said Section 19 bears N. $86^{\circ} 40'$ E., a distance of 2,770 feet.
25. NW1/4 SE1/4 Section 18, T.24N., R.20E., M.D.B.&M., or at a point from which the SE corner of said Section 18 bears S. $45^{\circ} 30'$ E., a distance of 2,440 feet.
26. SE1/4 NW1/4 Section 18, T.24N., R.20E., M.D.B.&M., or at a point from which the NW corner of said Section 18 bears N. $39^{\circ} 10'$ W., a distance of 3,360 feet.
27. NE1/4 NW1/4 Section 18, T.24N., R.20E., M.D.B.&M., or at a point from which the NW corner of said Section 18 bears N. $82^{\circ} 50'$ W., a distance of 1,675 feet.
28. NW1/4 NW1/4 Section 18, T.24N., R.20E., M.D.B.&M., or at a point from which the NW corner of said Section 18 bears N. $76^{\circ} 10'$ W., a distance of 980 feet.
29. NW1/4 NW1/4 Section 18, T.24N., R.20E., M.D.B.&M., or at a point from which the NW corner of said Section 18 bears N. $33^{\circ} 40'$ W., a distance of 470 feet.

30. Sugar Cane Springs - NW1/4 NE1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the NE corner of said Section 13 bears N. 86° 25' E., a distance of 1,500 feet.
31. Vicki's Reservoir - NE1/4 NE1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the NE corner of said Section 13 bears N. 67° 20' E., a distance of 940 feet.
32. Vicki's Reservoir - NE1/4 NE1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the NE corner of said Section 13 bears N. 15° 40' E., a distance of 740 feet.
33. Sugar Cane Springs Reservoir - NE1/4 NW1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the NW corner of said Section 13 bears N. 82° 55' W., a distance of 2,320 feet.

PRIOR- ITY	CULTURAL ACREAGE			LOCATION				DUTY OF WATER		
	HARV.	MEAD. PAST.	DIVER. PAST.	SUBD.	SEC.	TWP.	N. RGE.	E.	C.F.S.	AC-FT
1867	4.30	*15.00		SW1/4SE1/4	12	24	19		0.625	62.20
1867		*15.73		SE1/4SE1/4	12	24	19		0.393	47.19
1867	* 4.50			NE1/4SW1/4	12	24	19		0.112	18.00
1867	30.20			SE1/4SW1/4	12	24	19		0.755	120.80
1867		* 4.10		NE1/4NE1/4	13	24	19		0.102	12.30
1867		* 9.20		NW1/4NE1/4	13	24	19		0.230	27.60
1867	* 7.50			NE1/4NW1/4	13	24	19		0.188	30.00
1867	*20.00			NW1/4NW1/4	13	24	19		0.500	80.00
1867	*19.00			SW1/4NW1/4	13	24	19		0.475	76.00
1867	*13.53			NE1/4SW1/4	13	24	19		0.340	54.52
1867	* 9.80			NW1/4SE1/4	13	24	19		0.245	39.20
1867	*15.00			SW1/4SE1/4	13	24	19		0.375	60.00
1867		11.80		SE1/4SE1/4	13	24	19		0.295	35.40
1867	*11.10			NE1/4NE1/4	14	24	19		0.278	44.40
1867	* 5.20			SE1/4NE1/4	14	24	19		0.130	20.80
1867		* 5.00		NE1/4NE1/4	24	24	19		0.125	15.00
1867		* 8.00		NW1/4NW1/4	19	24	20		0.200	24.00
1867		*11.20		SW1/4NW1/4	19	24	20		0.280	33.60

1867	* 4.40	SE1/4NW1/4 19	24	20	0.110	13.20
1867	*11.40	NE1/4SW1/4 19	24	20	0.285	34.20
1867	<u>2.94</u>	SW1/4SW1/4 7	24	20	<u>0.070</u>	<u>8.82</u>
TOTALS	140.23	98.77			6.113	857.23

*The acreages listed with an asterisk are also irrigated from Dry Creek or Matley Creek as set forth in Certificate of Appropriation 5021 issued under Permit 17830. The total amount of water placed on these lands from all sources shall not exceed the quantity in acre-feet tabulated above.

PROOF NO.: Second Amended 02844 and Third Amended 02844

CLAIMANT: W. Dalton LaRue, Sr., and Juanita S. LaRue, dba Winnemucca Ranch

SOURCE: Springs, tributary to Warm Springs Valley Creek

USE: Irrigation and stockwater

MEANS OF DIVERSION: Natural spring areas and ditches

POINTS OF DIVERSION:

24. NE1/4 NW1/4 Section 19, T.24N., R.20E., M.D.B.&M., or at a point from which the NE corner of said Section 19 bears N. 86° 40' E., a distance of 2,770 feet.
25. NW1/4 SE1/4 Section 18, T.24N., R.20E., M.D.B.&M., or at a point from which the SE corner of said Section 18 bears S. 45° 30' E., a distance of 2,440 feet.
26. SE1/4 NW1/4 Section 18, T.24N., R.20E., M.D.B.&M., or at a point from which the NW corner of said Section 18 bears N. 39° 10' W., a distance of 3,360 feet.
27. NE1/4 NW1/4 Section 18, T.24N., R.20E., M.D.B.&M., or at a point from which the NW corner of said Section 18 bears N. 82° 50' W., a distance of 1,675 feet.
28. NW1/4 NW1/4 Section 18, T.24N., R.20E., M.D.B.&M., or at a point from which the NW corner of said Section 18 bears N. 76° 10' W., a distance of 980 feet.
29. NW1/4 NW1/4 Section 18, T.24N., R.20E., M.D.B.&M., or at a point from which the NW corner of said Section 18 bears N. 33° 40' W., a distance of 470 feet.

PRIOR- ITY	CULTURAL ACREAGE			LOCATION				DUTY OF WATER		
	HARV.	MEAD. PAST.	DIVER. PAST.	SUBD.	SEC.	TWP.	N. RGE.	E.	C.F.S.	AC-FT
1867		9.91		NW1/4NW1/4	18	24		20	0.247	29.73
1867		2.57		SW1/4SE1/4	18	24		20	0.064	7.71
TOTAL		*12.48							0.311	*37.44

*The acreages listed herein also are irrigated from Dry or Matley Creek as set forth in Certificates of Appropriation 7649 and 7654 issued under Permits 24002 and 24213, respectively. The total amount of water placed on these lands from all sources shall not exceed the quantity in acre-feet tabulated above.

PROOF NO.: Second Amended 02737

CLAIMANT: Robert W. Marshall and Nanette Marshall,
and Robert Dickenson and Dorothy
Dickenson, dba Intermountain Land Co.

SOURCE: Warm Springs Valley Creek and
tributaries

USE: Irrigation, stockwatering and domestic

MEANS OF DIVERSION: Dams and ditches

POINTS OF DIVERSION:

1. NW1/4 NE1/4 Section 30, T.24N., R.20E.,
M.D.B.&M., or at a point from which the
E1/4 corner of Section 4, T.23N.,
R.20E., M.D.B.&M., bears S. 44° 50' 58"
E., a distance of 17,860.69 feet.
2. SE1/4 NE1/4 Section 30, T.24N., R.20E.,
M.D.B.&M., or at a point from which the
E1/4 corner of Section 4, T.23N.,
R.20E., M.D.B.&M., bears S. 44° 18' E.,
a distance of 15,635.0 feet.

PRIOR- ITY	CULTURAL ACREAGE			LOCATION				DUTY OF WATER		
	HARV.	MEAD. PAST.	DIVER. PAST.	SUBD.	SEC.	TWP.	N. RGE.	E.	C.F.S.	AC-FT
1867	4.5			SW1/4NW1/4	29	24		20	0.112	18.0
1867	26.6	* 5.0		NW1/4SW1/4	29	24		20	0.790	121.4
1867	* 0.5	* 1.1		NE1/4SW1/4	29	24		20	0.040	5.3

1867	6.2			SW1/4SW1/4	29	24	20	0.155	24.8
1867	* 7.4			SW1/4SW1/4	29	24	20	0.185	29.6
1867	* 0.7	* 3.6		SE1/4SW1/4	29	24	20	0.107	13.6
1867		9.5		SE1/4SW1/4	29	24	20	0.237	28.5
1867	1.1	0.8		SW1/4SE1/4	29	24	20	0.047	6.8
1867		3.6		NW1/4NE1/4	30	24	20	0.090	10.8
1867		1.6		SW1/4NE1/4	30	24	20	0.040	4.8
1867	22.0	3.4		SE1/4NE1/4	30	24	20	0.635	98.2
1867	14.5			NE1/4SE1/4	30	24	20	0.362	58.0
1867	1.2			SE1/4SE1/4	30	24	20	0.030	4.8
1867		2.0		NE1/4NW1/4	32	24	20	0.050	6.0
1867	15.6		0.2	NW1/4NE1/4	32	24	20	0.395	62.6
1867		2.1		NE1/4NE1/4	32	24	20	0.052	6.3
1867	11.0	7.1		SE1/4NE1/4	32	24	20	0.452	51.1
1867	* 7.8	3.0		SW1/4NW1/4	33	24	20	0.270	34.2
1867	* 2.3	3.0		NW1/4SW1/4	33	24	20	0.133	12.2
1867			* 2.1	NE1/4SW1/4	33	24	20	0.053	2.1
1867		* 8.0		SE1/4SW1/4	33	24	20	0.200	24.0
1867			* 3.0	SW1/4SE1/4	33	24	20	0.075	3.0
1867		* 4.1		NW1/4NE1/4	4	23	20	0.102	12.3
TOTALS	121.4	57.9	5.3					4.612	*638.4

*The lands indicated with an asterisk also receive water from other sources (Proofs 02738 and 02739). The total quantity of water placed on these lands from all sources shall not exceed the quantity in acre-feet tabulated above.

PROOF NO.: Second Amended 02738

CLAIMANT: Robert W. Marshall and Nanette Marshall,
and Robert Dickenson and Dorothy
Dickenson, dba Intermountain Land Co.

SOURCE: Dewey Springs, tributary to Warm Springs
Valley Creek

USE: Irrigation, stockwatering and domestic

MEANS OF DIVERSION: Dams, reservoir and ditches

POINTS OF DIVERSION:

1. SW1/4 NW1/4 Section 29, T.24N., R.20E., M.D.B.&M., or at a point from which the E1/4 corner of Section 4, T.23N., R.20E., M.D.B.&M., bears S. 41° 18' 11" E., a distance of 14,599.43 feet.
2. SW1/4 NW1/4 Section 29, T.24N., R.20E., M.D.B.&M., or at a point from which the E1/4 corner of Section 4, T.23N., R.20E., M.D.B.&M., bears S. 43° 01' 16" E., a distance of 14,768.78 feet.

PRIOR- ITY	CULTURAL ACREAGE			LOCATION				DUTY OF WATER		
	HARV.	MEAD. PAST.	DIVER. PAST.	SUBD.	SEC.	TWP.	N. RGE.	E.	C.F.S.	AC-FT
1867	* 4.5			SW1/4NW1/4	29	24	20		0.112	18.0
1867	* 9.9	* 5.0		NW1/4SW1/4	29	24	20		0.372	54.6
1867	* 0.5	* 1.1		NE1/4SW1/4	29	24	20		0.040	5.3
1867	* 7.4			SW1/4SW1/4	29	24	20		0.185	29.6
1867	* 0.7	* 3.6		SE1/4SW1/4	29	24	20		0.108	13.6
TOTALS	23.0	9.7							0.817	*121.1

*The lands indicated with an asterisk also receive water from Warm Springs Valley Creek (Proof 02737). The total quantity of water placed on these lands from both sources shall not exceed the quantity in acre-feet tabulated above.

PROOF NO.: Second Amended 02739

CLAIMANT: Robert W. Marshall and Nanette Marshall, and Robert Dickenson and Dorothy Dickenson, dba Intermountain Land Co.

SOURCE: Pradere Springs, tributary to Warm Springs Valley Creek

USE: Irrigation, stockwatering and domestic

MEANS OF DIVERSION: Dams, reservoir and ditches

POINTS OF DIVERSION 1. NW1/4 SW1/4 Section 27, T.24N., R.20E., M.D.B.&M., or at a point from which the E1/4 corner of Section 4, T.23N., R.20E., M.D.B.&M., bears S. 1° 56' 22" E., a distance of 10,453.50 feet.

2. SE1/4 NW1/4 Section 33, T.24N., R.20E., M.D.B.&M., or at a point from which the E1/4 corner of Section 4, T.23N., R.20E., M.D.B.&M., bears S. 28° 22' 28" E., a distance of 7,293.78 feet.
3. SE1/4 NW1/4 Section 33, T.24N., R.20E., M.D.B.&M., or at a point from which the E1/4 corner of Section 4, T.23N., R.20E., M.D.B.&M., bears S. 31° 05' E., a distance of 6,865.0 feet.

PRIOR- ITY	CULTURAL ACREAGE			LOCATION				DUTY OF WATER		
	HARV.	MEAD. PAST.	DIVER. PAST.	SUBD.	SEC.	TWP.	N. RGE.	E.	C.F.S.	AC-FT
1867	5.9			SW1/4NW1/4	33	24		20	0.148	23.6
1867	* 7.8			SW1/4NW1/4	33	24		20	0.195	31.2
1867	* 2.3	* 3.0		NW1/4SW1/4	33	24		20	0.133	18.2
TOTALS	16.0	9.0							0.476	*73.0

*The lands indicated with an asterisk also receive water from Warm Springs Valley Creek (Proof 02737). The total quantity of water placed on these lands from both sources shall not exceed the quantity in acre-feet tabulated above.

PERMIT NO.: 13677

CERTIFICATE OF APPROPRIATION NO.: 4967.

OWNER OF RECORD: W. Dalton LaRue, Sr., and Juanita S. LaRue

SOURCE: Sugar Cane Springs, a tributary to Warm Springs Valley Creek

USE: Irrigation

MEANS OF DIVERSION: Reservoirs and ditches system

POINTS OF DIVERSION: NE1/4 NW1/4 Section 13, T.24N., R.19E., M.D.B.&M., or at a point from which the NE corner of said Section 13 bears N. 81° 58' E., a distance of 2,903 feet.

PERIOD OF USE: April 1st to October 31st of each year

PRIORITY: April 10, 1951

AMOUNT OF APPROPRIATION: 456.4 acre-feet annually (storage)
DESCRIPTION OF LAND TO WHICH WATER IS APPURTENANT:

7.5 acres in NE1/4 NW1/4 Section 13, T.24N., R.19E.,
M.D.B.&M.
20.0 acres in NW1/4 NW1/4 Section 13, T.24N., R.19E.,
M.D.B.&M.
19.5 acres in SW1/4 NW1/4 Section 13, T.24N., R.19E.,
M.D.B.&M.
7.6 acres in NW1/4 SW1/4 Section 13, T.24N., R.19E.,
M.D.B.&M.
13.6 acres in NE1/4 SW1/4 Section 13, T.24N., R.19E.,
M.D.B.&M.
9.8 acres in NW1/4 SE1/4 Section 13, T.24N., R.19E.,
M.D.B.&M.
15.0 acres in SW1/4 SE1/4 Section 13, T.24N., R.19E.,
M.D.B.&M.
16.1 acres in SE1/4 SE1/4 Section 13, T.24N., R.19E.,
M.D.B.&M.
5.0 acres in NE1/4 NE1/4 Section 24, T.24N., R.19E.,
M.D.B.&M.
114.1 TOTAL

*Quantities of water diverted from Sugar Cane Springs which are conveyed to Sugar Cane Reservoir shall not be stored in said reservoir during the irrigation season when there is insufficient quantities of water in Winnemucca Valley Creek to irrigate the lands served by Proof of Appropriation 02737 in this Order under Article XII, Rights of Appropriation.

DECREE

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the relative rights of the users in and to the waters of Warm Springs Valley Creek (aka Winnemucca Valley Creek, aka Isaac Mathews Creek) and its tributaries be, and the same hereby are, determined as stated hereinabove.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each and every water user and claimant to the Warm Springs Valley stream system and its tributaries and each of their agents, attorneys, servants and employees, and their successors in

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interest and each and every person or persons acting in aid or assistance of the said parties or either of or any of them be, and that each of them is, hereby perpetually enjoined and restrained as follows:

(a) From at any time diverting or using any of the water of the Warm Springs Valley Creek stream system and its tributaries hereinabove mentioned, except to the extent and in the amount and in the manner and at the time or times set by this Decree to such respective party hereto allotted, allowed, prescribed and determined, or allowed by permits which have been or may hereafter be granted by the State Engineer of the State of Nevada.

(b) From diverting from the natural channel and from using any of the said water for irrigation or for any other purpose, in excess of the specific allotment herein set by this Decree, or in excess of the specific allotment under permits granted or that may hereafter be granted by the State Engineer.

(c) From diverting from the natural channel and from using any of the said water in any other manner or for any other purpose or purposes or upon any other land or lands than as provided and prescribed by the terms of this Decree or by a permit granted or that may hereafter be granted by the State Engineer.

(d) From diverting from the natural channel and from using any of the said water at any other time or times than as

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specified and provided by the terms of this Decree or by permits granted or that may hereafter be granted by the State Engineer of the State of Nevada.

(e) From, in any manner, meddling with, opening, closing, changing, injuring or otherwise interfering with any headgates, weirs, water box, flume, or other measuring device, placed, installed or established by the State Engineer or under his authority or direction, unless such act be done by the permission or authority of the Water Commissioner or the State Engineer, if during the period of his regulation or control of said water, or if not done during such period, then by virtue of the allowances, authority, terms and provisions of this Decree or by a permit granted or that may hereafter be granted by the State Engineer.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all enforcement rights set forth in this Court's Decree Affirming in Part and Modifying in Part the Order of the state Engineer dated October 6, 1987, are fully incorporated herein.

Dated this _____ day of _____, 1988.

DISTRICT JUDGE

Case No. 83-7362

Dept. No. 2

FILED

October 6, 1987
JUD. BAILEY, CLERK

By Julian Smith
Clerk

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

IN THE MATTER OF THE DETERMINATION OF
THE RELATIVE RIGHTS IN AND TO THE WATERS
OF WARM SPRINGS VALLEY CREEK (AKA
WINNEMUCCA VALLEY CREEK, AKA ISAAC MATHews
CREEK) AND ITS TRIBUTARIES, WASHOE COUNTY,
NEVADA,

W. DALTON LA RUE, SR. AND JUANITA S.
LA RUE, dba WINNEMUCCA RANCH,

Appellants-Petitioners,

vs.

DECREE AFFIRMING IN PART
AND MODIFYING IN PART THE
ORDER OF THE STATE
ENGINEER

PETER G. MORROS, STATE ENGINEER,
STATE OF NEVADA, ROBERT E. DICKENSON
AND DOROTHY DICKENSON, and ROBERT W.
MARSHALL and NANETTE MARSHALL, dba
INTERMOUNTAIN LAND COMPANY,

Respondents.

INTRODUCTION

The pleadings which initiated this adjudicatory hearing challenge the final Order of Determination of Peter G. Morros, State Engineer, in the Matter of the Determination of the Relative Rights In and To the Waters of Warm Springs Valley Creek, (which is also known as Winnemucca Valley Creek and Isaac Mathews Creek). Present at the hearing which covered three days were Julian Smith, Esq. and Gene Barbegelata, Esq., representing

1 the LaRues, who were present, George Benesch, Esq., representing
2 the State of Nevada and the State Engineer, with Chief Engineer
3 and Adjudication Officer Larry Reynolds in attendance; and Ross
4 deLipkau, Esq., representing the Marshalls, with Robert Marshall
5 in attendance.

6 The Order of the State Engineer determined the vested
7 (pre-1905) water rights of the owners of two Washoe County
8 ranches concerning a surface water system. Both ranches enjoy
9 the same year of priority. The Settelmeyer Ranch, which is also
10 known more recently as the Marshall Ranch (and whose owners will
11 be referred to as "Marshall"); and the Winnemucca Ranch (and to
12 an extent the Olds Ranch), more modernly referred to as the La
13 Rue Ranch (the owners of which will hereinafter be referred to as
14 "La Rue"), both have a priority dating back to 1867. Both
15 parties find fault with the State Engineer's Order of
16 Determination.

17 On September 7, 1983, approximately one month after the
18 Order of Determination was prepared, but before it was filed with
19 the Court, the La Rues filed a pleading styled "Petition for
20 Judicial Review from the State Engineer's Order of Determination"
21 in case no. 83-7362, which was subsequently consolidated with
22 case no. 83-6641 and case no. 83-7398, the former case being
23 later dismissed.

24 The Marshalls filed a similar document which was
25 stricken at the time of the hearing since a more appropriate
26 pleading, "Objections to the Order of Determination", was filed
on August 19, 1987, under the provisions of NRS 533.170. The

1 LaRue petition contains a broadside attack on the Order of
2 Determination, while the Marshall Objections more specifically
3 enumerate the acreage alleged to have been wrongfully deemed as
4 appurtenant to "vested" or "decreed" water rights.

5 The Marshall Objections concern eleven (11) parcels on
6 the Winnemucca Ranch comprising 79.92 acres and 257.26 acre feet
7 of water rights.

8 The LaRue's Petition concerns itself with certain
9 alleged procedural deficiencies; inaccuracies in the Order of
10 Determination and other unspecified deficiencies. The main point
11 argued in the hearing, however, was the finding that the unnamed
12 springs in the northeast quarter of the southwest quarter of
13 Section 7 and the southwest quarter of the northeast quarter of
14 Section 12 are tributary to Winnemucca Valley Creek. The LaRues
15 contend that the only tributaries which contributed to downstream
16 water available to Marshall are the seasonal flows from McKissick
17 Creek, run off from Dog Skin Mountain and perennial springs on
18 the slope of Dog Skin Mountain.

19 PROCEDURAL AND JURISDICTIONAL ISSUES

20 Before turning to the substantive issues, there are a
21 couple of procedural issues raised by the pleadings and by
22 counsel at the adjudicatory hearing which merit threshold
23 attention.

24 The first of those issues is whether the La Rue's
25 pleading (styled "Petition for Judicial Review"), filed
26 September 7, 1983, can be considered by the Court as a substitute
for the exceptions called for by NRS 533.170(1).

1 Marshalls' counsel claims that this issue is
2 jurisdictional and must be determined against LaRue under the
3 authority of G & M Properties v. District Court, 95 Nev. 301, 594
4 P.2d 714 (1979), where the Nevada Supreme Court held that late
5 filed exceptions deprive the District Court of jurisdiction to
6 consider their content.

7 The difference between the circumstances of G & M and
8 those in the present case, however, are that in G & M nothing was
9 filed on time, where in the case at Bench the LaRues' counsel
10 endeavored to file a Petition for Judicial Review, which is
11 timely, if given any effect.

12 The State Engineer's attorney has joined with the
13 Marshalls' attorney in asking the Court to strike the LaRue
14 pleading. The Court has determined, however, not to strike this
15 pleading and to allow limited evidence to be adduced by LaRue at
16 the hearing in support of his appeal. Thus, his Petition has
17 been considered, but only to the extent of its content which, as
18 earlier noted, has a shortcoming in its lack of specificity
19 relative to The Order. Pursuant then to the provisions of
20 subsection (3) of NRS 533.170, the Court allowed LaRue's counsel
21 to present and argue objections. The scope of this judicial
22 review, however, is further limited by the second procedural
23 ruling, which follows.

24 The Nevada statute is not crystal clear with respect to
25 the scope of judicial review in water rights cases, but the
26 holding of the Nevada Supreme Court in Revert v. Ray, 95 Nev.
782, 603 P.2d 262 (1979) is plain enough. The District Court is

1 not to substitute it's judgment for that of the State Engineer's
2 and the Courts are generally to look only to whether or not the
3 record of evidence, together with any supplemental materials,
4 contain substantial evidence supporting the State Engineer's
5 decision. The Court has reviewed the pleadings, the exhibits,
6 and the transcript and concludes that except for a couple of
7 relatively minor findings, there is substantial evidence to
8 support the Order of Determination. The analysis will first turn
9 to the Marshall objections.

10 THE MARSHALL OBJECTIONS

11 Even though the Marshall objections refer to eleven
12 separate areas, the objections qualitatively fall into one of
13 three categories, as follows:

14 1. The first category claims that the record is simply
15 devoid of substantial evidence which would support the Engineer's
16 Findings of Fact as to certain conditions on the Winnemucca Ranch
17 in 1867. The primary geographical area included in this category
18 is the determination of meadow pasture for a 7.6 acre parcel
19 which extends as a finger below the corrals off of the "back" of
20 the seahorse-shaped parcel in the northwest quarter of the
21 southwest quarter of Section 13, Township 24 North, Range 19
22 East.

23 2. The second category of Marshall's objections are
24 Engineering calculations by Marshall's expert, Richard Arden,
25 which differ from the State Engineer's calculations accomplished
26 in-house, principally by Mr. Clock. Included in this category
are area #1 and a portion of area #2 on Marshall's Amended

1 Schedule A, which immediately abut the "mouth" of the seahorse-
2 shaped parcel depicted in green on Marshall's Exhibit A. Also
3 included is area #6 which is a 3.2 acre parcel along the "throat"
4 of the seahorse-shaped parcel depicted in Marshall's exhibit A-1.

5 3. The final Marshall category might be termed the
6 "Walsh" exceptions, referring to the decision of the Nevada
7 Supreme Court in the case of Walsh v. Wallace, 26 Nev. 299
8 (1902). Marshall argues that under this doctrine there must be
9 actual mechanical diversion of water prior to 1905 for vested
10 rights to arise, that the mere cutting or use of wild grass
11 production by overflow (or in our case, subirrigated seepage from
12 a spring), is not a valid appropriation of water such as would
13 allow vesting. The land primarily covered by this category are
14 the remainder of area #2 on Marshall's Schedule A, #3, #4, #5 and
15 #9, and together they form what was referred to as the "ladle-
16 shaped" parcel and the "railroad spike-shaped" parcel depicted on
17 Marshall's Exhibit A-1.

18 Turning now to the first category-- the failure of
19 evidence category-- the Court's examination supports the
20 contention that there is substantial evidence for the Order of
21 Determination, except with respect to the 7.6 acre parcel. The
22 State Engineer's Office based its Decision to include this 7.6
23 area because they felt that there is evidence that a ditch, later
24 extended by the Matleys in 1929, had run along the western border
25 of this parcel prior to 1929. That conclusion can legitimately
26 be drawn from the record, especially in reference to John
Marshall's Affidavit, Exhibit #26. However, the inference that

1 the land was cultivated or irrigated from the application of Warm
2 Springs or McKissick Creek water as of 1867 seems to be rebutted
3 fully by the "old-timer's" testimony, that there was no
4 irrigation or use of the field until the Matleys placed it in
5 irrigation for growing alfalfa, [please refer to the Marshall
6 Matley testimony in the transcript at pages 324 through 354; that
7 of Leslie Zurfluch in the transcript at page 234 and Joe
8 Capurro's statement, Marshall Exhibit 27, at page 4]. Thus, the
9 substantial weight of the testimony favors the Marshall exception
10 and not the Engineer's conclusion. 30.4 acre feet should be
11 subtracted from the final Order of Determination in the final
12 Court Decree. All of the rest of the acreage in this category is
13 supported by substantial evidence and the Engineer's
14 Determination will not be interfered with.

15 Turning to the second category of Marshall's exceptions
16 -- engineering miscalculations -- the Court once again finds,
17 with one minor exception, that the Engineer's judgment is
18 supported by substantial evidence and that his calculations
19 should not be disturbed for most of area 2 and all of area 6.

20 As to area #1, however, a 3.0 parcel and a portion of
21 area 2 (5.7 acres) along the "mouth" of the seahorse-shaped
22 parcel, Mr. Clock conceded in cross-examination that it wasn't
23 until the post-1905 installation of ditches that irrigation
24 reaching these uphill areas would have been possible. The Court
25 determines that substantial evidence favors the Arden calculation
26 for these areas, reducing the Clock calculations, and the Decree,
by another 31.8 acre feet.

Turning finally to the third category of Marshall
1 exceptions -- the Walsh exception -- the Court is faced not so
2 much with a review of the Engineer's discretion, as with a ruling
3 of law. The 1902 Walsh decision has been accurately quoted for
4 the cited proposition by Marshall's attorney, Ross deLipkau. The
5 State Engineer's position (joined in by LaRue's attorneys Smith
6 and Barbagelata) take a much broader view. Their theory is that
7 the litmus test is not mechanical diversion, despite the holding
8 in Walsh, supra. Instead, the only test should be beneficial
9 use. Diversion to achieve beneficial use, they say, is
10 unnecessary for recognition of an appropriation, citing as
11 authority Steptoe Livestock Co. v. Gully, 53 Nev. 163, 295 P.2d
12 772 (1931), and Waters of Horse Springs v. State Engineer, 99
13 Nev. 780, 672 P.2d 37 (1983), which quotes Steptoe with approval,
14 using the following condensed statement:

15 "It is not always essential, however, that the water
16 actually be diverted 'to constitute an
17 appropriation...where it could be put to a beneficial
18 use without such diversion, where there was a practice
19 of appropriating the waters of the streams to a
20 beneficial use without such diversion,..."

21 The Walsh decision and even to an extent the Steptoe
22 decision assume that appropriation for agricultural use
23 necessarily or at least normally requires diversion. In our case
24 the State Engineer has determined that meadow pasture, as
25 distinct from harvested grounds, is a use not necessarily
26 requiring diversion, especially when the water irrigates the
ground by subsurface seeping, a factual situation not present
either in the Reese River Valley in the late 1800's (Walsh), or
in the livestock watering areas of Canyon Creek, Stag Creek and

Cottonwood Creek in Elko County (Steptoe).

1 The term "mechanical means of diversion" is neither
2 synonymous with the term "appropriation" nor "beneficial use" in
3 the State of Nevada. Our case stands on its own unique
4 circumstances. The Court concludes, perhaps as a matter of first
5 impression,¹ that a pre-1905 appropriation for meadow pasture may
6 occur without actual mechanical diversion. Put another way, the
7 Court sustains the findings by the State Engineer that the use by
8 LaRues' predecessor of the subirrigation meadow pasture was an
9 actual application of water to beneficial use coupled with the
10 intent to apply the water to beneficial use. Under such
11 circumstances, actual diversion is not a necessary prerequisite
12 to accomplish irrigation between 1867 and 1905 giving rise to a
13 vested water right.

14 Marshall's counsel argues that even if the Court were
15 to find that "modern" law favors such an interpretation, that
16 "...the law in existence at the inception of a right must be
17 followed for the life of that water right", [post-trial brief,
18 page 5, citing In Re Waters of Manse Springs, 60 Nev. 280, 180
19 P.2d 311 (1980)]. He insists that the 1902 "Walsh doctrine",
20 therefore, must be the law of a case dating from 1867.

21 From a comparison of the authorities, the crucial
22

23 ¹On behalf of the State Engineer, Deputy Attorney General
24 Benesch suggests that the precedent has already been established
25 in this State by affirmance of a District Court decree upholding
26 a 1915 Order of Determination confirming vested rights to water
 in swamplands, see, Scossa v. Church, 46 Nev. 254 (1923). But
 the obliqueness of the reference and the incompleteness of the
 record raise genuine doubt about the precedential value of this
 decision to this case.

1 determination seems to involve a subjective intent manifested by
2 objective signs to "the world" [c.f. Ophir Silver Mining Co. v.
3 Carpenter, 4 Nev. 534, (1868)] that a lasting appropriation has
4 taken place. In this sense, there is a genuine difference
5 between a rancher seizing upon an irregular opportunity to cut or
6 use wild grasses nourished from overflows (Walsh) and the regular
7 exploitation of subirrigated meadows for which diversion is a
8 meaningless act (our case).

9 As Mr. LaRue's counsel points out, another truly
10 distinguishing feature is that application of the Walsh doctrine
11 to subirrigated land would seemingly require an irrigator to
12 "...bring[ing] the water to the surface and then reapply it in
13 order to obtain a vested water right" [post-trial brief, p. 18,
14 lines 14, 15]. Such a requirement would clearly be
15 nonsensical. It is also significant that the Warm Springs
16 drainage concerns a small water course capable of furnishing
17 water for these ranches only, since the State Engineer has
18 declared that the waters and tributaries are fully
19 appropriated. That is factually dissimilar from the Reese River
20 Valley where channels and forks of the stream system run for more
21 than a hundred miles through ranching areas and serve numerous
22 ranching and grazing operations. The findings of the State
23 Engineer in favor of a completed appropriation will not be
24 disturbed.

25 LARUE OBJECTIONS

26 Though the scope of his objections is constricted by his
predecessor's pleadings, attorney Smith advances a number of

1 objections and arguments on behalf of Mr. and Mrs. LaRue (many of
2 which are improperly before the Court because they are being
3 raised for the first time). Clearly though, foremost among the
4 claims, is the contention that the State Engineer committed
5 reversible error by determining that Winnemucca Springs is
6 tributary to Warm Springs Valley Creek (which LaRue would prefer
7 to be called Winnemucca Valley Creek).

8 Some of the arguments advanced by Mr. Smith cut both
9 ways. For example, he is critical of the deductive reasoning
10 used by the State Engineer's hearing officer who, he alleges at
11 page 7 of the post-trial brief, "backed into" his conclusion that
12 Winnemucca Springs was in 1867, a tributary to the Creek.

13 In order to contextualize this issue, Mr. Reynold's
14 syllogism goes something like this:

15 (a) Both ranches at all material times had very roughly
16 the same amount of irrigated acreage.

17 (b) The Dogskin Mountain drainage usually dries up in
18 the early Spring;

19 (c) Therefore, in all probability some of the year-
20 around spring water from Winnemucca Springs found its
21 way to the creekbed and downstream to the Settlemeyer
22 (Marshall) ranch;

23 Not so, LaRue claims. He feels that because the State
24 Engineer could not find physical evidence of a gorge or tributary
25 channel, there is insufficient record evidence to support the
26 conclusion that the spring is tributary to the Creek. Moreover,
he claims, Mr. Reynolds ignored the possibly resurfacing

1 watersprings arising at the south end of the Winnemucca (LaRue)
2 ranch.

3 Yet, what Mr. Reynolds didn't ignore is the same
4 proposition urged by Mr. Smith in support of other LaRue
5 contentions:

6 "Common sense would dictate that a man tilling the soil
7 to feed himself and his family would till to the limit
8 of the natural resources available". [LaRue post-trial
9 brief, page 4, lines 2-4.]

10 While it is not now possible to reconstruct with
11 exactitude the condition and the location of waters travelling
12 through this drainage in 1867, it is a legitimate presumption
13 that both ranches put to optimum use the available water for the
14 size of their operations at the time. And if both ranches of
15 similar size were operating in 1867 for the most part off the
16 same water system with the same summer growing conditions and
17 similar crop yield, Marshall's ranch logically must now be being
18 deprived of water from vested rights. Over the last few years
19 the summer flows have so dwindled, (or altogether stopped) that
20 Marshall can no longer irrigate some of the fields which were
21 historically irrigated by his predecessors.

22 LaRue also asks the Court to give great weight to some
23 early geographical survey maps which seem to indicate in some
24 areas that spring water doesn't reach the channel in the valley,
25 but since the streams are either intermittent, unsurveyed, or
26 obscured by a road, the maps aren't very illuminating for either
side.

In summary, despite LaRue's claims that Marshall simply

1 doesn't know what he's doing, the Court finds that it is not
2 Marshall's imprudent water management practices -- but that it is
3 LaRue's rather impudent water management practices -- which
4 created the situation giving rise to this controversy.

5 The State Engineer's finding that the so-called
6 Winnemucca Springs is tributary to Warm Springs Valley Creek is
7 sustained.

8 Most of the rest of LaRue's objections are either
9 outside the scope of his "Petition for Judicial Review," or
10 weren't even addressed by the hearing officer in the first
11 place. Although a remand is suggested to determine other vested
12 rights, the suggestion will have to form the basis for a new
13 proceeding, since the pleadings and evidence in this case are
14 "closed".

15 Finally, the LaRue's argue that even if the finding
16 that the unnamed (or springs referred to as Winnemucca Springs)
17 are tributary to the valley creek, the Court should nonetheless
18 conclude that Marshall's predecessors abandoned the rights when
19 they failed to object to diversion and impounding of the
20 springwater in one or more of three dams, and also the diversion
21 and use of water through various ditches on the Winnemucca Ranch.

22 LaRue argues a de facto forfeiture pursuant to NRS
23 533.060(2). Yet the law is clear that this forfeiture provision
24 is neither self-executing or automatic. There must be a
25 proceeding to establish forfeiture, see, United States v.
26 Cappaert, 508 F.2d 313 (9th Cir. 1974), aff'd. U.S. R8 128, 96
S.Ct. 2062; In re Filippini, 66 Nev. 17, 202 P.2d 535 (1949);

1 Bergman v. Kearney, 241 F.884 (D. Nev. 1917), and there must be
2 proof of intent to abandon, see, Franktown Creek Irrigation Co.
3 v. Marlette Lake Co., 77 Nev. 348, 364 P.2d 1069 (1961); In Re
4 Manse Springs and its Tributaries, 60 Nev. 280, 108 P.2d 311
5 (1940). The record is devoid of both.

6 All other LaRue claims have similar infirmities since
7 they primarily rest on arguments and evidence outside the
8 pleadings and outside the record.

9 ENFORCEMENT ISSUES

10 The single most difficult task in this matter relates to
11 the enforcement of Marshall's water rights. Those rights involve
12 a complex stream system made more complex by weather and
13 environmental conditions and by LaRue's transportation,
14 commingling and regulation of water from another watershed.

15 As Mr. Reynolds so forcefully made clear, a water right
16 gives the owner or the permit holder the authority to use water;
17 it surely does not guarantee the presence of water for use. The
18 evidence shows that in this Valley, as in so many arid desert
19 areas of Nevada, the availability of water fluctuates
20 dramatically from season to season. Accordingly, the water right
21 as finally adjudicated, in certain seasons becomes little more
22 than a mathematical reference point from which the State Engineer
23 develops a formula to apportion and allocate available water,
24 assuming his office has the time capacity and inclination to
25 perform those services.

26 And if not, the task is left to a watermaster, the
expense for which is often, as here, prohibitive. The reason for

1 discouragement in this case is that the evidence suggests that
2 LaRue has systematically construed the imperfections and
3 ambiguities of the system in such a way as to deprive Marshall of
4 receiving his share of the downstream flow. LaRue's counsel
5 hastens appropriately to point out that LaRue operates his ranch
6 in 1987 -- not 1867, conditions. The principal stream channel
7 into the Warm Springs Creek which the State Engineer found to
8 exist in 1867 does not now exist. But it is clear that with
9 LaRue being allowed the de facto discretion to determine that the
10 water he is regulating and using on a given day is his Spanish
11 Flat drainage water and not his and Marshall's Warm Springs
12 water, the discretionary decision that this fiercely independent
13 rancher comes to is really no surprise to anybody. LaRue has
14 protected his own interests first, every time.

15 Marshall's counsel suggests that the court should
16 simply order the three (3) LaRue dams be breached, but the Court
17 finds that solution is both an overkill and perhaps in the long
18 run, unduly punitive to the LaRues and their successors in
19 interest. The complexity and fluidity of the situation commends
20 giving a procedural solution a try.

21 There is a peculiar dichotomy presented by the
22 circumstances of this case which the Court will first attempt to
23 describe, then to mitigate. Few Courts are equipped to monitor a
24 dynamic situation involving water rights interpreted in the
25 context of changing conditions. Indeed, few Courts have the
26 calendar and/or the skill to perform the frequent small
adjudications necessary to justly regulate the controversy. This

1 may be at least one of the reasons the legislature wisely
2 invested the State Engineer with such broad adjudicatory and
3 regulatory powers.

4 Yet the Court senses an apprehension on the part of the
5 State Engineer's representatives when it comes to exerting power
6 over matters traditionally reserved only to the Courts. For
7 example, Mr. Reynolds seemed to feel that matters such as
8 ordering payments not stipulated to, or the breaching of dams, or
9 the use of ditches privately owned by LaRue, or the
10 reconstruction of the old water course to name a few -- to be
11 simply outside the State Engineer's enabling authority. And
12 perhaps his reluctance to overstep administrative authority is to
13 be commended.

14 The jurisdictional ambiguity that may exist in the
15 boundary area between Court and agency will no longer exist in
16 this case, however.

17 The State Engineer's office is sua sponte appointed a
18 Special Master under the authority of Rule 53 of the Nevada Rules
19 of Civil Procedure. This broad grant of authority enhances all
20 of the enumerated powers already held by the office of the State
21 Engineer.

22 The authority thus delegated or confirmed will fall
23 into two categories, as follows:

24 A. Matters which can be implemented without prior Court
25 approval. These powers shall include but not be limited
26 to the following: the power to...

(1) Order the installation of continuous recording
devices, headgates and any other measuring or regulating

1 devices on any waters coming into the Warm Springs
2 drainage area from the Spanish Flat drainage area and in
3 addition, waters anywhere inside the Warm Springs
4 drainage area, as deemed suitable by the State
5 Engineer's office. Unless otherwise determined, the
6 cost of implementing this plan will be equally borne by
7 the landowners;

8 (2) To order transportation of water through existing
9 LaRue ditches, channels, pipelines or streambeds;

10 (3) To order the release of dammed or regulated water
11 in quantities deemed consistent with the Order of
12 Determination as modified; and

13 (4) To order a rotation irrigation schedule consistent
14 with the Order of Determination, as modified.

15 B. Matters which require a hearing held after a Notice
16 period of at least five (5) days. The parties will be
17 advised that they will be given the opportunity at the
18 hearing to produce evidence in support of, or in
19 opposition to, a recommendation to the Court for an
20 Order:

21 (1) To breach dams and/or create major new points of
22 diversion and means of transportation of water,
23 including the restoration of historic channels;

24 (2) To unequally allocate expenses of enforcement or
25 regulation in order to discourage non-compliance and
26 assure compliance with the Order of Determination as
modified;

(3) To order the installation of pipelines, channels,
or ditches directly from source waters to Marshall's
place of diversion or use;

(4) To hold a party adjudicated to be failing to act in
good faith in connection with the fulfillment of the
Order of Determination, as modified, in contempt of
Court.

The Special Master's recommendations will be ratified,
adopted and approved by the Court unless there is not substantial

1 evidence on the record to support the recommendation, or if the
2 Special Master's recommendation is clearly erroneous.

3 If the State Engineer finds the appointed tasks unduly
4 burdensome or cumbersome, he may appoint a watermaster under the
5 authority of NRS 533.220 and 533.270, and if confirmed by the
6 Court, the watermaster will have all of the powers of the Special
7 Master enumerated above.

8 CONCLUSION:

9 Out of the hundreds and hundreds of acre feet of water
10 rights adjudicated by the State Engineer in his final Order of
11 Determination filed over four years ago (upon a petition filed
12 over eleven years ago), error was made as to only 62.2 acre
13 feet. Meanwhile, apparently Dalton LaRue lies sick, and Robert
14 and Nanette Marshall's ranchlands lie fallow. It may be that the
15 law and its procedures contribute substantially to the tortuous
16 path these parties have had to follow. In any event, it is
17 finally over. Judgment shall enter in accordance with this
18 decree and the parties shall abide by the terms thereof.

19 DATED this 6th day of October, 1987.

20
21 **CERTIFIED COPY**

22 The document to which this certificate is at-
23 tached is a full, true and correct copy of the
24 original on file and of record in my office.

25 DATE October 7, 1987
26 JUDI BAILEY, Clerk of the Second Judicial
District Court, in and for the County of
Washoe, State of Nevada.

By [Signature] Deputy.

Charles M. McGehee
DISTRICT JUDGE